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Is Justice Blind or Just Visually Impaired?	1
<i>The Effects of Eyeglasses on Mock Juror Decisions</i>	
Jurors with Attention Deficit Disorder	13
<i>Tips on Identifying Jurors and Improving their Attention</i>	
Beyond Bullet Points on Trial	17
Ten Dynamite Tips to Improve Your Results From Group Voir Dire	24
Playing the Other Side's Hand: Strategic Voir Dire Technique	29
Is the Time Right for Online Jury Research?	32
Let's Talk: Addressing the Challenges of Internet-Era Jurors	34
A Video Review of the 'iJuror' and 'Jury Duty' Apps	46

Is Justice Blind or Just Visually Impaired? The Effects of Eyeglasses on Mock Juror Decisions

Michael J. Brown

Michael J. Brown is an Assistant Professor of Psychology at the [State University of New York – College at Oneonta](#). His research examines the social-cognitive processes involved in decision making. In particular, he is interested in how individuals make attributions and judgments when presented with novel, complex, and contradictory information. His work largely examines issues related to gender, sexuality, and the law.

This article has been adapted from:

*Brown, M. J., Henriquez, E., & Groscup, J. (2008). The effects of eyeglasses and race on juror decisions involving a violent crime. *American Journal of Forensic Psychology*, 26(2), 25-43.*

Previous research has demonstrated the importance of a defendant's physical appearance on juror decision-making (e.g., Stewart, 1980; Efran, 1974). The face, in particular, is often used as a means of assessing a defendant's character, intelligence, and culpability. The eyes are the first thing we notice, and the facial feature we spend the most time looking at when meeting an unfamiliar person (Janik, Wellens, Goldberg, & Dell'Osso, 1978). Also, the size of an individual's eyes is often used as a means of appraising his or her personality (Geldart, Maurer, & Carney, 1999; Paunonen, Ewan, Earthy, Lefave, & Goldberg, 1999). It follows that appliances that resize, obstruct the viewing of, or otherwise alter the appearance of the eyes – namely eyeglasses – may influence our perceptions of an individual who uses such devices.

Research into the physical and personality traits often attributed to people who wear eyeglasses has found that these devices significantly alter our perceptions of individuals who wear them – in both positive and negative ways. Thus, it is important to examine how eyeglasses might influence jurors' decisions when evaluating a defendant. This article describes some of the research my colleagues and I have conducted in this area.

Traits Associated with People Who Wear Eyeglasses

In one of the earliest studies to examine the physical and personality traits attributed to individuals who wear eyeglasses, Thorton (1943) found that participants rated models wearing eyeglasses higher in intelligence, dependability, industriousness, and honesty. Reports of these attributions have remained relatively consistent despite variations in methodology and the passage of time (Thorton, 1944; Manz & Lueck, 1968). A more recent nationwide survey of over 3,000 individuals revealed that individuals, whether they wear eyeglasses or not, tend to perceive those who wear eyeglasses as smart (40%) and sophisticated (39%) (Essilor of America, Inc., 2004 February).

However, not all of the characteristics associated with eyeglasses are necessarily positive. Elman (1977) examined the effects of eyeglasses on the perception of an individual's masculine and feminine personality traits. Elman found that participants who viewed a male model who was wearing eyeglasses judged the man as weaker and more of a follower than participants who viewed the same male



model without eyeglasses. In a similar study, Terry and Krantz (1993) reported that eyeglasses on both men and women were associated with attributions of diminished forcefulness. Furthermore, several researchers have shown that although people who wear eyeglasses are often judged as more intelligent (Boshier, 1975; Terry and Krantz, 1993), they are also considered less socially (Terry and Macy, 1991) and physically attractive (Edwards, 1987; Hasart and Hutchinson, 1993).

The effects of a defendant's attractiveness on jurors' decisions have been well documented. In a study of mock jurors, Efran (1974) discovered that physically attractive defendants were judged with less certainty of guilt than unattractive defendants. Likewise, Smith and Hed (1979) found that attractive defendants in a burglary case were judged less harshly than unattractive defendants. Attractiveness might also be used as a means of assessing other personal characteristics of a defendant. In Darby and Jeffers's (1988) study, participants rated attractive defendants as more happy, likeable, trustworthy, and less responsible for the charges against them than unattractive defendants. Even when convicted of a crime, attractive defendants appear to have an advantage in the sentencing process. They are consistently given "softer" punishments than unattractive defendants (Efran, 1974; Leventhal & Krate 1977; Smith & Hed 1979). Field studies in actual legal settings have yielded comparable results (Downs & Lyons 1991; Stewart 1980). However, attractiveness is not always an advantage in the courtroom. Sigall and Ostrove (1975) found that attractive defendants were treated more harshly than unattractive defendants when attractiveness was relevant to the crime (e.g., a swindle).

Because eyeglasses have a notable effect on the judgment of an individual's appearance and character, both of which play an important role throughout the criminal justice process, it is important to evaluate their influence on the perception of a defendant who wears such devices. The existing research offers contradictory implications. Eyeglasses are associated with intelligence, honesty, industriousness, and dependability – characteristics that are favorable to a defendant. However, eyeglasses are also associated with unattractiveness – a quality that has been shown to have damaging implications for a defendant.

The Effects of Eyeglasses on Juror Decisions

In 2008, my colleagues, Jennifer Groscup and Ernesto Henriquez, and I published a study that examined the effects eyeglasses have on perceptions of a defendant who wears such devices. Specifically, we examined the interaction between a defendant's race and whether he wears eyeglasses on jurors' decisions.

Two hundred and twenty undergraduate students participated in our study. We used a vignette of a fictitious trial in which a defendant was accused of committing an armed robbery. Purposefully ambiguous evidence was presented to the participants. We constructed our experimental conditions by photographing two models (one African-American and one Caucasian) while they were wearing eyeglasses and while they were not wearing eyeglasses. The same pair of eyeglasses was used in each of the photographs. We selected models of comparable age, height, weight, hair color, hair length, and other physical characteristics (i.e. facial hair and eye size). We also created a brief physical description of the defendant by averaging our models' actual age, height, and weight. This description was attached to each photograph. Each participant was given a folder that contained a photograph of a defendant, the defendant's physical description, the vignette, and a survey asking participants to render a verdict (guilty or not guilty) and to rate the defendant as more or less intelligent, attractive, friendly, and physically threatening.

Overall, defendants who wore eyeglasses received fewer guilty verdicts (44%) than defendants who did not (56%). However, this difference was only moderately significant. Using path analysis, we found that eyeglasses had a significant indirect effect on verdict by increasing ratings of intelligence, which in turn was related to not guilty verdicts. Defendants who wore eyeglasses were also rated as less physically threatening; however, this was not a significant predictor of verdict.

There was no significant difference between the number of guilty verdicts Caucasian (51%) and African-Americans (49%) defendants received. However, race was a significant predictor of several perceived defendant characteristics. African-American defendants were rated as less attractive, less friendly, and more physically threatening. We also found interaction effects between the defendant's race and the presence of eyeglasses for ratings on a number of these characteristics. The African-American defendant was rated as more attractive when he was wearing eyeglasses, and the Caucasian defendant was rated as less attractive when he was wearing eyeglasses. Likewise, the African-American defendant was rated as more friendly when he was wearing eyeglasses; while the Caucasian defendant was rated as less friendly when he was wearing eyeglasses. Both defendants were rated as less physically threatening when they were wearing eyeglasses. However, this effect was greater for African-American defendants than Caucasian defendants.

Follow-Up Study: White-Collar Crime

We recently conducted a follow-up study (manuscript under review) examining the effects of eyeglasses on mock juror decisions involving a case of white-collar crime. We used the same general methods used in the original study; however, participants were asked to read a vignette of a fictitious trial in which a bank employee was accused of creating a computer program to embezzle funds from costumers' accounts. Overall, we found that Caucasian defendants received more guilty verdicts (58%) than African-American defendants (38%). Consistent with our previous findings, defendants who wore eyeglasses were rated as significantly more intelligent than defendants who did not wear eyeglasses. However, in this scenario, higher ratings of intelligence were associated with more guilty verdicts. That is, eyeglasses had a detrimental indirect effect of defendants by making them appear more intelligence, which in turn was associated with guilty verdicts. In this study, eyeglasses did not affect perceptions of defendants' friendliness or attractiveness, and there were not significant interaction effects for defendants' race and the presence of eyeglasses.

Conclusion

Our line of research suggests that the presence of eyeglasses on a defendant may significantly affect verdict outcome. However, this effect is likely to be small and indirect. In both scenarios, the presence of eyeglasses increased ratings of defendants' intelligence. For the violent crime scenario, this increase was associated with less guilty verdicts. Eyeglasses also decreased ratings of defendants' as threatening; however, this decrease was not significantly related to verdict. Thus, how intelligent a defendant appeared was a better predictor of verdict outcome than how physically threatening he appeared. Future research should examine if other indicators of intelligence (level of education, vocabulary, etc.) produce the similar effects.

Our African-American defendant was rated as more attractive and more friendly when he was wearing eyeglasses. However, there were no such effects for Caucasian defendants. These results suggest that some of the stereotypes associated with people who wear eyeglasses found in previous studies may no longer apply to Caucasians. Furthermore, the presence of eyeglasses on an African-American defendant may not be consistent with the stereotype of the "violent Black criminal."

The presence of eyeglasses also increased ratings of defendants' intelligence in our white-collar crime scenario. However, in this case, increased ratings of intelligence were associated with more guilty verdicts. These findings support the notion that white-collar crimes require a certain level of intelligence and skill to carryout. Overall, Caucasian defendants received more guilty verdicts than African-American defendants; however, there were no interaction effects for defendant's race and the presence of eyeglasses.

Research on criminal stereotypes suggests that certain crimes are associated with members of certain races. For example, in Gordon, Michels, and Nelson's (1996) study, participants ranked "white-collar crimes" as more common for Caucasians and "blue-collar crimes" as more common for African-Americans. There is also evidence that jurors punish criminals more severely when they commit stereotype-consistent crimes. Gordon, Bindrim, McNicholas, and Walden (1988) found that participants gave a Caucasian embezzler longer jail sentences than an African-American embezzler, and an African-American burglar longer sentences than a Caucasian burglar. The results of our studies suggest that the presence of eyeglasses may help reduce juror bias in cases where an African-American defendant is accused of a stereotype-consistent crime. In cases of white-collar crime, eyeglasses may actually reinforce the juror bias - especially for Caucasian defendants.

Although these results have potential theoretical and practical implications, we must note that they were demonstrated using only one African-American and one Caucasian model. Also, our participants did not view a mock trial. They only read a vignette. Replication of our findings, preferably with a non-student sample, and with more realistic stimuli (i.e. a video-taped trial with opening and closing statements, witness testimony, cross examination, etc.), is necessary to determine if our results are reliable. It would also be interesting to examine the effects of eyeglasses of juror decisions involving defendants of other races / ethnicities.

