

SUBSCRIBE via [RSS](#)  
 SUBSCRIBE via [Email](#)



# The Jury EXPERT

*The Art and Science of Litigation Advocacy*

A BiMonthly E-Journal

Volume 22, Issue 2 March 2010

**The Rules Don't Apply to Me**

*An experienced trial consultant looks at why some apologies work and others fail or even backfire. The recent apologies of Eliot Spitzer and Tiger Woods are examined.*

Page 1

**East Texas Jurors and Patent Litigation**

*Experienced trial consultants offer their experiences in East Texas patent trials & thoughts for plaintiff and defense attorneys on success in this venue.*

Page 5

**Unintended Consequences of Toying with Jurors' Emotions**

*Two researchers discuss the impact of emotional evidence on juror decisions and three experienced trial consultants offer their reactions.*

Page 16

**Use of Technology to Enhance Communication in Litigation**

*An experienced trial consultant shows the power of visual imagery to communicate complex ideas to jurors at trial.*

Page 35

**Goals of Witness Preparation**

*An experienced trial consultant discusses the goals of witness preparation from the perspective of a trial consultant (what we do, why we do it, how it helps).*

Page 45

**Panic Over the Unknown: America Hates Atheists**

*Two experienced trial consultants review the surprisingly consistent research on our powerful hatred for atheists & offer recommendations to minimize bias at trial.*

Page 50

**Jury Impeachment in Cases of Juror Racial, Religious or Other Bias**

*An academic examines 606(b) and offers ideas for implementation. Three experienced trial consultants respond to this difficult issue.*

Page 61

## The Rules Don't Apply to Me

by Beth Foley

Elizabeth Foley [[BFoley@ZMF.com](mailto:BFoley@ZMF.com)] is a founding partner of Zagnoli McEvoy Foley, LLC with more than 18 years of experience in trial consulting and studying and teaching communication. She conducts jury research in a variety of case types including environmental & toxic torts, product liability, personal injury and commercial litigation. Read more at [www.zmf.com](http://www.zmf.com).

Americans have been bombarded with examples of powerful people acting like the rules don't apply to them. From governors to corporate executives to athletes—there seems to be a new example of poor judgment every week. Is there an upward trend in moral hypocrisy among powerful people? As a communication consultant, I am interested in the ritual that often follows these transgressions: the public apology. Why do the powerful turn to public apologies for leniency? Apologies can provide closure, forgiveness and, ultimately, clear a path for the company or person to rebuild their reputation. What is the social psychology behind these two simple words, I'm sorry? Why do some apologies work and some fail, or even backfire?

## Moral Hypocrisy

Let's first look at moral hypocrisy, as it is so frequently the precursor to the increasingly prevalent public apology. Adam Galinsky, Professor of Ethics and Decision in Management at the Kellogg School of Management (Galinsky et al.) will soon publish research on the topic in *Psychological Science*. The research confirms what we already suspected: the powerful don't think the rules apply to them.

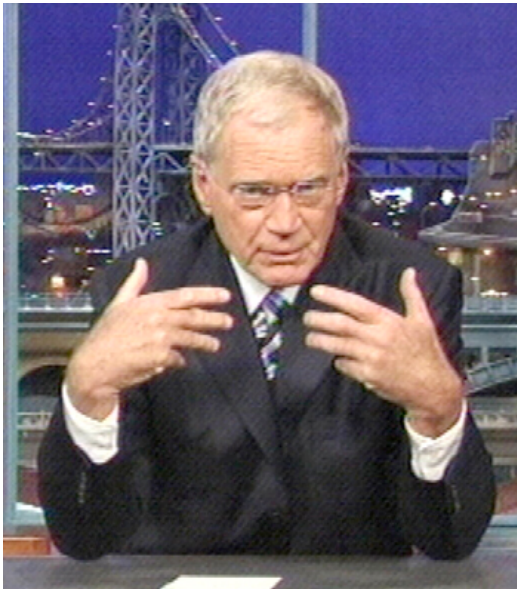
Through a series of five experiments, Galinsky et al. examined the impact of power on moral hypocrisy. Galinsky explains that, "In all cases, those assigned to high-power roles showed significant moral hypocrisy by more strictly judging others for speeding, dodging taxes and keeping a stolen bike, while finding it more acceptable to engage in these behaviors themselves. The powerful impose rules and restraints on others while disregarding these restraints for themselves, whereas the powerless collaborate in reproducing social inequality because they don't feel the same entitlement."

Galinsky recognizes the timeliness of his research, "This research is especially relevant to the biggest scandals of 2009, as we look back on how private behavior often contradicted the public stance of particular individuals in power." The trend continues in 2010.

## The Rule of Reciprocity

I am often asked what is motivating the rule-breaker when he steps in front of the camera to apologize. In large part, he is relying on the rule of reciprocity to help clear a path to rebuilding his reputation.

In 1984, Robert Cialdini wrote a landmark book: *Influence: The Psychology of Persuasion*. In his book, Cialdini identifies the Rule of Reciprocity as one of the key weapons of influence. Cialdini describes several social experiments that show the rule dictates we are obliged to the future repayment of favors, gifts, invitations, aid, etc.



There is no human society that does not subscribe to the rule because, Cialdini (1984) explains, "Human societies derive a truly significant competitive advantage from the reciprocity rule, and consequently they make sure their members are trained to comply with and believe in it" (p. 19). According to Cialdini (1984) and his research team, "The rule possesses awesome strength, often producing a 'yes' response to a request that, except for an existing feeling of indebtedness, would have surely been refused" (p. 21). Cialdini further explains that the rule is powerful enough to get us to say yes to people we don't like and to get compliance for uninvited favors and unwanted debts.

Reciprocity starts a process of mutual concessions: "Just as in the case of favors, gifts, or aid, the obligation to reciprocate a concession encourages the creation of socially desirable arrangements by ensuring that anyone seeking to start such an arrangement will not be exploited" (Cialdini, 1984; p. 38).

Apologizing is one way to trigger reciprocity and get concessions. Many of the public apologies given in the last several months were not meant to evoke complete forgiveness. Instead they were a strategy to get relief from scrutiny, provide closure and start the process of reciprocal concessions. The reasoning is if I

humble myself and apologize to you, you are obliged to show me some degree of leniency and start the process of forgiveness.

### **How to Apologize Effectively**

There are several examples of the good, the bad and the ugly when it comes to apologies. Choosing to apologize is a strategy; the act of actually giving an apology is an art. Apologizing is a fundamentally sound communication tool in American culture, but there is a societal code of conduct written around apologies. The most powerful apology is the Full Apology and it has several markers.

#### ***The Full Apology:***

- Acknowledge what you did wrong.
- Take responsibility for your actions.
- Acknowledge the impact your actions had on others.
- Apologize for having caused pain or done damage.
- Repair the damage (offer money or a concession) or state your future intentions.
- Do not make excuses.
- A humble demeanor and appropriate nonverbal communication must match the spoken message.

Like giving someone a nicely wrapped gift box that is empty, leaving out any of these steps makes the Full Apology ineffective. Two recent public statements stand in stark contrast and demonstrate the mechanics of the tool.

#### **Eliot Spitzer, Former Governor of New York**

Mr. Spitzer staged a cold, unemotional recitation of a scripted apology, which he read with minimal eye contact and a guarded demeanor. His apology lacked sincerity as evidenced by its brevity and his distinct lack of eye contact with the audience. His nonverbal communication and tone was controlling and domineering, not humble. His statement included the words “I apologize,” but felt more like a political stump speech than a sincere apology. This apology did nothing to trigger the rule of reciprocity.



*“Today, I want to briefly address a private matter.*

*I have acted in a way that violates my obligations to my family that violates my – or any – sense of right and wrong. I apologize first, and most importantly, to my family. I apologize to the public, whom I promised better.*

*I do not believe that politics in the long run is about individuals. It is about ideas, the public good and doing what is best for the State of New York.*

*But I have disappointed and failed to live up to the standard I expected of myself. I must now dedicate some time to regain the trust of my family.*

*I will not be taking questions. Thank you very much. I will report back to you in short order.”*

Mr. Spitzer violated two important markers of an effective apology: First, an effective apology is not about the person who gives it, is about the person or people he hurt. By having his wife stand next to him and share in his public shame, he victimized her again. Although he did say “I apologize” to my family and the public, he spent equal time talking about his own political views and how he disappointed himself.

His second shortcoming is that he gave only a vague acknowledgement of what he did wrong. It is impossible to effectively apologize for the damage his actions caused without acknowledging the actions themselves. Perhaps he left out the details because it would emphasize his hypocrisy. After all, as Attorney General of the State of New York he aggressively prosecuted two prostitution rings. He gives no real evidence that he understands his own hypocrisy and how that violates the audience. Not only did this fail to trigger reciprocity and concessions, it angered his audience.

### Tiger Woods, Professional Golfer

Conversely, Tiger Woods appeared embarrassed and ashamed in a public statement that lasted approximately 13 minutes. Though imperfect, his nonverbal communication overall and his saddened facial expressions were a clear indicator that he was sorry. Mr. Woods managed to do what most public apologists never can. He clearly admitted “I thought the rules didn’t apply to me.” In this one sentence he addressed the very reason his audience was mad and told the world he understands what he did wrong. Mr. Woods did not have his wife, the biggest victim of his transgressions, stand by his side but he did make an impassioned plea for the media to stop hounding her. The following examples demonstrate the full apology in action:



*“I was unfaithful, I had affairs, I cheated.... What I did was unacceptable.”*

*“It’s now up to me to make amends, and that starts by never repeating the mistakes I’ve made. It’s up to me to start living a life of integrity.”*

*“I do plan to return to golf one day. I just don’t know when that day will be. I don’t rule out that it will be this years. When I do return, I need to make my behavior more respectful of the game.”*

### Conclusion

Supported by new research by Galinsky, et al., it is increasingly clear that many individuals in positions of power live as though the rules don’t apply to them. The rules do apply to us all. The rule of reciprocity is a powerful tool and there are clear rules of social engagement that monitor its effectiveness. It applies to all of us in every aspect of our lives: marriage, friendship, politics, merchandizing and litigation. Effective apologies take advantage of reciprocity by invoking a sense of obligation to offer leniency and forgiveness. Used in trial or in settlements, effective apologies can be leveraged to gain some leniency for both plaintiffs and defendants.

### References

Cialdini, R.B. (1984). *Influence: The Psychology of Persuasion*. William Morrow & Company, Inc. New York.

Citation for this article: [The Jury Expert](#), 2010, 22(2), 1-4.

# East Texas Jurors And Patent Litigation

by Julie Blackman, Ellen Brickman & Corinne Brenner

Julie Blackman, Ph.D. ([jblackman@julieblackman.com](mailto:jblackman@julieblackman.com), [www.julieblackman.com](http://www.julieblackman.com)) is a social psychologist and the Principal of Julie Blackman & Associates. She has worked as a trial strategy consultant for more than 25 years and has consulted on a number of trials in East Texas. The special concerns addressed in this paper reflect her ongoing commitment to educating jurors in meaningful ways even in complex cases. She believes that trial consultants are ideally positioned to help lawyers become better teachers and that the better teacher wins.

Ellen Brickman ([ebbrickman@julieblackman.com](mailto:ebbrickman@julieblackman.com), [www.julieblackman.com](http://www.julieblackman.com)), Director of Research at Julie Blackman & Associates, has worked in trial consulting since 1987. Dr. Brickman received her B.A. from Barnard College, and her Ph.D. in Social Psychology from Columbia. She has extensive experience directing large-scale research studies in the social sciences. Dr. Brickman has also worked on trials in East Texas.

Corinne Brenner ([corinne.j.brenner@gmail.com](mailto:corinne.j.brenner@gmail.com), [www.julieblackman.com](http://www.julieblackman.com)) graduated from Cornell with a B.A. in Psychology in 2008. As an undergraduate, she conducted research on decision-making. She then worked as a litigation paralegal in New York. Ms. Brenner currently works as a Research Associate at Julie Blackman & Associates.

In the past ten years, the Eastern District of Texas has become a wildly popular venue for plaintiffs in patent cases. This has been attributed to a number of factors including judicial expertise, plaintiff-friendly local rules, speedy dispositions and jurors who are predisposed to find for plaintiffs and award large damages.

As trial strategy consultants who advise attorneys on how to maximize the persuasiveness of their cases to jurors, this last factor is of particular interest to us. There is no doubt in our minds that regionalism plays a significant role in juror decision-making, and therefore must be taken into account by attorneys trying cases away from their “home turf.” In this paper, we offer observations about how jurors in East Texas think about patent cases, based on pre-trial research conducted in such cases. We offer advice to plaintiffs about how to build on their natural advantages in this venue, and to defendants about how to overcome the unique challenges of this venue.

We begin with a brief summary of trends in East Texas patent litigation, with special attention to jury verdicts in the District.

## The Rise Of The Eastern District As Plaintiff’s Venue Of Choice

In the past decade, the Eastern District of Texas has experienced a meteoric rise in patent litigation: In 1999, it was not even on the “top ten” list of venues<sup>1</sup> with large numbers of patent cases,<sup>1</sup> but by 2008, more patent cases were filed in East Texas than in any other district in the country (over 300; the next highest was the Central District of California with 244).<sup>2</sup>

There is broad consensus that these numbers are a function primarily of forum-shopping; in fact, one article described patent suit filings in East Texas as the equivalent of going to Mexico to get a “quickie

divorce.”<sup>3</sup> It should be noted, though, that analyses comparing the Eastern District of Texas with other venues demonstrate that it is not necessarily a “rocket docket.” In fact, at least five other districts have been faster for patent cases,<sup>4</sup> though the Marshall Division of the district initially became a hotbed of patent litigation because of the judge’s decision to move cases more quickly.<sup>5</sup>

Given that it is not the fastest docket, that few if any major corporations are actually housed in the district, and that Eastern Texas is unlikely to be chosen as a venue because of its convenience to parties and witnesses, many have looked to other factors to explain the soaring popularity of this region with plaintiffs in patent cases. The causes that have been suggested are judges with expertise and experience in patent litigation, local rules that are often favorable to the plaintiff, a general judicial disinclination to grant summary judgment and jurors who tend to favor patent holders – so much so that for one three year period, there were 20 consecutive plaintiff victories without a single defense win in a patent case in the district.<sup>6</sup> More broadly, from 1995 to 2007, plaintiffs won in over 70% of the district’s jury patent trials, the third-highest plaintiff win rate in the country.<sup>7</sup> In 2008 the district fell to seventh place, with a plaintiff win rate of 61%.<sup>8</sup>



While plaintiffs’ chances of winning at trial may have started to decrease, a fundamental truth remains: When plaintiffs win at trial in East Texas, they tend to win big. In 2008, the median damages award in patent cases was \$20.4 million, the third highest in the country.<sup>9</sup> Moreover, in mid-2009, East Texas jurors awarded the largest US jury verdict to date in a patent case: \$1.67 billion to Centocor Ortho Biotech and NYU after finding that Abbott Laboratories had infringed their patents.<sup>10</sup>

These are not the only factors that have contributed to plaintiffs’ choices to file in the Eastern District of Texas. Judicial expertise in patent cases, local rules that favor plaintiffs and a faster-than-average case disposition time have also helped to establish the District as a preferred venue for patent plaintiffs. In fact, the district – and in particular Marshall – has been called a “haven for patent pirates”<sup>11</sup> and Supreme Court Justice Antonin Scalia has called it a “renegade jurisdiction.”<sup>12</sup> Marshall was also held up as an example of the problems in patent law that result in plaintiffs having wide latitude in forum-shopping.<sup>13</sup>

While terms like these clearly reflect the distaste that many have expressed for plaintiffs’ rush to East Texas, it is worth noting that the plaintiffs are aided in their forum-shopping by a venue that has, at least to some extent, worked to lure litigants to the area. Marshall, in particular, had its economy revived when it became a hotbed of patent litigation, and is understandably eager to keep what has become its “cottage industry” strong and thriving.<sup>14</sup>

Marshall and the rest of the Eastern District maintain their attraction for plaintiffs, and the numbers above tell why. Perhaps most telling, when there was a series of defense victories in this seemingly unwinnable venue, after a long run of plaintiff wins, it was such a significant event in the IP world that an article entitled “Taming Texas” graced the cover of the *American Lawyer* in March 2008.<sup>15</sup> The author attributes one of the victories (EchoStar’s win over Forgent Networks, after a crushing loss to TiVo a year

earlier) to defense lawyers learning some important lessons: hiring consultants to teach them how to talk to Texas juries, deferring to local counsel at trial, and simplifying complex cases.

### The Tide Begins To Turn

With these verdicts and then four defense jury verdicts in 2009 and early 2010,<sup>16</sup> there are some indications that the tide is turning and defendants are facing better odds at trial. Moreover, recent decisions by the Federal Circuit suggest that the heyday of the Eastern District may be coming to an end. In 2008, a writ of mandamus granted by the Fifth Circuit *In re Volkswagen of America* (545 F.3d 304 [5th Cir.2008]) directed the Court to grant defendant's change of venue motion in a product liability case. Later that year, the Federal Circuit cited that precedent in granting a similar writ of mandamus in *TS Tech* (551 F.3d 1315 [2008]), a patent case. It stated that the Court had clearly abused its discretion in refusing to transfer venue, instead giving too much priority to plaintiff's preference. This was followed by a similar decision in *In re Genentech* in 2009 (566 F.3d 1338 [2009]). These decisions have had a marked effect on the number of patent cases filed in the district: In the eight months following the October 2008 *Volkswagen* decision, the monthly average for new cases filed in the district dropped from 15.5 to 7.5.<sup>17</sup> The drop has been so dramatic that some attorneys suggest that the forum-shopping provision in patent reform bills currently in Congress is no longer necessary as the East Texas problem is taking care of itself.

Current trends notwithstanding, there is little doubt that East Texas will continue at least for a while to receive more than its fair share of patent litigation, as plaintiffs find ways to justify their filing in this patent-friendly venue. And, many of these cases will continue to end up in the hands of juries. With this in mind, we offer some observations about jurors in East Texas based on recent pre-trial research we conducted, followed by advice to both plaintiff and defense counsel. First, though, we consider what makes East Texas jurors different from those in other venues, and then we offer lessons learned from our research.

### What Makes East Texas Jurors Different?

There are universal challenges to trying patent cases in any venue. Teaching complex technology to a jury of laypersons is simply difficult, no matter where you are trying to do it. Patent law can be equally difficult to understand, and sometimes goes against commonsense principles. For example, the idea that U.S. citizens can undo an act of government and invalidate a patent is a foreign notion to some. Similarly, the typical pairing of a non-infringement defense with an invalidity defense smacks to some of "I didn't borrow your lawn mower and besides, it was broken when you loaned it to me."

These challenges become even greater in a venue where jurors are relatively uneducated. In some of the major counties feeding the East Texas courthouses, college graduation rates are as low as 15% (e.g. Harrison County, home to Marshall, where the large majority of Eastern District patent cases are filed).<sup>18</sup> We note, however, that in *voir dire* panels seen at the Tyler courthouse in early 2010, college graduates and IT professionals were reasonably well-represented, suggesting that there may be considerable variability in the region, and that more educated people may be overrepresented on some panels. Even with this variability, though, a generally older population of jurors in most East Texas counties means that jurors are coming to technology cases with less experience with complex technology than in other, younger venues.

Furthermore, East Texas differs from more urban venues because of the paucity of large corporations based there. Thus, corporations are likely to be viewed with more suspicion in East Texas than they are in places like New York, Delaware, or even Dallas, just a few hours away from Tyler and other East Texas courthouse locations.

Finally, while research and anecdotal evidence has suggested that U.S. jurors nationwide are generally pro-plaintiff,<sup>19</sup> this pattern appears to be particularly marked among East Texas jurors. This has been attributed to East Texans' respect for government and their strong belief in property rights.<sup>20</sup> In the context of such beliefs, infringement on intellectual property is akin to trespassing on physical property, and is taken equally seriously.

These observations form the basis for our discussion, below, of how mock jurors deliberated in mock trials for several East Texas cases. In one of the cases, the mock jurors came from Tyler, Texas. In the other two, they were recruited from Kaufman County, a county immediately adjacent to East Texas and often called the “gateway” to East Texas. Demographics of mock jurors were matched to the general demographics of the Eastern District venue.<sup>21</sup>

### **Lessons Learned From East Texas Mock Trials**

#### **Lesson 1: Simplicity Is The Hallmark Of Effective Teaching**

In pre-trial research for East Texas computer technology patent cases, we saw mock jurors struggle to understand complex technology. Many were simply unable to do so, grasping only the broadest principles of the technology that they were taught. To the extent that they tried to engage in comparisons of the patent and the accused devices, they looked for simple visual matches in schematics. They rarely ventured beyond this kind of analysis.

The few exceptions were the mock jurors who had either educational or employment experience with technology. While these jurors sometimes made an effort to engage others in discussions of the technology, it was an uphill battle and most continued to do an “end run” around the technology. Instead, as we discuss below, they often defaulted to other considerations, focusing on moral and contextual aspects of the story that were easier to understand.

The lesson learned here is, never overestimate the importance of simplicity in your teaching. Do not assume any knowledge or familiarity with the concepts that you are teaching. For example, some mock jurors in our research did not know what “hardware” and “software” meant or how they differed from each other. Start with the basics and work your way up slowly to more complex concepts. In all of your teaching, use as many concrete examples as you can.

It is also important to resist the temptation to litigate – and teach – every detail of your technology. Consider what is essential for the jurors to understand, and then assume that they will remember the “gist” of what you say rather than the minute details. Mock jurors in our research were best able to hold on to short key phrases that were easy to understand and easy to remember. In one mock trial, for example, while many did not understand the technology, most remembered that the defendant had built a “better, faster” product. We heard this phrase from even the least sophisticated jurors. Short phrases like this – ideas that you determine are most important for jurors to hold on to – should be used repeatedly in your presentations.

Parties have a definite advantage if the product at issue is one that is concrete rather than one that is abstract and can be visualized only in schematics. Nonetheless, simplicity will always serve you well. In both your oral presentations and your demonstratives, short sentences, easy definitions, and simple examples will work in your favor. And good, clear demonstratives with simple instructive images are nothing short of essential.



We offer an important final caveat: In your efforts to simplify, be careful not to cross the line into patronizing your jurors. In the recent trial of *i4i v. Microsoft* in Tyler, jurors found that Microsoft had infringed i4i's patent and awarded i4i \$200 million (to which the judge added \$90 million for willfulness and post-trial interest), and the software giant was enjoined from selling some versions of its Word 2007 and Office 2007 packages. The case garnered extensive media attention, some of it unfavorable to East Texas jurors. One of the trial jurors complained to a reporter that bloggers and others talked about patent holders rushing to Texas because of the "stupid people in Texas, ignorant people in Texas."<sup>22</sup> Particularly in light of this portrayal and its backlash, it will be important to show your respect for East Texas jurors' ability to wrestle with and comprehend your case.

Lesson 2: Jurors May Think Broadly, Considering Infringement, Invalidity And Damages Together In Ways That Favor The Patent Holder

Across multiple mock trials, we found that mock jurors tended to think about infringement and invalidity (and sometimes damages) as part of the same package: In deliberating on one question, they often relied on information pertaining to the others as well. Thus, in considering infringement, some believed that the defendants infringed simply because the patent holder held a valid patent, or was the first to come up with an idea. These basic beliefs often trumped (or took the place of) an infringement analysis involving detailed comparisons of the patent claims with the accused device. When mock jurors relied on the existence of the patent or the primacy of the inventor to support their infringement analysis, the patent holder was given a distinct advantage.



In a similar vein, mock jurors tended to consider information about damages as part of their infringement analysis. Upon hearing the defense offer a damages position mitigating the numbers in the event that jurors found infringement, a number of mock jurors believed the defendants were conceding infringement. For example, one mock juror reacted negatively to a defendant's alternative damages number, saying:

---

*If I'm certain I'm not guilty, I'm not going to throw out any number for the jury to consider. I'm going to say we're not guilty, the evidence shows we're not guilty, so the only number you need to be thinking about is a big zero.*

---

Similarly, in a case involving computer technology the defendant argued that its accused product was only configured to use the allegedly infringing feature 10% of the time. Thus, any royalties should only apply to 10% of the sales of the product. Some heard this as tantamount to an admission of guilt, as illustrated by this quote:

---

*At one point the attorney said something to the effect of "if we did, it was only a little bit" and I thought, it's kind of like saying "she's a little pregnant."*

---

Jurors' misinterpretation of defendants' alternative damages calculations conferred obvious benefits upon the patent holders/plaintiffs.

*Lesson 3: Jurors Accord Great Respect To Inventors, Patents And The PTO, And Are Loath To Find Invalidity*

In our pre-trial research, mock jurors in East Texas cases were both highly respectful and quite protective of inventors/patent holders and their rights. These jurors tended to personalize the cases, framing them as moral conflicts rather than as business disputes. They talked about companies cheating each other (or an inventor) and stealing ideas, and experienced these perceived violations in very personal terms, often talking about how they would feel if this were happening to them.

Some became so wedded to the moral dimensions of the conflict that they engaged in their own versions of jury nullification, taking positions that they thought were morally right even if they were unsupported (and unsupportable) under the law. For example, in one mock trial some jurors voted to award damages to the plaintiff even though they had found that the patent was not infringed. They felt that the defendant had used some aspects of the plaintiff's invention, though not each and every element of any of the claims. Nonetheless, these jurors felt, the patent holder should receive some compensation in acknowledgement of the patentee's role in developing aspects of the technology that the defendant ultimately used. One mock juror articulated this sentiment:

---

*[The defendant] profited from [the plaintiff's] patent. I do feel that they profited from that; and by doing so, I do feel that they should be entitled to something.*

---

Consistent with the respect and value that these jurors attached to the patents, they also displayed more resistance to the idea of invalidating a patent than we have seen in any other venue. They often began their deliberations on invalidity with blanket statements indicating their reluctance to consider this question, as illustrated in these two comments from mock jurors:

---

*It's valid. I don't think we should even argue that point. If the Patent Office gave it to them, it's there. You can't challenge what the Patent Office does.*

---

Some mock jurors were, in fact, offended by the defendant's effort to overturn an issued patent. These jurors perceived the invalidity defense as a cheap trick to distract jurors from the defendant's infringement of a hard-earned patent. For example, one mock juror said:

---

*[The defendant] was trying to draw attention away from the fact that maybe they used it and shouldn't have.*

---

Jurors' unwillingness to invalidate a patent stemmed from several sources. First, some simply refused to believe that they had the power to do so. At each mock trial, a few mock jurors held on to the belief (despite repeated instructions to the contrary) that only the Patent Office could "undo" a decision that it had made. One even believed it would take an act of Congress to reverse a Patent Office decision. He equated patents with laws and said:

---

*Once they get it, it validates. Once it's validated, that's the law. That's what a patent is – a law.*

---

Second, most jurors believed that the Patent Office would not have “gotten it wrong.” Partly, these jurors typically lacked the cynicism with which more urban jurors often view government agencies. Documents issued by the U.S. government were assumed to be correct and beyond questioning. Additionally, these mock jurors assumed that the expert patent examiners would have researched the prior art on their own, and would have been sure to have all the facts before allowing the patent to issue. One mock juror expressed this clearly:

---

*There's a lot of diligence goes into getting a patent, especially on something like a chip or a circuit board that requires so much technical information. And the United States does a very good job of monitoring it. I mean, that's why very few other countries have patent offices or patent guidelines, because it's very tough and very rigid and strict. And so I think it's a valid patent. I don't think -- you know, our country doesn't issue a lot of them that are full of -- frivolous or not necessary.*

---

Similarly, another said:

---

*If they issued them a patent, they had a reason to do that...They're gonna research that, and they had all the references that went with them, and I feel confident they're gonna research that before they offered it.*

---

This sentiment was generally shared by other mock jurors in the research described here. Furthermore, these jurors believed that once a hard-won patent had issued, it was valid no matter what. This belief was so strong that more than once, we heard mock jurors insist that a patent was valid even though they agreed with an argument that would legally render it invalid. In one mock trial, for example, several jurors agreed that the invention might have been obvious, but nonetheless upheld the validity of the patent. Speaking on behalf of this group, one mock juror said:

---

*It's obvious but not invalid... I can't just say I think he has a good patent and then say, “Throw it out.”*

---

#### Lesson 4: “First-ness” Is Important To Jurors, Even In The Face Of Obviousness

In deliberating invalidity (and to some extent, infringement as well), mock jurors in our research put a lot of stock in “first-ness.” This was a more important concept to them than was non-obviousness or newness. Mock jurors talked about “the race” to the Patent Office, and believed that the first to patent, wins. They held on to this belief even when they thought the idea was obvious. In a mock trial in which the defendant argued for invalidity on the basis of obviousness, a number of people agreed that the idea was obvious because, as the defendant had said, “everybody was working on it.” Nonetheless, some credited the patentee/plaintiff with being the first to patent this obvious idea, and thought the patent should be upheld.