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Tara Trask Response

Tara Trask is CEO of [Tara Trask and Associates](#), a full service Litigation Strategy, Jury Research and Trial Consulting practice with offices in San Francisco and Dallas. She has 17 years' experience in the field and focuses her practice on complex commercial litigation including products, securities and intellectual property cases.

Michael J. Brown's piece, *Is Justice Blind or Just Visually Impaired? The Effects of eyeglasses on Mock Juror Decisions*, comports with many of the general trends that I see in my practice. I read the results of his research with great interest, mostly because I do almost no criminal work and this research clearly has implications across civil work as well. I would be interested in further research in how these issues impact juror decision making in securities, tort cases and intellectual property, which is where most of my work is focused.

Brown lays out the history of the benefits often afforded to attractive defendants over less attractive defendants and I have observed similar ratings of both witnesses and attorneys. I think there is significant documentation that attractive witnesses are viewed as more likeable, more trustworthy and generally more credible than their less attractive counterparts. I do believe that the question remains whether this is an outcome determinative issue and I believe that, generally speaking, it is not. In fact, we recently reviewed and compared data from several mock trials, all completed by the same law firm over several years to determine whether attractiveness and likability of the attorneys presenting at the mock trials had been an outcome determinative issues. Counsel had grown concerned that the mock trials, all highly technical patent cases, had become "beauty contests" with the mock jurors simply voting for the side who had the "best" or "most liked" attorney. We found no data to suggest that. In fact, we found that on multiple occasions, the lawyer they deemed as most credible was not the lawyer of the side they voted for.

I found the fact that Brown's results changed based on the crime, (either a physical crime or an "intelligent" crime) to be fascinating. Because I rarely work on cases where there is a physical nature to them, I wondered, as I read along, how eyeglasses, or lack thereof, would impact jurors' views of an inventor of patented software, for example.

My personal experience in patent cases is that jurors expect inventors to be smart and even a little geeky. Credentials are helpful but not absolutely necessary. Brown touches on the heart of the matter when he begins to discuss stereotypes. I have seen that jurors tend to assign credibility to those who fit the stereotypes they have. Jurors tend to view inventors as geeky, intelligent people who often are missing certain social graces and, in my experience, jurors tend to excuse inventors for a lack of social grace, and often even hold it against them if they seem too "slick." If I had to guess, I would say that further research might show a large gap of credibility between inventors who wore glasses and those who did not. My experience has been that jurors tend to be more critical of inventors with highly polished social graces, those who are attractive, or those who have highly refined business acumen.

It is clear from Brown's research, however, that although eyeglasses had an impact, it was small. It seems that there are so many other factors that go into how attorneys and witnesses are perceived. I would certainly be interested in Brown's suggested further research as well as my suggestions in the civil realm.

Joe Guastaferra Response

Joe Guastaferra is a trial consultant based in Atlanta, GA.

He works nationwide with criminal and capital punishment defense teams.

When the great rhetorician Quintilian was asked the secret to persuasive oratory his reply was: be well-liked. Persuasion has been linked to likeability since we began trying to figure out how to quantify its elements. In modern times there has been an element of 'slick' and 'manipulative' attached to the concept of persuasion that reduces and diminishes it. The knee-jerk reaction to the piece by Dr. Brown and his colleagues is to assume that he is packaging a manipulative gimmick. Such a reaction would be unfortunate.

Exposure in the press and the media rarely works out well for the defendant and his team. It seems that exposure has done a disservice to this research as well. Dr. Brown's piece has received shallow headline notoriety that could cause some to believe that his point is: Eyeglasses = Not Guilty. His message is more complex. The research attempts to help us understand subjective aspects of Quintilian's glib response. The study is about attractiveness, likeability if you will, and how it affects perception and influences decisions.

There is no need for panic in the legal or consulting community about the gimmicky connotations created by those reporting on the article. The authors tell us the outcomes are "small and indirect." Brown et al, point to the limitations of their study and they do not attempt to convince us of the equation: Eyeglasses = Not Guilty. The finding is that eyeglasses influenced whether the jurors saw the defendant as less threatening and this perception, along with other things, affected the verdict. In the white-collar crime scenario, glasses negatively influenced the jurors but, again, the effect was small and indirect. Therefore our primary focus must remain on the evidence, theory of the case and communication. In my consulting work I try to shake lawyers free from the notion that the case is composed of 'elements' that they have been trained to think of as discrete pieces of the case they have to prove or refute. The work is a collaboration to see the trial as a whole that starts with brainstorming and ends with closing argument. This research reveals and reminds us of the difficulty and complexity of presenting an accused person to members of the community where the offense occurred.

This research has an 'ignore at your own peril' subtext. Few would disagree with the proposition that it is advantageous to the defense that criminal defendants appear less threatening. As consultants, we should direct time and concern to ensure appearance and attractiveness are included in the persuasive message and narrative presented to the jury. Anyone who has worked on a case with a string of co-defendants has been called on to help craft a strategy to keep out the array of booking photographs (mug shots) that were taken at what is possibly the worst moment of the defendant's life. The client's appearance is at its absolute worst and our awareness of the prejudicial effect of displaying a "rogues gallery" is motivated by our sense of how important it is for the client(s) to look less threatening. We cannot dismiss the study's findings.

The importance of appearance motivates us to further action. Jails are about control. To gain control there are accepted practices and policies imposed to achieve conformity and strip the accused of a sense of individuality. Hair and clothing are the first to go. When we dress an accused person who has been in jail we are trying to give them a sense of dignity that will affect how they respond in the courtroom as well as how people in the courtroom will respond to them. Appearing in a jail-issued orange jump suit is not acceptable. Dignity and respect are not gimmicks but they are crucial elements in persuasion. Often the indigent client's clothing needs will prompt a trip, funded by the defense lawyer, to Target or Wal-Mart for appropriate clothing. When the client is not in custody there is always a meeting about what they should choose from their wardrobe to appear in court. As consultants, we have been aware of the importance and power of appearance and attractiveness for a

long time.

All studies can, in hindsight, be better. But we know that small studies are necessary to design larger more complicated studies. Jury pools continue to grow in complexity. We have four distinct generations of Americans from which jury panels are drawn. Racial and ethnic diversity continues to be a labyrinth of unknowns as the population moves and shifts. Insight into the perceptions and the cognitive processes entailed in juror decision making are vital to be aware of even if they are not immediately useful. Future researchers will build on these findings with improved study designs and additional insight will be revealed. Shifting the study from burglary to white collar crime exemplifies the authors' efforts in this regard.

The original paper from which this piece was adapted was titled, "The effects of eyeglasses and race on juror decisions involving a violent crime." Shifting the study to include white collar crime showed vision but much more needs to be learned about jurors' perceptions of people accused of violent crime. By no means do I underestimate the difficulty of designing a study that tries to capture and measure attributes such as threat or attractiveness. The authors acknowledge that reading a scenario about a crime is static and limited. It is not only the recreation of the crime that poses a problem for future studies. The courtroom setting is stereotyped as sterile and monotonous. This is not the case for the person accused, sitting at counsel table listening to others talk about him as if he is not even there. It is a shifting and dynamic interplay of unfamiliar elements. Observing the client's reaction and interaction with that environment is something that has to be incorporated in an assessment of threat and attractiveness.

The over-arching value of this study, and the issue that we should applaud, is that this new work once again keenly focuses consultants and lawyers on the complexity of jury selection. We all endeavor to design the questions that tap into the subtleties of feelings about sensitive issues. Working exclusively in criminal cases, one becomes inured to the usual battles: getting judges in some jurisdictions to allow attorneys to participate in voir dire, getting the court to allow a jury consultant at all, trying to educate the court to the value of a supplemental questionnaire, time to meaningfully review it, and empowering the lawyers to ask open-ended questions about sensitive issues such as race. The nature and context of the crime also matters and we know there are preconceived notions associated with certain types of crimes. The value of this work is that amidst all the usual endeavors it gets us to consider how the jurors are looking at our client, literally.

Holly G. VanLeuven Response

*Holly G. VanLeuven, MA, has been a practicing Trial Consultant since 1972.
She is president of Genesis Group in Scottsdale, Arizona.*

My comments come from the perspective of a Trial Consultant, not from an academic perspective. I am visually impaired myself and thus am looking hard for the relevance of this research as presented.

For the findings of this line of inquiry to be of true value to me and to my attorney clients, the following changes would be necessary: Forget the photos of 1 black man and 1 white man. Lose the vignettes. Get 6 black men and 6 white men, 12 pair of glasses and put on a brief, authentic mock trial or two. Then ask the questions. I would find information gathered this way to be far more useful and the findings likely to be more valid, not to mention having more practical applications

The cast of characters in a jury trial does not arrive from Central Casting. These are real people with foibles of manner and appearance that may or may not strengthen their believability, their attractiveness, their appeal for a particular jury at a particular point in time, given a particular set of facts. Just as there is a legitimate role for planning the processing of a case, for refining trial strategy, for developing a trial theme, for scripting opening and closing statements, for planning an informative voir dire, etc., it is

every bit as important to deal forthrightly with the image of key participants in a trial for which you have responsibility. Of course, that might involve adding a pair of glasses here and there - or not! Or, add a sweater! Tame a stutter, or embrace it. Maybe make slight changes of hairstyle. Maybe shave off the facial hair. Or, in some venues, leave it or even grow some! In my practice, I fully endorse carefully conceived alterations of the appearance and behavior of key trial participants when appropriate. If there is a perceived problem, something that could be an impediment to having the jurors relate positively to the case or to various witnesses, then serious, skilled image work should be done. And, if at all possible, plan on a couple of evaluation sessions to make sure that the changes are effective. For example:

The witness stutters.

Is this a plus or a minus given the evidence in the case? Maybe it doesn't matter at all. Maybe it evokes empathy but, if it makes him sound like a liar, watch out! Get him some help.

Bad hair day every day?

Decide what would work better for the venue, for the age and stage of the witness, in consultation with an image specialist, and get the problem taken care of in time to make changes if necessary.

Too smart for his own good?

In a small town, your client is a prominent businessman known for being brilliant, arrogant, and successful. But he is suing his accountants for altering his books, under-reporting his income and getting him in deep trouble with the IRS. Will Mrs. Smith down the street believe this is possible? Will any typical small town juror? At the very least we need to make the witness seem impeccably honest, trusting and vulnerable, but not quite as smart as his reputation would imply.

Years ago, Joel Boyden, a legal legend in Michigan but someone I had never worked with, called me into his office and handed me a file - and his credit card! Besides preparing for a traditional jury selection, Joel wanted me to dress his client, her husband and two daughters for a three-week civil trial. I met the next day with the client and her family in their home. Having reviewed the file, I knew that this 35-year-old school bus driver had sustained severe head injuries when the car in which she was a passenger had been hit by a commercial truck running a red light at a high rate of speed.

It was her day off and she and a friend were on their way to celebrate the client's birthday over lunch when suddenly this truck drove over Life as she and her family knew it. The woman I met lived in a house with all the shades drawn. Dressed only in her husband's undershirt, her hair was straggly and matted, her voice was flat, and her eyes were dull. The young woman who was hit was attractive and vivacious and accomplished. She enjoyed her family and they adored her. And yet not one penny had been offered in this case which was scheduled for trial in a month! The defense saw this woman as a drug-addicted failure and was sure the jury would too. "Any jury would see a damage award as money down a rat hole," is an actual quote from the lead defense attorney.

The task was clear: bring the appearance of this family back to what it was. That meant shopping and much more. Wanting everything this family was presented in to be understated, nice, but not new, I even gave the client several outfits of my own. We shopped at J.C. Penney for everything from bras and shoes to slacks; two classic sport jackets, shirts, a belt, socks, shoes and underwear for him; and several outfits for the girls. Then we went to a salon for an easy, attractive hairstyle for each of them, tasteful makeup for the client, and all the products necessary to maintain the new look. Long story short: shock from the defense as the family entered the courtroom and a multi-million dollar settlement offer immediately following jury selection. That credit card really paid off!

Caveats

There are two important issues to consider when reshaping images

1. Before and After

If there is any possibility that you are going to want to change the image of someone involved in a principal role, especially the litigant, avoid any visually recorded depositions until after the changes are in place. A tasteful, sensitive makeover can turn into a disaster if the person on the screen during trial undermines the authenticity of the person sitting at the table with you or in the witness box. I once made over a plaintiff, a wildly successful businessman who's normal appearance resembled a Las Vegas gigolo. His lawyer had forgotten the videotaped depositions and hadn't included them in the file. Fortunately, all was revealed during a mock trial and in plenty of time to soften some of the changes.

2. Comfort of the Witness

If change or changes are determined to be advisable, by all means, leave enough time for the person or persons to be comfortable with the changes, to feel natural. Any discomfort is easily telegraphed to observers and the intended advantages can be destroyed in an instant. For example, if a person hasn't worn them before, glasses can be really annoying

Conclusion

Attorneys and Trial Consultants, what vision Justice has is in your hands and you are responsible for fine-tuning the correction. It is your job to bring as much clarity to the jury's vision as you possibly can, including intelligent, sensitive reshaping of the annoying, dysfunctional aspects of a principal's appearance and behavior.

Walter Katz Response

Walter Katz served for seventeen years as a criminal defense attorney in Southern California first at the San Diego Public Defender and then the Los Angeles County Alternate Public Defender. He left the defense practice in late 2010 to join the Office of Independent Review which manages the oversight and monitoring of the Los Angeles Sheriff's Department and other agencies. He has also taught courses in the use of technology and persuasion in the courtroom.

Of the seventy-five or so cases that I took before juries, the vast majority were for alleged violent crimes and about half of those had some form of gang enhancement. (See Calif. Penal Code § 186.22.) Very few of my trials involved familial crimes, meaning that most relied upon some form of out-of-court identification to corroborate the in-court identification that the prosecutor hoped to elicit before the jury.

In trying these cases, there was one constant that I always wanted to be able to rely on – my own credibility. From the moment a jury venire walked into the courtroom to when a panel filed out to start deliberating, my every word and action was designed to project trustworthiness. Hence, I avoided anything that could visibly undermine that trust. The notion that I would dress up my client to render him a “harmless nerd” would have done nothing but to make a mockery of my attempts at projecting credibility, because jurors – who are already cynical – would see right through such a hackneyed ploy.

While Dr. Brown does raise some interesting issues regarding the impact of race (especially in crimes supposedly requiring intelligence) and attractiveness, he fails to take into account the structure and design of a criminal trial when he makes statements such as, “the eyes are the first thing we notice, and the facial feature we spend the most time looking at when meeting an unfamiliar person.” Dr.

Brown posits the wearing of eyeglasses distorts that initial perception in significant ways. He suggests that if a defendant is wearing eyeglasses, the initial reaction of a juror will be that the defendant seems relatively smart and non-threatening and, therefore, "less guilty."

In reality, the start of trial is very ritualistic. When the venire walks in, I would study them intently. I was looking at their clothing and jewelry style, what books they were carrying if at all, and especially whether they were looking at my client and how. Jurors often feel intimidated by the ritual of the clerk's orders, the bailiff's demeanor and the black-robed judge and avoid looking at anyone too closely as they shuffle in knowing they are very far outside their comfort zone. In my experience, the very potential jurors who spent a lot of time peering at my client were the most judgmental in their opinions about presuming the defendant innocent. The peering juror was most likely to say, "he looks guilty," or "I am afraid of him," during voir dire. Needless to say, such a potential juror never made it onto a panel. In other words, the very type of juror that Dr. Brown identifies as allowing the presence of eyeglasses to impact their decision-making is the impulsively judgmental person that I would try to identify and weed out.

The logical response to my argument may be to ask if my strategy didn't prove Dr. Brown's point that the wearing of eyeglasses negates the threat level, as it were, of the defendant and makes him a more cuddly proposition? That may be true if the wearing of eyeglasses was the only variable I had to worry about, but if his study finds that the chance of conviction drops by twelve percent due to the wearing of glasses, I know that in that 12% sub-group lies the very type of juror that scared me the most because they would allow any random factor – glasses, the way a pencil is held, the color of his shirt, whether I talked too fast – to drive their decision-making. No thanks.

The presence of eyeglasses is not the only variable, of course. The study conducted by Brown is akin to a laboratory test tube when, in fact, a jury trial is a bowl of macaroni salad left out in the sun – a hot mess. As mentioned above, most of my trials were for charged violent crimes – often murder – and many involved defendants who were alleged to be members of a criminal street gang. In almost all of those cases, the homicide detective arranged a six-pack photo lineup for witnesses to attempt to make an out-of-court identification by using booking or driver's license photos. The jury would see each of those photos. Was my client wearing glasses? If not, the jury would probably ask, "Then why is he wearing glasses in court now?"

California has a very strict criminal street gang enhancement which can add many years to a sentence if pled and proven. To prove that the crime was committed for the benefit or at the direction of a criminal street gang, the prosecutor would attempt to introduce evidence showing that defendant was either a member of or associated with the particular gang in question. The claim was usually made through evidence of past admissions to officers, associations with known members, found snapshots of the defendant with gang members and menacing bare-torso photos of his gang-related tattoos taken by the police for trial which often were very influential on jurors. Again, if he wasn't wearing glasses then, why was he in trial? Since I often started a trial by inoculating the jury by telling them about my client's gang history, and thus gain credibility by not seeming unreasonably resistant to the inevitable evidence, popping a pair of thoughtful-looking spectacles on his brow would have only hurt my credibility and my cause.

In sum, violent crimes are horrific enough. Jurors will see autopsy photos, scenes of the crime, and the murder weapon. It takes every ounce of energy of a defense attorney to try to keep a jury from hating the defendant. I tried three murders in the last five years of my defense career where the defendant was wearing glasses. One was convicted of first degree murder – the one who always wore glasses. The second defendant was middle-aged, so it made sense that he would wear glasses, with a mixed result; and the third - where he tried the nerd defense on his own by showing up in glasses - hung 10-2 for not guilty. Looking back, I don't think their wearing of glasses made one bit of difference in the outcome. In fact, in the last one, our defense was that my client was too ignorant to have known

what was really going on during the murder he allegedly set up.

While studies, such as Dr. Brown's, are interesting in the abstract, in the reality of the trenches of criminal trials, the ploy of wearing glasses is easy to spot as an amateur move. I preferred to re-arrange the pieces of the chessboard subtly where neither the prosecutor nor the jury knew what I was up to.

Michael Brown Response

Staying true to the stereotype of the "absentminded professor," I was unaware of the extent of the controversy the media portrayal of our research had generated until after I had written this piece for The Jury Expert. I typically decline media requests for interviews about my work because of the misrepresentation that often follows. However, when the Daily News approached me for comment on our study, the results of which they intended to include in their article, I saw this as an opportunity to add nuance to the discussion and help lessen any potential sensationalism. I spent nearly half an hour discussing the results of our research with the reporter, so I was surprised to see that my "interview" had been reduced to just two sentences. Live and learn.

It is important to put our research in its proper context. These studies were designed to examine if a particular extra-legal factor (i.e. eyeglasses) moderates juror bias in stereotype-consistent crimes – a largely social-psychological topic with possible implications for the legal system. Our studies are small first-steps in examining an issue that had not been studied before (at least not in the scientific literature). We never intended for our results to be used in the realm of jury consulting. As we've noted, there are too many limitations to our methodology for the results of our studies to be readily applied in the courtroom.

We should note that experimental research, by its nature, is limited. When manipulating a particular variable we must hold all other variables constant so that we can tease out the effects of our manipulation. This type of control often compromises the generalizability of research findings to real-world settings, where there is a virtual free-for-all of factors that can affect the outcome variables of interest (in our case: verdict and ratings of defendant characteristics).

Furthermore, we need to focus on the size of the effects reported in any study. With a large enough sample size, even the smallest effects are likely to be "statistically significant." The effects found in our studies were significant and meaningful; however, they were relatively small and indirect. That is, even after holding all other variables constant, eyeglasses had a small effect in increasing the perceived intelligence of a defendant, which in turn had a small effect on verdict. It is not known whether this effect will stand up in an actual courtroom environment or whether participants who were most influenced by the presence of eyeglasses on a defendant would survive the voir dire process.

However, a wealth of evidence from scientific studies and public opinion polls has shown that people who wear eyeglasses are rated differently on a number of physical, social, and personality traits than people who do not wear eyeglasses. These differences are fairly strong and consistent, so it is important to examine how they might influence juror decisions. Our studies scratched the surface of this previously unexamined topic. Further research, using more realistic methods and settings, is certainly needed.

One of the ethical dilemmas researchers often face is how others will use the results of their studies. The general consensus is that such concerns are likely to stifle scientific inquiry. Thus, we try to report the results and limitations of our work as objectively as possible and hope for the best. This is why it is extremely important to seek out the primary source of any research results presented elsewhere.

Jurors with Attention Deficit Disorder Tips on Identifying Jurors and Improving their Attention

Jill M. Leibold & Elizabeth Babbitt

Dr. Leibold is currently a Senior Consultant with [Litigation Insights, Inc.](#), a leading litigation consulting firm. Dr. Leibold has extensive experience in all aspects of jury research – from focus groups and mock trials to jury selection and voir dire development – and has participated in such high-profile cases as Enron Broadband and the Phillip Spector murder trial. Applying her training in interpersonal communication, she is also skilled in preparing challenging witnesses for deposition and trial. Dr. Leibold has also authored numerous articles in industry publications and has presented at many legal industry conferences.

Ms. Babbitt recently earned her M.A. in Communication Studies from the University of Kansas. As a Consultant with [Litigation Insights, Inc.](#), Liz has worked on a wide variety of jury research projects for cases involving toxic tort, medical malpractice, products liability, employment and contract disputes. She also specializes in developing Supplemental Juror Questionnaires for use at trial, assisting trial teams during jury de-selection and conducting post-trial juror interviews.