While some jurors focused on the patentee being first to reduce the invention to practice, for others just being the first to patent was enough. For example, one mock juror said:

---

*Everyone has ideas but the one who gets the egg at the end of the rainbow is the one who files the paperwork.*

---

In a similar vein, another said:

---

*I don't know the exact rules, is it the idea first or the patent first? I've always heard "first come first served" which is who gets to the Patent Office first.*

---

### Lesson 5: Jurors Rely On Contextual Factors To Guide Their Decision-Making

Largely because of their difficulty in evaluating the case based on technological comparisons, mock jurors looked to other (non-technical) factors for guidance. In particular, they looked to what other companies in the industry were doing. If others were acknowledging using the patent holder's invention, jurors wanted to see the defendants acknowledge this as well. If others were paying large amounts of money for this use, jurors wanted the defendants to do so also. For example, one mock juror said:

---

*I just keep coming back to – these other companies have settled with them out of court. They've had two, three companies already pay them off. There's something there. Nobody's going to give you money unless they think you deserve it.*

---

In generalizing from what other companies have done to determine what the disputant parties should do, mock jurors failed to acknowledge fine (or even gross) distinctions between products that would make one product infringing and another not infringing. Instead, they assumed that within a general field of technology, companies should behave in roughly the same manner.

Similarly, mock jurors relied on information about how others in the industry viewed the patent to reach their own conclusions about the patent's value. In some cases, they even used this information to infer the patent's validity, as in the following comment from a mock juror:

---

*If their patent was invalid, do you really think [Company X, a licensee] would have paid them \$13 million for that? No, that wouldn't have happened. It wouldn't have gone down like that.*

---

Conversely, though, some mock jurors used contextual information about the defendant's "usual" practices to infer honorable intent: If a company routinely paid for licenses from others when it was warranted, why would they start infringing now? A mock juror used this argument to support his vote for non-infringement:

---

*I don't think [defendant company] feels like they owe him [the inventor] anything, otherwise they would have paid. They paid everyone else. They paid \$75 million [to license another technology]! It's not like they can't afford to pay it. They don't feel like they owe it.*

---

## Implications for Plaintiffs And Defendants

The observations described above have important implications for both plaintiffs and defendants. Here, we offer suggestions to plaintiffs about how to build on their natural advantage in the Eastern District, followed by advice to defendants on how to overcome the unique challenges associated with the District.

### Advice To Plaintiffs

- **Feature your patent physically.** Show jurors your patent as often as you can, ribbon, seal and all. Reinforce in their minds that it is a piece of property, not just an abstract concept.
- **Emphasize that you were first.** The more you can tell a story of being first – first to conceive of the idea, first to reduce it to practice, and first to file a patent – while you argue that the idea is not simply commonsensical,<sup>23</sup> the more jurors’ respect for the patent will stand firm.
- **Show jurors that others in the industry respected – and paid for – your patent.** Information about others who took licenses from you should serve you well at trial, enhancing perceptions of both the defendant’s infringement and the patent’s validity.

### Advice To Defendants

- **Make confusion your friend:** Suggest to jurors that if they are confused and cannot see a clear match between the patent and the accused device, it is the plaintiff’s failure to prove infringement, not the jury’s failure to comprehend. We saw this happen successfully in one mock trial, where jurors translated “I didn’t get it” into “I didn’t see the evidence to prove it.”
- **Pre-empt jurors’ tendencies to understand your damages analysis as an offer or a concession of infringement.** Acknowledge that some may perceive the defense’s analysis as an “offer” or an admission of infringement, but then explain why you are presenting these numbers – and that, in fact, you have a legal obligation to do so.
- **If you have your own patents, wave them in the air, literally and figuratively.** Learning that you have your own patents on the accused technology can mitigate jurors’ bias in favor of the plaintiff/patent holder, allowing the benefits of their respect for patents to accrue to you as well as to the plaintiff.
- **Educate jurors about the legal limitations of “first-ness” in the context of patent law.** Explain to the jury that the law – handed down from the Federal Circuit – has changed recently and that being first with something that is only commonsensical is not patent-worthy.<sup>24</sup> Even if an idea is new, if it is also a common sense solution to the problem of interest, it does not deserve a patent.<sup>25</sup> These days, perhaps because so many people are at work in technological fields, non-obviousness means the most. Then, bring this concept to life with examples.
- **Take advantage of jurors’ tendency to look to contextual factors for guidance.** Tell jurors about the defendant’s history of paying license fees to other companies when it was appropriate to do so. Emphasize that a company that honors others’ valid patents would have no reason not to do so in this case if it were warranted. Actions speak louder than words, and the defendant’s actions in the broader industry context show that it is not an infringer.

## **An Overarching Consideration: Jurors Look For Fair And Respectful Behavior By The Parties And Their Lawyers**

One of the important lessons we learned from the mock trials we conducted, which transcends any particular decisions about trial strategy, was how much importance Texans place on polite and respectful behavior. They deferred to each other in deliberations (sometimes giving in on verdict votes rather than arguing for strongly held positions), they disliked what they perceived as aggressive or nasty behavior by either party, and they wanted to see parties treat each other with respect. Thus, for example, we saw jurors get offended when a defendant proposed a damages number of several hundred thousand dollars for technology for which others had paid tens of millions. People talked about this as an “insult” and a “slap in the face” to the plaintiff.

Similarly, jurors were offended when defendants in another case mocked the plaintiff, a small company that never had the resources to develop its patented technology and instead focused on licensing. Jurors in urban venues may expect to see a certain amount of aggressive lawyering, but East Texans do not. They complained that the defense arguments were “nasty” and that the defendant was “bashing” the plaintiff.



Reliance on local counsel is particularly important in East Texas, where a kind of self-effacing charm and personal openness are a significant part of their courtroom advocacy. Their manner should set the standard for out-of-town practitioners.

### **Conclusion**

At the broadest level, our experiences with both mock jurors and actual trial jurors in East Texas cases has taught us that attorneys trying cases in this venue must take regionalism into account. In a region where being nice takes precedence over aggressive business practices or retaining the competitive edge, it is more important than ever to stake out the high moral ground – but to do so without violating the standards of fairness and decent behavior that East Texans will demand of you. You will need to demonstrate your respect for the jurors’ intelligence and ability to decide your case, while accommodating to the generally low levels of education in the venue. If you are the defendant, you will need to reckon with the deference to the Patent Office and the great respect accorded to patents and inventors, while empowering jurors to make decisions about invalidity and non-infringement. In either case, the better you understand the regional and cultural factors that play into jurors’ decision-making, the better prepared you will be to enhance your natural advantages as a plaintiff or overcome your initial challenges as a defendant, and the better your chances of prevailing at trial.

### **End Notes**

<sup>1</sup> Moore, Kimberly A. (2001, July 24). Judges, juries and patent cases: An empirical peek inside the black box. *Michigan Law Review* 99. Available at SSRN: <http://ssrn.com/abstract=222708>.

<sup>2</sup> Beamer, Norman H. & Lee, Janise. (2009, August 17). Freedom of choice. *The Recorder* 133(158). Available at: [http://www.ropesgray.com/files/upload/Article\\_Freedom\\_9-17-09.pdf](http://www.ropesgray.com/files/upload/Article_Freedom_9-17-09.pdf).

<sup>3</sup> Mahmud, Shahnaz. (2006, October). See y’all real soon! *Managing Intellectual Property*.

<sup>4</sup> Meece, Timothy C. & Medlock, V. Bryan. (2009). Is *TS Tech* the death knell for patent litigation in the Eastern District of Texas? *IP Litigator* 15(6), 22-27. Available at: <http://www.bannerwitcoff.com/news/429/>.

- <sup>5</sup> Court Marshall: High-stakes patent lawsuits surge in small East Texas town. (2006, April 16). *Austin American Statesman*. Available at: <http://www.tortreform.com/node/219>.
- <sup>6</sup> Your guide to U.S. patent venues. (2008, September). *Managing Intellectual Property*. Kauffman, Chuck & Anderson, Casey. (2009, February). Why US juries are so pro-plaintiff. *Managing Intellectual Property*. Available at: [www.managingip.com/Article/Why-US-juries-are-so-pro-plaintiff.html](http://www.managingip.com/Article/Why-US-juries-are-so-pro-plaintiff.html).
- <sup>7</sup> Levko, Aron, Torres, Vincent & Teelucksingh, Joseph. (2008). A closer look: 2008 patent litigation study: Damages awards, success rates and time-to-trial. Available at: [http://www.pwc.com/en\\_US/us/forensic-services/assets/2008\\_patent\\_litigation\\_study.pdf](http://www.pwc.com/en_US/us/forensic-services/assets/2008_patent_litigation_study.pdf).
- <sup>8</sup> Levko, Aron. (2009, February 11). 2009 patent damages study: Preliminary results. FTC Panel Discussion. Available at: <http://www.ftc.gov/bc/workshops/ipmarketplace/feb11/docs/alevko.pdf>.
- <sup>9</sup> Ibid.
- <sup>10</sup> Largest patent jury verdict awarded in Texas. (2009, February 11). *Managing Intellectual Property Weekly News*.
- <sup>11</sup> Williams, Sam. (2006, February 3). A haven for patent pirates. *Technology Review*. Available at: <http://www.technologyreview.com/communications/16280/page1/>.
- <sup>12</sup> Court Marshall: High-stakes patent lawsuits surge in small East Texas town, 2006.
- <sup>13</sup> Frank, Ted. (2008, February). There is a role for Congress in patent litigation reform. *American Enterprise Institute for Public Policy Liability Outlook Series*. Available at: <http://www.aei.org/outlook/27550>.
- <sup>14</sup> Creswell, Julie. (2006, September 24). So small a town, so many patent suits. *The New York Times*. Available at: <http://www.nytimes.com/2006/09/24/business/24ward.html>.
- <sup>15</sup> Raymond, Nate. (2008, March 1). Taming Texas. *The American Lawyer*. Available at: <http://www.immagic.com/eLibrary/ARCHIVES/GENERAL/GENPRESS/Ao80301R.pdf>.
- <sup>16</sup> Smith, Michael C. (2009, November 23). *Defense verdict in patent case in Marshall; trial stats so far in 2009*. Available at: [http://mcsmith.blogs.com/eastern\\_district\\_of\\_texas/2009/11/defense-verdict-in-patent-case-in-marshall-trial-stats-so-far-in-2009.html](http://mcsmith.blogs.com/eastern_district_of_texas/2009/11/defense-verdict-in-patent-case-in-marshall-trial-stats-so-far-in-2009.html).
- Mullin, Joe. (2010, February 17). Not so plaintiff-friendly this time, eh? Google's first patent trial win. *IP Law & Business*. Available at: [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202443585156&Not\\_So\\_Plaintiff\\_Friendly\\_This\\_Time\\_Eh\\_Googles\\_First\\_Patent\\_Trial\\_Win](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202443585156&Not_So_Plaintiff_Friendly_This_Time_Eh_Googles_First_Patent_Trial_Win).
- <sup>17</sup> Meece & Medlock, 2009.
- <sup>18</sup> U.S. Census Bureau, 2006-2008 American Community Survey 3-Year Estimates.
- <sup>19</sup> Kauffman & Anderson, 2009.
- <sup>20</sup> Raymond, 2008.
- <sup>21</sup> In 2008, Judge Ward of the Eastern District of Texas issued an order requiring anyone conducting a mock trial in the Marshall Division to reveal that a mock trial was taking place and to provide the names and addresses of the mock jurors. Mock trials had become so frequent in Marshall that the court was too often obliged to excuse jurors for cause because they had been mock jurors for the cases at hand. See Standing Order of District Judge T. John Ward and Magistrate Judge Chad Everingham. (2008, February 19). United States District Court, Eastern District of Texas.
- <sup>22</sup> Mullin, Joe. (2010, January 9). Patent litigation weekly: So what do E.D. Texas jurors really think? *IP Law & Business*. Available at: <http://www.law.com/jsp/iplawandbusiness/PubArticlePLB.jsp?id=1202437806740>.
- <sup>23</sup> See *Perfect Web Tech., Inc. v. InfoUSA, Inc.*, No. 2009-1105 (Fed. Cir. Dec. 2, 2009).
- <sup>24</sup> Ibid.
- <sup>25</sup> For example, imagine a man is raking leaves in his front yard on a windy fall day. He realizes that it is easier to rake the leaves in the direction the wind is blowing. He thinks he has discovered a great idea. However, as he looks toward his neighbors' yards, he sees that they have all had the same idea, and are all raking their leaves in the direction of the wind. (Thanks to Dr. David Albonesi of the School of Electrical and Computer Engineering, Cornell University for this example.)

Citation for this article: *The Jury Expert*, 2010, 22(2), 5-15.

# Unintended Consequences of Toying with Jurors' Emotions: The Impact of Disturbing Emotional Evidence on Jurors' Verdicts<sup>1</sup>

By Jessica M. Salerno and Bette L. Bottoms

Jessica M. Salerno ([jsaler4@uic.edu](mailto:jsaler4@uic.edu)) is a doctoral student in social and personality psychology at the University of Illinois at Chicago. Her research focuses on how jurors' emotions influence their case judgments and deliberation behavior. She also studies how jurors' information-processing style influences their ability to evaluate the quality of scientific expert testimony, and how legal safeguards can affect this process. She has received competitive grants and awards in recognition of her work, and has published her work in journal articles and books chapters. <http://sites.google.com/site/jessicasalerno/>

Dr. Bette L. Bottoms ([bbottoms@uic.edu](mailto:bbottoms@uic.edu)) is Professor of Psychology, Vice Provost for Undergraduate Affairs, and Dean of the Honors College at the University of Illinois at Chicago. Her research on child abuse, children's eyewitness testimony, and jurors' perceptions of child victims and of juvenile offenders has been funded by the National Institute on Mental Health and published in numerous scholarly articles. Dr. Bottoms has edited five books, served on numerous editorial boards and has received national awards for excellence in teaching and mentoring. <http://www.psych.uic.edu/bbottoms.asp>

Despite the legal system's conventional story that our judicial process is devoid of emotions and based on pure reason (Bandes, 1999), attorneys have intuited the role of emotion in jurors' verdict decisions. Attorneys attempt to elicit emotions in jurors during opening and closing statements, or through the use of emotionally disturbing evidence. These attempts might, however, cause unintended changes to the way jurors process or interpret trial evidence. As psychologists, it is not our job to argue that emotion can (or should) ever be divorced from legal decision-making. Instead, we argue that it is important for attorneys to understand how emotion might change jurors' thinking processes in ways that attorneys might not expect. First, we explain how different types of emotional evidence influence jurors' verdicts, highlighting instances in which emotional evidence influences verdicts in the opposite direction that one would expect. Second, we explain how social psychological and neuroscience research about emotion in general can be applied to jury decision-making to inform attorneys about the less expected effects this evidence might have on how jurors process and interpret evidence in the trial. For a more extensive examination of these issues see Salerno and Bottoms (2009).

## *Emotional Evidence*

Of course, both sides in a criminal case -- defense and prosecution -- attempt to sway jurors' emotions, and in turn, their verdicts. Prosecuting attorneys might flash as many gruesome post-mortem photographs as the judge will allow to make jurors angrier at the defendant. Defense attorneys might make appeals to jurors' empathy during closing statements. Disturbing evidence, such as autopsy photographs of children, has caused extreme reactions in jurors, such as crying or even vomiting (Rowan, 2007). Will jurors' heightened anger or disgust lead them to be more punitive toward a defendant? And if so, how? According to Rule 403 of the Federal Rules of Evidence (2006), "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or



misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Negative emotion can influence legal judgments, however, in both probative and prejudicial ways (for reviews see Feigenson & Park, 2006; Salerno & Bottoms, 2009). Thus, it is important to note that emotional evidence can affect jurors’ judgments through the legally desired *probative* channels or the legally untenable *prejudicial* channels. For example, the prosecution’s goal is obviously to present evidence (emotional or not) to increase punitiveness. Evidence, such as graphic crime scene photographs and victim impact statements, is presented to demonstrate the amount of harm inflicted by an offender, and in turn, increase punishment. If jurors become more punitive because of unique information about harm, the law considers that the evidence has had a probative effect. But if the evidence does not provide unique information about harm, or if it increases jurors’ emotions in informationally irrelevant ways and this outweighs the unique factual information – it could be considered legally prejudicial.

*Prosecution evidence.* Prosecutors are likely to try and elicit negative emotions (i.e., anger, disgust) in jurors in hopes of making them more likely to convict the defendant. One form of evidence that prosecutors might use to elicit strong emotion in jurors is gruesome photographs from a murder scene. Mock juror studies reveal that, even when all mock jurors hear the same exact evidence, jurors who see gruesome photographs of a murder victim are more likely to vote guilty (Bright & Goodman-Delahunty, 2004, 2006; Douglas et al., 1997) compared to mock jurors who do not see the photographs. For example, Bright and Goodman-Delahunty (2006) presented mock jurors with a lengthy trial transcript describing a case against a man on trial for murdering his wife. Half of the mock jurors heard either non-gruesome or gruesome verbal descriptions, and in addition the jurors viewed either no photographs, non-gruesome photographs, or gruesome photographs. The mock jurors then reported their verdicts and how angry and disgusted they felt before and after reading the case materials. The verbal descriptions had no effect on verdicts, but the visual stimuli did: Mock jurors who saw the gruesome photographs were more likely to vote guilty and rated the prosecution’s evidence as more sufficient than did jurors who saw non-gruesome or no photographs. Furthermore, these effects were driven by the mock jurors’ reported anger toward the defendant; that is, viewing the photographs caused the jurors to become angry toward the defendant, and in turn, this anger led them to vote guilty more often and to believe that the prosecution evidence was sufficient. This suggests an emotion-driven explanation as opposed to an argument that gruesome photographs were merely providing unique information. An emotion-driven explanation is also supported by studies demonstrating that jurors who view color photographs are more biased toward punitive sentencing than jurors who viewed the same photographs in black and white (Oliver & Griffitt, 1976; Whalen & Blanchard, 1982). To claim that the color photographs serve a probative (i.e., informational) function for the jurors, one would have to argue that the more punitive judgments resulted because the color photographs contained unique information not evident in the black and white versions. A more compelling explanation is that the color photographs elicited more emotion in the mock jurors, which lead to more punitive judgments.



A second type of emotionally disturbing prosecution evidence that might elicit negative emotion in jurors is victim impact statements. In the sentencing phase of a capital trial prosecutors can have the victim’s family members testify about the impact of the victim’s death. Supporters of victim impact statements believe that these statements provide information about the extent of harm committed by a defendant (i.e., serve a probative value). In *Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1989), the Supreme Court banned victim impact statements from death penalty trials, finding them informationally irrelevant and biasing of jurors against the

defendant, thereby contributing to arbitrary death penalty sentences and violating the 8<sup>th</sup> amendment that forbids cruel and unusual punishment. But in *Payne v. Tennessee* (1991), the Supreme Court reversed itself, and in a recent case, the Court even allowed the admission of “video tributes” to the victim, including pictures of the victim from childhood set to soft music and narrated by the victim’s mother (*Kelly v. California*, 2008) – surely an appeal to jurors’ emotions. The majority in *Payne* opined that victim impact statements are relevant to the sentencing phase of a trial because they speak to the level of harm resulting from a crime and that any violation of the defendant’s rights “were harmless beyond a reasonable doubt” (*Payne v. Tennessee*, 1991). Thus, the court is assuming that the effect of victim impact statements is probative (i.e., providing information regarding harm) and not prejudicial (i.e., “harmless”).

The Court’s assumptions have been tested in a growing number of laboratory and field studies. Several laboratory studies have found that mock jurors who are exposed to victim impact statements (versus no statements) are more punitive toward the defendant in terms of sentencing in death penalty cases (ForsterLee et al., 2004; Luginbuhl & Burkhead, 1995; McGowen & Myers, 2004; Myers & Arbuthnot, 1999; Myers, Goodwin, Latter, Winstanley, 2004) and ratings of crime severity (Greene, Koehring, & Quiat, 1998). One study with real cases echoed these results: Among actual trials in one Midwest U.S. county, defendants in trials that included (versus did not include) victim impact statements were more likely to be incarcerated than put on probation (Erez and Tontodonato; 1990). One study, however, failed to find that victim impact statements had an effect on sentencing outcomes (Davis & Smith, 1994).

Field studies, however, have found little or no effect of victim impact statements on sentencing decisions (Erez & Roeger, 1995; Erez & Rogers, 1999; Henley, Davis, & Smith, 1994). Although these studies are more realistic than laboratory simulations, our ability to generalize the results to American juries is limited because they assessed decisions made by legal professionals (e.g., judges) and involved much less serious cases than the experimental studies (which might elicit less emotion) (for a review see Salerno & Bottoms, 2009). Jurors and judges might differ greatly in the extent to which their punitiveness is affected by victim impact statements. For example, compared to potential jurors, judges are likely to hear victims’ stories that induce sadness, anger, and disgust on a regular basis and may, especially over time, become less emotionally affected by them.

*Defense evidence.* Defense attorneys also appeal to jurors, perhaps by attempting to elicit sympathy and empathy in jurors in hopes of making the jurors more lenient toward their clients. Haegerich and Bottoms (2000), for example, found that mock jurors who heard a defense attorney urging empathy for the defendant during opening and closing statements were less likely than jurors who did not hear this empathy induction to find a defendant guilty. Thus, appeals to jurors’ empathy appear to affect their verdicts. Defense attorneys might also elicit negative emotions in jurors. Perhaps the best example of defense attorneys presenting emotionally disturbing evidence we can offer is the defense presenting disturbing details of a defendants’ history of child abuse as mitigating evidence in an attempt to steer jurors away from the death penalty. Such evidence is often aimed at stirring jurors’ emotions and certainly has the potential to be as emotionally charged as gruesome crime scene photographs or victim impact statements presented by the prosecution. The research investigating this phenomenon reveals, however, that the effect of emotional mitigating evidence is not always what one might expect. For example, research finds that mitigating evidence that is emotionally-disturbing (e.g., a history of child abuse) sometimes causes mock jurors to be more punitive, which has been labeled as the “backfire effect” (e.g., Barnett, Brodsky, Price, 2007; Brodsky, Adams, Tupling, 2007). Stevenson, Bottoms, and Diamond (2010) coded mock jurors’ comments about a defendant’s history of abuse during deliberations and found that jurors were more likely to either ignore the defendant’s history of child abuse or even to use this factor as an aggravator, than they were to use this evidence in the intended mitigating manner. They found jurors were more likely to discuss a defendant’s history of child abuse to mean that his behavior was controllable and stable more than uncontrollable and

unstable, respectively. This, of course, is not likely the reaction the attorney would have expected. The researchers speculated that the emotional evidence probably made jurors' more angry, but toward the defendant, which made them more punitive – even though the evidence was originally intended to make them sympathetic and thus less punitive toward the defendant. This is an example of how trying to manipulate jurors' emotions might have unintended effects – effects that can be explained by social psychological and neuroscience research about emotion and decision-making. This research can explain the effects of appeals to jurors' emotions that attorneys might not predict based on their own intuition about how jurors' emotions operate.

### *Social Psychological Explanations*

Heightened juror emotion might have unintended consequences in the courtroom because of how emotion affects how deeply jurors process evidence. People can process information (such as testimony in court) through either a deliberative and effortful route or a quicker more efficient route (for review of dual-process models, see Evans, 2008). Emotion depletes attention and ability to process information deeply (Wilder & Simon, 1996). Anger in particular results in shallower processing, because anger makes people feel more confident in their own judgments (Lerner & Tiedens, 2006). When people are less able or motivated to process information deeply, they rely on heuristics or “cognitive shortcuts,” such as stereotypes. For example, Bodenhausen, Sheppard, and Kramer (1994) found that after reading the same case evidence, people induced to be angry perceived a Hispanic person as more guilty of assault than a non-Hispanic person, but people who were induced to be in a sad or neutral mood perceived the Hispanic and non-Hispanic persons as equally guilty. The authors concluded that angry participants relied on the race stereotype because their anger was making them process the case information less deeply. A more recent study clarified, however, that angry people have the capacity to process deeply because they only rely on stereotypes when they think the stereotype is relevant (Moons & Mackie, 2007). This research suggests one unintended consequence of making jurors more angry: it might increase their reliance on stereotypes when deciding on a verdict.

Another unintended effect of emotion is that it can cause jurors to process other trial evidence in a biased way. In other words, making jurors angry might not just make them more likely to vote guilty, but it might change how they process and interpret other evidence. Strong negative emotion can bias the information-processing and decision-making processes in many different ways. For example, negative emotion can cause jurors to look for information and interpret evidence to be consistent with blaming a target (Alicke, 2000). This means jurors who are angry at a

defendant might be more likely to seek out information that backs up that emotion and to interpret other information to be consistent with their anger. Emotion can also change our judgments in a more direct way. People consult their emotions to decide how they feel about something (Forgas, 1995; Schwartz & Clore, 2003). For example, when jurors are deciding whether they trust a defendant, they might ask themselves how they are feeling. If they are angry they might interpret that to mean that they do not trust the defendant – even if the anger came from something unrelated, such as being in a bad mood. So, for attorneys, this means that jurors might consult their anger (caused by seeing a photograph of a child victim) as information that they do not trust the defendant, independent from an assessment of evidence indicating guilt. Finally, emotion can lead to visceral reactions that are merely justified by deeper cognitive reasoning that happens *afterward* (Haidt, 2001). For example, seeing a gruesome photo might make us angry, which we



STEREOTYPE

later justify by coming up with reasons to believe the defendant did it. In a particularly relevant metaphor, Haidt (2001) likens people more to lawyers defending a case than to judges or scientists seeking truth. If true, this would suggest that emotion might bypass rational, deliberative processing entirely and directly result in more punitive judgments. This theory would predict that the reason victim impact statements make jurors react more punitively is because they induce immediate visceral response that jurors later justify with evidence that fits their emotional reaction, not because they gain unique information from the statement.

Feigenson and Park (2006) applied these theories to legal decision-making specifically. They proposed that emotion can affect legal judgments indirectly through providing information, but also directly in ways that are independent from any information the emotion might provide. For example, jurors' negative emotions caused by emotional evidence would make them more likely to process evidence that is negative, thus focusing their attention more on the evidence that is consistent with their anger toward the defendant. So, if jurors are extremely angry after hearing a victim impact statement, they might be more likely to pay attention to negative information (e.g., an officer testifying that the crime was particularly heinous) than positive information (e.g., a defendant's mother testifying to the positive aspects of his character). This might explain why mock jurors who viewed gruesome photographs rated the prosecution's evidence as more sufficient than did jurors who did not view the photographs (Bright & Goodman-Delahunty, 2006). Because the two groups heard exactly the same case evidence, this suggests that the jurors who saw the photographs focused more on the negative anger-congruent evidence (e.g., traumatic details of the crime, negative information about the defendant, etc.) than did other jurors.

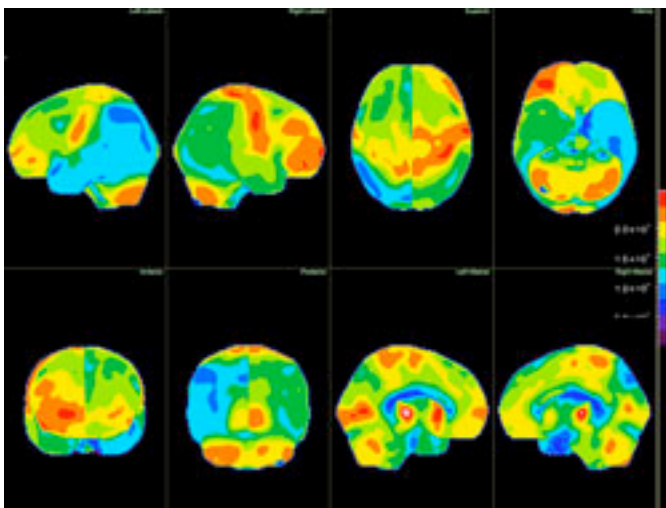
### *Neuroscience Explanations*

In addition to social psychological research, neuroscience research can tell us about the impact of emotional evidence on jurors' emotions and subsequent judgments. We can learn a lot about the effect of emotion on information processing from neuro-imaging studies that use functional magnetic resonance imaging (fMRI). fMRI is a technique used to measure blood flow to areas of the brain during activities. By measuring where blood flows during different tasks, researchers can show the level of brain activity on an image of the brain associated with the tasks. For example, if people are speaking they might have more blood flow to the areas of the brain associated with language, areas that would be shown as "lighting up" on the fMRI image. By examining these images and considering the amount of blood flow to a given area, researchers can correlate brain activation in particular areas with whatever cognitive activity is being performed by a subject. Studies using fMRI to investigate emotion can provide insight into how brain activity differs when people make decisions that involve more (compared to less) emotional stimuli. A study investigating emotion might, for example, compare how brain activity differs between people who experience the emotional stimuli (e.g., view angry faces, disturbing photographs, etc.) to people who do not experience the emotional stimuli.

Although neuroscience and law is a growing field, we are aware of only one study that investigates brain activity while making legal guilt and punishment decisions (Buckholtz, Asplund, Dux, Zald, Gore, Jones & Marois, 2008). This study found that a set of brain areas linked to social and emotional processing are associated with deciding punishment for 50 hypothetical legal cases. This study has found preliminary support for the contention that emotion is at least somewhat involved in legal decision-making. This study did not, however, investigate whether increased levels of emotion affect legal decision-making.

A number of non-legal, but relevant, fMRI studies have compared the effect of more versus less emotional decisions on brain activity. For example, researchers have compared brain activation differences when people consider moral dilemmas that involve a personal element (and therefore believed to elicit more emotional engagement) versus a non-personal element (Greene, Nystrom, Engell, Darley, & Cohen, 2004;

Greene, Sommerville, Nystrom, Darley, & Cohen, 2001; Greene & Haidt, 2002). For example, Greene and colleagues (2001) asked participants to decide a classic “moral dilemma” in which they must decide between letting a trolley full of people run off a cliff versus sacrificing only one man’s life to stop the trolley (thus saving the people on board). In the impersonal (i.e., less emotional) condition, participants were told they had to pull a lever to switch the trolley to a second track and away from the cliff, killing a man standing on that second track. In the personal (i.e., more emotional) condition, participants were told they had to push a man onto the track in front of the trolley to stop it. Participants contemplating the more personal moral violation had increased activity in brain areas associated with emotion and, of even more interest, decreased brain activity in areas associated with cognitive processes such as working memory. Greene and colleagues (2004) found that these two different activation patterns were what drove their decisions in the moral dilemma. In other words, people who had to make a more (versus less) emotional decision had greater activity in the brain area associated with emotion and less activity in the brain area associated with cognition, which led the two groups to make different moral decisions. In another study, participants judged whether the action depicted in a scenario was wrong (similar to jurors’ task in a trial) and whether they would have acted the same way. Judgments about the morality of inflicting intentional harm resulted in greater activation in emotional areas of the brain and lesser activation in cognitive areas, compared to judgments about unintentional harm (Borg, Hynes, Van horn, Grafton, & Sinnott-Armstrong, 2006). If we assume that reading about intentional harm would make people more angry than unintentional harm, this would also suggest that more (versus less) emotional judgments lead to more emotion and less cognition activity. So, if we apply this to our issue of emotional evidence in court, this (along with the social psychological theories described above) might suggest that jurors whose verdict decisions are more emotional due to disturbing evidence might be driven more by their emotions and process the evidence less deeply, compared to jurors who have a less emotionally charged decision-making process.



Other neuroimaging studies have compared people with higher versus lower emotion in ways more like the circumstances encountered by jurors considering harm suffered by victims in court cases. One study found that people who read sentences about bodily harm (which participants rated as higher in emotionality) made quicker judgments and showed less activation in a brain area associated with autobiographical episodic memory and deciding intentions of others, compared to people who read sentences that did not include bodily harm (Heekeren, Wartenburger, Schmidt, Prehn, Schwintowski, & Villringer, 2005). The researchers concluded that viewing bodily harm limits one’s ability to take the emotional context into account when judging another person’s actions. Although reading sentences

about harm does not exactly mimic viewing gruesome photographs, if people are less able to take context into account when they have seen more emotional stimuli, this might explain why people who see autopsy photographs might be less open to mitigating evidence (i.e., the context in which the crime was committed).

*What does this mean for attorneys?*

Next, we will discuss what the practical applications of these theories might be for attorneys. Typically, psychologists avoid going “beyond their data,” to predict behavior. The research we have reviewed relies on what people tend to do on average and does not necessarily apply to any individual juror. So, rather than try to predict how jurors will react to attorneys’ attempts to “toy” with their emotions, we consider

possible unintended effects that attorneys might not expect. Earlier we described an example of an unexpected effect of emotional evidence: the backfire effect in which mitigating evidence about a defendant's history of child abuse was more often ignored or used as an aggravator, as opposed to as a mitigator, as the defense intended (Stevenson et al., 2010). Theories about emotion that predict jurors' heightened negative emotions might change how they process other information might explain this unexpected effect. For example, jurors' anger toward the defendant (which might have already been elicited during the guilt phase of the trial) could cause jurors to pay more attention to evidence that fits with their anger. This might explain why many jurors ignored the defendant's history of child abuse during deliberation – because it was not congruent with their anger toward the defendant. These theories also predict that angry jurors might interpret ambiguous information to be consistent with their emotion or to justify their immediate visceral response. This could explain why some jurors use a history of child abuse as an aggravator – their anger toward the defendant led them to reason that the abuse left the defendant permanently “damaged” and unable to be rehabilitated. Thus, jurors' negative emotions might bias their processing and interpretation of evidence to produce effects attorneys might not have expected based on their intuition about how emotional evidence will influence jurors.

Thus, defense attorneys might want to pay particular attention to how the evidence they present could be filtered through anger jurors might already feel toward the defendant. Perhaps addressing these alternative interpretations of the evidence up front might ameliorate the collateral effects of jurors' emotions on how they interpret evidence. In other words, perhaps participants in Stevenson et al.'s (2010) study might not have interpreted the history of child abuse as meaning the defendant was “damaged goods” if the defense attorney had presented expert testimony combating that claim. Calling attention to the potential impact of jurors' emotions might also cause jurors to correct for this influence. In fact, emotions affect judgments most strongly when the emotion is unnoticed. For example, Schwarz and Clore (2003) found that anger is more likely to affect judgments after it dissipates into irritation, because its origin is less clear and thus less likely to be corrected. Similarly, by the time jurors render a verdict, the emotional influence on their judgments might be outside of their awareness. This might make jurors less likely to realize their emotions are running high due to disturbing evidence and thus less likely to correct for this effect.

Defense attorneys, however, are not the only ones who should be cautious about the unintended effects of toying with jurors' emotions. Prosecutors should also exercise caution and be aware of collateral effects of jurors' negative emotions. Angry jurors, for example, might process the case evidence less thoroughly, which might make them more likely to miss or make mistakes about evidence in general – including prosecution evidence. Jurors misinterpreting or forgetting evidence can be just as detrimental to the prosecution's case as to the defense's case. For example, if the prosecution's case hinges on complex expert testimony that might be difficult for jurors to follow, making jurors angry might limit their ability to process the expert testimony, ultimately weakening the case overall. Further, making jurors angry might lead to increased stereotyping, which could be detrimental to the prosecution if the plaintiff or one of the prosecution's witnesses belongs to a stereotyped group.

Attorneys should note that not all jurors will react strongly to emotional evidence, even the most gruesome photograph or the most compelling victim impact statements. Some jurors, for example, might have more experience with disturbing information (perhaps through medical or emergency rescue, playing graphic video games or watching graphic forensic television programming such as *CSI: Crime Scene Investigators*), which one could speculate might cause these people to react differently than others. Jurors also might be more or less naturally affected by emotional information. Researchers have identified personality variables, such as Need for Affect (Maio & Esses, 2001) and Disgust Sensitivity (Haidt, McCauley, & Rozin, 1994), which are considered individual differences in susceptibility to emotional information. These

individual differences are assessed with questionnaires that may be incorporated in *voir dire* to determine how much a given juror might be influenced by emotional evidence.

Although we believe that the constellation of evidence we have presented is quite relevant in understanding how emotional evidence might impact jurors' decisions, there are certainly a number of reasons to be cautious about generalizing from some of the studies we reviewed to the actual legal arena. First, the social cognition and neuroscience studies we reviewed were not conceived of for generalization to the context of legal decision-making specifically and still need to be tested further in the legal context. Second, none of the models we have discussed take into account the potential influence of the jury deliberation process. Studies that do not include the jury deliberation component might misrepresent what final post-deliberation verdicts would be in a real jury context (Diamond, 1997; Salerno & Diamond, in press). Finally, it is important to note that these studies are based on how people are affected on average – thus these results cannot predict how any one given juror will react.

### Conclusion

The purpose of our paper is not to predict how jurors will react emotionally, but instead to argue against the ability to do so with accuracy. Our purpose is to caution attorneys about the complexity of emotion and decision-making and to caution against assuming the effects of their attempts to toy with jurors' emotions. Inducing juror emotion, such as anger, can affect not only jurors' verdicts, but also how deeply they process and how they interpret trial evidence. This can lead to many unintended effects, such as biasing processing and interpretation of evidence in emotion-consistent ways, increased errors, decreased ability to understand complex testimony, increased reliance on stereotyping, and perhaps many others that have not yet been identified.

### References

- Alicke, M. D. (2000). Culpable control and the psychology of blame. *Psychological Bulletin*, 126, 556-574.
- Bandes, S. A. (1999). *Passions of law*. New York, NY: New York University Press.
- Barnett, M. E., Brodsky, S. L., & Price, J. R. (2007). Differential impact of mitigating evidence in capital case sentencing. *Journal of Forensic Psychology Practice*, 7, 39-45.
- Bodenhause, G. V., Sheppard, L. A., & Kramer, G. P. (1994). Negative affect and social judgment: The differential impact of anger and sadness. *European Journal of Social Psychology*, 24, 45-62.
- Booth v. Maryland, 482 U.S. 496 (1987).
- Borg, J. S., Hynes, C., Van Horn, J., Grafton, S. T., & Sinnott-Armstrong, W. (2006). Consequences, action, and intention as factors in moral judgments: An fMRI investigation. *Journal of Cognitive Neuroscience*, 18, 803-817.
- Bright, D. A., & Goodman-Delahunty, J. (2004). The influence of gruesome verbal evidence on mock juror verdicts. *Psychiatry, Psychology, and Law*, 11, 154-166.
- Bright, D. A., & Goodman-Delahunty, J. (2006). Gruesome evidence and emotion: Anger, blame, and jury decision-making. *Law and Human Behavior*, 30, 183-202.
- Brodsky, S. L., Adams, D., & Tupling, J. E. (2007, August). The backfire effect of substance abuse: When a mitigating factor becomes aggravating. In S. L. Brodsky (Chair), *Mitigation Evidence and Testimony in Capital Trial Sentencing*. Symposium conducted at the meeting of the American Psychological Association Conference, San Francisco, CA.
- Buckholtz, J. W., Asplund, C. L., Dux, P. E., Zald, D. H., Gore, J. C., Jones, O. D., & Marois, R. The neural correlates of third-party punishment. *Neuron*, 60, 930-940.
- Davis, R. C., & Smith, B. E. (1994). The effects of victim impact statements on sentencing decisions: A test in an urban setting. *Justice Quarterly*, 11, 453-469.

- Devine, D. J., Clayton, L. D., Dunford, B. B., Seying, R., & Pryce, J. (2001). Jury decision making: 45 years of empirical research on deliberating groups. *Psychology, Public Policy, and Law*, 7, 622-727.
- Diamond, S. S. (1997). Illuminations and shadows from jury simulations. *Law and Human Behavior*, 21, 561-571.
- Douglas, K. S., Lyon, D. R., & Ogloff, J. R. P. (1997). The impact of graphic photographic evidence on mock jurors' decisions in a murder trial: Probative or prejudicial? *Law and Human Behavior*, 21, 485-501.
- Erez, E., & Roeger, L. J. (1995). The effects of victim impact statements on sentencing patterns and outcomes: The Australian experience. *Journal of Criminal Justice*, 23, 363-375.
- Erez, E., & Rogers, L. (1999). Victim impact statements and sentencing outcomes and processes: The perspective of legal professionals. *British Journal of Criminology*, 39, 216-239.
- Erez, E., & Tontodonato, P. (1990). The effect of victim participation in sentencing on sentence outcome. *Criminology*, 28, 451-474.
- Evans, J. B. T. (2008). Dual-processing accounts of reasoning, judgment, and social cognition. *Annual Review of Psychology*, 56, 255-278.
- Feigenson, N. R., & Park, J. (2006). Emotions and attributions of legal responsibility and blame: A research review. *Law and Human Behavior*, 30, 143-161.
- Forgas, J. P. (1995). Mood and judgment: The affect infusion model (AIM). *Psychological Bulletin*, 117, 39-66.
- ForsterLee, L., Fox, G. B., & ForsterLee, R., Ho, R. (2004). The effects of a victim impact statement and gender on juror information processing in a criminal trial: Does the punishment fit the crime? *Australian Psychologist*, 39, 57-67.
- Goldberg, J. H., Lerner, J. S., & Tetlock, P. E. (1999). Rage and reason: the psychology of the intuitive prosecutor. *European Journal of Social Psychology*, 29, 781-795.
- Greene, E., Koehring, H., & Quiat, M. (1998). Victim impact evidence in capital cases: Does the victim's character matter? *Journal of Applied Social Psychology*, 28, 145-156.
- Greene, J. D., & Haidt, J. (2002). How (and where) does moral judgment work? *Trends in Cognitive Sciences*, 6, 517-523.
- Greene, J. D., Nystrom, L. E., Engell, A. D., Darley, J. M., & Cohen, J. D. (2004). The neural bases of cognitive conflict and control in moral judgment. *Neuron*, 44, 389-400.
- Greene, J. D., Sommerville, B. R. B., Nystrom, L. E., Darley, J. M., & Cohen, J. D. (2001). An fMRI investigation of emotional engagement in moral judgment. *Science*, 293, 2105-2108.
- Haegerich, T. M., & Bottoms, B. L. (2000). Empathy and jurors' decisions in patricide trials involving child sexual assault allegations. *Law and Human Behavior*, 24, 421-447.
- Haidt, J. (2001). The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review*, 108, 814-834.
- Haidt, J., McCauley, C., & Rozin, P. (1994). Individual differences in sensitivity to disgust: A scale sampling seven domains of disgust elicitors. *Personality and Individual Differences*, 16, 701-713.
- Heekeren, H. R., Wartenburger, I., Schmidt, H., Prehn, K., Schwintowski, H., & Villringer, A. (2005). Influence of bodily harm on neural correlates of semantic and moral decision-making. *NeuroImage*, 24, 887-897.
- Henley, M., Davis, R.C., & Smith, B.E. (1994). Reactions of prosecutors and judges to victim impact statements. *International Review of Victimology*, 3, 83-93.
- Kelly v. California, 555 U.S. (2008).
- Lerner, J. S., & Tiedens, L. Z. (2006). Portrait of the angry decision maker: How appraisal tendencies shape anger's influence on cognition. *Journal of Behavioral Decision Making*, 19, 115-137.
- Logan, W. A. (1999). Through the past darkly: A survey of the uses and abuses of victim impact evidence in capital trials. *Arizona Law Review*, 41, 143-192.
- Luginbuhl, J., & Burkhead, M. (1995). Victim impact evidence in a capital trial: Encouraging votes for death. *American Journal of Criminal Justice*, 20, 1-16.
- Maio, G. R., & Esses, V. M. (2004). The need for affect: Individual differences in the motivation to approach or avoid emotions. *Journal of Personality*, 69, 583-615.



- McGowen, M. G., & Myers, B. (2004). Who is the victim anyway? The effects of bystander victim impact statements on mock juror sentencing decisions. *Violence and Victims*, 19, 357-374.
- Moons, W. G., & Mackie, D. M. (2007). Thinking straight while seeing red: The influence of anger on information processing. *Personality and Social Psychology Bulletin*, 33, 706-720.
- Myers, B., & Arbuthnot, J. (1999). The effects of victim impact evidence on the verdicts and sentencing judgments of mock jurors. *Journal of Offender Rehabilitation*, 29, 95-112.
- Myers, B., Godwin, D., Latter, R., & Winstanley, S. (2004). Victim impact statements and mock juror sentencing: The impact of dehumanizing language on a death qualified sample. *American Journal of Forensic Psychology*, 22, 39-55.
- Oliver, E., & Griffitt, W. (1976). Emotional arousal and objective judgment. *Bulletin of the Psychonomic Society*, 8, 399-400.
- Payne v. Tennessee, 501 U.S. 808 (1991).
- Rowan, J. (2007, November 16). Jury considering verdict in toddler murder case. *The New Zealand Herald*. Retrieved March 27, 2008, from [http://www.nzherald.co.nz/section/1/story.cfm?c\\_id=1&objectid=10476404](http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10476404).
- Salerno, J. M., & Bottoms, B. L. (2009). Emotional evidence and jurors' judgments: The promise of neuroscience for informing psychology and law. *Behavioral Sciences & the Law: Special Issue: The Neuroscience of Decision Making and Law*, 27, 273-296.
- Salerno, J.M., & Diamond, S. S. (in press). The promise of a cognitive perspective on jury decision-making. *Psychonomic Bulletin & Review*.
- Schwarz, N., & Clore, G. L. (2003). Mood as information: 20 years later. *Psychological Inquiry*, 14, 296-303.
- South Carolina v. Gathers, 490 U. S. 805 (1989).
- Stevenson, M. C., Bottoms, B. L., Diamond, S. S. (2010). Jurors' discussions of a defendant's history of child abuse and alcohol abuse in capital sentencing deliberations. *Psychology, Public Policy, and Law*, 16, 1-38.
- Whalen, D. H., & Blanchard, F. A. (1982). Effects of photographic evidence on mock juror judgment. *Journal of Applied Social Psychology*, 12, 30-41.
- Wilder, D. A., & Simon, A. F. (1996). Incidental and integral affect as triggers of stereotyping. In R. Sorrentino, & T. Higgins (Eds.), *Handbook of Motivation and Cognition, Vol. 3: The Interpersonal Context* (pp. 397-419). New York, NY: Guilford Press.
- Winkielman, P., Knutson, B., Paulus, M., & Trijillo, J. L. S. (2007). Affective influence on judgments and decisions: Moving towards core mechanisms. *Review of General Psychology*, 11, 179-192.

### Endnote

<sup>1</sup> Portions of this article are adapted from Salerno, J. M., & Bottoms, B. L. (2009) Emotional evidence and jurors' judgments: The promise of neuroscience for informing psychology and law. *Behavioral Sciences and the Law: Special Issue: The Neuroscience of Decision Making and Law*, 27, 273-296.

**We asked three experienced trial consultants to offer their reactions to Salerno and Bottoms article on the impact of disturbing emotional evidence on jurors' verdicts. On the following pages, John McCabe, Dennis Elias and Richard Waites offer their perspectives.**

## Response to Unintended Consequences from John McCabe

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

We are all familiar with the concept of people being *blinded by emotion*. The blinding emotion could be rage, or jealousy, or envy, etc. We have probably all heard someone say something akin to, "He was so upset that he wasn't thinking straight." And, of course, there is, or at least was, the *in flagrante delicto* defense: killing the interloper is justifiable if a man catches another man in bed with his wife. That emotions can overwhelm reason is not controversial.

A more radical idea, proposed by Antonio Damasio in his 1994 book *Descartes' Error*, is that emotions set not only the upper limit of reasoning, but also reasoning's lower limit. That is, without input from our emotions we would be unable to reason as social beings. Here Damasio is not referring to systematic, abstract, syllogistic reasoning (i.e., All men are mortal. Socrates is a man. Therefore, Socrates is mortal). Rather, he is referring to social reasoning (e.g., being able to judge whether a given action will lead to an increased or decreased likelihood of achieving one's social goals).



In the 1986 book *Law's Empire*, Ronald Dworkin argues that the rightful purpose of the justice system is to "secure a morally defensible outcome" (p. 165). By and large, this is what I believe jurors are attempting to do, but they cannot do it without taking into consideration their own emotional reactions. A cold cost-benefit analysis may be an artificial substitute for determining if an outcome is *morally defensible*, but I tend to think that the gauge is more in one's gut than one's head. Besides, a systematic cost-benefit analysis is likely to be unwittingly influenced by emotional information. Thus, if we are to understand the juridical decision-making process, it is critically important to understand the role that emotional reactions play in that process.

When I read Salerno and Bottoms' article, these two great books by Damasio and Dworkin were brought to mind. Salerno and Bottoms are correct; despite the legal myths, emotions permeate jury decision-making. Rule 403's *substantially outweighed* language sets a high bar for exclusion. The law favors jurors seeing more rather than less, despite the potential biasing impact. Rule 403 concerns only *unfair* prejudice. I appreciate Salerno and Bottoms' contribution regarding evidence and testimony that is likely to elicit emotions that in turn can lead to increased punitiveness or leniency. Their explanations, both social psychological and neuro-cognitive, were presented well. Moreover, as someone who studies these issues, I thank them for presenting information about the impact specific emotions have on jurors' level of cognitive effort as well as the potential unintended pitfalls of attorneys trying to induce particular feelings in jurors. A colleague recently sat on a jury in which a last-minute appeal to emotion backfired; he says, like watching a train wreck, everyone cringed, but you just could not look away. It is always important to anticipate, understand, and manage jurors' emotional responses.

Clearly, though, more research is necessary. For instance, for logistical reasons, we psychologists tend to test the effects of emotions in relatively short timeframes, a couple of hours or a day, whereas a trial may last days, weeks, or even months. There is a natural ebb and flow to both emotional reactions and the motivation and ability necessary to critically evaluate evidence and testimony. As a result, an angry emotional response on one day may or may not hamper thoughtful consideration of evidence the next day or even later that same day. Although extremely valuable, effects demonstrated in laboratory experiments may not map onto jurors' naturalistic experiences very well. As we move forward, a greater understanding of the modulation of the effects of juror's emotional reactions is necessary. This is to say nothing of source effects like perceived sincerity, factors affecting emotional dynamics in a trial, etc.

Still, emotional responses of decision-makers have not gotten their due in the history of law and rhetoric. Appeals to emotion, or *pathos*, are relegated in the minds of many to third place behind *logos*, logical argument, and *ethos*, the speaker's character. Yet, the more we learn, the more we see emotion's prominent and sometimes insidious role in decision-making. Notable is one of the articles cited by Salerno and Bottoms, Douglas et al. (1997), in which participants were more punitive when exposed to graphic photographic evidence relative to those not shown any photos. This was despite the photos' lack of any information diagnostic of the defendant's guilt. More importantly, though, the participants whose decisions were affected by exposure to the graphic photos were unaware that the photos had impacted their judgments. Unless brought to consciousness, emotion biases without the biased even noticing.

This article by Salerno and Bottoms speaks to a larger issue as well, law as a reflection of the Western notion that rationality is separate from (and superior to) emotionality. This is what Damasio refers to as *Descartes' error*, conceiving of the mind as separate and distinct from the body, especially the viscera, the gut where emotion is felt. An interesting consequence of this bifurcation, according to Damasio, is that because the body and mind are thought of as distinct, Western medicine tends to treat the body, the disease, without sufficient consideration given to the mind, the patient. The popularity of holistic medicine, which was just beginning to flourish in the early 1990s when Damasio wrote his book, is evidence of people's need to feel that their doctor understands not just their disease but also how that disease is affecting their whole self. Medicine has only recently embraced some of the ideas of a holistic approach with very encouraging results. Preliminary evidence shows more favorable outcomes when both body and mind are treated. However, an impediment to progress in this area is likely the medical establishment, particularly as substantiated by medical schools. Traditional approaches have momentum on their side.