In a recent trial, a juror sat on a bench directly behind the attorneys' table fidgeting, whispering to his neighbors and constantly raising his hand in voir dire to ask questions or clarify voir dire issues that had already passed. He was engaged, smart and interested. Yet, his ability to sit still or focus on the voir dire questions being asked was so limited that he seemed to be 10 minutes behind the rest of the court. Additionally, while his questions were insightful and he asked for definitions and clarifications on important terms, he was too high-energy and scattered to attend to three weeks of tedious testimony in that case. As the hours of voir dire passed, he became more disruptive to the proceedings and he was dismissed from jury service. This juror likely suffered from ADD (Attention Deficit Hyperactivity Disorder), which is not an uncommon disorder among the general population. As a result, every trial has a decent likelihood of having an ADD (Attention Deficit Disorder) or ADHD juror in the pool. The questions raised in this article include: Are these jurors automatic peremptory or cause strikes, or can they sometimes be diligent jurors? What are the signs that a juror may become too disruptive to sit on a panel? And if an ADD juror ends up on a jury, how can attorneys help him to focus and remember the details of the case?



Traits of Jurors with ADD and ADHD

As with just about everything, ADD and ADHD have positive and negative aspects. Each person's symptoms are somewhat unique and there is no blanket answer as to whether an attorney should strike a juror based solely on that fact. On the upside, those with ADD and ADHD are creative thinkers and can give undivided and sustained attention to things they enjoy – to the point of being hyperfocused. When ADD and ADHD jurors are intrigued by a subject, they can actually become extremely focused on the issue at hand and ignore other surrounding distractions. In assessing a

juror's suitability for trial, vet whether the subject matter may be interesting to her, because in that case some ADD jurors could even find themselves with greater memory capacity and attention to the details of the case than other jurors.

Persons with ADD and ADHD tend to be quite intuitive, curious and can capture the big picture pretty quickly. They have a greater willingness to take risks and think outside the box, which can also be a downside if it leads them into high-risk or compulsive behaviors. Oftentimes, they are friendly, talkative and effortlessly funny. Because of setbacks experienced in academics or other situations that require attention, they have adapted and strengthened their social charms. This means they are good at getting needed information from others when they have not been able to focus enough to read or pay attention in class or meetings. In a trial setting, other jurors welcome their friendliness because it helps to bring the panel together as a group.

Unfortunately, ADD and ADHD sufferers also experience notable difficulties. They have trouble remembering, learning new information or focusing for long periods of time because their thoughts feel cluttered and seem to go in many directions at once. They can feel overwhelmed quickly, especially in new or unstructured situations. They often jump from one task to another and have difficulty bringing tasks to completion. Sometimes the anxiety or extra stimulation caused by difficult situations causes words to tumble out faster than the thoughts behind them. Because of all this, they constantly procrastinate and struggle to plan, prioritize or keep track of appointments. They also tend to misplace or lose things. Additionally, they are poor self-observers, so they do not typically know when they are losing focus or missing something important.

Not every ADD or ADHD juror will be a bad fit for a jury trial. While there is at times a concomitant disorder related to the ADD, such as depression, anxiety, substance abuse, etc., many sufferers have learned how to maintain seemingly "normal" functionality and do not have these additional difficulties. A good way to find out whether a juror you suspect has ADD also suffers from any of these other common problems is to add questions to the end of any supplemental trial questionnaire. ("Please describe any problems – vision, hearing, medical, language, psychological, etc. – that may affect your jury service." "Are you on any medications of any kind that would affect your ability to serve on a jury?") Jurors do not always feel comfortable talking about medical issues in open court, but often will describe problems in writing on a private questionnaire. Then, a lawyer can ask for a sidebar with the juror to talk about any effects the medication or medical problem will have on his jury service without embarrassing him in front of others. Asking jurors about medications can be helpful even if the issue is something other than ADD. In a brief analysis of a sample of juror data from five recent mock trials, 37% stated that they were currently taking a prescription medication. Typically, on a questionnaire in trial, only a handful of jurors may claim that the drug would actually affect their jury service, but it is important to know about them and use that information for cause challenges when needed.

Help the Juror Manage His/Her Performance in Court

Adults with ADHD are able to focus; the problem is their difficulty staying focused. This is especially true when the activity calling for our attention (e.g., witness testimony) is not one that the juror finds especially engaging. Have you ever struggled to pay attention to a boring presentation? Or to stay involved in a meeting that goes on, seemingly forever? The snail's pace of court can be a struggle for anyone. In trial, it may be the case that such a good jury pool appeared in court that you have extra peremptories to use on a juror you suspect has ADD, but frequently there are far more dangerous jurors that require those precious strikes. If an ADD juror is empanelled, also make sure that there is at least one or more jurors who will have a calming influence on the ADD juror. If that person will likely be a fair leader – and someone who is organized – she may be able to counterbalance the challenges the ADD juror will face.

The presentation of the case through opening, closing and the witnesses can also be adjusted to help the ADD juror concentrate and remember your message. The recommendations below are certainly pointed toward jurors with attention difficulties, but are also good advice for all jurors, especially now that technology is shrinking everyone's attention spans.

1. Increase the structure of presentations.

- Get your themes out early and often.
- Provide presentation "sign posts" and be sure to follow through with each element.
- Use lists for everything.
- Use reminders.
- Stick with one or two core themes and repeat them over and over. Repetition is a great presentation tactic for influencing memory. However, be cautious about what information gets repeated and the overuse of repetition. As one of our clients explained, "At trial we try to explain the wall (or whichever analogy one chooses), brick by brick. Jurors with ADD will quickly see the wall, but we lose them describing the bricks."
- Throughout trial, color code similar ideas, parties, witnesses, etc. This will help to create consistency and draw attention to key elements of the presentations. Because ADD and ADHD jurors tend to be more visual, this will aid their focus and ability to remember and easily recall information.
- Tell jurors to take good notes and circle or highlight areas in the notes they feel may be important.
- Be aware that every "new" thing presented to a person with ADD or ADHD will become a distraction. Therefore, it is important to minimize the number of distractions brought into court. Be conscious of the clothes you are wearing, the objects on your counsel table, the number of people who appear or leave your side's table during the day, fidgeting, etc.

2. Focus on developing a strong rapport with jurors during voir dire and delivering a strong opening statement. As with all jurors, and especially ADD jurors, first impressions will be critical to setting the tone for the rest of the case. It is better to grab jurors' attention early in trial, than to make up for lost time later.

3. Help the jurors focus on processing bottom-up, day-by-day. It can be too overwhelming for ADD and ADHD jurors to consider a large, high-level task and how they will accomplish it, such as processing a trial full of information into a verdict decision.

- Break up that end verdict decision into smaller parts and categories for jurors. Sometimes a large task can seem unachievable. By helping jurors understand that each big decision is really made up of smaller ones, you will help them to focus on the small ones and give them a roadmap of how to these lead to the big one. It will also offer the attorney more opportunities to explain each step from his client's point of view. For example, break down pieces of the jury instructions throughout trial, explaining and pointing out what would and would not be "proximate cause," "reasonable," a "defect," and so on. Juror will then focus on putting the smaller pieces together and

find that the larger decision is much easier to handle.

- Tell the jurors that while they will have a lot of information to think about at the end, it will be easier if they just focus on today. Encourage them to take one day at a time.

4. Provide attention-grabbing and non-distracting visuals.

- When it comes to slides/graphics, do not make them too visually overloaded, but do make them appealing so they grab the jurors' attention on particularly important points. Along with the color coding suggested above, add minor animations (e.g., having the text fly in from the side) and choose a background that is calming, but visually pleasing.
- Help jurors remember who said what. Pull up still images of witnesses when talking about their testimony to help stir the memory and encourage easy recall.
- Accommodate different learning styles. Read aloud and show on-screen what you want jurors to attend to. Research indicates that people retain twice as much information when they both hear it and see it, as compared to when only one learning style is employed.

5. Take frequent breaks; allow jurors to stand if needed.

- Often judges will make accommodations for jurors with back pain, or other problems that occur from sitting too long, by allowing them to stand in the jury box when needed. If a juror has admitted to having ADD/ADHD, ask if the court will be willing to make an exception and allow this juror to stand in the back of the jury box when needed to help her remain focused.
 - A seat in the back row, closest to the witness box will be best for ADD jurors. It allows them to stand up when needed, without disrupting others, and helps keep them focused because they are front and center for witness testimony. Some judges will not allow jurors to shuffle seats. If a juror has already told the court about his ADD/ADHD, the seating change is something that can be requested if the juror feels it will help his attention. As always, it is up to the court's discretion.
- Most courts are very good about keeping break times so that jurors have 15 minutes free for every 90 to 120 minutes of court time. Do not agree to an exception to significantly shorten or eliminate a break. The typical ADD/ADHD juror will have trouble adjusting to the change in schedule and will already be too exhausted from attending to the preceding testimony to keep up the pace.

Conclusion

It is important to not only recognize the signs of ADD or ADHD, but also to understand how best to help a juror displaying those signs to absorb trial information given their challenges. Ultimately, the question of whether an ADD or ADHD juror will help or hurt your case depends upon the case, the evidence and your presentation style. However, by keeping in mind these general tips and tuning your presentation style to help jurors with attention deficit disorders, you will be in a stronger position to communicate with and influence those jurors.

Beyond Bullet Points on Trial

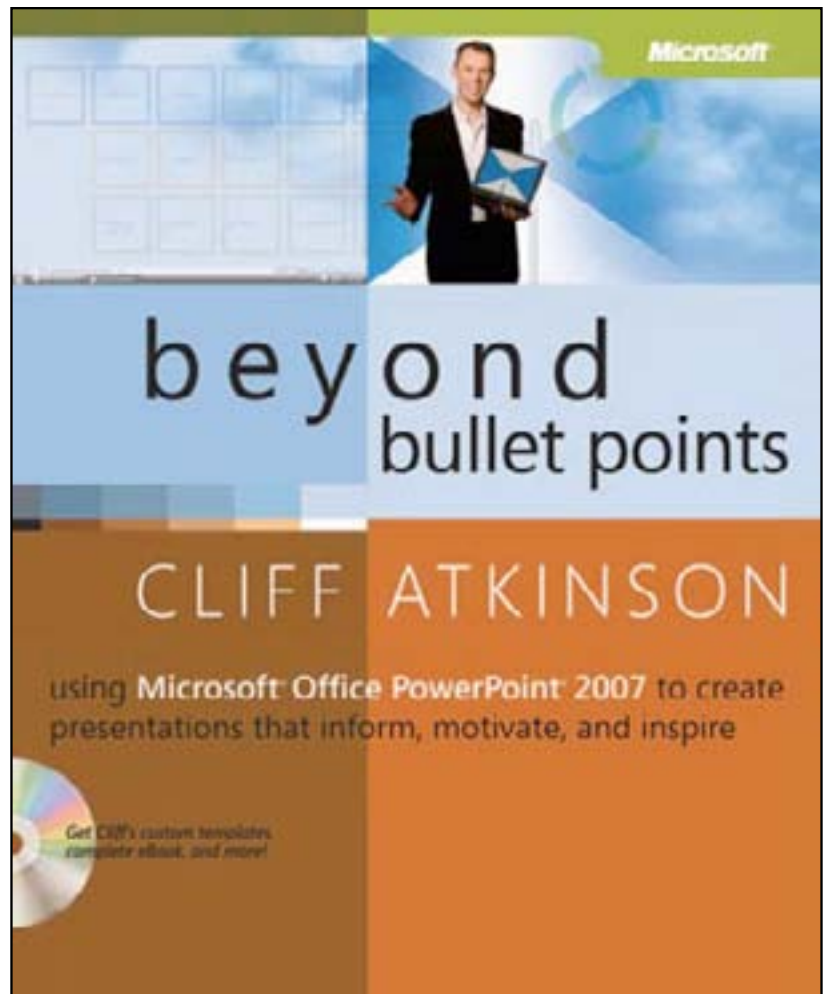
Jason Barnes and Brian Patterson

[Jason Barnes](#), a.k.a. “The Graphics Guy” is a graphic designer and trial consultant based in Dallas, Texas. He has been practicing visual advocacy since 1990 and has worked in venues across the country. He specializes in intellectual property and complex business litigation cases. You can read more about Mr. Barnes and how he can help you tell better stories in the courtroom at his [webpage](#).

Brian Patterson became a graphic designer in 1990. In 1998, he began work at DecisionQuest, a national jury research and trial consulting company. As Art Director of their Dallas office, he created and oversaw production of multimedia presentations for more than a hundred courtroom proceedings. He joined Barnes & Roberts in 2007 as a Trial Consultant where he continues to prepare clients for trial. He blogs regularly on presentation topics at www.igetlit.com.

Much has been written about the shortcomings of Microsoft PowerPoint™, and especially the way many people utilize it’s default templates to churn out uninteresting and uninformative presentations. Cliff Atkinson, author of the book *Beyond Bullet Points*, has proposed a method he believes will transform both the audience’s and presenter’s experience with PowerPoint. Though Atkinson rightly criticizes the structure and design of the basic bullet-point-based PowerPoint template, his solution simply substitutes a rival structure and design template without addressing the broader problem of users blindly applying the same template (any template) to every presentation.

Beyond Bullet Points (“BBP”) was initially aimed at corporate and sales presentations. In that setting, the BBP template may be a good way to get rid of bullet point presentations while still enforcing consistency within a business. It does not so much break with the so-called “PowerPoint Culture” (i.e., standards based design) as it seeks to shift that culture in a more aesthetically pleasing direction. However, Atkinson has increasingly targeted his methods at the legal market, a situation which requires us to look critically at the BBP method and its applicability to our situation as courtroom presenters.



Atkinson Credits a \$253 Million Verdict to Beyond Bullet Points

In 2005, trial attorney Mark Lanier represented the Plaintiff in Ernst v. Merck, the first of several highly publicized lawsuits surrounding the drug Vioxx. Lanier felt he needed an unconventional approach (watch his explanation [here](#), beginning at about the 5:00 mark) and chose the Beyond Bullet Points method, contacting Atkinson to assist him in developing a presentation. His opening statement received attention from the [New York Times](#) and a reporter from Fortune called his remarks “frighteningly powerful”. The graphics were received with less enthusiasm, being described as “imaginative, easily understood (if often hokey).”

*“On the first day of the nation’s first Vioxx trial, in a case brought against Merck by the widow of a man who died of a heart attack that she believes was caused by the painkiller Vioxx, plaintiff’s lawyer W. Mark Lanier of Houston gave a frighteningly powerful and skillful opening statement. Speaking in state court in Angleton, Texas without notes and in gloriously plain English, and accompanying nearly every point with **imaginative, easily understood (if often hokey) slides and overhead projections**, Lanier, a part-time Baptist preacher, took on Merck and its former CEO Ray Gilmartin with merciless, spellbinding savagery.” [Emphasis added.] [Fortune Magazine, July 15, 2005](#)*

The trial resulted in a [\\$253 million jury verdict](#) for the Plaintiff. Atkinson [touts the verdict on his website](#) as proof that his method is a success in a trial setting:

*“Is it worth it? Ask trial lawyer Mark Lanier. **He used BBP techniques to present his case against drug maker Merck in a famous legal trial that made international news. And he won a verdict of \$253 million.**” [Emphasis added.]*

Atkinson rewrote his Beyond Bullet Points book in 2008, the first chapter of which now describes the strategy and slides which Lanier used at trial, again citing the favorable verdict as evidence that the system is effective. (Atkinson 1)

But the \$253 million jury verdict isn’t the end of the story. First, the initial verdict was reduced to \$26.1 million due to caps on punitive damages in Texas. More importantly, the verdict was overturned by the appellate court citing [lack of evidence](#). Lanier may have won on emotion, but the panel found that he had not proven his case. Similar reversals occurred in the second Vioxx trial held in New Jersey.

Atkinson’s Beyond Bullet Points approach cannot be blamed for the reversal any more than it can be credited for the verdict – at least, not without a complete analysis of the case. But such a task is unnecessary. The peculiar circumstances of the case serve to highlight what we perceive to be the insidious danger of the BBP method. Both the BBP methodology and its templates encourage the production of presentations which are high on emotion but low on evidence – exactly the problem in the Vioxx trial.

What Is the Beyond Bullet Points Methodology and Template Structure?

Many observers have noted that people using PowerPoint often rely on the default templates provided with the program. Users enter the text of their presentation onto the slide in bulleted lists, then read those bullet points to the audience during their presentations. The unsurprising result is a dry, text-heavy slide show and a bored, disengaged audience. This comes as no surprise to any experienced presentation designer.

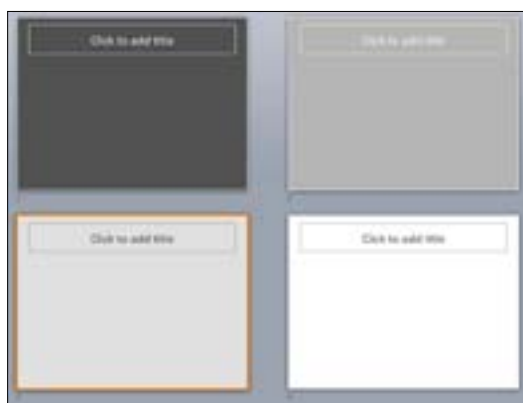
Atkinson’s solution to this problem was to devise a system of steps and practices which replaced bullet point presentations with something different. In his book, he lays out his method which is based largely on his interpretation of the multimedia research of [Richard Mayer](#) (Atkinson 29), as well as classic story structure and his own experience creating corporate presentations. While it is not possible in this space to discuss the pros and cons of every aspect of Atkinson’s method as it relates to litigation, we will try to explain the key parts of the system, as well as a few of the benefits and problems we see.

The basic steps of the BBP method begin with creating the titles of his slides in a Microsoft Word™ template provided with the book. The template loosely follows the three act story structure used in ancient Greek tragedies as well as many Hollywood movies and is divided into a table with three Acts. Act II is further divided into three Key Points, each with three Explanations, and three Details to support each Explanation. The author teaches that this will allow him to present three versions of his story: the 5 minute version with Key Points only, the 15 minute version including Explanations, and the 45 minute version which delves into the supporting Details. He claims that conforming stories to this template is the most effective way to create a presentation. (Atkinson 58-62)

Then, he imports the Word document into PowerPoint which will generate slides following the Act:Key-Point:Explanation:Detail structure of the outline. Next, he adds his speaking notes – not as bullet points, but in the notes section. Finally, he creates a visual, which usually takes the form of clip art or stock photography, to support the title of each slide.

Title and byline		
Act I: Setup the story from the audience's viewpoint ("Act I, what's at it for me?")		
Setting (minutes:0)		
Title (minutes:0)		
Point A (minutes:0)	Call to Action (minutes:0)	Point B (minutes:0)
Act II: Tweaking the action ("Act II, show me only what I need to see")		
Key Point (1) (minutes:0)	Explanation (1) (minutes:0)	Detail (all minutes)
1		
2		
3		
Act III: Setup the resolution ("To be completed in the storyboard phase")		

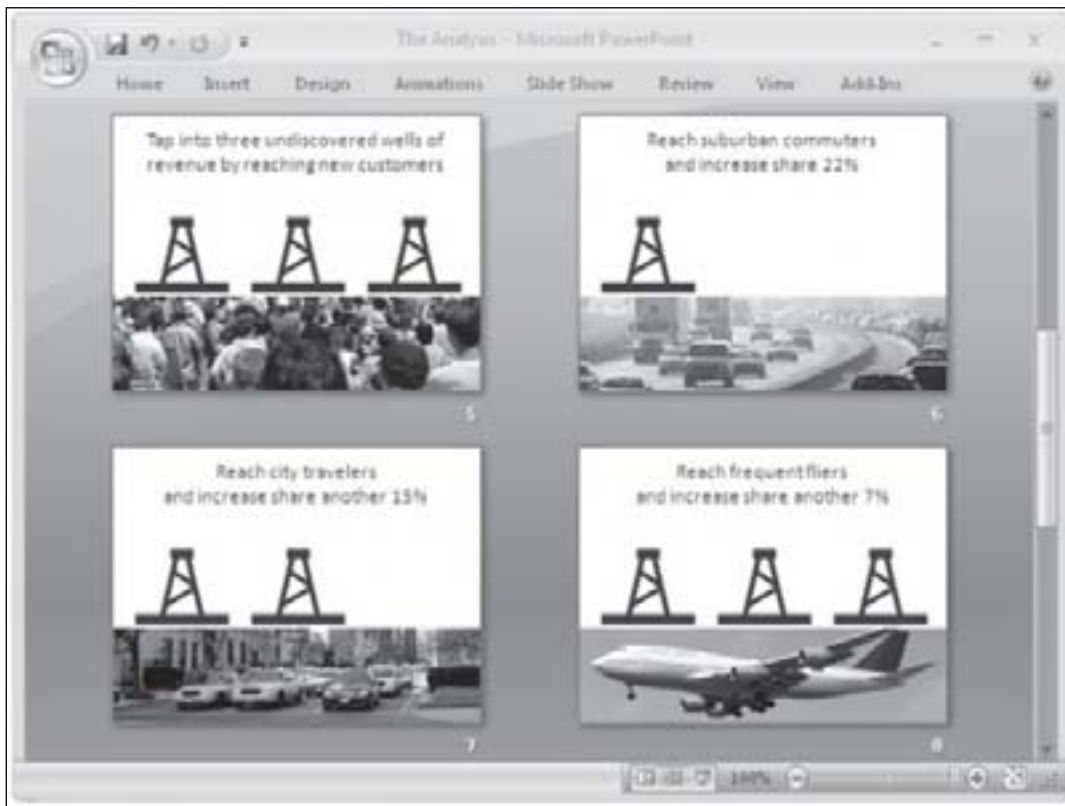
Atkinson's BBP template for creating presentation outlines creates rigidity. (Atkinson 59)



As for the PowerPoint template supplied with the book, it does not get any simpler. In fact, it is hardly a template at all unless one considers the absence of anything but a title bar to be a template. It does, however, come in four shades of grey.