Another likely problem is that the skill set necessary to become a great orthopedic surgeon, for instance, is probably not the same as the skill set necessary to relate to and connect with patients on an emotional level. In this age of medical specialization, demanding a great surgeon have extraordinary technical skills and great bedside manner may be asking too much. And, having to choose, most of us would prefer the heartless but skillful surgeon. Of course, the only thing worse than a doctor with a bad bedside manner is one that unknowingly fails to connect with his or her patients. In the same way, an attorney may hone their argumentative skills as much as an expert surgeon hones surgical skills, but the training may not emphasize what is necessary to relate to a jury, the *box-side manner*.

## Response to Salerno & Bottoms from Dennis C. Elias

Dennis C. Elias, Ph.D. is Senior Litigation Consultant with the firm, [Litigation Strategies, Inc.](#), Phoenix, AZ and Member of the Executive Committee, ASTC Board of Directors.

Two things grabbed me immediately when I read Salerno & Bottoms contribution: 1) “Unintended Consequences”, and 2) “Toying with Jurors’ Emotions”. The former bespeaks the unpredictability of juror response to novel, emotionally-charged evidence and the latter, the notion that the trial advocate has the capacity to target, evoke and harness emotion that will enhance his or her chances of persuading to a verdict.

Unintended consequences can be limited but not completely controlled by adequate preparation and pretrial research.

The case is about what the jury says it’s about. It’s well known (and often painfully proven) that what you, the trial advocate, think is important and impactful in your case narrative or fact pattern, doesn’t necessarily carry the freight with your jurors. Advocates marry their theory of the case and through the passion of advocacy, become embedded in belief that their valuing and emotional response to a certain fact, piece of evidence or narrative thread, is the norm. How could anyone feel differently? Any trial advocate can tell war stories about the surprise, horror and desolation of a deliberation and verdict that result in the total refutation of such idiosyncratic and misplaced certainty. What you think and feel about the case probably has too much biasing baggage for you to accurately predict the judgment and emotions of an average jury member.

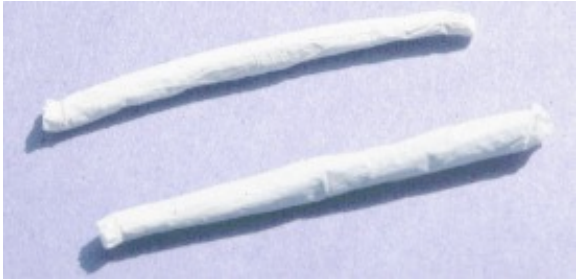
Jurors compose melodramas from the facts, features and characters involved in the events leading to conflict and trial. They create character profiles of the players in order to help them explain the motives and choices of each actor. Once they have composed the narrative, often filled with counterfactual in-filling, they unconsciously and consciously are guided by how they feel and the emotions emerging from the story path.

It’s probably a good idea to stop imagining that a particular piece of evidence that has an emotionally evocative component is going to reliably evoke the same emotion, the same intensity of emotion and the same effect of that emotion on the valuing/decision process of any one or group of jurors. The idiosyncrasies of individual life experience, values, attitudes, perspectives, etc., alone suggests that it is foolhardy to predict the impact of a particular piece of evidence ex cathedra from your navel.

Regardless, the savvy trial advocate can discover the quality and range of emotional perspective taken on any particular case material by testing it fairly in front of mock jurors within the context of a summary presentation of the case in chief. Presenting the material in question in context is essential, as that is the best approximation of how the actual triers of fact are going to experience the narrative. Nota bene: Allow several panels of mock jurors to inform you of their characteristic or consensus emotional involvement and reaction to evocative evidence or testimony. One panel can simply be affected by too many outlier variables to be reliable.

Once you’ve got a consensus and consistent feel for the way actual people embrace and embody the emotional elements into their case narrative and judgment, it’s time to shape your trial presentation in such a manner that invites jurors to recognize how your case theory and facts are congruent with what they expect and what they feel organically.

You can lead a horse to water, but you can't make him drink. You cannot reliably make jurors feel one way or the other. The notion of stimulus and response when it comes to eliciting emotion from jurors is simplistic, misguided and pretty much an invitation to chaos. I recall one product liability roof crush case where the plaintiff produced a photo of the bloody wreckage of the driver's side interior of an SUV that had rolled over and crushed the driver. The vehicle was righted and the photo was taken from directly behind the driver's seat. The attorney was convinced that this photo explicitly showed the roof collapse and the unnecessary and horrific crushing of its occupant. This was his slam dunk.



When presented to four separate focus group panels, something disturbing developed. In each panel, someone in the panel would notice a crack in the dash board clearly visible in the photo. The crack was misperceived in all four panels as a marijuana cigarette. The case turned from product liability to a reckless and stoned driver who lost control of his vehicle. Had he not been stoned, the accident would not have happened. The jurors, rather than being angered by the totality of the collapse of the roof, were now disgusted with the fact that this unworthy character's family were trying to profit from his death.

Yes, the autopsy drug screen showed he was negative for all and any recreational or prescription substances, but the strength of their misperception of the photo prevailed... as did the persisting unanticipated emotion of disgust and angry blame. This slam dunk became a fatal gut shot.

The emotional components of your fact pattern and case narrative cannot be induced, they must be invited. Gross effort to provoke, prod or perpetrate a specific emotion and the contextual meaning of that emotion is prone to failure. For one reason, the context of trial is such that jurors know they are subject to arguments, evidence and spin that is designed to persuade them to one rendering of the facts or another. They are savvy to most persuasion enterprises and will often become resentful of what they see as ham handed and/or slick efforts to push them one way or the other.

In another product liability case, the plaintiff put up horrifying pictures of burn victims of a LP gas flash explosion. The visceral reaction of the entire large panel could be heard in gasps and seen with locked gaze, audible gasps and sub vocalizations, "Oh my dear God!" Later in the presentation video excerpts from the videotaped depositions of these same folks, taken some two years after the explosion, were played. The room was hushed and not a sign of reaction could be seen.

During deliberation, mock jurors nearly unanimously went ballistic and were offended by the Burn Unit pictures. The photos were seen as a gross effort to emotionally manipulate the jurors to find for the plaintiff. Clearly, as proven by the deposition video, these folks were not permanently or seriously injured. The unintended consequence for the plaintiff was that the jurors punished the 'manipulation' by severely reducing the damages. While the actual horror of the acute phase of the burns and the agonizing treatment was accurately demonstrated in the pictures, this acute phase pain, suffering, anxiety, horror and the nature of the injuries during this phase were relegated to offensive "spin". You cannot toy with jurors' emotions. You mustn't tease the bear.

Discovering how jurors react to emotionally charged evidence prior to trial allows you to craft, sequence, and contextualize your evidence. In the above LP gas explosion case, the plaintiff subsequently created a sequential montage of photos showing the arc of the treatment and improvement emphasizing the unique hardships of each recovery and rehabilitation ordeal. By placing the ED and Burn Unit pictures within the context, it allowed the jurors to experience both the shock and agony of the original injury, but also

empathize with the ordeal of recovery as well as the miracle of how well they recovered. Context and sequence dissolved the sense of being manipulated by shock and awe and resolved subsequent mock jurors' anger and resentment. This process made sense to the jurors as they now had participated in the course of injury through recovery and the outcome was emotionally congruent and satisfying, yet they retained an acute awareness of what a long, painful ordeal it had been.

Emotions, both simple and complex, are the common stuff of all storytelling. The melodrama produced by the individual jurors fits within their life experiences and expectancies. They meet the parties and compose profiles to describe their character, motives and choices. As the conflict occurs, they are thrust into perspective-taking that invites basic emotions of anger, anxiety, sadness, empathy and disgust. These emotions and the relative intensity of each emotion can and does shape the evaluative process, often short-circuiting a purely rational thread.

You cannot evoke push-button emotions. You must present the narrative and evidence to jurors and allow them to tell you what the story is, what the conflict is, what the right thing to do about it is... and the emotions they have about that process are the palette you take away to shape and nuance your case presentation. You cannot make them feel. You must learn to invite their feelings to aid in your burden of persuasion.

### On Being Reasonably Emotional by Richard Waites

**Dr. Richard Waites is a board certified trial attorney and social psychologist. He is a senior trial consultant with [The Advocates](#), a trial consulting firm with offices in 17 major U.S. cities.**

The article written by Bottoms and Salerno is helpful in raising awareness of trial attorneys and trial consultants about the complexities involved in trying to manipulate the emotional reactions of jurors in trial. Although some of the ideas the authors provide to us are helpful, others are too simplistic and raise more questions than they answer.

One of the stated objectives of the present article and the authors' previous work is to warn trial attorneys about the possibility of unintended effects upon "jurors' thinking processes" of presenting evidence that might elicit strong emotions of jurors. (Salerno & Bottoms, 2009). In reaching this objective, the authors provide several clear examples of how evidence that might invoke a strong emotional reaction from some jurors offered for one purpose, might instead invoke a different emotional reaction or effect than was intended. However, the authors have scant advice to a trial attorney about how to deal with the trial strategy questions involved.

#### Disturbing Trends in Juror Research

One of the strengths of the article is its restatement of the conflicting and disturbing trends that have developed between those who narrowly focus on the study of juror decision making and those who study the general psychology of decision making in the resolution of moral dilemmas. The authors here restate and refer to other juror research that discusses "emotion" or "emotional evidence" as if the emotional experience of a person is a definable segment of one's decision making processes that can be rationally understood and excised by a trial judge or trial attorneys in the course of a trial. (Salerno & Bottoms, 2009; Feigenson & Park, 2006). In Feigenson & Park, the authors refer to "legal decision makers' abilities to correct for any affective influences they perceive to be undesirable".

Couched in these terms, how are non-psychologists, including most trial attorneys, supposed to understand the real role that the emotional experience of a judge, juror, or arbitrator plays in resolving moral dilemmas presented in trial? How can a trial attorney develop a successful trial strategy while believing that he or she can pick and choose which emotional reactions can be manipulated within jurors or whether emotional reactions should be somehow prevented altogether?

Another of the article's strengths is the authors' position that despite the rhetoric about attempts to manipulate and regulate jurors' emotional or affective responses, the role of emotion in juror decision making is not well understood. The authors state that their purpose is not to predict how jurors will react emotionally, but instead to argue against the ability to make such predictions with accuracy.

In the final analysis, one might argue that an exhaustive study of how to manipulate the role of emotion in courtroom decision making comes at the expense of studying the larger picture of how jurors and other legal decision makers do their job.

### Moral Decision Making

How people, including jurors, resolve the moral dilemmas presented to them has proven to be a rich field of study for those of us who work in the courtroom. Over the past 30 years, the revelations that have come from intense study of how people resolve moral dilemmas have changed the landscape of what is important for us to know in our work in the courtroom and in arbitration.

We have now evolved from the premise that the key to resolving moral dilemmas (including those in the courtroom) lies in rational thought (See Kohlberg, 1963). The role of rational reasoning has come increasingly into question as investigators have documented a number of limits to the reasoning process. Researchers have determined, for example, that individuals will rely upon cognitive shortcuts (e.g. stereotypes) when their cognitive capacities are insufficient for the task at hand (Kahneman & Frederick, 2002). Other researchers have demonstrated that some judgments and decisions appear to sidestep conscious deliberation entirely (e.g., Greenwald & Banaji, 1995; Dijksterhuis, 2004). Other investigators have discovered other fundamental limits on purely rational decision making.

As a result of the mounting awareness of the limits of rational reasoning, there has been a resurgence of interest in the impact of emotions on decisions (e.g., Lowenstein et al., 2001). Some investigators now theorize that emotions are the primary motivators for moral judgment and behavior, that moral judgments evolve from sudden, emotion-laden moral perceptions, and that the rational accounts given by decision makers often amount to little more than post-facto rationalizations (e.g., Haidt, 2001).

The importance of this evolution in thought to practice in the courtroom is immediate and profound for several reasons. First, we now believe that the whole story and meaning of the evidence and the arguments to jurors takes priority over the incremental parts of a presentation (i.e., the sum effect of the argument is greater than the total of its parts). Second, different individual jurors will perceive the case differently depending upon their own personal influences. Therefore, the most powerful and persuasive courtroom arguments will appeal to



individual jurors who experience the case in different ways. Finally, we are no longer limited to studying the effects of incremental items of evidence or argument. We can study the combined effect of a prospective argument as a whole organic unit and our freedom to be creative and imaginative is enhanced.

The research work of Joshua Greene at Princeton in the course of studying how people resolve a moral dilemma is helpful as an example of one way to study how judges, jurors, and arbitrators form stories and meaning from potential evidence and arguments in a case. Greene's work often employs the use of the tools available in the practice of neuroscience (Greene, et al., 2001).

In one of his experiments, he asked research participants how they would resolve a difficult situation. For example, he presented a video where the participants watched five people in a trolley rolling down a railway track towards the edge of a cliff. The participants were given the choice of throwing a lever to divert the trolley, although doing so would result in another person being killed who was standing on the track on which the trolley would be diverted. If they made the choice to pull the lever, one person would be sacrificed to save the other five.

During the study, Greene and the other researchers used functional MRI scans to watch for brain activity. The scans showed that the images' moral content, or lack of it, influenced easily identifiable distribution of brain activity—but with substantial overlap between two categories. In essence, moral and emotional responses were distinguishable, but not entirely separable.

Greene's work and findings are helpful in understanding how evidence and arguments in the courtroom or in arbitration will evoke a complex reaction and experience from the decision makers including elements of emotion and logical reasoning that cannot be separated. So the real objective of developing a successful trial presentation for a trial attorney must be to create a trial presentation that appeals to both the emotions and the logical reasoning of the individual decision makers in a way that gives them a satisfying experience.

## Conclusion

It is true that the introduction or withholding of evidence or arguments that might invoke an emotional response might lead to unintended consequences. However, practitioners in the courtroom do have a great many tools to help them experiment with the alternatives and discover new and powerful ways to tell the story for a client and create positive meaning in the case in the quest for a favorable decision. Some suggestions for consideration are included below.

## Recommendations

1. **Tell an appealing story.** If it is true that many factors (i.e., logic, emotion, heuristics, and others) are elements in a juror's decision making process, then perhaps Aristotle was correct when he stated that every good story or persuasive argument must appeal in three ways; to one's logic, to one's emotions, and to one's beliefs about character. Therefore the most important part of trial strategy in most instances is the story and meaning of the case from the viewpoint of the judge, jury, or arbitration panel.
2. **Address all of the audiences in your jury.** Courtroom and jury decision making is all about making moral judgments and resolving moral dilemmas. Varying degrees and types of emotion and logic can be expected. The belief or assumption that courtroom decision making is the same as rational



decision making is a fallacy. In the courtroom, we must accept the premise that different jurors will experience varying degrees and types of both emotion and logic in resolving our case. Eliminating jurors in jury selection who we believe will not give our client a fair hearing because they are naturally very emotional in their processing of information or are not very emotional is a good initial strategy. But, we must assume that we will have a mix of people on the jury. If that is true, we must help them deal with the emotional or lack of emotional content of the evidence and arguments in intelligent ways that are more likely to respect the varied emotional and rational personalities of a mixed group of people. Simply put, we might present information to different people in different ways. For the more emotional members of the jury, we help them to resolve or experience their emotions, whichever is best for our client. For the more rational members of the jury, we help them to see the logic of the evidence and our superior arguments. Varied presentations do not have to be conflicting.

3. **Test your approach in advance.** As with all important decisions that trial lawyers must make about their trial strategy, some advance research and testing can be helpful. This research can be conducted informally or using social science research methods, such as focus groups or mock jury trials, but should use the feedback of disinterested people who have many of the same background characteristics of the likely jurors.

### References

- Dijksterhuis, A. (2004). Think different: The merits of unconscious thought in preference development and decision making. *Journal of Personality and Social Psychology*, 87(5), 586–598.
- Feigenson, N. R., & Park, J. (2006). Emotions and attributions of legal responsibility and blame: A research review. *Law and Human Behavior*, 30, 143-161.
- Greene J.D, Sommerville R.B., Nystrom L.E., Darley J.M., Cohen J.D. An fMRI investigation of emotional engagement in moral judgment. *Science* 2001; **293**: 2105-2108
- Greenwald, A. G., & Banaji, M. R. (1995). Implicit social cognition: Attitudes, self-esteem, and stereotypes. *Psychological Review*, 102, 4–27.
- Haidt, J. (2001). The emotional dog and its rational tail: A social intuitionist approach to moral judgment. *Psychological Review*, 108, 814–834.
- Kahneman, D., & Frederick, S. (2002). Representativeness revisited: Attribute substitution in intuitive judgment. In T. Gilovich, D. Griffin, and D. Kahneman (Eds.) *Heuristics and biases: The psychology of intuitive judgment*. New York: Cambridge University Press, 49–81.
- Kohlberg, L. (1963). Moral development and identification. In H. Stevenson (Ed.), *Child Psychology: 62<sup>nd</sup> Yearbook of the National Society for the Study of Education*. Chicago: University of Chicago Press.
- Loewenstein, G. F., Weber, E. U., Hsee, C. K., & Welch, N. (2001). Risk as feelings. *Psychology Bulletin*, 127, 267–286.
- Nisbett, R., & Wilson, T. D. (1977). Telling more than we know: Verbal reports on mental processes. *Psychological Review*, 84, 231–295.

Salerno, J. M., & Bottoms, B. L. (2009). Emotional evidence and jurors' judgments: The promise of neuroscience for informing psychology and law. *Behavioral Sciences & the Law: Special Issue: The Neuroscience of Decision Making and Law*, 27, 273-296.

Citation for this article: [The Jury Expert](#), 2010, 22(2), 16-34.

## March 2010's Favorite Thing!!!

Every issue we tuck in a 'Favorite Thing' from an ASTC member. A favorite thing is something freely available on the internet, useful for litigators, and generally speaking, quite cool. This month's favorite thing comes from Ted Brooks.

Ted Brooks is a Trial Presentation Consultant and President of Litigation-Tech LLC, and publishes the [Court and Trial Technology Blog](#).



The WayBack Machine <http://www.archive.org/> (part of The Internet Archive, which is a digital library of Internet sites and other cultural artifacts in digital form) is a very valuable resource for viewing the chronological evolution of nearly every web site currently (or formerly) in existence. The WayBack Machine (does anyone besides me remember [Mr. Peabody](#)) is updated approximately once a month, and also indicates when changes were made to the site.

4.

# The Use of Technology to Enhance Communication Strategies in Litigation

by Susan Pennebaker

Susan Pennebaker, J.D. ([susan@pennebaker.com](mailto:susan@pennebaker.com)) received her B.A. (1976) and J.D. (1978) from Louisiana State University. She practiced at Exxon and in Houston law firms for twelve years before joining Pennebaker Fifth Ring as a principal. She consults with attorneys on theme development, presentation strategy, jury strategy and demonstrative evidence development in complex litigation, focusing on energy and toxic tort litigation. Learn more at [www.pfrlegal.com](http://www.pfrlegal.com)

“We test communication by conveying a message and having the recipient understand it, be interested in it and remember it. Any other measure is unimportant.”

— Richard Saul Wurman, *Information Anxiety*, 1990

## The Urgency of Now

When an important event happens anywhere in the world today, the speed with which it's disseminated via the Internet, television and other electronic media is unprecedented. Viewers will likely see an anchor person coordinating the coverage, live video from the field, animations, interactive maps, historical footage and documents, all of which are rapidly delivered in sound bites via multiple channels. As technology has changed the way we receive, process and evaluate information, the way we communicate – whether in the classroom or the courtroom – must align.

This is particularly true with Generations X (born 1966 – 1981) and Y (born post-1981), the former being raised on cable TV and video games, the latter on the Internet, text messaging, blogs, smart phones, Wikipedia and Facebook. These generations expect instant access to headlines and diverse forms of presentation.

But our multi-technological lifestyle has even permeated Baby Boomers. According to data from Deloitte, 2009 was the year that social media bloomed for Boomers, with 47% of them maintaining a profile online, the largest increase of any group from the previous year. 73% of those reported that they actively maintain a Facebook site.

Thus, it should come as no surprise that today's juror expects to be engaged and entertained quickly and through multiple visual mediums. And the price any litigator pays for not keeping pace with their expectations and high standards for communication can be deadly — disengagement. When confronted with a subject matter too tedious, complex or remote, the typical reactions are to become frustrated, to turn off — and worse, to look elsewhere for a more digestible explanation. In a courtroom, this could lead to your opponent.

## Cutting Through the Haze

Making things concise, impactful and more memorable is a key reason behind the dramatic growth of demonstrative visuals and increasing sophistication in courtroom technology. We know from numerous studies that jurors will understand more and retain it longer with both visual and verbal presentations (Weiss-

McGrath Report, 1994). While legal cases grow increasingly complex and cumbersome, victory often goes to the side that makes its points most readily understandable and presents its arguments in the manner and medium best suited to jurors' learning preferences today.

## Technology by Design

Given the technological advances that have expanded the arsenal of tools available to the litigator, a pressing problem centers on how best to deploy them. What are the options?

Intra-firm enterprise software is used to manage the flow of information among the trial team members, allowing users to store and retrieve documents, reports and depositions. But as the case moves into the courtroom, techniques and tools can help organize and present the voluminous information.

## Boards

Anything electronic is generally understood to be “technology,” and this includes even the document camera or “Elmo.” However, boards or blow-ups still have a place in the courtroom, and we recommend using boards for your most salient points — the ones you want to keep in front of the jury for as long as possible. Much like “Pavlov’s dog response,” every time that a board appears, a juror should think, “This must be important.” Use boards for:

- key themes
- timelines
- maps
- parties charts

Example: The following boards were used in opening statement by the defense in an asbestos trial as a way to introduce themes or information “buckets” to the jury.

The Rest of the Story
<p><b>Plaintiffs didn't tell you about...</b></p> <ul style="list-style-type: none"> <li>• Mr. Dailey's heavy exposure in the U.S. Navy</li> <li>• The other companies that he sued who aren't here</li> <li>• What he told his doctors</li> <li>• What OilCo did to pro-actively protect its workers</li> <li>• No doctor has positively determined that he had an asbestos-related disease</li> </ul>

What This Case is About
<ul style="list-style-type: none"> <li>• Mr. Dailey's <u>entire</u> work history</li> <li>• OilCo is a good company that cares about its employees and their health and safety</li> <li>• OilCo did not cause Mr. Dailey's disease</li> <li>• Mr. Dailey never personally accused OilCo</li> </ul>

## PowerPoint

PowerPoint™, the ubiquitous corporate presentation toolset, has become a mainstay in the courtroom. It's easy to program, easy to use, and an effective way to present information, particularly during opening statement and closing argument. But, just because PowerPoint has many presentation features (text dissolves, zooms, fades and other snazzy transitions) does not mean that one should use each and every one of them. Moreover, not everyone is adept at graphic design, and the effective display of information on each slide is an art that develops with practice.

Some important points to remember with PowerPoint:

Use pre-prepared document “call-outs” in PowerPoint to ensure readability:

**Ethanol Drawbacks Exist Today**

**Is Ethanol the Answer?**

“The drawbacks: It’s almost impossible to find outside the Midwest. It contains less energy than gasoline, so you’d have to fill your tank more often.”

“The technology and the economics aren’t there yet’ to produce enough ethanol for a massive switch....”

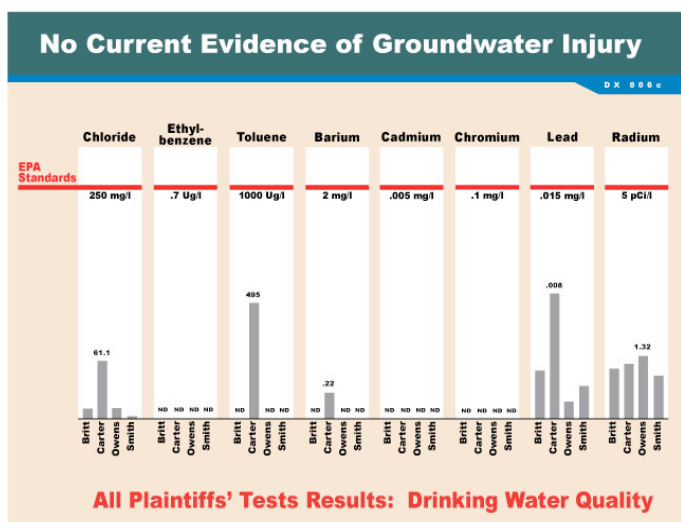
USA Today  
by James R. Healey  
2/1/2006

**Brown's Work Performance Evaluation - 1-27-03**

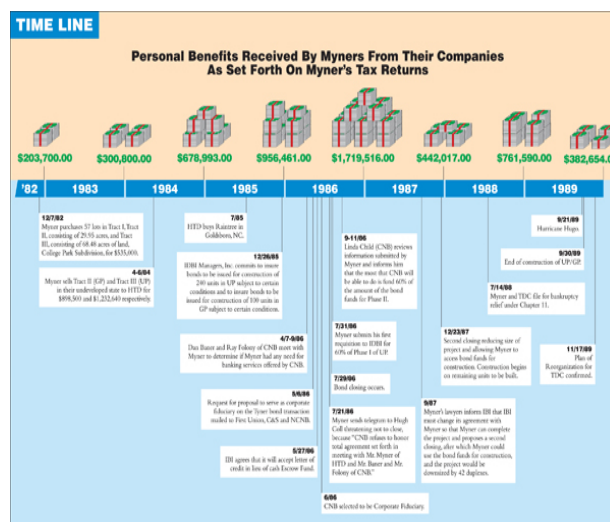
[WORK PERFORMANCE DEFICIENCIES]

**6. Needs to improve in some self initiated activities, such as warrants, warnings and citations.**

Builds can also be used in PowerPoint to present complex information in layers, bit by bit, so as to maximize the jury's understanding and minimize confusion, particularly with a scientific chart:



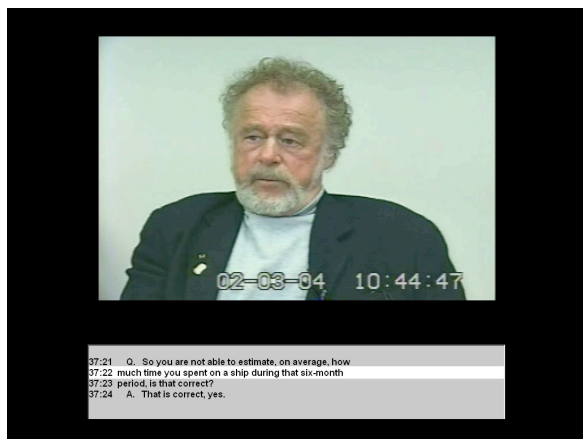
In this example, the data from each test well was brought in one column at a time. All results were at or below the red line (the EPA standard.)



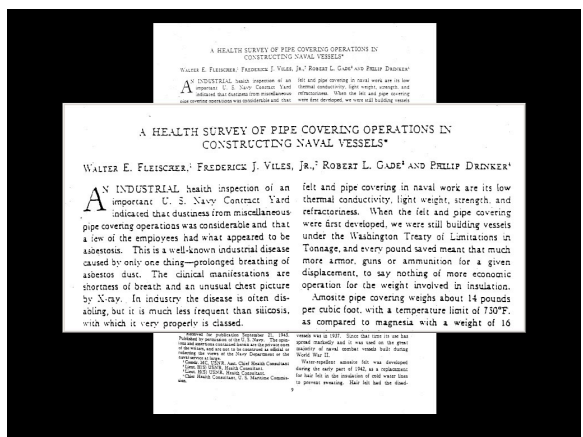
Timelines can be shown as a build by date.

## Trial Presentation Software

Trial presentation software is the best technology to use with document intensive cases since it allows for excerpting and highlighting documents “on the fly.” This interactivity makes an otherwise laborious and dull presentation more engaging and memorable to the jury, and it uses time more efficiently. TrialDirector™ and Sanction™ are two of the most commonly used trial presentation software packages. Both of these programs use non-proprietary formats and integrate well with other programs such as Summation™. They serve as case “portals” where documents, video, animations and graphics are organized and easily accessed during trial.



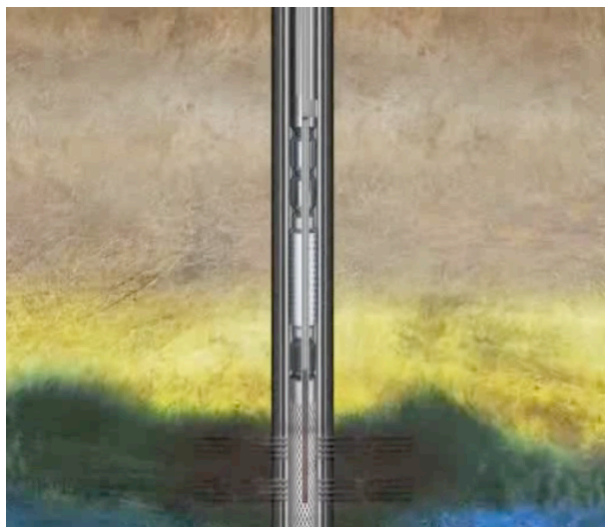
Screen shot from Sanction of a video deposition with scrolling text. Since jurors are both reading and hearing the testimony, they are more likely to retain it.



Document excerpt using Sanction or TrialDirector.

## Animations

The great value in using animations is that they can help you see what you can't normally see, go where you can't normally go, and graphically simplify a complicated process. This is particularly true with abstract and complex scientific concepts such as those found in toxic tort cases. The science needs to be explained in a way that is both compelling and understandable to the jury. It should teach them about the science in small doses, while at the same time reminding them of how it fits into your case theme.



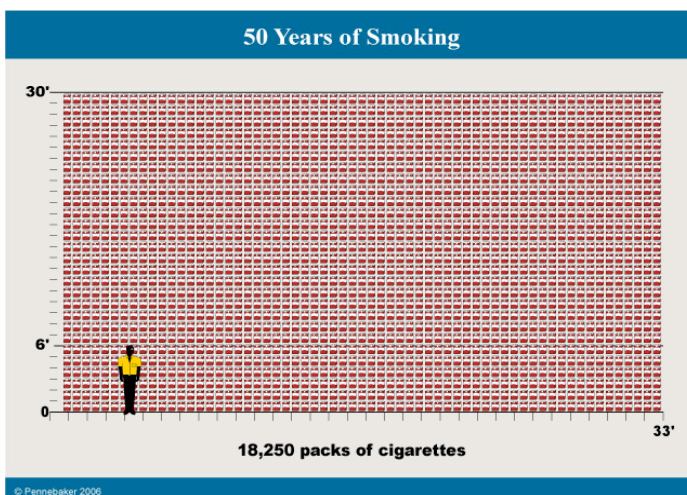
Downhole animation

Accident reconstruction

## Graphics

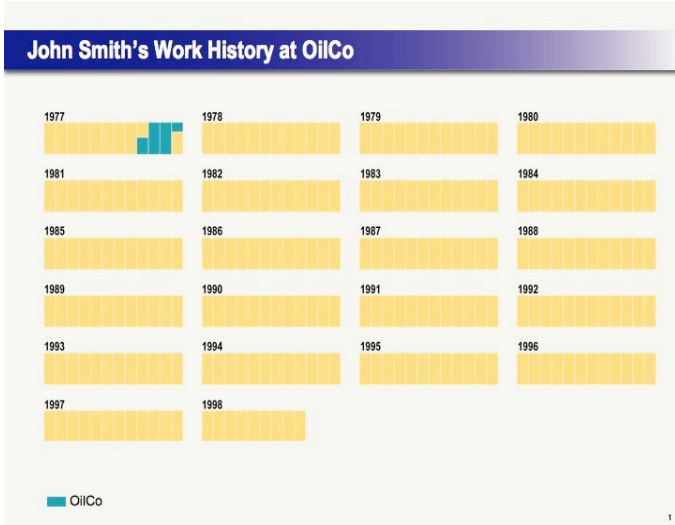
Creating effective and persuasive graphics is a skill that combines art, cognitive psychology and communications strategy. Consider the following examples:

Characteristics of Chemically Induced (Secondary) AML	
Characteristics	Applies to Smith?
<ul style="list-style-type: none"> <li>Worked with high levels of benzene or was exposed to it over a long period of time</li> </ul>	<b>No.</b> No evidence presented
<ul style="list-style-type: none"> <li>Short latency period (2 - 10 years)</li> </ul>	<b>No.</b> Mr. Smith diagnosed 21 years after his work with Oilco
<ul style="list-style-type: none"> <li>Most commonly encountered chromosomal defects noted in secondary AML are loss of parts or all of the 5th and 7th chromosomes (in 75% of patients)</li> </ul>	<b>No.</b> Mr. Smith had 8:21 translocation, a classical de novo chromosomal aberration
<ul style="list-style-type: none"> <li>2/3 of patients with secondary AML exhibit a period of MDS preceding the development of AML</li> </ul>	<b>No.</b> Mr. Smith's AML onset was abrupt
<ul style="list-style-type: none"> <li>Response to chemotherapy in secondary is lower than in de novo AML</li> </ul>	<b>No.</b> Mr. Smith promptly entered remission

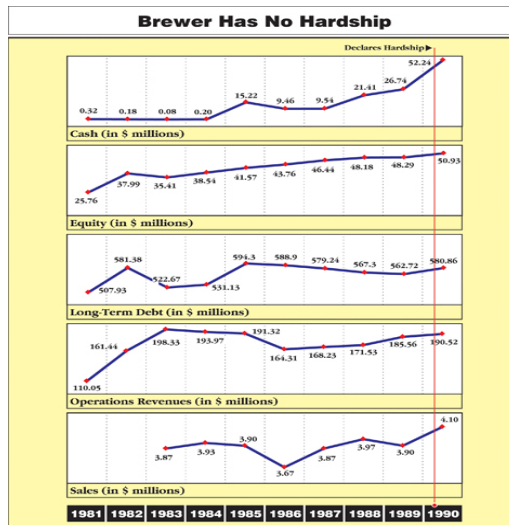


In discussing scientific studies, use a visual build to demonstrate that the plaintiff does not exhibit the typical disease profile, as shown above.

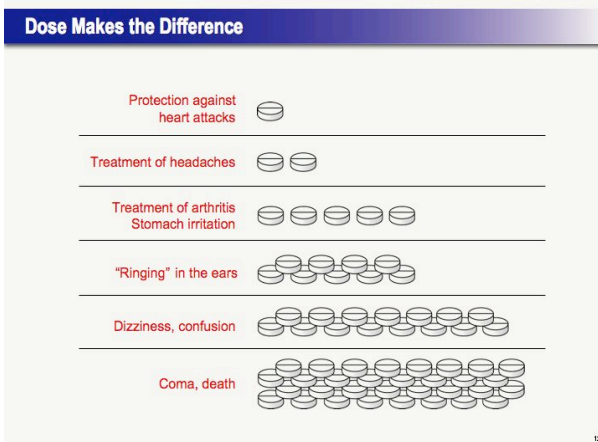
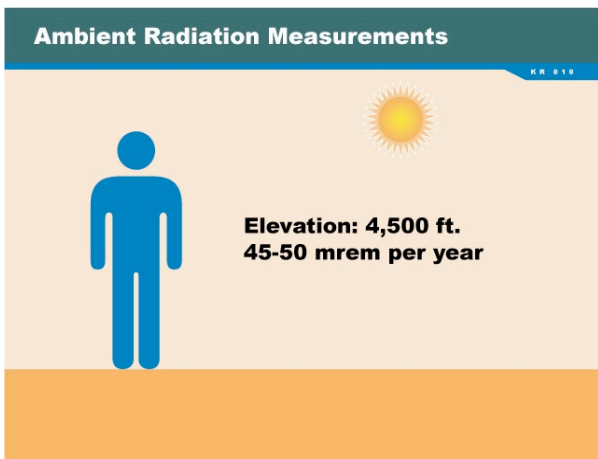
Differentiate plaintiff's lifestyle from population studied.



Put work history into context. The blue bars represent the number of months the worker worked for OilCo vs. the yellow bars, where he worked elsewhere.



Economic hardship "at a glance in 1990".



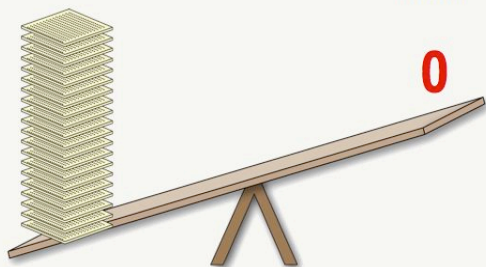
Diffuse the belief that any amount of exposure to a chemical or element can be toxic, no matter how small the dose.



**No One Has Found That MTBE Causes Cancer**

Studies on MTBE Health Effects

Studies proving that MTBE causes cancer in humans

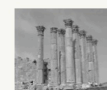


**What is One Part Per Million (ppm)?**



One Minute

in



2000 Years



One Penny

in



\$10,000 dollars



One Inch

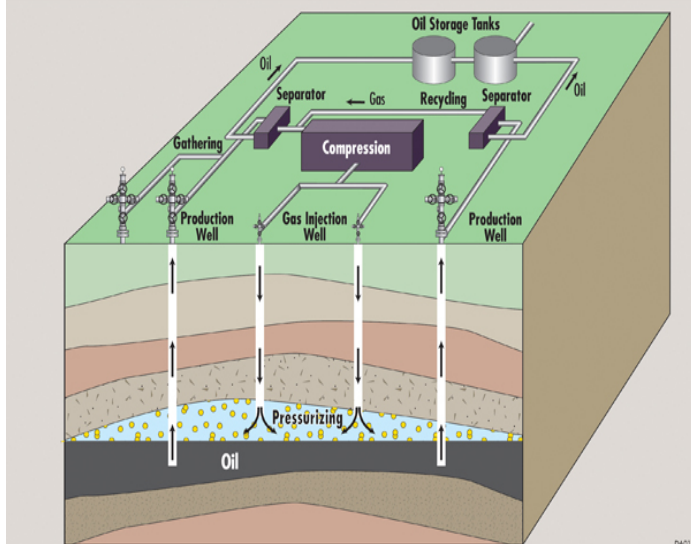
in



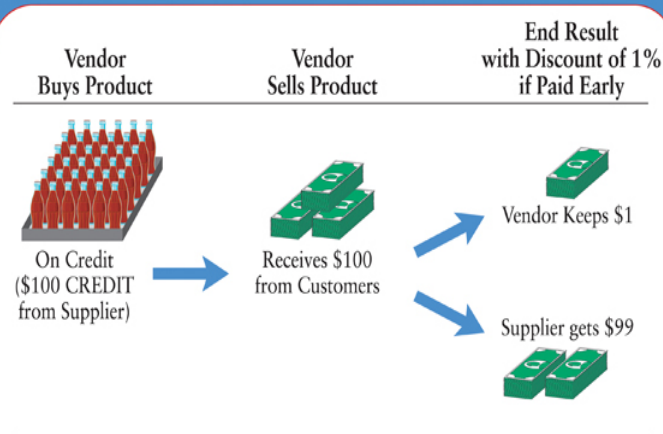
16 Miles

Contrast and compare data or facts to support your conclusion.

**Production Activities - Enhanced Recovery**



**HOW SUPPLIER DISCOUNTS WORK**



Barth claims \$172,691 of discounts/rebates in March of 2000 alone.  
*At 1% he would have had to make \$17,269,100 in purchases to pay this.*

Visual schematics demonstrate process flow.

Job Site Comparison		
Work Responsibilities	Morton International	Texaco
Work responsibilities	Laborer	Welder helper
Direct asbestos handling	<b>Yes</b>	No
Asbestos exposure	<b>Heavy</b>	Uncertain
Percentage of raw asbestos in use	<b>100%</b>	0%



Comparison charts.

a.

**Policy 56 - Insuring Agreements**

1. This coverage is to indemnify the Insured, subject to the Definitions, Warranties, Conditions, Exclusions and Limits and all other terms and conditions of this Policy, for its Ascertained Net Loss, in excess of the applicable Deductible provided herein, for:

a. **Cost Overrun**

Those additional expenses in excess of the Budgeted Hard Costs actually, reasonably and necessarily incurred by the Insured to achieve Completion of the Project as a result of a Valid Claim. In addition, this Cost Overrun coverage is to indemnify the Insured for relocation costs actually, necessarily and reasonably incurred with respect to relocation of the cryogenic plant to be constructed pursuant to the Gas Plant EPC Contract and relocation of pipelines necessitated by such relocation in the event (a) of a termination of the Chalmette Contract (b) provided such relocation is permitted under the Credit Agreement.

b.

**Policy 56 - Insuring Agreements**

indemnify

for:

a. Cost Overrun expenses in excess of the Budgeted Hard Costs incurred to achieve Completion of the Project as a result of a Valid Claim

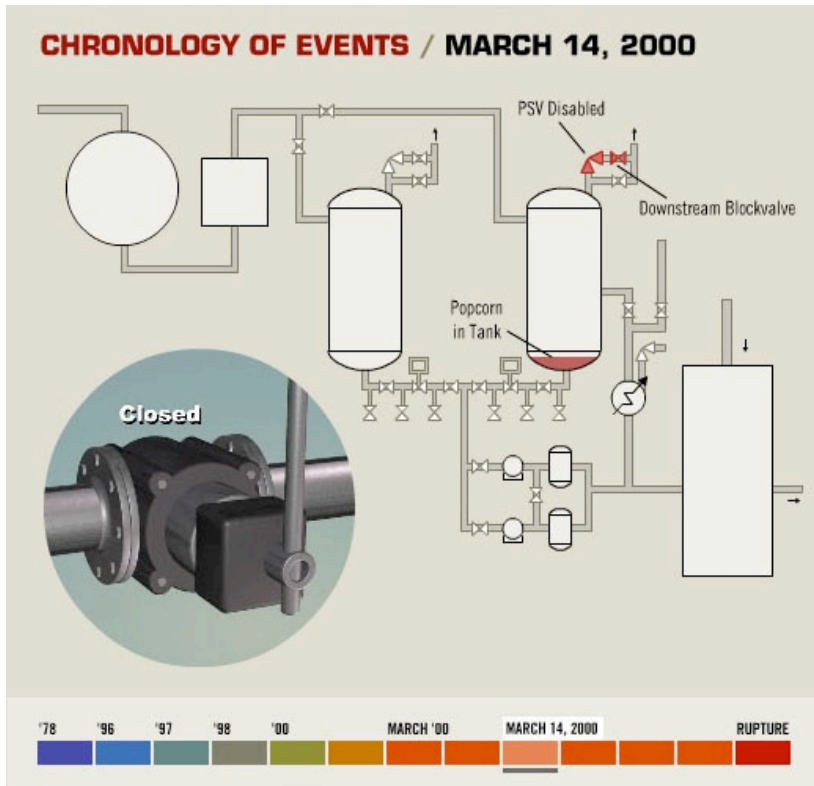
c.

**Policy 56 - Insuring Agreements**

indemnify for:

a. Cost Overrun expenses in excess of the Budgeted Hard Costs incurred to achieve Completion of the Project as a result of a Valid Claim

Use sequence to highlight the critical text.



Use interactive timelines to tell the story in manageable sound bites.

### Dr. Stant's Changing Story

Task	Supplemental Report (June 22, 1999)	"Amended" Supplemental Report (July 21, 1999)	"Corrected" Amended Supplemental Report (July 25, 1999)	"Analysis" Corrected for Errors/Using Monitoring Data
Parts Cleaning with Gasoline	146 ppm yr	48 ppm yr	48 ppm yr	0.01 – 0.46 ppm yr
Parts Cleaning with "Solvents"	23 ppm yr	1 ppm yr	1 ppm yr	1 ppm yr [0.05 ppm yr]
Pumping Gasoline (Assumes 15 minutes to fill gas tank)	7 ppm yr	7 ppm yr (Assumes 15 minutes to fill gas tank)	7 ppm yr (Assumes 15 minutes to fill gas tank)	4.6 ppm yr (10 minutes vs 15 minutes)
Unloading Gasoline Tanker Trucks	1 ppm yr	0 ppm yr	0 ppm yr	0 ppm yr
"Background Exposure"		48 ppm yr	4.8 ppm yr	4.5 ppm yr
<b>Total</b>	<b>177 ppm</b>	<b>104 ppm</b>	<b>60.8 ppm</b>	<b>10.11 – 10.56 ppm</b>

51

Use inconsistencies to attack credibility of a witness.

**The bottom line:** use graphics as liberally as possible to show context, comparisons and contrasts, and to otherwise visually support elements of your case. Some rules of thumb:

1. **Mix your media.** If every point you make is presented in the same medium the jury will soon become bored and disengage. Using color, illustrations, animation, and interactivity will help keep jurors' interest piqued.
2. **Limit the number of words per slide.** Anyone who has had to sit through a PowerPoint slide show where the speaker has felt compelled to read each slide word for word has experienced the true meaning of "Presentation Hell." The slide should be the shorthand device that gives the jury context to your argument.
3. **Limit the slide to one message.** Before preparing a slide, ask yourself, "What is the one point I want the jury to get from this?" Too often a slide becomes the repository of multiple thoughts and the jury spends its time trying to figure out the slide, rather than listening to the speaker.

## Conclusion

The use of technology in the courtroom has been increasing as lawyers realize its value to today's tech-savvy jurors. It brings organization and clarity to your case, allows you to present information in a format that is visually appealing, and delivers it in easily digestible sound bites. Anything less might give your opponent an unnecessary advantage.

All trial attorneys realize that a picture is worth a thousand words. But today's technology is speaking in volumes.

## References

Dombroff, M. (1983). *Dombroff on Demonstrative Evidence 2*, Weiss-McGrath Report by McGraw Hill, 3-4.

Citation for this article: [The Jury Expert](#), 2010, 22(2), 35-44.

(972) 386-4500


One call books all 21 markets

**State of the art facilities and recruiting  
for your litigation research needs.**

- **MOCK JURIES**
- **SHADOW JURIES**
- **COMMUNITY ATTITUDE SURVEYS**
- **STATE AND FEDERAL VENUES**

[www.focuscoasttocoast.com](http://www.focuscoasttocoast.com)  
[answers@focuscoasttocoast.com](mailto:answers@focuscoasttocoast.com)

# Goals Of Witness Preparation: From A Trial Consultant's Point Of View

By Katherine James

Katherine James ([ActLawABKJ@aol.com](mailto:ActLawABKJ@aol.com)) with husband and partner Alan Blumenfeld is the founder of ACT of Communication, a litigation consulting firm that specializes in live communication skills for lawyers and witnesses. An active theater artist, she acts, writes and directs. ACT's website is <http://www.actofcommunication.com>.

*We love answering the questions that our readers have about our work.  
This article is written as an answer to one reader's question.*

---

**Reader Question: “When trial consultants work on witness preparation, what are the goals they seek and how do they work to attain those goals?”**

---

Let me begin by saying that this is the most common question that I get from an attorney who has never used a trial consultant to aid in the preparation of a witness. What a wonderful and welcome question for any trial consultant from ASTC to answer – especially one who spends eighty percent of her time helping attorneys prepare witnesses for testifying as I do!

In this article, I will discuss four sets of goals that I believe we all have as trial consultants: Attorney Education, Witness Diagnosis, Witness Cure, and Follow Up.

In order to best understand how The American Society of Trial Consultants views witness preparation as an organization, I encourage anyone reading this article to put it side by side with our Professional Code, Practice Area B, [Witness Preparation](#).

Before panic sets in, please note that this part of the code is only a few pages long: 30 – 35. I had the honor of serving on the Standards Committee for ASTC when this part of our professional code was written, so I am very familiar with it. ASTC members have agreed to adhere to this code, and so attorneys can count on it as the basis of our witness preparation practices.

## **FIRST SET OF GOALS: ATTORNEY EDUCATION**

The trial consultant's first goal is to reassure the attorney who asks this question that he or she is not alone. Most attorneys practicing the law today have never worked with a trial consultant. Attorneys often decide to use one of us for the first time because they are in some kind of a crisis situation. No one calls in a trial consultant to help prepare a witness the first time because things are going perfectly well. Most often we are called in because the attorney realizes that she or he has someone who is vital to the case who has to testify and seems to the attorney to be such a bad witness that he or she has the potential of blowing up the case. In a business case this witness is almost always a company owner or employee. In a personal injury case it is most often the plaintiff. In a medical or legal malpractice case it is the defendant doctor or lawyer. In a criminal case it is the defendant.

For the purpose of this article, I am going to assume that the witness is the client or an employee of the client if the client is a corporation.

The second goal is to educate the attorney on trial consultants' definition of witness preparation in order to allow the attorney to understand that our idea is consistent with theirs. I generally paraphrase or refer the attorney new to using a trial consultant to the definition of witness preparation found on page 30 of the ASTC Professional Code:

*"... witness preparation refers to the assistance trial consultants provide attorneys ... in their effort to increase witnesses' understanding, comfort and confidence in the process of testifying for deposition or in court, and to improve witnesses' ability to truthfully present testimony in a clear and effective manner."*

The next goal is to let the attorney know that we will be working together to prepare the witness. I personally don't understand the usefulness of preparing a witness without his or her attorney and from a practical standpoint, it is a matter of privilege. If we are going to be discussing anything substantive – and we always are – the attorney's presence will always be required according to the code.

A trial consultant also has to advise the attorney that although widely assumed to be a privileged activity, some have challenged the confidentiality of witness preparation with a trial consultant. I can assure the attorney this is rare, and that in my more than three decades of working with attorneys and their witnesses this has not yet happened to me personally. In addition to clients, I have helped prepare other witnesses (experts, for example) but not without thoroughly making it known that the privilege is not going to extend to these witnesses. Many attorneys have an agreement with the attorneys on the other side not to discuss use of consultants. I encourage new clients to have such a provision with their opponents.

An important goal for any trial consultant is to let the attorney know just how much the consultant can or cannot help a given witness. For example, although very experienced with all kinds of human beings who testify there are certain things I can't "fix". I can't necessarily help someone who is seriously brain damaged be a better witness on a Tuesday and be assured that will "stick" on Wednesday.

## SECOND SET OF GOALS: RESEARCH AND WITNESS DIAGNOSIS

The next thing the trial consultant needs to do is find out why the attorney believes that "this witness" needs extra help with witness preparation. What are the weaknesses that the attorney couldn't fix without professional help? We always need to know, "Why was I called in?"

We have various ways of doing this. I prefer a phone call or in person meeting. First, I ask the attorney what is wrong. The attorney usually describes a set of symptoms. For example, "She volunteers constantly and I can't get her to stop." Or, "He's completely arrogant and angry and I can't get him to be nice." I carefully listen for the lawyer's attitude toward the witness and often ask how the lawyer feels about the witness. This doesn't necessarily change what needs to be done in terms of fixing the witness, but it will make a difference in the long run. I find that some clients have driven their lawyers so



crazy that the lawyers hate them. Sometimes I find that a lawyer and a witness are very different people in the way that they learn, approach life, or think that the world works. I keep these first impressions of the attorney-client human relationship in mind for when we are in the witness preparation session itself.

As all trial consultants do, I always ask for some written material to review for the case. If we are preparing the witness for a deposition, I need to at least read the complaint and the response. If we are going to trial, I need to read the motion for summary judgment and the response or something equivalent. If there has been a focus group study, I want to read at minimum a summary of the findings and what the group said about this witness. This material allows the trial consultant a working knowledge of the case.

If the witness preparation is for trial testimony, the trial consultant will also want to review the deposition transcript and any recordings made (still often referred to as “videotape” although they will actually be either CD’s or computer files) of the witness during deposition. If there is prior trial testimony, it is very helpful for the trial consultant to read that as well. Review of these witness specific materials gives the trial consultant as good a handle as possible on a witness’ strengths and weaknesses before meeting him or her. It also allows the trial consultant even more of a working knowledge of the content of what this witness might be responsible for in direct and in cross-examination. From review of the written material a trial consultant can learn everything from whether or not this witness uses clear, active, regular English to the witness’s demeanor to the kind of impression this witness’ physical appearance makes.

This material also “fills out” the information that the attorney has already talked about – the attorney perceptions of the witness. It helps the consultant “diagnose” the witness’s “disease” the witness “presents” through all the “symptoms”. I can’t stress enough the need for this independent point of view. A trial consultant who prepares witnesses has often seen the issue or the problem again and again and knows the root causes and cures. For example, talking too much is a symptom for any number of problems from the witness wanting to take over control of the case to the witness having self esteem problems (just to name two). Most attorneys know the “what”, but most trial consultants have the answer to the “why”. It is in the answer to the “why” that the best results are achieved for making this witness the best possible witness he or she can be on the day of testimony.

### **THIRD SET OF GOALS: IN THE PREPARATION SESSION**

The general goals in a witness preparation session are outlined in the ASTC professional code on page 33:

*B. Methods used with the witness to meet the agreed upon goals for a witness preparation session can include, but are not limited to:*

- 1. Assess and address verbal and nonverbal communication strengths and limitations.*
- 2. Identify witness concerns about testimony and goals for preparation.*
- 3. Work to increase witness comfort and confidence in testimony.*
- 4. Work to strengthen and help develop witness communication skills.*
- 5. Whenever helpful, educate the witness on significant aspects of the process and procedures for testimony in deposition or in other forums.*
- 6. Clarify the consultant’s role in the preparation process and address the possible limits of the confidentiality of the work.*

7. Address any issues with the physical appearance of the witness.
8. Discuss assessment with witness.
9. Discomfort or anxiety may be addressed by behavioral techniques, including, but not limited to: breathing exercises; relaxation or visualization techniques; reframing anxious reactions, fears or misperceptions; actual or facsimile courtroom visits; reviewing video recorded mock testimony.
10. Work to improve witness' listening skills.
11. Whenever possible, conduct and review a sufficient number of mock examinations to encourage the greatest improvement.

I believe that the attorney who asked the question on which this article is based wanted a specific methodology for the second part of the question “how do consultants work to attain those goals?”