In the BBP method, the titles should be complete, declarative sentences in the active voice. The method uses very little text on screen, save for the titles which present the single point of the slide. Instead, all other text is relegated the notes section of PowerPoint, so the presenter still has access to it when using the presenter’s view in PowerPoint, but the audience doesn’t see it on screen.

What the audience does see on screen is the title, along with a simple visual that reinforces the title. These are accompanied by verbal narration. There are several examples in the book and online that show the type of visuals Atkinson thinks should be used – mostly predictable, if not trite, stock photography and clip art.



Exemplar graphics in BBP lack basic design and refinement. (Atkinson 302)

So What Is Wrong with Beyond Bullet Points?

First, we want to be clear that we have no opinion as to whether or not the BBP method is appropriate for standard corporate or sales communications. In that environment, perhaps the enforcement of template-based procedures and “[motivational-poster](#)” imagery are good ideas. However, both of those things are inapposite to the production of effective visual communications in trial. Let’s take them one at a time:

Trading One Template for Another: It is ironic that, after determining that the thoughtless adherence to templates (bullet point templates from Microsoft) was the root of bad corporate communications, Atkinson proposes yet another template that, though stripped of the much vilified bullet point, is subject to the same abuse by users. It is easy to follow a template – the path of least resistance. It is more difficult to ask and find answers to the questions:

“Is this a good template?”

“Should I modify this template?”

“Should I combine with another template?”

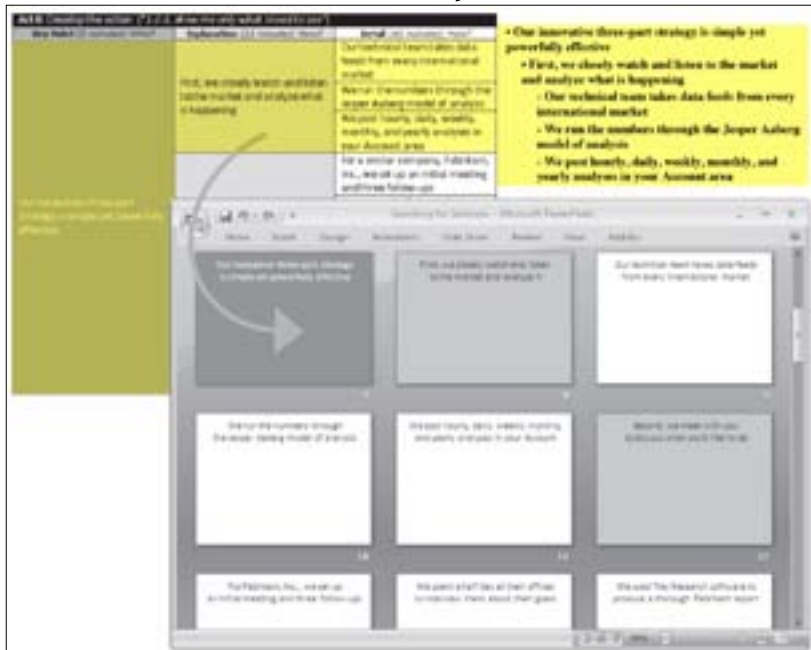
“Should I reject templates entirely?”

In using Atkinson’s template, much like using the PowerPoint default templates he is criticizes, Atkinson imposes a specific organization strategy which simply does not fit in all cases. His answer to that seems to be, Make it fit, because this is what works, but he offers us no research to suggest that this particular structure, ordered in this particular way, is any more or less effective than any other structure. There is nothing wrong with creating a structure for your presentation, in fact, structure is unequivocally good. But to suggest that this template is sufficient for all cases is an illusion. Using the BBP template and “filling in the blanks” as he calls it (Atkinson 62), is as ill-suited for our presentations as using the old bullet point template.

As noted above, the BBP template is structured in 3 parts that stem from its origination in the world of corporate sales pitches: 5 minutes, 15 minutes and 45 minutes. So how do we apply that structure to an opening statement? We cannot. In the Ernst v. Merck case cited earlier, it is [reported](#) that Mark Lanier’s opening statement was nearly three hours long, almost four times as long as the longest suggested Beyond Bullet Points presentation. A presentation of that length obviously requires serious modification to the BBP template, undercutting Atkinson’s claim that adhering to his method was the key to success.

Although it is claimed that the BBP Story Template is based on Hollywood script writing techniques (Atkinson 58), it looks nothing like a Hollywood script. There are many script writing applications and templates available, but we can find none that follow the BPP format. In fact, contrary to the BBP template, screen plays (synonymous with “scripts”) are linear documents which incorporate rich visual descriptions along with the dialog. As shown below in the example, the visuals are developed synchronously with the dialog. In other words, following the Hollywood model, we ought to develop our visual ideas and our spoken words simultaneously, not first one then the other.

Scripts interlineate the visuals and the dialog



If anything, the BBP Story Template, looks like an outline of bullet points. As shown in the yellow highlighting, bullet points have not been eliminated, just reformatted. They are written as complete sentences and spread out one for each slide, but removing the bullet character does nothing to change the nature of the language and structure.

Further, Atkinson teaches that we must make the jury the protagonist of our story to properly apply his method (Atkinson 91). While this may fit some stories well, it certainly does not fit in each case and largely ignores the reality of most stories in which our client is the real protagonist. Of course, many stories told in court rely on the construct that the jurors are active participants and will “write the final chapter.” That does not make them protagonists, that makes them authors.

*BBP Story Template is nothing more than one bullet point per slide.
(Atkinson 66)*

Sometimes jurors are actors on the stage and play many different roles: sympathetic friend, grieving parents, police officer, community conscience or even crime scene investigators. Sometimes they are the playwright and must finish the work to determine whether the result is triumph or tragedy.

This focus on story, we fear, detracts from the importance of presenting real evidence. Story is, of course, effective and appeals to the jury on the most basic levels. However, jurors are also intellectual beings, who must find some basis in fact for their decisions even if only to satisfy their own [confirmation bias](#). More importantly, trial and appellate judges are most certainly tethered to the substantiated evidence applied to the letter of the law. So, although storytelling is an important feature of almost every jury trial, it must not come at the expense of proof.

The danger of the BBP story template is the danger inherent in any template. We all naturally want to find action templates that we can rely upon, ones that work in every situation – it would make life easy: “Follow these steps and you will be successful.” Obviously, that kind of gross oversimplification rarely works. Some templates work some of the time in some situations. Our task is to determine whether or not any particular template works in our particular situation.

Finding simplicity in your message is difficult but essential to successful communication at trial. Every case is unique and complex. The variables of each trial, lawyer, venue, judge, client, opponent, etc. compound the complexity. So, there is nothing magical about the BBP story template – nor is there any magic in any other template. We must arm ourselves with many templates – like any tools – and select the right one for the right job.

Trite Graphics at the Expense of Evidence:

It is not surprising that Atkinson would select the graphics that he does since his background is in corporate presentations. However, we find the examples Atkinson provides for visuals to be unacceptable in the context of litigation. While they are arguably fine in a sales meeting or boardroom, a courtroom is a much different setting, with special rules and expectations, and the goals of your presentation are different.

The most obvious difference between trial and a sales pitch is that, in a trial, we have an opponent who is waiting to pounce on any misstatement, mischaracterization or weakness in logic. Most sales people do not make a pitch with their competitor in the room jumping up and shouting, “Objection!” We, on the other hand, find ourselves in that exact situation and we had better make certain that we can prove the claims in our “pitch” with demonstrable facts. Simply filling the slide with some stock photography will not be enough.

Simplistic stock photography, such as a picture of a gavel (Atkinson 13), might be used sparingly in an opening or closing presentation. But in the BBP template images like this make up over 40% of the slides (Atkinson 59). Why would we spend 40% of your time talking about things that are not evidence? There is some discussion of the need to present evidence – but never any examples of just how to do that. In fact, the account of Lanier’s opening statement implies that the evidence was not in the slide presentation at all but, rather, on the document camera.

With effective graphic design and information design, there is no need to strip away the evidence that supports our point. Rather, we use that evidence to create compelling visuals that both offer evidence and resonate with our audience. While honing our message is good, reducing it to a title and stock photography is not.



*BBP graphics from the first Vioxx trial are devoid of evidence.
(Atkinson 283)*

We must all struggle with our evidence, trying to fit it to a coherent and compelling story. This struggle argues strongly that we must maintain as much flexibility as possible in our presentations. We do not get to choose our evidence. It is what it is, and trying to fit it into a rigid form is not the proper way to approach a trial presentation. In every presentation, form must always follow function.

What Is Useful in Beyond Bullet Points?

Even though we disagree with much of the BBP method, there are some useful ideas. Though none of them are unique to BBP, it is worth a few moments to discuss them briefly.

Focus:

Keeping each slide focused on a single, clear message is certainly good advice. We also agree with the use of declarative titles. Applying a title such as “Timeline of Events” is absolutely useless. Everyone can certainly see that it is a timeline and that it is populated with events. The more important question, and the one our title must answer, is “What is the meaning of this graphic?” The title must instruct the audience in a meaningful way – it may be the only part of the demonstrative they read. This applies not only to our imaginary timeline but to every demonstrative we prepare. However, we see no need for Atkinson’s requirement that titles should be complete sentences; complete thoughts are sufficient and often preferable.

Structure:

A well defined hierarchy in your presentation is also worth recommending. We don’t believe it needs to follow the exact BBP structure, but keeping our presentations well organized with section slides as we move from point to point will help our audience stay oriented from beginning to end. Instead of using the BBP Word template, we recommend creating a numbered outline using the strong statement titles as suggested in BBP. This will keep you organized without imposing unnecessary restrictions and allowing flexibility when it is time to create your slides.

Story:

As discussed at length above, telling our audience a compelling story, and weaving themes within and around that story, is important. Maybe that has not been the norm in a sales or business environment, but storytelling is inherent in trial lawyering. Which is not to say you should turn every case into a murder mystery, but a good story does help you connect with your audience.

Conclusion

While there are elements of the Beyond Bullet Points method that are useful in litigation, we cannot recommend the system as a practical or effective strategy for presenting cases in trial. Taken in pieces, Atkinson has articulated some sound advice, which, though not novel, is nonetheless a good reminder for those of us who create presentations. Courtroom presentation is determined by the format of the proceedings and by the case itself, and should not be shoehorned into any template that limits our ability to present real evidence in the most convincing manner possible.