Since there are so many different kinds of trial consultants and we come from so many different disciplines, I can't speak for all of us when it comes to specific methodology. As the professional code states on page 30:

*“Trial consultants recognize witness preparation involves the art and science of interpersonal communication, and therefore our professional approaches will take many different forms. ASTC recognizes the diversity of practice by its members within this area.”*

I come from the discipline of the theater, so my methodology is strongly based in learning everything – form and content – “by doing.” Other trial consultants come from various branches of psychology, from sociology, from education, and other backgrounds. Some even were or are attorneys in addition to being trial consultants. I will say, however, that almost all of us will have some component of mock examination and critique of that mock examination. Many attorneys are used to preparing witnesses “as they go along” in a lecture combined with a few questions sprinkled in along the way. Most trial consultants would rather have actual mock examination, which we often record with a video camera and then play back and discuss.

What this means practically for the attorney who is new to using a trial consultant for witness preparation is that the attorney needs to be prepared before the session with mock questions. If this is a deposition preparation, the attorney should have questions prepared for all the areas that she or he believes will be covered in the deposition. If this is trial preparation, the attorney needs to have both direct and cross-examinations prepared for these mock sessions.

Many trial consultants, myself included, pride ourselves on helping attorneys structure direct examinations as a whole and find “better” direct examination questions. One of the great benefits that an attorney new to using a trial consultant for witness preparation can achieve is learning new and better ways of telling the witness's story. Also, attorneys find that they can ask a trial consultant for a critique of the attorney's style, demeanor, presentation, etc. in these mock sessions. A word of caution – this is best done out of the earshot of the witness, who has enough on his or her plate without being involved in improving attorney performance.





Speaking of what is in this work for attorneys, one of the major goals of most trial consultants is to improve the relationship between the witness and the attorney. The trial consultant is not, for example, putting the witness on the stand in direct examination. Also, as I mentioned earlier, by the time one of us is called in on a case there might very well already be some kind of a rift between the witness and the attorney. I find that making a weak relationship stronger and a strong relationship great is often a by-product of my witness preparation sessions.

The number and length of witness preparation session it takes to ensure the witness is sufficiently “prepared” will vary from situation to situation and consultant to consultant. In my experience, it is rare that anyone is “fixed” in less than a half day. In my practice, I always encourage attorneys to allow a minimum of one day per witness per event when budgeting time for witness preparation. For example, you have two clients who are having their depositions taken. Allow a day for each. Be pleasantly surprised when one of them only takes a half day and relieved that you were able to apply that second half day to the other who needs it. I often find that when working with several witnesses in a case that this kind of time budgeting can pay off. Many attorneys only allow one or two hours to meet with a witness before a deposition, for example, and are shocked that many trial consultants tell them it is going to take longer.

#### **FOURTH SET OF GOALS: FOLLOW UP**

Follow up takes a few forms in witness preparation.

First, there is the question of whether or not another session is going to be needed with the trial consultant prior to the witness’s actual testimony. This is why so many consultants recommend that the initial preparation session take place with a comfortable amount of time between the session and the testimony. For example, in my practice I recommend a minimum of two weeks before a deposition for an initial preparation session. That way there is plenty of time to schedule more sessions if the witness needs them. This also allows time for wardrobe changes, hair cuts, and other “costuming” changes that need to take place.

Next, there is the question of testimony being delayed. Depositions get postponed and trials get pushed all the time. A witness who is prepped and ready to go for trial in January is not necessarily going to stay prepped until October.

Ultimately, the goals with any follow up preparation session are:

- to make sure that the witness is as prepared and ready as possible for testifying.
- to make sure that the attorney is well assured of this fact.

#### **CONCLUSION**

It is my hope that this response to a reader’s question results in both a discussion on this topic of “goals” between ASTC members and *The Jury Expert*’s attorney readers. And please keep submitting questions to be answered by us – it is our pleasure to answer them!

**Citation for this article: [The Jury Expert](#), 2010, 22(2), 45-49.**

# Panic over the Unknown: America hates Atheists

By Douglas L. Keene and Rita R. Handrich

Douglas L. Keene, Ph.D. [[dkeene@keenetrials.com](mailto:dkeene@keenetrials.com)] is a psychologist, founder of Keene Trial Consulting, Past-President of the American Society of Trial Consultants, and adjunct faculty at the University of Texas School of Law, teaching Advanced Civil Trial Advocacy. He assists law firms with trial strategy (including focus groups and mock trials) on major civil litigation and white collar criminal defense, voir dire strategy, jury selection, witness preparation, and related services. His national practice is based in Austin, Texas [<http://www.keenetrial.com>].

Rita R. Handrich, Ph.D. ([rhandrich@keenetrials.com](mailto:rhandrich@keenetrials.com)) joined Keene Trial Consulting in 2000. She is a licensed psychologist with extensive experience as a testifying expert witness. In addition to providing trial consulting services through KTC, she is Editor of *The Jury Expert*. Rita is a frequent contributor to "[The Jury Room](#)" --the Keene Trial Consulting blog.

*“If ‘Guess Who’s Coming to Dinner’ was remade today, the ‘shocking’ guest would no longer be a highly accomplished, educated and sophisticated black man (Sidney Poitier) but a highly accomplished, educated and sophisticated atheist.”<sup>1</sup>*

*“The prisons are probably filled with people who don’t have any kind of a spiritual or religious core. So I don’t have to worry about... a conservative Christian, you know, committing a crime against me.”<sup>2</sup>*

Contempt for out-groups—those members of society that are identified as “not like me”—is as old as time. But for all the awareness of bias, hate crimes, and prejudice against minorities, some get overlooked. Atheists are the most mistrusted, reviled, and disliked minority in the United States, according to numerous studies. Jews, African Americans, homosexuals, illegal immigrants, and even the much-mistrusted Muslim communities are all held in higher regard by the average American than are Atheists. The threat of spiritual alienation is more compelling than anything other than immediate injury.

It may be surprising that we Americans are more suspicious of atheists than we are of Muslims, but there you have it! Bias works in mysterious ways. Gad Saad’s blog post last year<sup>1</sup> (Atheists Are the Most Mistrusted Group: They Are Evil and Immoral!) cast a bright light on a 2006 study published<sup>2</sup> (but previously largely unnoticed) by researchers from the University of Minnesota.

In this article, we examine today’s surprisingly intense negative attitudes toward atheists, review what research tells us about “them” (atheists), and make recommendations for how you can use this information to improve your own litigation advocacy. Should you pay attention to potential triers-of-fact who espouse atheism? Let’s put it this way: Can you ever afford to ignore intense personal values held almost universally by your jury?

## The “Most Hated” Group In America

The [American Mosaic Project](#) at the University of Minnesota is focused on diversity in America with a particular focus on race and religion. Mosaic Project researchers asked survey questions to determine Americans’ reactions to situations involving members of various out-groups (e.g. a person’s feeling about

one their children marrying a Jewish or Muslim or Catholic or atheist person)<sup>3</sup>. Researchers expected (in our post 9-11 reality) that ‘Muslim’ would be the most prejudiced category. Understandable hypothesis, but incorrect. ‘Atheist’ was by far the ‘lightning rod’ category on multiple queries and atheists were even described as “evil and immoral”.

[Note: As we are Americans, the authors will often refer to the consensus of these major research findings in the first person possessive tense. “We” are describing “our” society, after all. At the same time, the authors would like it clearly understood that we do not personally endorse or agree with these mainstream prejudices, and are writing this paper in large part out of concern for their potential to undermine justice.]

These findings are surprising considering bias in America has traditionally been thought of as surrounding race and ethnicity. Clearly, acts of anti-Semitism are present, and both Muslims and Catholics experience active prejudice, but the level of passion against atheists is exceptional. Let’s take a look at some survey responses to atheism from the American Mosaic Project in 2003<sup>4</sup>.

#### ‘You want to marry a what?’

In a twist on common wisdom that Americans are more concerned about interracial marriages than interfaith marriages—we don’t want our kids marrying an atheist. Almost half of Americans ‘disapprove’ of one of their own children marrying an atheist—compared to 1/3 disapproving of a Muslim partner, ¼ disapproving of an African American partner, 1/5 disapproving of an Asian American or Hispanic partner, and so on down the line.

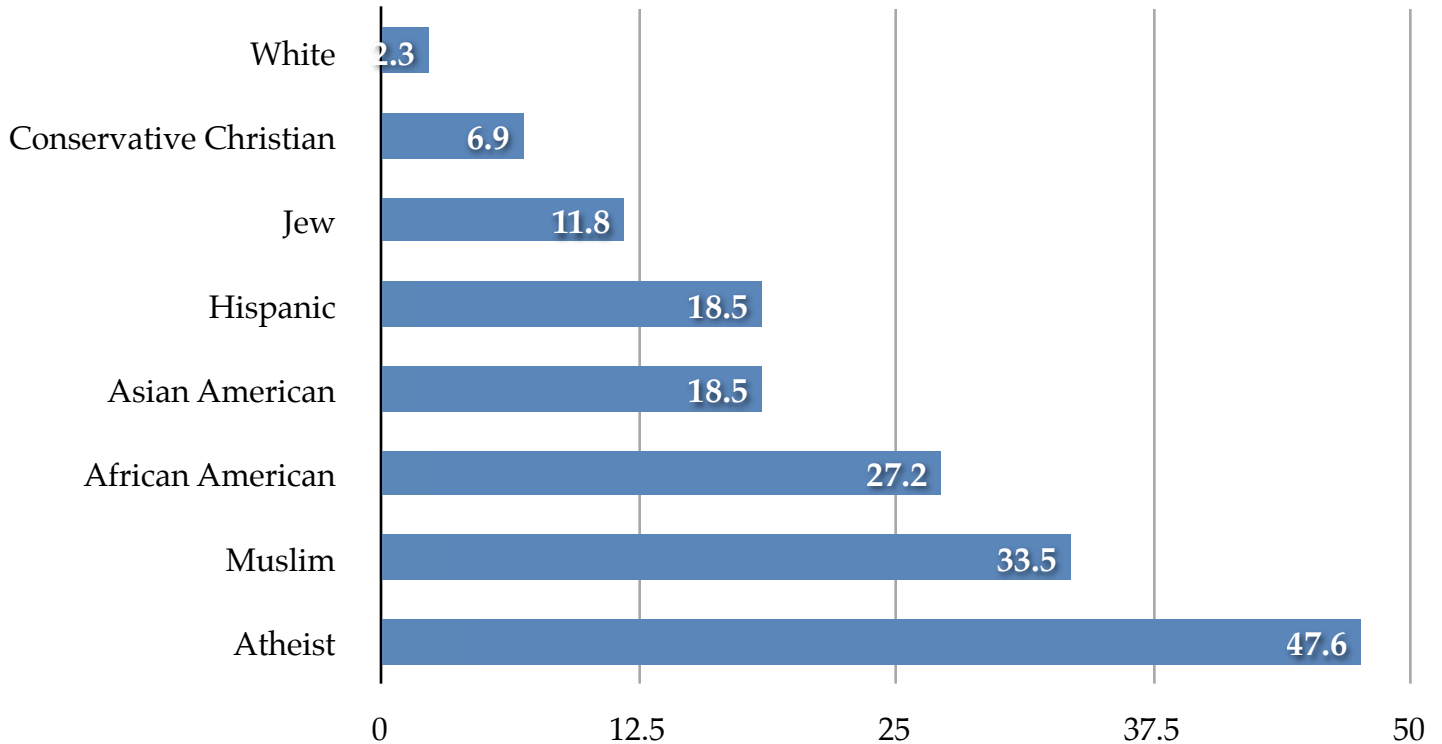
Regular churchgoers, conservative Protestants, and those who report religion is important/salient in their lives are the most likely to disapprove of their children marrying atheists. While it should surprise no one that the non-religious respondents are the most accepting of atheists, even this group rejects atheists to a degree. One in ten (10%) of the non-religious don’t want their child marrying an atheist. When it comes to welcoming diversity into our families, atheists are resoundingly rejected.



**Voir Dire Tip:** To avoid unspoken bias, query about atheism attitudes, especially if it has no bearing on case-specific issues. It will “out” some people, and will inhibit acting on the bias for many others.

**I would disapprove if my child wanted to marry a member of this group**

Egdell, P., Gerteis, J. and Hartman, D. (2006). Atheists as “other”: Moral boundaries and cultural membership in American society. *American Sociological Review*, 71(211-234).



*‘Atheist or just plain un-American?’*

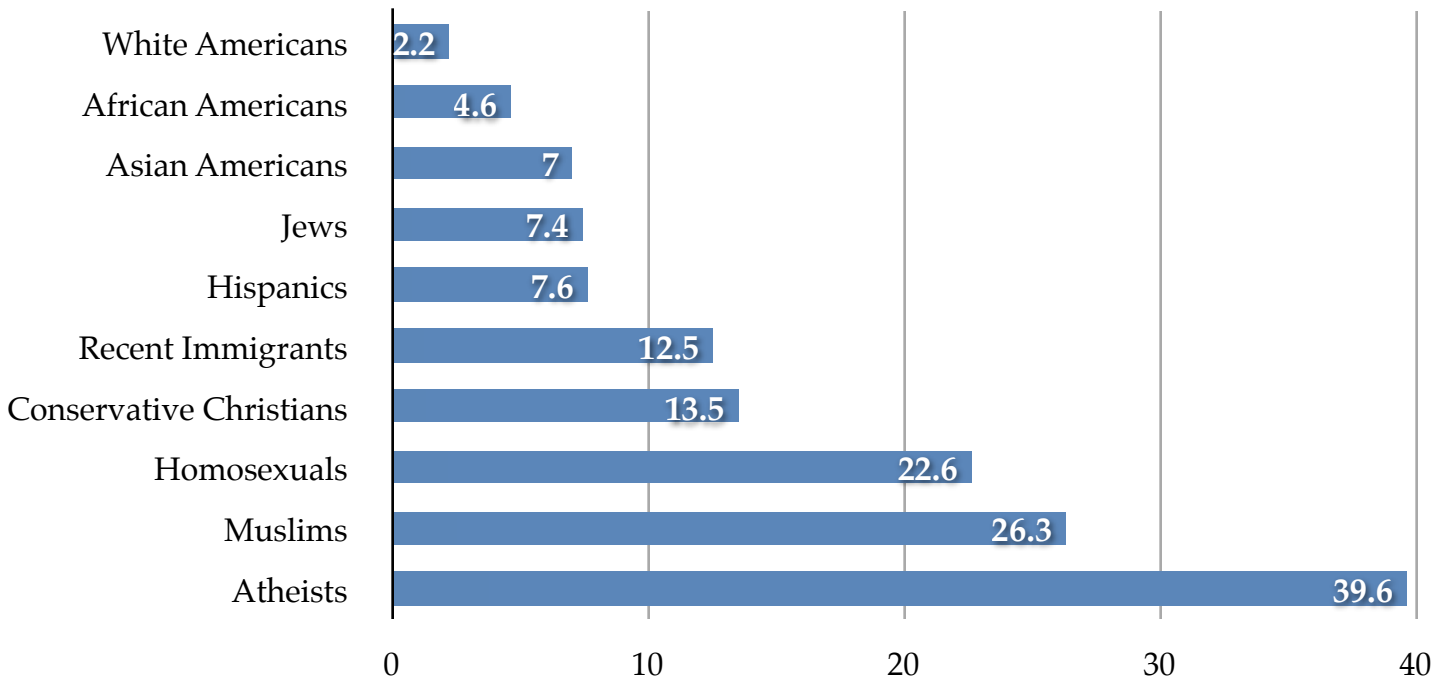
In 1987, former President George H.W. Bush wondered if atheists should be thought of as ‘American’: “I don’t know that atheists should be considered as citizens, nor should they be considered patriots. This is one nation under God”<sup>5</sup>.

The American Mosaic Project respondents saw atheists as the most likely to see a very different ‘vision of America’. Almost 40% thought atheists see a ‘very different America; ¼ thought Muslims had a different vision; 1/5 thought homosexuals saw things differently; and so on. When lines are drawn, atheists (who can readily ‘hide’ or ‘pass’ by maintaining silence) are always on the outside. Our extension of tolerance does not seem to encompass non-believers. We do not see atheists as “like” us.

**Possible Juror Attitudes:** *Atheists do not fit into the fabric of America. They do not deserve the same rights and freedoms as the rest of us.*

**This group doesn't agree at all with my vision of American society**

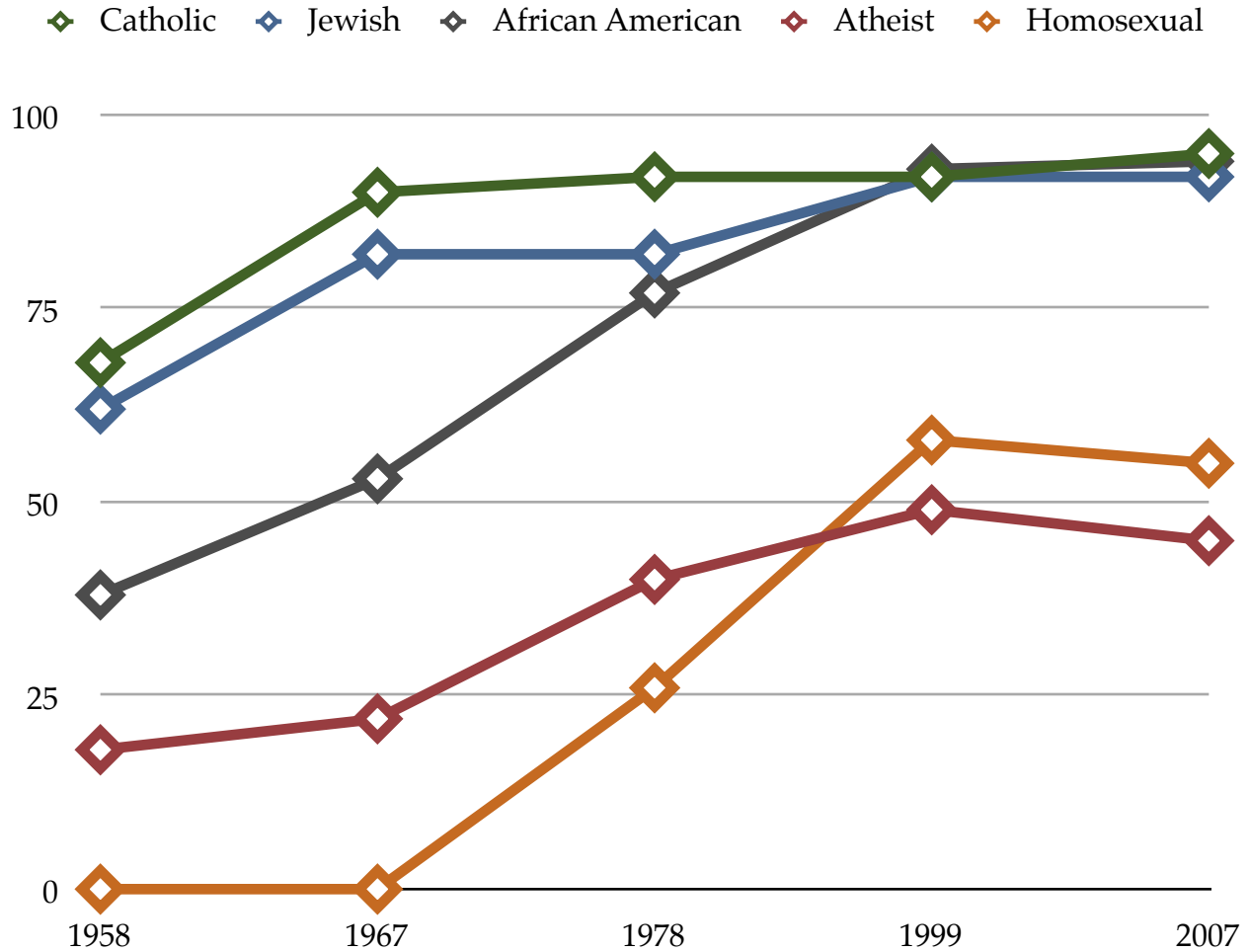
Egdell, P., Gerteis, J. and Hartman, D. (2006). Atheists as “other”: Moral boundaries and cultural membership in American society. *American Sociological Review*, 71(211-234).



'A President without God?'

So why are we so afraid of atheists? It's hard to say. While attitudes toward others who are racially different or religiously different have softened over the past four decades, attitudes towards atheists (the non-religious) have not kept pace. Our willingness to vote for an atheist for President is still below 50%. Data provided by the [Gallup Organization](#) illustrates this reality. Our willingness to elect Catholic, Jewish or African Americans has increased dramatically. Not so for our willingness to elect atheists—we'd rather have homosexuals in office.

If your party nominated a generally well-qualified person for President who happened to be (insert here), would you vote for them?\*



\*(Gaps in available Gallup data presented in the above graph are extrapolated from historical Gallup data illustrated at [Pollster.com](http://Pollster.com) and the American Mosaic Project [publication](#).)

America’s negative view of atheists

The American Mosaic Project sheds bright light on the extreme and specific biases toward atheists in America. More generally, Americans’ views of atheists reflect the following:

We think they are immoral: Negative attitudes toward atheists seem to stem from a moral judgment. These negative evaluations of atheists are linked to distrust, a sense that atheists are immoral and arrogant, and a perception of a negative impact that atheists have on our society.<sup>6</sup>

‘The new atheists’ rub us the wrong way: A new group of writers/spokespersons for atheists has emerged who are described as “angry, abrasive and critical of believers”<sup>7</sup>; arrogant<sup>8</sup>; and “fundamentalists” who are as “wrong-headed and dangerous as the bible thumping Christians”<sup>9</sup> (a conclusion consistent with the negative impressions that Americans had of atheists all along).

Some of us are less tolerant of atheists than others: Non-white Americans, females and those with less education tend to be more rejecting of atheists than white Americans, males and the college degreed. Residents of the South and Midwest are less accepting than those who live in either the East or West.

Regardless of grouping, however, acceptance of atheists ranges only between 33% and 60% of any given population group.<sup>10</sup> There are reasons atheists refer to themselves as being targets of the new ‘ism’ (although we might question just how ‘new’ it is to dislike and distrust atheists)<sup>11</sup>.

Although the existing literature on atheists is small, it is consistent. We don’t like them. They are not like us. They do not share our values, our vision of America, and we don’t want them marrying into our families. While these attitudes toward atheists appear to be robust, research also tells us some important and useful things about the characteristics of atheist individuals.

**Voir Dire Tip:** *Ask open-ended questions about how atheists would think/act differently than “us”. Get them to discuss their assumptions about supposed differences.*

Illustrations of the current day stigma against atheists can be found in examples of bias in the public arena:

- 1) an Eagle Scout kicked out of Boy Scouts for being an atheist;
- 2) children at a charter school shoved and told they would go to hell by fundamentalist students over religious differences; and
- 3) a high school athlete dropped from her basketball team for refusing to recite the Lord’s Prayer.<sup>12</sup>

### What We Know About Atheist Individuals

Atheists are a difficult group to study for a few reasons. Interestingly, some of the reasons they are difficult to study may also be reasons for you to strongly consider the role atheism could play in your next trial. Whether it’s a witness, a client, or a juror – common characteristics of atheist individuals can impact the ways in which courtroom presentation influences jurors’ decisions. In spite of the challenges, there are sound research conclusions that shed light on common factors to consider:

Atheists tend not to be ‘joiners’. As a result, there are not organized groups which most of them ‘join’ where they can be studied, or where they can develop clear community.

There is no common definition of what constitutes an atheist (i.e., are atheists only those who self-report the label, those who don’t attend church, those who are not convinced there is a God—and so on).<sup>13</sup>

They are willing to stay ‘in the closet’. There is enough of a stigma associated with identifying as atheist that many atheists choose to ‘pass’ as believers and not ‘come out of the closet’ as true non-believers. For example, in recent US surveys, twice as many respondents say they ‘do not believe in God’ as describe themselves as atheists.<sup>14</sup>

They are skeptical of the non-scientifically proven: Atheists are defined by not believing in gods. What they do believe in may be natural science, human equality and individual freedom. They tend to be skeptical of supernatural phenomena or new age sorts of ‘connectedness’.<sup>15</sup> However, given that

atheists are such a diverse group, these beliefs may not be shared uniformly (just as beliefs in the supernatural are not shared equally among all believers).<sup>16</sup>

They are no longer a ‘small’ group: Atheism is no longer rare. Non-believers are the 4<sup>th</sup> largest belief group in the world (after Christianity, Islam and Hinduism)<sup>17</sup> and the third largest belief group in the United States (behind Catholics and Baptists).<sup>18</sup>

The range of estimated number of atheists in the United States is wide. Estimates range from 1% to 14% of Americans. The stigma of identifying as atheist is believed to lower the actual count so numbers/percentages are generally presented at the lower end of the continuum by religious groups, at the higher end by atheist groups, and as a range by researchers.<sup>19</sup>

They tend not to serve in the military: Those who are ‘nonreligious’ do not tend to serve in the military (in comparison to their ‘highly religious evangelical’ counterparts) *unless* the sample is of college students and graduates. Once in college, the gap disappears.<sup>20</sup>

They do have an ethical compass: Contrary to our beliefs that atheists are immoral, researchers find that atheists actually do have a moral compass and they know right from wrong just as well as church-goers. In other words, the intuitive moral judgments about right and wrong seem to operate independently of religious affiliations.<sup>21</sup>

They may be smarter than us: A new ‘Online First’ article at the [Social Psychology Quarterly website](#) suggests that liberals and atheists are more intelligent because they tend to endorse more “novel values and preferences” than the rest of us. Satoshi Kanazawa (the author) examines both adolescent and adult intelligence and reports on the significant relationships among intellect, adult liberalism, atheism, and men’s (but not women’s) valuing of sexual exclusivity in relationships.



*"Most people do trust atheists -- they just don't know it... That trusted family member, friend or neighbor might very well be an atheist."<sup>22</sup>*

- August Berkshire, spokesman for Minnesota Atheists.

### Handling Atheism in the Courtroom

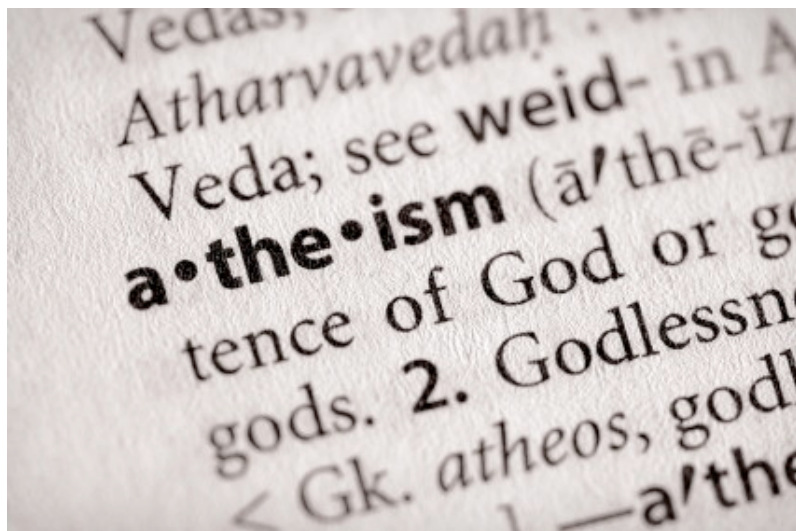
Beliefs of atheists (just like the beliefs of theists) structure world views, values, expectations of others, and sense of right and wrong. The dilemma is that since there is no atheistic non-holy scripture upon which “others” can evaluate their core beliefs, there is uncertainty. And for those who are intolerant of uncertainty, alarms start going off. While the research on atheism is instructive for understanding the ferocity of the bias against atheists, it offers little in the way of “how atheists think”. Atheists, like most of the rest of us, have individual life experiences and values that inform their perspectives. While we can hypothesize that they would react negatively to religious argument/testimony, we can’t even know that for sure.