Ten Dynamite Tips to Improve Your Results From Group Voir Dire

Jeffrey T. Frederick

*Jeffrey T. Frederick, Ph.D., is a trial consultant and Director of the Jury Research Services Division of the [National Legal Research Group, Inc.](#) He has consulted with attorneys since 1975. He is the author of *The Psychology of the American Jury* (1987) and *Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury, Third Edition* (2011). You can contact him at jfrederick@nlrg.com and learn more about the [Jury Research Services Division](#).*

In the [last edition of TJE](#), Charli Morris shared some [thoughts on voir dire and jury selection](#). I would like to extend that discussion, focusing on the challenges faced in questioning jurors in a group setting. While individual, attorney-conducted questioning has been shown to be superior to group questioning, the norm is usually some form of group-conducted voir dire questioning, either solely group questioning or group questioning with limited individual questioning based on topic areas, e.g., pretrial publicity, death penalty views, or potentially sensitive topics areas. Given the prevalence of some form of group questioning, our challenge is to employ methods that increase juror participation and disclosure in this setting. What follows are ten tips to meeting this challenge. Some or all of these approaches may be applied in your jurisdiction depending on the rules of the court and the trial judge.

Tip One: It's a Conversation

Whether you are questioning a few jurors or a group of 30-40 potential jurors, your demeanor and questioning style will affect how jurors respond to you and the value of the information they provide. Approaching voir dire questioning as a "conversation" with jurors where you are interested in listening to them and discovering who they are in a nonjudgmental manner is paramount. Avoiding the pitfalls of treating voir dire as a job interview or, worse yet, an interrogation will promote candor and participation and minimize "good job candidate" answers and defensiveness and guarded answers, respectively.

Tip Two: Get Jurors Involved Early

We need to have jurors participate in the questioning process from the start. Unfortunately, jurors often have a natural reluctance to participate in this novel experience. Our goal is to break down this resistance by encouraging participation through giving jurors the experience of participating. Participation in group voir dire often takes two forms, hand-raising (to indicate an affirmative response to the inquiry) and the actual verbal responses to questions. Two nonmutually exclusive approaches can help encourage jurors to participate now and later in voir dire.

Initial hand raising. Jurors often are reluctant to raise their hands in a group setting, particularly at the outset. You can break down this barrier by providing jurors with a safe opportunity to do so by structuring a question that forces all the jurors to raise their hands. One way is to acknowledge the problem and provide a solution. For example, tell jurors that they will be required to raise their hands in response to some questions and that previous jurors have said that the



most difficult time they had with the questioning process was with raising their hands for the first time, after that, it was fairly easy. Encourage them to help out their fellow jurors by everyone raising their hands. This approach serves the purpose of getting everyone to raise their hands and tends to break the ice by acknowledging the elephant in the room. A second approach is to ask the group of jurors a question based on jury qualifications, such as length of residence in the jurisdiction or citizenship. All jurors should raise their hands. Those who don't are not qualified to begin with.

Initial background summary. By the same token, it is also possible to increase jurors' comfort level with speaking (and participating) in group voir dire by letting them gain experience in doing so at the beginning of voir dire. This can be accomplished by having each member of the panel or group provide a brief summary of their backgrounds. Asking each juror to answer a few nonsensitive, background questions, e.g., name, marital status, educational background, occupation/work in home, and spare-time interests/hobbies, gives them experience with speaking in this new environment. With a few gentle prompts, jurors quickly get the idea and participate readily. If you have to wait for the opposing side to finish voir dire and jurors need a little warming up to the situation, asking one question, such as, "What do you like most about your work either on the job or at home?" can put them back on the road to participation.

Tip Three: Keep Jurors Participating

Now that you have jurors participating, the challenge is to keep them doing so. Fortunately, several tools are available. These tools include using: (a) majority response questioning; (b) the springboard method; and (c) positive reinforcement and attention.

Majority response questioning. Group questioning often involves a series of questions where affirmative responses tend to come from a minority of jurors. During the course of any lengthy questioning jurors soon become accustomed to not raising their hands. Unfortunately, when the time eventually comes when a juror should raise his or her hand, a resistance has built up and the juror may not do so. To counteract this situation, insert a few majority response questions throughout your questioning (or be prepared to employ them when needed) to minimize this negative response set. For example, you could revisit qualifications for jury service such as, "I forgot to ask something earlier, how many of you have lived in this area for at least ___ years?" Everyone should raise their hands. Or you could change a minority response question, e.g., "How many of you have been a victim of a crime?" into a majority response question, i.e., "How many of you have not been a victim of a crime?" An interesting by-product of this later approach is that you still can follow up with those jurors who don't raise their hands. Thus, again, everyone participates in one form or another.

Springboard method. A second way to foster continued participation is to use the springboard method. This method involves directing a question to one juror in the group (often an open-ended question such as "Tell me about your views on . . ." or "How do you feel about . . .?") and using the juror's answer as a springboard to begin discussions with the other jurors. You can either ask questions of the remaining jurors in light of the answer or continue with the original question for these jurors. Questioning using this approach continues until you have asked all panel members for their opinions or you ask the key exit question of the entire panel. If you haven't asked each juror for their opinion, it is imperative that you take a final vote or poll on the issue (e.g., How many of you agree with Ms. Smith that . . .? Or How many of you believe . . .?). Otherwise, there is a risk that a juror who holds an unfavorable opinion in this area may make it on the jury unbeknownst to the questioner. Varying which juror acts as the initial springboard across topics will keep jurors engaged and facilitate greater overall participation.

Positive reinforcement and attention. Positive reinforcement increases the probability that the positively reinforced behavior will occur in the future. Positive verbal reinforcement can be as simple

as saying “uh-huh”, “thank you”, or “I appreciate your candor” in response to the juror’s answer. Such simple reinforcers will increase juror participation and disclosure. In a similar way, positive attention paid to jurors also can foster greater engagement and participation during questioning. Noting similarities among jurors, calling them by name, and making a positive comment promotes continued participation. For example, consider the following situation where there is more than one teacher in the group.

Attorney: Ms. Wilson, what is your occupation?

Juror Wilson: I’m a teacher at New Horizons elementary school.

<Juror is encouraged to discuss her duties and responsibilities.>

Attorney: Thank you. I see you and Mr. Jones <a teacher questioned earlier> put in long days educating our young children.

Juror Wilson: Yes, we do.

Attorney: Mr. Jones, isn’t that correct?

Juror Jones: (nods) That’s for sure.

Care should be taken with this approach to avoid a misstep resulting from a mischaracterization or other mistake. However, if one occurs, treat it as an opportunity to learn more about the juror, with the juror taking the role of educator.

Tip Four: Create an Expectation of Participation

The best voir dire questioning creates an expectation that jurors will participate. This can be done in (a) the phrasing of questions; (b) the treatment of non-responding jurors; and (c) giving jurors a second chance.

Phrasing of questions. The manner in which a question is phrased can affect the expectation that a response will be forthcoming. The difference can be as subtle as starting the question with the phrase “how many of you” versus “do any of you.” The “how many” phrase communicates an expectation of a number of potential affirmative responses while the “do any” phrase communicates an expectation of few, if any, potential responses. Fostering the expectation of many participants promotes overall participation.

Treatment of non-responders. As pointed out above, some jurors may be reluctant to participate in voir dire. However, their reluctance to participate does not guarantee favorable views or opinions. As such, you can’t let jurors hide. Particularly in combination with the majority response question approach, direct questions to those who do not raise their hands. Not only will you get answers from these jurors, but you will show all the jurors that keeping their hands in their laps will not enable them to avoid participation.

Giving jurors a second chance. When questions require the raising of hands, oftentimes the relatively few jurors who raise their hands are quickly examined and attention turns to the next topic/question without considering that other jurors still might be eligible. Some jurors may not raise their hands because they are unsure if the question applies to them. Other jurors are reluctant to respond for fear of how they will be treated if they were to raise their hands. A second chance needs to be offered so that any additional eligible jurors have an opportunity to respond. After follow-up questioning of

the original juror(s), empower other jurors to respond, using such follow-up questions as “How many of you (agree with/have had a similar experience as) Mr. Jones?” Such an invitation for participation should be repeated until no additional jurors raise their hands.

Tip Five: Normalize Responses

Jurors are often reluctant to voice support for critical and/or controversial opinions, particularly when such opinions may be in a minority. One approach to increasing the jurors’ willingness to be honest and candid is to normalize the critical position. Selecting phrases that communicate the endorsement of a position by others serve to increase the likelihood of a juror revealing his or her true position. Phrases such as, “Many people believe . . .”, “A number of jurors have told me . . .”, or “I was talking with a neighbor/sheriff/business owner/doctor, who said . . .” serve this purpose. When these phrases are followed by the potentially controversial/critical opinion of interest, jurors are more likely to be honest and candid.

Tip Six: Contrast Critical Views

Another way of uncovering jurors’ views on critical opinions is to contrast positions on critical issues. Key to this approach is to provide a clearly defined choice between two positions. Neither position should be so extreme as to produce no agreement whatsoever. The following illustrates this approach.

In talking with jurors, I have found that in awarding money damages to an injured party, some jurors feel that it would be worse to award too little money to an injured party. Other jurors say it would be worse to award too much to an injured party. BY A SHOW OF HANDS, of these two considerations, which do you think would be worse?

- (a) How many of you feel that it would be worse to award too little money to an injured party? (PLEASE raise your hands)
- (b) How many of you feel that it would be worse to award too much money to an injured party? (PLEASE raise your hands)

If it is unclear whether an option is too extreme to elicit any support, provide a less extreme response option, leaving yourself the ability to further pursue a critical opinion with an open-ended follow-up question (e.g., Tell me a little about your feelings about this?) or a further refined contrast question.

Tip Seven: Consider All Sides of the Issue

As we saw earlier, jurors may try to hide or be reluctant to raise their hands. When questions are phrased so as to focus on agreement with one position, other important positions may be ignored. Oftentimes when jurors don’t respond affirmatively, their lack of agreement is inferred to be the holding of the opposite position or at least the failure to agree with the stated position. This simply may not be the case. You can avoid this pitfall by phrasing the question so it includes the key positions on the topic. Consider the following example.

I would like to ask you to raise your hand to indicate whether you feel that the criminal justice system treats criminals too leniently, about right, or too harshly.

- (a) How many of you feel that the criminal justice system treats criminals too leniently?
- (b) How many of you feel that the criminal justice system treats criminals about right?
- (c) How many of you feel that the criminal justice system treats criminals too harshly?

Obviously, those who raise their hands may be subject to follow-up as would those jurors who do not raise their hands for any option.

Tip Eight: Flip the Key Question

While it is possible to consider all sides of an issue within one question, as we saw earlier with the springboard method, the same concept applies when jurors are given only one option, e.g., agreement or disagreement with a particular position. Get the full picture (and full disclosure) by flipping the question in a follow-up question. When a critical agreement/disagreement question is asked, follow it with another question addressing the opposite position on the issue, e.g., “How many of you agree with the view that . . .?” followed by “How many of you disagree with this view?” In this manner, you have an opportunity to uncover (a) those who support the follow-up position; (b) those who are undecided; and (c) of critical interest, those who should have responded to the first question (and are likely to not respond to the second question and, hence, be subject to follow-up) or those who respond in a hesitant manner (again, being subject to follow-up).