Here is what we do know:

- If your client isn't 'out' as an atheist, it is better for you to keep it that way. There is no point in complicating his or her identity as a litigant. On the other hand, if your client has ever publicly acknowledged being an atheist, assume it's on the internet and that jurors may learn about it.
- We know how powerful bias is against African Americans and Muslims. Remember it's even worse for atheists. Think about atheism as another 'ism' because this is a category of people against whom we discriminate/have bias.
  - We have written [numerous times](#) about the importance of building identification between your client and the jurors. Whether it is life experiences, family, religious connections, or lifestyle, it is important to help the jurors feel that there is a bond between them and the client. Atheism will complicate the effort, if not derail it.

- Having said that, if it is a matter of public awareness that a litigant is an atheist and you want to inhibit it, you absolutely have to *voir dire* about it. The possibility exists that you will disqualify some jurors, but as importantly you are likely to inhibit anti-atheism bias among those who serve.



- We have automatic assumptions about atheists (they are arrogant, abrasive, immoral, and so on). You have to test this issue in pretrial research. What reduces bias? Don't go into court without knowing. An [intuitive thought](#) is that atheists and agnostics, being less bound by conventional social mores, might be relatively pro-plaintiff (civil) and pro-defense (criminal). Consider this for your case.

• While there is a [brief measure](#) for negative attitudes toward atheists—you don't need it! The research is clear. Americans have negative attitudes toward atheists. What you have to determine is how to minimize that bias in your specific case.

- Atheists are not 'joiners' and many of them do not publicly identify themselves due to stigma. Most jury questionnaires only ask about religious affiliation, and since atheism is not a religion, per sé, offering atheism as a response to a religion query is gratuitous. You can fairly assume that anyone who publicly identifies him- or herself as atheist is unusually opinionated and might be too unpredictable to have on your jury. We see this in pre-trial research with anyone who identifies as extreme (e.g., very liberal or very conservative). They are often not people we want on juries because we simply cannot predict which direction they will go on a particular case, and they tend to have a polarizing affect on the jury.

There are also some additional research findings it makes sense to consider for your specific case. There are some specific tactics we recommend based on these findings and based on the persuasion literature in general.

Research Finding	What to do	Why to do it
We don't like atheists and we don't trust atheists	Show the jury how the atheist is 'like them' through volunteerism, values, family, et cetera. Make the atheist trustworthy and likable and most of all—moral. <sup>23</sup>	We like people who are 'like us'. Make 'your' atheist the exception to the irrational belief. See our blog category on witness preparation for ideas on this one. <sup>24</sup>
Religious intensity remains best predictor of politics <sup>25</sup>	See if religiosity is significant in pretrial research. If yes, consider how your case plays to what we now consider "Democrat/Republican values".	The judge will often not allow queries about politics. You can make a request for religious affiliation/commitment info. Use that to help you assess juror risk for your case.
Raise the atheist (bias awareness) flag	Talk to the jury about how atheism is a 'hot button' for Americans and the importance of deliberating on facts not feelings or bias.	We know that talking about bias reduces the likelihood of biased decisions being made <sup>26</sup> . Raise the flag and reduce the likelihood of unconscious bias.
Conservative fundamentalists are most punitive <sup>27</sup>	Assess fundamentalism. Check religious affiliation or identity.	Jurors with belief in the literal interpretation of the Bible are more punitive. Jurors who claim religious affiliation are more punitive than atheists/agnostics.
Religious attendance and generosity <sup>28</sup>	Religious attendance is linked to generosity worldwide.	Consider (and explore in pretrial research) if this might be linked to damage awards.
Victimless crime?	Religious affiliation and higher religiosity → greater condemnation in victimless crimes <sup>29</sup>	This is a shortcut to identifying jurors predisposed to punish your client.

### Summary

Atheists are unique and individual (just like all of us) and we have to attend to the attitudes, beliefs and life experiences that all of us (even atheists) bring to the table as jurors. Conversely, jurors need to be reminded, if they know they are judging an atheist, that they are human, American, and as deserving of thoughtful consideration as we all are. Do you want atheists on your particular jury? It depends. As we mentioned earlier, you probably don't want a militant atheist—like most militants they are likely too unpredictable and a potentially polarizing force in the deliberation room. (We have seen occasions where juries—and even focus group—have begun their deliberations with a group prayer. Many atheists (and others) would be very uncomfortable about this, of course, and resistance might have a strong impact on the deliberative process. Of course, if you want a contentious deliberation or a hung jury you may choose to inject a militant atheist, but we aren't getting into that for this article.)

Most important, maintain an awareness of the intense bias atheism arouses in most Americans, and remember that all bias stems from beliefs, and the trigger is not always a characteristic visible to the eye.

## Endnotes

1. Saad, Gad (2009). Atheists Are the Most Mistrusted Group: They Are Evil and Immoral! *Homo Consumericus* blog: <http://www.psychologytoday.com/blog/homo-consumericus/200908/atheists-are-the-most-mistrusted-group-they-are-evil-and-immoral>.
2. Egdell, P., Gerteis, J. and Hartman, D. (2006). Atheists as “other”: Moral boundaries and cultural membership in American society. *American Sociological Review*, 71(211-234). Available as pdf download at: <http://www.soc.umn.edu/~hartmann/files/atheist%20as%20the%20other.pdf>.
3. The American Mosaic Project: <http://www.soc.umn.edu/research/amp.html>.
4. Egdell, P., Gerteis, J. and Hartman, D. (2006). Atheists as “other”: Moral boundaries and cultural membership in American society. *American Sociological Review*, 71(211-234). Available as pdf download at: <http://www.soc.umn.edu/~hartmann/files/atheist%20as%20the%20other.pdf>.
5. Hutson, M. (2009). One Nation, Without God. *Psychology Today*, September/October, 2009. <http://www.psychologytoday.com/articles/200909/politics-one-nation-without-god>.
6. Edwards, J. and Abraham, N. (2010). Bonding of attitudes toward atheists to religious and secular ideologies. Poster presented at Eleventh Annual Meeting of the Society for Personality and Social Psychology, January 2010, San Antonio, TX. [http://www.spspsmeeting.org/poster\\_detail.php?ID=321](http://www.spspsmeeting.org/poster_detail.php?ID=321)
7. The new intolerance: Fear-mongering among elite atheists is not a pretty sight. *Christianity Today*, February, 2007. <http://www.christianitytoday.com/ct/2007/february/17.24.html>
8. Slack, G. (2005). The atheist. *Salon.com*: April. <http://www.salon.com/news/feature/2005/04/30/dawkins/index.html>
9. Coon, C. (2008). Book Review: I don’t believe in atheists. *Humanist.org*: [http://www.usatoday.com/news/religion/2009-11-24-college-atheists\\_N.htm](http://www.usatoday.com/news/religion/2009-11-24-college-atheists_N.htm)
10. Egdell, P., Gerteis, J. and Hartman, D. (2006). Atheists as “other”: Moral boundaries and cultural membership in American society. *American Sociological Review*, 71(211-234). Available as pdf download at: <http://www.soc.umn.edu/~hartmann/files/atheist%20as%20the%20other.pdf>
11. Underhill, W. (2008). Going Godless: What does it mean to be atheist in a culture of believers? *Nexus*, (May/June). [http://www.nexuspub.com/articles/2008/may\\_june08/feature\\_mj2008\\_atheism.htm](http://www.nexuspub.com/articles/2008/may_june08/feature_mj2008_atheism.htm)
12. Underhill, W. (2008). Going Godless: What does it mean to be atheist in a culture of believers? *Nexus*, (May/June). [http://www.nexuspub.com/articles/2008/may\\_june08/feature\\_mj2008\\_atheism.htm](http://www.nexuspub.com/articles/2008/may_june08/feature_mj2008_atheism.htm)
13. Bullivant, S. (2008). Research Note: Sociology and the Study of Atheism. *Journal of Contemporary Religion*, 23(3), 363-368. <http://www.informaworld.com/smpp/10835777-4616128/content~db=all~content=ag03332698>
14. Cheyne, J.A. (2009). Atheism rising: The connection between intelligence, science and the decline of belief. *Skeptic*, 15(2), 33-37. [http://www.skeptic.com/the\\_magazine/archives/vol15no2.html](http://www.skeptic.com/the_magazine/archives/vol15no2.html)
15. Underhill, W. (2008). Going Godless: What does it mean to be atheist in a culture of believers? *Nexus*, (May/June). [http://www.nexuspub.com/articles/2008/may\\_june08/feature\\_mj2008\\_atheism.htm](http://www.nexuspub.com/articles/2008/may_june08/feature_mj2008_atheism.htm)

16. Atheism. Wikipedia: <http://en.wikipedia.org/wiki/Atheism>
17. Cheyne, J.A. (2009). Atheism rising: The connection between intelligence, science and the decline of belief. *Skeptic*, 15(2), 33-37. [http://www.skeptic.com/the\\_magazine/archives/vol15n02.html](http://www.skeptic.com/the_magazine/archives/vol15n02.html)
18. Gallup Organization (2009). This Christmas, 78% of Americans Identify as Christian. <http://www.gallup.com/poll/124793/This-Christmas-78-Americans-Identify-Christian.aspx>
19. Egdell, P., Gerteis, J. and Hartman, D. (2006). Atheists as “other”: Moral boundaries and cultural membership in American society. *American Sociological Review*, 71(211-234). Available as pdf download at: <http://www.soc.umn.edu/~hartmann/files/atheist%20as%20the%20other.pdf>.
20. Burdette, A., Wang, V., Elder, G., Hill, T. and Benson, J. (2009). Serving God and Country? Religious involvement and military service among young adult men. *Journal for the Scientific Study of Religion*, 48(4), 794-804. <http://www.ingentaconnect.com/content/bpl/jssr/2009/00000048/00000004/art00012>
21. Atheists ‘just as ethical as churchgoers’. *Telegraph.co.uk*: <http://www.telegraph.co.uk/science/7189188/Atheists-just-as-ethical-as-churchgoers.html>
22. Miller, P. (2006) U of M study finds atheists are least trusted. *Minnesota Star Tribune*: <http://blog.lib.umn.edu/edgell/home/Strib%20Atheist%20Faith%20and%20Values.html>
23. So help me God. Keene Trial Consulting blog post on atheism. <http://keenetrial.com/blog/2009/08/22/so-help-me-god/>
24. Witness Preparation tips. Keene Trial Consulting collected blog posts. <http://keenetrial.com/blog/category/witness-preparation/>
25. Gallup Organization (December 2009). Religious intensity remains powerful predictor of politics. <http://www.gallup.com/poll/124649/Religious-Intensity-Remains-Powerful-Predictor-Politics.aspx>
26. Juries and Racism: A Failure of Justice. Download at our website with free registration: <http://www.keenetrial.com/articles.html>
27. Millares, J. (2009). *Religious roots of punitive attitudes*. Master’s thesis. University of Texas at Arlington. ISBN: 9781109313598.
28. Gallup Organization (2009). Religious attendance relates to generosity worldwide. <http://www.gallup.com/poll/122807/Religious-Attendance-Relates-Generosity-Worldwide.aspx>
29. Shame and punishment: An international comparative study on the effects of religious affiliation and religiosity on attitudes to offending. Download from SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1436943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436943)

Citation for this article: *The Jury Expert*, 2010, 22(2), 50-60.

# Without Bias: How Attorneys Can Use The Right to Present a Defense to Allow For Jury Impeachment Regarding Juror Racial, Religious, or Other Bias

by Colin Miller

Colin Miller ([7MillerC@jmls.edu](mailto:7MillerC@jmls.edu)) is Associate Professor at The John Marshall Law School and Blog Editor of EvidenceProf Blog: <http://lawprofessors.typepad.com/evidenceprof/>. Ideas in this article are based on an article published in the Baylor Law Review.

## I. THE APPLICATION OF RULE 606(b) TO ALLEGATIONS OF JUROR BIAS

A jury convicted African-American Roland William Steele of three counts of first-degree murder and related charges after he allegedly killed three Caucasian women. The Supreme Court of Pennsylvania later upheld Steele's conviction despite the declaration of a juror, "who stated that race was an issue from the inception of the trial. The juror stated in his declaration that 'early in the trial one of the other jurors commented on the race of the defendant.'" According to the declaration, the racist juror "also noted the race of three victims and stated that, on that basis alone, the defendant was probably guilty..." The juror additionally alleged that the racist juror's "comments continued at other breaks and he made very racist remarks. First one juror, then two or three more gradually became drawn to his position as the first week wore on." Finally, the declaration asserted that the racist juror said during trial that Steele should "fry, get the chair or be hung."<sup>1</sup>

Devastatingly, the racist juror's death wish will likely come true because the Supreme Court of Pennsylvania deemed the declaration inadmissible and sustained Steele's three death sentences by relying upon Pennsylvania Rule of Evidence 606(b), which states that:

Upon an inquiry into the validity of a verdict,...a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions in reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith, and a juror's affidavit or evidence of any statement by the juror about any of these subjects may not be received. However, a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

The opinion was consistent with most precedent from across the country. Rules similar to Pennsylvania Rule of Evidence 606(b) have "repeatedly been held to preclude a juror from testifying, in support of a motion for a new trial, that juror conduct during deliberations suggests the verdict was tainted by racial bias."<sup>2</sup> Moreover, while such cases arise with less frequency, courts consistently have found that Rule 606(b) precludes jurors from testifying after trial about religious or ethnic slurs used by jurors.

While addressing a case with somewhat similar facts, the Ninth Circuit in *United States v. Henley* reached a very different result. In *Henley*, a jury convicted four men on drug charges, and three of the four men were African-American. After they were convicted, the men moved for a new trial, claiming, among

other things, that juror Sean O'Reilly made "several racist remarks" during trial, perhaps including statements such as, "All the n\*\*\*\*\* should hang" and "The n\*\*\*\*\* are guilty." These statements would have surprised anyone who read O'Reilly's responses to his *voir dire* questionnaire, in which he averred that "his overall view of interracial dating was 'neutral,' that he had never had a bad experience with a person of a different race, and that race would not influence his decision as a juror in any way." The Ninth Circuit was able to consider O'Reilly's alleged statements in *Henley* when addressing the motion, concluding that, "[w] here, as here, a juror has been asked direct questions about racial bias during *voir dire*, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."<sup>3</sup>



The Ninth Circuit was not being hyperbolic. In reaching a similar conclusion in its 2008 opinion in *State v. Hidanovich*, (2008), the Supreme Court of North Dakota noted that "[c]ourts have universally held that provisions similar to N.D.R.Ev. 606(b)... do not preclude evidence to show that a juror lied on *voir dire*."<sup>4</sup> The reason for this distinction between *Henley* and *Steele*, where jurors were not asked about racial prejudice before trial, is that "rule 606(b) restricts inquiries into the validity of a jury's verdict but it does not bar inquiries into whether a juror lied or purposely withheld information during *voir dire*." While these courts are technically correct that such inquiries are directed toward the issue of whether a juror lied on *voir dire* and not the (in)validity of the verdict, the

distinction is frequently ephemeral. Quoting the Supreme Court's opinion in *McDonough Power Equipment, Inc. v. Greenwood*, the Ninth Circuit aptly concluded in *Henley* that if "[i]f appellants can show that a juror 'failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause,' then they are entitled to a new trial." Because "[d]emonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause," it is easy to see how quickly the distinction can collapse.<sup>17</sup>

This being the case, how can judges continue to preclude appellants from presenting evidence of bias, based solely on the fact that their attorneys did not anticipate that their trials would be resolved with reference to factors such as skin color or choice of deity? How can Rule 606(b) deem jurors *per se* incompetent to impeach their verdicts on the ground of bias based at least in part upon concerns about reliability when, as will be seen *infra*, courts have eliminated all other reliability-based competency rules in criminal cases? And how can they do so when it is the appellant's freedom, and often his life, that is at stake, rather than simply a private injury?

The answer can be found in two parts. First, courts generally conclude that they are prohibited by the strict language of Rule 606(b) from considering such allegations, despite being uncomfortable with the results that the Rule produces. For instance, in its 2008 opinion in *People v. Brooks*, the Michigan Court of Appeals denied Keith Brooks' motion for a new trial after finding that it was precluded from considering the affidavit of the jury foreman, who, like Brooks, was African-American. According to that foreman, a juror claimed that the foreman's position that Brooks was not guilty was a "brotherhood thing," which immediately prompted another juror to "introduce[] race into the discussion." But while the foreman eventually relented in his "not guilty vote," the court stood firm in its application of Rule 606(b); despite characterizing this alleged misconduct as "disturbing," it found itself duty-bound to preclude the affidavit because it did not allege an "extraneous influence."<sup>5</sup>

Second, courts faced with constitutional challenges to such applications of Rule 606(b) generally have rejected them based upon *Tanner v. United States*<sup>6</sup>, where the Supreme Court found that applying Rule 606(b) to preclude jury impeachment concerning jurors drinking alcohol, using and selling drugs, and falling asleep during trial did not violate the petitioners' Sixth Amendment right to a *competent* jury. Most courts have extrapolated from *Tanner* that applying Rule 606(b) to preclude jury impeachment concerning jurors using racial, religious, or other slurs similarly does not violate the Sixth Amendment right to an *impartial* jury. As an example, in *Shillcutt v. Gagnon*, the Seventh Circuit denied an African-American appellant's petition for writ of *habeas corpus* from the Supreme Court of Wisconsin's opinion denying his motion for a new trial after he was convicted of soliciting prostitutes and keeping a place of prostitution. The state supreme court denied that motion after refusing under its version of Rule 606(b) to consider the affidavit of a juror who claimed that one of the jurors had commented, "Let's be logical, he's a black, and he sees a seventeen year old white girl-I know the type." The Seventh Circuit thereafter denied the appellants' petition, citing *Tanner* for the proposition that the exchange of ideas during jury deliberations, "however crude or learned, is important enough to preserve" to preclude peering behind the jury room curtain.<sup>7</sup>

This article sets forth an alternative method through which attorneys should be able to introduce evidence of juror racial, religious, or other bias.

## II. HOW TO ARGUE THAT THE APPLICATION OF RULE 606(b) TO ALLEGATIONS OF JUROR BIAS VIOLATES THE RIGHT TO PRESENT A DEFENSE

While the Supreme Court in *Tanner* found that the application of Rule 606(b) to preclude jury impeachment did not violate the petitioners' Sixth Amendment right to a *competent* jury, attorneys representing convicted criminal defendants should be able to rely upon another Sixth Amendment right to allow them to present juror testimony regarding racial, religious, or other bias by jurors. In its 1967 opinion in *Washington v. Texas*, the Supreme Court addressed the constitutionality of two Texas statutes which provided "that persons charged or convicted as coparticipants in the same crime could not testify for one another." The Court found that these statutes contravened the Compulsory Process Clause of the Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor." According to the Court, this right is in plain terms, the right to present a defense, the right to present the defendant's version of facts as well as the prosecution's to the jury so it may decide where the truth lies."<sup>8</sup>

The Court found that the Texas statutes violated this right because they were arbitrary rules that prevented whole categories of witnesses from testifying on the basis of a categorization that presumed them untrustworthy of belief. Alternatively, the Court concluded that the Texas statutes could not even be defended on the ground that they "rationally set[] apart a group of persons who are particularly likely to commit perjury."<sup>8</sup> While these statutes precluded a charged or convicted coparticipant from providing exculpatory testimony in favor of his alleged partner in crime, they (1) removed this proscription if the coparticipant was exonerated and (2) never precluded such a coparticipant from providing incriminatory testimony as a witness for the prosecution.

According to many courts, a court violates a criminal defendant's right to present a defense when its application of an evidentiary rule: (1) deprived or would deprive him "of the opportunity to present evidence in his favor;" (2) the excluded evidence was or would be "material and favorable to his defense;" and (3) the deprivation was or would be "arbitrary or disproportionate to any legitimate evidentiary or procedural purpose."<sup>9</sup> This article lays out a strategy that attorneys can use to argue that the application of Rule 606(b) to allegations of juror bias violated this right.

## A. Rule 606(b) Deprives Appellants From Presenting Evidence of Juror Bias

Plainly, when courts apply Rule 606(b) to preclude jurors from impeaching their verdicts based upon allegations of juror racial, religious, or other bias, they deprive appellants from presenting evidence of juror bias. Some courts hold that courts can only violate the right to present a defense by applying *per se* rules of evidence to exclude appellants from presenting evidence and not by excluding evidence under discretionary Rules, such as Rule 702. Because Rule 606(b) is a *per se* rule of exclusion, even the courts reading the right to present a defense in this manner would find that the Rule's application implicates the first factor of the analysis.

## B. The Excluded Evidence is Material, Favorable, and Critical

In determining whether evidence was or would be “material and favorable,” courts usually focus upon four factors, the extent to which the evidence at issue is or was: (1) corroborated, (2) the sole evidence on an issue or merely repetitive or cumulative, (3) probative of a central or critical issue and (4) important to a weighty interest of the accused.

### 1. Allegations of Juror Bias Can Easily Be Corroborated

In a typical jury trial, as many as eleven jurors can corroborate a juror's claim that a juror made biased statements during trial. Indeed, there have been cases where all twelve jurors signed affidavits admitting to jury misconduct. Moreover, “because racist conduct occurs in front of the entire jury, its existence is easier to prove or disprove than outside influences or prejudicial information that affects only one juror.”<sup>10</sup>

### 2. Juror Testimony is Almost Always the Sole Evidence of Juror Bias

In the vast majority of cases, juror testimony would be the sole evidence that an appellant could present after trial to establish that jurors made biased statements during trial. Usually, only jurors are privy to jury deliberations, rendering juror testimony “the only available evidence to establish racist juror misconduct.”<sup>10</sup>

### 3. Evidence of Juror Bias is Probative of a Central Issue

It is well established that the presence of a biased juror is a “structural defect not subject to a harmless error analysis” necessitating “a new trial without a showing of actual prejudice.”<sup>11</sup> Put another way, “even if only one member of a jury harbors a material prejudice, the right to a trial by an impartial jury is impaired.”<sup>12</sup> And to put it even more simply, “[o]ne racist juror would be enough” to require the reversal of a verdict.<sup>13</sup> Because the presence of a bias can never constitute harmless error, evidence of juror bias during trial is *ipso facto* probative of a central issue. See, e.g., *State v. Santiago*, 715 A.2d 1, 20 (Conn 1998).

### 4. Evidence of Juror Bias is Important to a Weighty Interest of the Accused

In *United States v. Scheffer*<sup>14</sup>, the Supreme Court found that the application of Military Rule of Evidence 707, which *per se* precludes the admission of polygraph evidence, did not violate an airman's right





to present a defense. In part, it reached this conclusion by finding that the Rule did not implicate a weighty or significant interest of the accused because such evidence did not consist of the testimony of a person who personally observed or had firsthand knowledge of a relevant event. Under this reading, courts applying Rule 606(b) to preclude jurors from impeaching their verdicts through testimony regarding racial, religious, or other slurs that they personally heard implicates a weighty interest of the accused because “[t]he jurors are the persons who know what really happened.”<sup>15</sup>

### C. The Application of the Rule is Arbitrary or Disproportionate

The Supreme Court’s opinion in *Washington* and its opinion in *Rock v. Arkansas*, both of which the Supreme Court recently reaffirmed in *Holmes v. South Carolina*<sup>16</sup>, as addressing applications of rules of evidence that were arbitrary or disproportionate to the purposes that they were designed to serve, set forth three ways in which the application of Rule 606(b) to allegations of juror bias implicates the third right to present a defense factor.

#### 1. Arbitrary Rules That Prevent Whole Categories of Witnesses from Testifying

In *Washington*, the Supreme Court found that the right to present a defense is violated “by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them untrustworthy of belief.”<sup>8</sup> Federal Rules of Evidence 601 states that reliability-based competency rules have been cleared from the books in criminal cases. Rule 601 states in part that “[e]very person is competent to be a witness except as otherwise provided in these rules.” The Advisory Committee Note to this Rule indicated that “[t]his general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article.... American jurisdictions generally have ceased to recognize these grounds.”

The one anomaly left standing after the purging of reliability-based competency rules in criminal cases is Rule 606(b), a vestige of Lord Mansfield’s centuries-old conclusion that jurors could not impeach their own verdicts, and thus themselves, because “a person testifying to his own wrongdoing was by definition, an unreliable witness.” On this ground alone, courts could find that application of Rule 606(b) to allegations of racial, religious, or other bias by jurors violates the right to present a defense because it is an arbitrary rule that prevents a whole category of witnesses – jurors – from impeaching their verdicts after trial on the basis of an *a priori* categorization that presumes them untrustworthy of belief.

#### 2. Rules Not Rationally Setting Apart Persons Likely to Commit Perjury

In *Washington*, the Supreme Court concluded that even if the Texas statutes before it were something other than improper competency rules, they could not even be defended on the ground that they “rationally set[] apart a group of persons who are particularly likely to commit perjury.”<sup>8</sup> As noted, while these statutes precluded a charged or convicted coparticipant from providing exculpatory testimony in favor of his alleged partner in crime, they (1) removed this proscription if the coparticipant was exonerated and (2) never precluded such a coparticipant from providing incriminatory testimony as a witness for the prosecution. In other words, the statutes precluded coparticipants from testifying for certain purposes and under certain circumstances but permitted them to testify for different purposes and under different circumstances.

The same can be said about Rule 606(b). Courts repeatedly have held that the Rule precludes jurors from impeaching their verdicts based upon allegations of racial, religious, or other bias. Conversely, as noted in the introduction, when “a juror has been asked direct questions about racial bias during *voir dire*, and has

sworn that racial bias would play no part in his deliberations, evidence of that juror’s alleged racial bias is *indisputably admissible* for the purpose of determining whether the juror’s responses were truthful.”<sup>3</sup>

As with the Texas statutes in *Washington*, Rule 606(b) precludes jurors from testifying for certain purposes and under certain circumstances – to impeach a verdict when jurors have not been asked about bias on *voir dire* – but allows them to testify for different purposes and under different circumstances – to prove that jurors lied on *voir dire* when jurors have been asked about bias.

In reality, though, the purposes are not meaningfully different because inquiries into whether jurors lied on *voir dire* regarding bias necessarily become inquiries into the validity of a verdict. As the Supreme Court held in *McDonough Power Equipment, Inc. v. Greenwood*, if an appellant can “demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause,” he is entitled to a new trial.<sup>17</sup> Because “[d]emonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause,” an inquiry into whether a juror lied during *voir dire* is an inquiry into the validity of the verdict for all relevant intents and purposes, especially because the presence of a biased juror is a structural defect.<sup>17</sup>

Consequently, when courts allow jurors to render post-trial testimony concerning juror bias during deliberations to prove that a juror lied during *voir dire*, the interests protected by Rule 606(b) are for the most part implicated to the same extent that they would be if courts allowed jurors to impeach their verdicts after trial through allegations of juror bias. If a court allowed either type of testimony, jurors could be harassed by the losing party, jurors could be embarrassed when their biased comments are exposed in court, and the verdict would lose its finality if the appellant could prove that a juror was biased.

Accordingly, Rule 606(b) serves no legitimate purpose by precluding jurors from testifying for certain purposes and under certain circumstances but allowing them to testify for technically different purposes and under different circumstances. Therefore, *Washington* provides a second reason that the application of Rule 606(b) to post-trial allegations of bias by jurors during trial violates the right to present a defense.

### 3. Rules Per Se Excluding Evidence that may be Reliable in an Individual Case

In *Rock v. Arkansas*, the Supreme Court found that Arkansas’ categorical exclusion of hypnotically refreshed testimony violated a defendant’s right to present a defense because “[a] State’s legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case.”<sup>19</sup> Instead, courts may not apply rules of evidence in a way that is “arbitrary or disproportionate to the purposes they are designed to serve.”<sup>18</sup> Courts similarly could find that the application of Rule 606(b) to allegations racial, religious, or other bias violates the right to present a defense because such allegations may be reliable in individual cases and because such an application is arbitrary and disproportionate.

Initially, there is a strong argument that courts already have found that the scales of justice tip in the favor of appellants in such cases. As noted previously, courts universally have found that jurors may testify after trial regarding juror deliberations to prove that a juror lied during *voir dire*. In so doing, most courts simply note that Rule 606(b) is inapplicable in such situations, but a few courts have made clear what is implicit in these opinions: These courts are concluding that appellants’ need for this evidence outweighs the interests protected by Rule 606(b). To wit, in *Levinger v. Mercy Medical Center, Nampa*, the Supreme Court of Idaho “ma[d]e clear that I.R.E. 606(b) does not bar the introduction of juror affidavits revealing dishonesty during *voir dire*.”<sup>19</sup> In the accompanying footnote, the court indicated that it was reaching this conclusion “not unmindful of the policy goals underlying I.R.E. 606(b), namely, to promote finality, protect jurors from

post-trial inquiry or harassment, and to avoid the practical concern that an affidavit by a juror to impeach the verdict is potentially unreliable.”<sup>18</sup> Because the appellant’s need for evidence of juror bias is not altered by the presence or absence of questions concerning juror bias during *voir dire*, courts should be able to find that the scales of justice tip in favor of the appellant in jury impeachment cases based upon analogy to *voir dire* exception cases.

If, however, courts do not accept this analogy, an appellant would first have to demonstrate that a juror’s allegations of juror bias are reliable in his individual case. As noted, an appellant could establish such reliability by having as many as eleven jurors corroborate those allegations. Also, opposing counsel would be able to cross-examine the juror regarding his allegations and test his reliability. Finally, many courts have found that statements of bigotry are reliable reflections of the declarant’s bias because they “would tend to subject the declarant to hatred, ridicule, or disgrace such that a reasonable person would not make the statement unless the person believed it to be true.”<sup>20</sup>

The question then becomes how an appellant can demonstrate that his evidentiary need for jury testimony concerning juror bias outweighs the interests protected by Rule 606(b) when the Supreme Court in *Tanner* held that the application of Rule 606(b) does not violate the right to a *competent* jury. The answer is that the American judicial system is much more concerned with the right to an *impartial* jury than the right to a *competent* jury. The inclusion of an incompetent juror, such as a juror who cannot read and write English, does not require reversal of a conviction unless there is a showing of actual prejudice.<sup>21</sup> Conversely, the inclusion of a biased juror is a “structural defect not subject to a harmless error analysis” necessitating “a new trial without a showing of actual prejudice.”<sup>22</sup>

The reason for this difference is two-fold. First, the Supreme Court has concluded that one of “[t]he purpose[s] of the jury is to guard against the...biased response of a judge,”<sup>23</sup> and that “[p]roviding an accused with the right to be tried by a jury of his peers g[ives] him the inimitable safeguard against the biased or eccentric judge.”<sup>24</sup> Second, the Court has found that “[t]he right to an impartial jury lies at the heart of due process.”<sup>25</sup> In turn, “[a]llegations of racial bias on the part of jury members strike at the heart of that right.”<sup>25</sup> These additional interests could tip the scales of justice in favor of the appellant when there are allegations of juror bias even though those scales tip against him when there are allegations of juror incompetence.

The more important point, however, is that because the presence of a biased juror is a structural defect not subject to a harmless error analysis, courts allowing jury impeachment on the issue of juror bias would not need to inquire into the juror’s mental processes underlying the verdict. Courts have strongly avoided such inquiries, explaining the *Tanner* holding, because if jurors in that case had testified, the Court would have needed to inquire into the effect of their alcohol and drug use and drowsiness on their mental processes in reaching the verdict.

Conversely, when a juror claims after trial that another juror made biased comments during deliberations, the court does not need to inquire into the mental processes underlying the verdict. This point is made clear by an opinion from Connecticut, a state that allows jurors to impeach their verdicts through allegations of juror bias. In *State v. Phillips*, jurors were allowed to impeach their verdict convicting an African-American defendant of third degree robbery and related charges through allegations of a juror’s racist comments. During the jurors’ testimony, the trial court asked the jurors whether anything improper influenced their verdict. On appeal, however, the Appellate Court of Connecticut concluded that the trial court<sup>25</sup>

should not[] have asked jurors whether anything improper had influenced their verdict. It should have instead restricted its inquiry to objective evidence of racially related statements

and behavior. The court should then have decided whether that evidence amounted to racial bias against the defendant on the part of one or more jurors, which would have automatically warranted a new trial.

In other words, if courts allowed jurors to render post-trial testimony concerning racial, religious, or other slurs used by a juror during trial, they would not need to inquire into the mental processes underlying the verdict. Indeed, they would not even need to inquire into the verdict itself. They would solely need to consider whether the juror made the alleged slurs and whether those slurs evinced bias because the inclusion of a biased juror is a “structural defect not subject to a harmless error analysis” necessitating “a new trial without a showing of actual prejudice.”<sup>25</sup>

### III. RECOMMENDATIONS FOR ATTORNEYS WHO BELIEVE JUROR BIAS MIGHT TAINT A VERDICT

- Screen prospective jurors for prejudice during pre-trial *voir dire* if the judge allows such questioning and if you do not think that it will not alienate jurors who might feel implicitly accused of harboring bias;
- If not automatically given, ask for a jury charge instructing jurors that they have an obligation to immediately come forward and (1) report jury misconduct, and (2) correct a misstatement or omission during *voir dire*;
- If you believe that a verdict was tainted by juror bias
  - request post-verdict jury *voir dire*;
  - move for leave to interview jurors;
  - request an evidentiary hearing into jury misconduct
- If you learn that a juror who claimed during *voir dire* that bias would play no part in his deliberations expressed bias during deliberations, move for a new trial based upon his deceit during *voir dire*;
- If there was no such *voir dire* but you learn that a juror expressed bias during deliberations, move for a new trial and argue that this bias was extraneous prejudicial information or an improper outside influence under Rule 606(b); and
  - Argue that if the court refuses to hear such evidence under Rule 606(b), it will violate your client’s right to present a defense.

### IV. CONCLUSION

When courts preclude jurors from impeaching their verdicts through allegations of juror bias, they violate one of the plainest principles of justice: the right to an impartial jury. Because the right to an impartial jury lies at the heart of due process, the presence of a biased juror is a structural defect not subject to a harmless error analysis. And yet, by applying Rule 606(b), an anomalous, reliability-based, competency rule, courts preclude appellants from proving such bias. Such an application of the Rule is thus arbitrary and disproportionate to the purposes it was designed to serve, and attorneys should be able to argue that this application of the rule is violative of the right to present a defense.

## References

- <sup>1</sup> *Commonwealth v. Steele*, 961 A.2d 786, 792, 807-08 (Pa. 2008).
- <sup>2</sup> *Juror Competency to Testify that a Verdict Was the Product of Racial Bias*. (1993). Gold, Victor. 9 ST. JOHN'S J. LEGAL COMMENT. 125, 126
- <sup>3</sup> *United States v. Henley*, 238 F.3d 1111, 1112-14, 1119-21 (9<sup>th</sup> Cir. 2001).
- <sup>4</sup> *State v. Hidanovich*, 747 N.W.2d 463, 474 (N.D. 2008)
- <sup>5</sup> *People v. Brooks*, 2008 WL 2855040, No. 281487 at \*2 (Mich.App., July 24, 2008)
- <sup>6</sup> *Tanner v. United States*, 483 U.S. 107, 113-15, 126-27 (1987)
- <sup>7</sup> *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159-60 (7<sup>th</sup> Cir. 1987)
- <sup>8</sup> *Washington v. Texas*, 388 U.S. 14 (1967)
- <sup>9</sup> *Government of the Virgin Islands v. Mills*, 956 F.2d 443, 446 (3<sup>rd</sup> Cir. 1992)
- <sup>10</sup> *Racist Juror Misconduct During Deliberations*, 101 HARV. L. REV. 1595, 1597 (1988).
- <sup>11</sup> *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9<sup>th</sup> Cir. 1998)
- <sup>12</sup> *After Hour Wedding, Inc. v. Laneil Management Co.*, 324 N.W.2d 686, 690 (Wis. 1982)
- <sup>13</sup> *United States v. Henley*, 238 F.3d 1111, 1120 (9<sup>th</sup> Cir. 2001)
- <sup>14</sup> *United States v. Scheffer*, 509 U.S. 579 (1993)
- <sup>15</sup> 46 F.R.D. 161, 291 (1969)
- <sup>16</sup> *Holmes v. South Carolina*, 547 U.S. 319, 321-22 (2006)
- <sup>17</sup> *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)
- <sup>18</sup> *Rock v. Arkansas*, 483 U.S. 44 (1987)
- <sup>19</sup> *Levinger v. Mercy Medical Center, Nampa*, 75 P.3d 1202, 1207 (Idaho 2003)
- <sup>20</sup> See, e.g., *Chaddock v. State*, 203 S.W.3d 916, 927-28 (Tex.App.-Dallas 2006)
- <sup>21</sup> See, e.g., *United States v. Silverman*, 449 F.2d 1341, 1343-44 (2<sup>nd</sup> Cir. 1971)
- <sup>22</sup> *Dyer v. Calderon*, 151 F.3d 970, 973 n.3 (9<sup>th</sup> Cir. 1998)
- <sup>23</sup> *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)
- <sup>24</sup> *Duncan v. State of Louisiana*, 391 U.S. 145, 156 (1968)
- <sup>25</sup> *State v. Phillips*, 927 A.2d 931, 933 (Conn.App. 2007).

We asked three experienced trial consultants to comment on Miller's article on 606(b). On the following pages, Edward Schwartz and then Julie Blackman and Ellen Brickman (collaborating on a response) offer their thoughts in reaction to Colin Miller's ideas.

## Edward Schwartz responds to Colin Miller

Edward P. Schwartz is a trial consultant from Lexington, MA, as well as the author of The Jury Box Blog. Edward heads up the New England Team of the ASTC Pro Bono Initiative and can be reached at [schwartz@eps-consulting.com](mailto:schwartz@eps-consulting.com).

### The Hollow Promise of Post-Verdict Juror Testimony:

#### Circumventing FRE 606(b) won't overcome racial prejudice

I have read with great interest Professor Miller's article, outlining an argument in favor of loosening the restriction on juror testimony to impeach criminal verdicts, where racial prejudice is alleged. I must say that I am not entirely persuaded that his approach can circumvent the logic of FRE 606(b). Of particular concern is a recognition that any effort at post-conviction relief begins a completely new phase of the judicial process, with new procedures, presumptions and burdens of proof. As such, one cannot easily analogize from forms of *trial* testimony to juror *post-verdict* testimony. That is, the jurors are most assuredly *not* testifying at the defendant's trial. Secondly, I seem to place a higher value on the interests being protected by 606(b) – namely the rights of jurors to deliberate free from state intervention or recrimination – than does Professor Miller.

Even were one able to loosen the bonds of 606(b), I am concerned that holding more post-verdict hearings, complete with juror testimony, wouldn't accomplish very much. This is a very blunt, unwieldy instrument for correcting the ills of racial animus. I outline below why I believe this to be so.

#### **The 606(b) Exception Exception – The Massachusetts Rule**

Reading the language of FRE 606(b) (and the state counterparts, which generally include the same language), there does not appear to be any room for impeaching a verdict based on racial animus infecting jury deliberations. Clearly, such animus falls squarely within the “mental processes” language and any jury discussion of racial issues falls under the “deliberations” prohibition.

Many impediments to impartial deliberations that would seem to be much more “extraneous” or “outside” have been interpreted to fall under the prohibitions of FRE 606(b). Verdicts have been allowed to stand despite the extreme depression, schizophrenia and mental retardation of jurors. The most famous case testing 606(b), *Tanner v. U.S.* (1978), involved a jury that got drunk and took cocaine together during deliberations. If cocaine and mental retardation don't qualify as “extraneous” influences, it is hard to think how racism might.

I was very surprised then to hear that a Massachusetts trial judge was conducting a hearing to investigate the verdict in the case of Christopher McCowen. McCowen, a black sanitation worker, had been convicted of murdering Christa Worthington, a white woman who lived on his route. A few days later, three jurors contacted the defense attorney to report racially charged irregularities in the deliberations.

I discovered that the Massachusetts Supreme Judicial Court has carved out a specific exception to 606(b) when racial animus is alleged. Although evidence that a juror made ethnically or racially prejudiced remarks during deliberations is not evidence of an “extraneous matter,” the Supreme Judicial Court has held that a

judge has authority to inquire into such matters because the existence of such remarks may deprive a defendant of the right to be tried by an impartial jury. *Commonwealth v. Laguer* (1991).

So, Mr. McCowen got his hearing (*Commonwealth v. McCowen*, Barstable Superior Ct., April 4, 2008). All the jurors were interviewed. A few racially insensitive remarks were recalled, as were several apologies. In the end, Judge Gary Nickerson was not convinced that racial animus infected the deliberations, something the defendant had the burden of proving by a preponderance of the evidence. So, even in a state with the most liberal standard available for reinvestigating a verdict due to racial prejudice, admitted instances of racially insensitive remarks were insufficient to bring the defendant relief.

### **So, you secured a hearing – now what?**

I would strongly advise against relying too heavily on 606(b) exceptions to overcome racial bias in the jury room. There are just too many things working against you. First of all, while some states like Massachusetts have carved out “racial animus” exceptions to the prohibition against juror testimony on matters relating to deliberations, not many of those exceptions were enthusiastically embraced by the state Supreme Courts. A state’s official position on this topic could change tomorrow.



Second, all the exception gets you is a hearing (provided you’ve got solid affidavits from some jurors). Convincing a judge that the verdict was the result of racial prejudice is going to be a bear. The main reason for this, of course, is that the very same jurors complaining about the verdict *voted for the verdict themselves* (except in Oregon and Louisiana, where criminal verdicts need not be unanimous).

Imagine that you were an African American juror, sitting on a case with racial overtones. One or two of your fellow jurors start uttering remarks that are racially insensitive, maybe even inflammatory. Will that make you more likely to vote guilty? I don’t think so. So, the first question any sensible judge will have for a juror who alleges that a verdict was tainted by racial animus is, “Then, why did you vote for it?”

The most likely scenario, leading to a juror contacting a defense attorney and complaining about the racial tension in the jury room, is that the juror experiences regret about the verdict for some reason. That is, after the fact, she comes to wish that she had voted differently. Most likely, she reads about the case in the newspaper, or hears about it on television, and learns some things that did not come out at trial.

The exceptions to 606(b) are not intended, however, to circumvent the other rules of evidence. Judges know this and no good judge will allow juror regret to impeach a verdict. As the judge in the McCowen appeal wrote, “The oft-expressed second thoughts of a conscientious juror do not necessitate a new trial.”

Consider the final paragraph in the opinion denying McCowen’s motion for a new trial:

“One final observation is in order. For over thirty years, this author has witnessed the delivery of verdicts in serious criminal cases. Watching jurors being polled has shown in many instances, a trembling hand, a tear trickling down, or the word “Guilty” getting caught in a juror’s throat. The polling of the jury in this case was extraordinary. After eight days of deliberations, not one juror trembled, or shed a tear or choked on his or her words. Unfettered unanimity was obvious from the conduct of the jurors as well as from the words they spoke as they were individually polled.”

### **Avoiding racial prejudice in the jury room**

While Professor Miller spends the bulk of his article articulating his attack on FRE 606(b), he ends with a list of sensible suggestions for minimizing the likelihood that racial animus will contaminate a jury’s deliberations.

Remember that 606(b) only applies after the verdict has been rendered. If you wait until then to try to rectify problems with your jury, the horse has already left the proverbial barn. The key is to be vigilant with respect to racial issues throughout the entire trial process.

By all means, follow Professor Miller's advice with respect to jury selection, but I would pay particular attention to his admonition to request a jury instruction regarding the reporting of juror misconduct. While it might not be prudent to mention racial prejudice explicitly, it is critical that the jurors are made aware that the judge is available to help with any issues that come up during the trial and deliberations. The judge should let each juror know that she should immediately come forward if she is at all concerned that she, or any other juror, has seen, heard or done anything that she believes might not be appropriate.

With any luck, you will have a judge who can couch such an instruction in a non-threatening way. In order to avoid reactance on the part of jurors, they must perceive this admonition as a genuine offer to help them work through any issues that might emerge.

Such an instruction can be critical because the prohibition against voir dire for the jurors does not apply until after a verdict is rendered. So, if jurors come forward during any point of the trial or deliberations, a proper investigation into possible racial prejudice can be conducted.

\*\*\*\*\*

### **Julie Blackman & Ellen Brickman Respond To Colin Miller**

**Julie Blackman, Ph.D. ([jblackman@julieblackman.com](mailto:jblackman@julieblackman.com)) is the Principal of Julie Blackman & Associates, a trial strategy consulting firm. She has consulted to attorneys on jury selection in many cases, with special attention to strategies for identifying and challenging biased jurors.**

**Ellen Brickman, Ph.D. ([ebrickman@julieblackman.com](mailto:ebrickman@julieblackman.com)) is a social psychologist and the Director of Research at Julie Blackman & Associates.**

For us as psychologists, the most intriguing part of Miller's paper was the recommendation that jurors need to be screened for prejudice during voir dire. As trial consultants, we believe that effective voir dire is the key step to ensuring an impartial jury. Miller highlights the difficulty of dealing with the effects of a biased juror after the fact, once the juror has been impaneled and has deliberated. Whether through attorney-conducted voir dire, questions added to the judge's voir dire, or juror questionnaires one can often avoid relying on the legal remedies proposed by Miller by directing concerted attention to keeping prejudiced jurors off the panel in the first instance. Here, an ounce of prevention is surely worth a pound of cure.

Thus, in response to Miller's work, we offer these recommendations for detecting prejudiced jurors during voir dire:

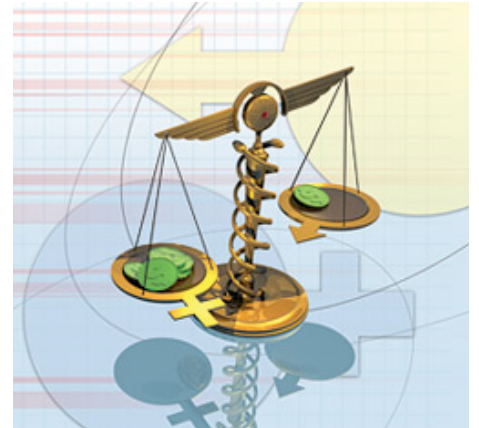
- (1) **Raise issues of gender and race (and any other characteristics that might engender bias) explicitly.** Acknowledge that jurors can sometimes feel uncomfortable with aspects of a case that have to do with gender or race or other characteristics, and let them know that you are not here to judge, you are simply interested in their honest reactions to the issues. Ask about bias in a non-threatening way, to increase the likelihood that jurors will be honest with you.



Avoid words like “prejudice” or “bias” or “stereotype,” and focus instead on more neutral words like “discomfort.”

Even if jurors do not acknowledge any discomfort or other negative emotions attached to gender or race, your questions about it will help to attune them to the broader issue of prejudice. Jurors want to do the right thing. If they are made aware of their own prejudices and instructed to set them aside, most will do their very best to do so.

- (2) **Offer jurors a way to acknowledge their prejudices privately.** Jurors are aware that gender- or race-related prejudice is socially undesirable, and will probably be reluctant to admit to such prejudice in open court. It can be useful to nest your questions about prejudice in the context of a broader question that offers jurors an opportunity to share their concerns at sidebar. Thus, for example, you might raise the issue of the defendant’s race, and say:



*My client is an African-American man. Sometimes people have strong feelings about certain groups of people that can get in the way of rendering a fair and impartial verdict. Or, some people may feel uncomfortable about a case in which an African-American man is accused of attacking a white woman. Or, there may be other aspects of this case – having nothing to do with my client’s race or gender – that make you uncomfortable and that we have not already discussed. If you have any such discomfort for any reason, please raise your hand now and we will discuss it with you privately.*

- (3) **Look to behavioral indicators of jurors’ feelings about the target group(s), not just to their professed feelings.** Jurors who live and work in integrated settings and particularly, who report voluntary membership in integrated groups (e.g. churches, social organizations) are more likely to be free of prejudice than are those whose interactions are limited to people in their own demographic cohort. Ask the jurors about their neighborhoods, group memberships, where they send their children to school, and what newspapers and magazines they read. All of these can be useful indicators of an individual’s social outlook, and can give you a good sense of how open-minded they are. This information is, of course, useful in ways that go far beyond detecting gender, race or other “demographic” biases.
- (4) **Ultimately, aim for a heterogeneous jury.** In the event that a biased juror evades detection during the voir dire process, the best way to minimize that juror’s impact is to have her/him deliberating with others from different demographic groups and social backgrounds. Then, individual beliefs are challenged and highly prejudiced views are unlikely to stand up to group consensus. Bringing a group of diverse individuals into a jury room inherently gives rise to a variety of perspectives, as each juror brings his or her life experience to bear on the case at hand. In this way, reasonable doubt comes to life in the jury room and jurors are prevented from coming to premature consensus – and particularly, from coming to consensus based on prejudice rather than on fact.

We recognize that attorneys sometimes have strong instincts, or even empirical findings from pre-trial research, about a preferred juror profile. Even if you are able to fill an entire jury with

that profile, we would encourage you not to do so. The ideal jury will have a strong cohort (e.g., 5 or 6 out of 12) of your preferred demographic, but the rest of the jury should be selected to maximize diversity, thereby promoting more elaborate deliberations and enlivening the burden of proof beyond a reasonable doubt.

Finally, though we recognize this goes beyond the scope of the original paper, we want to remind attorneys that prejudice is not limited to issues of sex and race. We have worked on cases involving Italian-Americans, ultra-Orthodox Jews, and other groups about whom jurors may hold beliefs based on stereotyped images. In all of these cases, we have recommended that attorneys inquire about these beliefs, and have been able to obtain cause challenges against jurors who expressed them. Even more frequently, we have worked on cases involving allegations of white-collar crime and have heard jurors express highly prejudiced views against wealthy corporate executives. For example, a potential juror in a recent case asked to be heard at sidebar and shared her belief that anyone who is rich and is trying to get richer is committing a crime. She was excused for cause.

In closing, we remind attorneys that prejudice comes in many forms and it is imperative that you delve into this issue during voir dire, and bear it in mind as you consider the overall makeup of your jury. It is far better to identify and de-select the prejudiced juror in advance than to have to rely on the complex and unpredictable legal remedies discussed by Miller.

Citation for this article: [The Jury Expert](#), 2010, 22(2), 61-74.



**Consumer Centers**  
Meadowlands, NJ • New York City

- **Mock Jury Trial Facilities**
- **LARGEST** rooms in  
New York City & New Jersey
- **Top Rated Recruiting**

info@consumercenters.com 800.998.4777

www.consumercenters.com

## Editor's Note

Welcome to our March 2010 issue of [The Jury Expert](#)! Once again, we have diverse and provocative offerings for you. Whether you flip first to our article on apology, choose to travel to East Texas, or ponder the impact of emotional evidence, see just how informative and persuasive visual communication can be, think about the goals of witness preparation, sweat through the surprising heat of attitudes toward atheists, consider the use of 606(b) in jury impeachment, or travel back in time with our March 2010 Favorite Thing, you are bound to have an experience that teaches you a thing or two and that means you have more interesting conversations with colleagues.

We are continuing to try new topics and formats of articles as we press forward with *The Jury Expert*. Let us know what you think (what should we do more of, what should we do less of, and what should we keep the same?) by sending me an email (click on my name below).

Tell us what you want to read. Tell us what you want to learn. Tell us what you are curious about (related to litigation advocacy). We will try to accommodate your questions, curiosities and desire for new topic areas.

You'll also see a bit of a new layout on our front webpage. We are looking for advertisers to help support costs of creating this publication and other activities of our publisher (the [American Society of Trial Consultants](#)). Read. Consider. Question. Comment on our website!

[Rita R. Handrich, Ph.D., Editor](#)

On Twitter: [@thejuryexpert](#)



The Jury Expert [ISSN: 1943-2208] is published  
bimonthly by the:

**American Society of Trial Consultants**  
1941 Greenspring Drive  
Timonium, MD 21093  
Phone: (410) 560-7949  
Fax: (410) 560-2563  
<http://www.astcweb.org/>

The Jury Expert logo was designed in 2008 by:  
Vince Plunkett of [Persuasium Consulting](#)

## Editors

**Rita R. Handrich, PhD — Editor**  
[rhandrich@keenetrial.com](mailto:rhandrich@keenetrial.com)

**Kevin R. Bouilly, PhD — Associate Editor**  
[krebouilly@persuasionstrategies.com](mailto:krbouilly@persuasionstrategies.com)

**Ralph Mongeluzo, JD--Advertising Editor**  
[ralphmon@msn.com](mailto:ralphmon@msn.com)

The publisher of The Jury Expert is not engaged in rendering legal, accounting, or other professional service. The accuracy of the content of articles included in The Jury Expert is the sole responsibility of the authors, not of the publication. The publisher makes no warranty regarding the accuracy, integrity, or continued validity of the facts, allegations or legal authorities contained in any public record documents provided herein.

**ASTC**   
AMERICAN SOCIETY OF TRIAL CONSULTANTS