Tip Nine: Ask Key Questions with the “Bad” Answer in Mind

We ask a lot of jurors when we ask them to be candid and forthcoming in a group setting. We are armed with our open-ended questions and follow-up questions. And yet, sometimes we don’t hear the “red flag” answers to our questions that we know exist in the jury pool. If there are critical answers that would serve as red flags (critical negative views uncovered in prior research or past experience), answers that would raise the potential for a challenge for cause or peremptory challenge, consider asking them directly. For example, negative views such as “money should not be given for pain and suffering because it doesn’t stop the pain”; “if it’s not written in the patient’s chart, it never happened”; “a (criminal) defendant who does not testify must be guilty”; or “it would be hard to convict a defendant without DNA evidence because there would always be a little doubt in my mind” could be addressed to the group by attaching some version of the phrase “How many of you believe . . .” This inquiry could be addressed either after earlier treatments of the topic or, in very restrictive settings, as part of the original treatment of the topic.

Tip Ten: Avoid the Socially Desirable Response Bias

Finally, the way you phrase questions affects the degree of candor elicited from jurors. Particularly in a group setting, jurors are sensitive to how others will view them. Will I be seen as a good person/juror? Will others like me? Knowing that jurors are already involved in managing others’ perception of them and are prone to respond in a manner that they hope makes them “look good,” we do not want to trigger this socially desirable response bias by giving them any clues as to what the “acceptable” or “right” answer is. Avoiding such phrases as “bias or prejudice,” “fair and impartial” or other phrases that set off the socially desirable response bias, such as “Do you understand . . .” is a must if you want to encourage juror honesty and candor. Focus on what the juror may or may not do as a way to address these concerns. For example, giving a witness’s testimony less weight or requiring more evidence to prove something are actions that may reflect prejudice, bias, or partiality. Jurors are more likely admit to such activities then publically declare that they are biased or prejudiced.

Conclusion

While all of the above approaches have been used in various jurisdictions across the country, jurisdictions and judges differ and some of the above approaches may not be allowed in your jurisdiction. However, given some thought on the principles and goals behind them, you can come up with creative ways to maximize juror disclosure and participation in the group voir dire settings you encounter.

Endnotes

- i See Cathy Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of Its Content and Effect*, 18 *Law & Hum. Behav.* 309 (1994).
- ii Some of these recommendations apply just as well to individual questioning. However, their value in group settings is accentuated because of the increased social pressures inherent in this setting. The recommendations contained in this article are not meant to be exhaustive. A more detailed discussion of these and other matters related to voir dire and jury selection can be found in Jeffrey Frederick's *Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury*, Third Edition (2011).
- iii See discussions by Jeffrey Frederick, *Voir Dire Techniques to Maximize Damage Recovery: A Primer*, 21 (1) *J. Va. Trial Law. Ass'n* 32 (2009) and Karen Lisko, *Proven Jury Arguments and Evidence* (2010).

Playing the Other Side's Hand: Strategic Voir Dire Technique

Roy Futterman

Roy Futterman, Ph.D. is a Clinical Psychologist and Director at [DOAR LitigationConsulting, LLC](http://DOAR.LitigationConsulting,LLC). He can be reached at rfutterman@doar.com.

Voir dire is structured like an important strategy game with moves and counter-moves based on the opposing action. Voir dire plans, however, often fail to take into account the other side's strategy, and their actions based on their thinking. Higher-level strategic thinking used by people like game theorists, professional poker players and military strategists involves thinking from the opponent's point of view and adjusting one's own strategy accordingly.



When seeing the voir dire process in this way, you will soon find that there are many untapped sources of information about the other side's trial strategy, voir dire strategy, and potential juror information that are not usually recognized by attorneys and jury consultants. In addition, you will find that there are more ways to make an impact in the jury selection process based on strategic thinking than are usually noted.

*Peeking at the Other Side's Hand:**The Jury Questionnaire as a Guide to the Opposing Side's Strategy*

Many jury consultants believe that the supplemental juror questionnaire is the key to being flooded with useful information with which to make informed decisions. What if, however, this finely crafted document actually exposes more information than it uncovers?

I recently worked on the plaintiff side of a medical malpractice case. The other side submitted a proposed twenty-page juror questionnaire. Amid scores of fairly boilerplate questions (including the soul-crushing “What television shows do you enjoy watching?” and “Have you ever served as a juror?”) were a variety of more case-specific questions that revealed the opposing side’s views of the case.

Although it is likely that the man who wrote these items believed that he was cleverly hiding his side’s intent, anyone who has ever written a jury questionnaire could have fairly easily discerned the seemingly overt reasons for asking them, as well as the covert reasons. In showing who they were trying to expose and thus strike, the opposing side was also inadvertently showing the areas that they believed were the weakest points of their case.

By reading what they wanted to expose, I was reading what facts and arguments were troublesome to them. I could thus offer a wealth of information to my clients, and make recommendations for alterations in voir dire strategy and trial strategy.

*When the Other Side Plays Your Hand:**Counter-Strategy to an Inappropriate Batson Challenge*

It could be argued that there is usually no reason to try to understand the other side’s voir dire strategy in that there is often no real strategy beyond opposing counsel getting a feel for potential jurors. This is often revealed with the surprise that the other side has failed to strike people who had seemed to be obvious strikes.

On the other hand, we often do not know whether the other side is thinking deeply about voir dire strategy until late in the process. I once had the realization late in the process that I was up against an attorney who was very successfully playing my hand.

I was working for the defense side of an employment case involving charges of racial discrimination of an Hispanic plaintiff. Based on focus group research, we had a clearly defined voir dire strategy. After we had made a number of strikes, we were surprised when opposing counsel made a Batson challenge stating that we had struck people from a variety of non-White racial groups. We were surprised because we had not been making strikes based on race, and because there was no particular racial group that we were being accused of striking. It was at that point that I realized that the opposing counsel’s strategy all along had been that he would make a Batson challenge almost regardless of what we had done.

The judge was clearly irritated by this challenge, because she too saw that there was no particular racial group that was ostensibly being targeted. When she questioned our attorney about it, though, he explained his reasoning for his strikes in a somewhat halting manner which apparently made the judge believe that he was making up reasoning on the spot to cover for racially motivated strikes. She placed some of the previously struck jurors back in the panel.

Meanwhile, I reviewed the other side’s strikes and whispered to our lead attorney that the opposing counsel had struck only White members of the pool. In response to what we considered to

be an inappropriate Batson challenge, we raised our own. The judge ultimately reseated a number of their struck jurors as well.

After the trial and verdict, we learned that one of their reseated jurors had turned the entire jury to a verdict favorable to our side. When I ran into this lawyer a few months later, he looked shaken when he realized who I was, and attributed his loss to our Batson challenge.

Outplaying with the Hand Dealt: Using Live Courtroom Social Behavior Strategically

What do you do when you believe you are in an unfavorable position going into voir dire? When playing a weaker hand, first, try to use more information in the courtroom than the other side uses. There are a lot of social behaviors by potential jurors in a courtroom that are not usually noticed or used by people selecting juries.

For example, many attorneys and consultants try to find out whether jurors will be leaders or followers in deliberations by asking them directly about their views of themselves on a leader-follower continuum. The actual evidence of these types of behaviors, however, is often highly visible and thus immediately accessible during the jury selection process. Many attorneys and jury consultants are more comfortable getting hard data from direct answers to direct questions, but those who are open to making mountains out of molehills can reasonably imagine how small behaviors will play out in deliberation rooms. As a sign of a potential juror's leadership qualities, take note of how hard each person presses the judge to get excused due to hardship, including whether they make repeated attempts, and how differentially or forcefully they treat the judge. If someone shows less deference to the judge, and is diligent in trying to get sent home, this person is likely to be a leader in the deliberation room. If he or she seems likely to favor your case (even if cranky about not getting sent home), the person can potentially bring other jurors to your side.

Observe how friendly potential jurors are to one another during the whole voir dire process, particularly if one connects two or three others into a conversation. Typically, most potential jurors have little social interaction with others in the room, but social connectors will be highly visible. These are the people with the social skills to build consensus in a deliberation room. If a connector juror seems like someone who will see things in your favor, he or she is highly valuable.

Outplaying From an Unfavorable Jury Pool: Encouraging Targeted Cause Challenges

The second thing you can do when in a less favorable position with an unfavorable jury pool is to make the most use of the limited number of peremptory challenges by encouraging potentially unfavorable jurors to provide quotable reasons for cause challenges. Many attorneys and jury consultants worry that potential jurors will say negative things that will "infect" the others. The concern that a stranger will have a strong effect on others' decisions seems a bit overblown, however, considering the alternate upside of being able to get this unfavorable juror to say, in so many words, that this negative opinion makes them unable to be fair and impartial. You can clear a lot of ground with targeted cause challenges before even getting to the peremptories.

*Outplaying from a Weaker Position:
Educating and Persuading with Strategic Questioning*

Lastly, outside of the most Spartan of federal voir dire, it is often possible to use voir dire to provide narrative context for the case under the guise of asking questions. This can be done to remedy issues that were revealed in a jury questionnaire, to spin issues that were revealed as weak points in focus group or mock trial research, or just to lay a foundation on which the opening will build. This is done by packing questions with favorable thematic material, usually by preceding the questions with a sentence or two of consensus-building context.

For example, in a case in which counsel is concerned about witness memory, it makes sense to ask a voir dire question that actually educates and spins the potential jurors on this topic by saying something like “Many people believe that when something bad happens to someone, for instance, the person gets attacked or shouted at, the details of that event are more memorable. In fact, though, many scientists have proven that it’s actually harder to remember the details of exactly who did what when the event was very emotional. A lot of people outside this courtroom would find that hard to believe. Who in here would find it surprising that someone might not remember some details about something that happened many years ago even though it was very upsetting?”

The Perception of the Strategist

My experience has been that juries are intrigued by the swirl of strategy and counter-strategy that leads to their selection. One jury that was selected based in large part on individuals’ social behaviors ended up friendly with each other and willing to deliberate for a long time without rancor. When interviewed after their favorable verdict, they asked who had put together “the perfect group of people.”

Opposing attorneys, however, seem to have a different view of being outflanked. I recently entered the courtroom on the day after voir dire only to be greeted by opposing counsel saying “The Forces of Evil are here.”

Is the Time Right for Online Jury Research?

Sharon Shofner-Meyer

Sharon Shofner-Meyer is an attorney and president of [LookingGlass](#), an online jury research tool that allows law firms to cost effectively get the many features of jury research in a secure and effective online format. LookingGlass is owned by [R&D Strategic Solutions](#), a nationally recognized team of jury consultants working on high profile trials regarding case analysis, jury selection, venue analysis, attorney training, witness preparation and more.

The short answer is an emphatic yes. But for any litigator who’s looking for a competitive edge while keeping a close eye on costs, new online research tools merit a longer discussion. As one attorney said to me recently, clients want it both ways.



“They want us to win – and win big for them – but watch legal costs like budget hawks,” she said. “There is definitely a new normal out there.”

The new economic reality has hit the legal profession particularly hard, and at its core presents a challenge of conflicting expectations: law firms must deliver successful results AND savings to their clients.

The good news in jury research is that, for the first time, it’s possible to do both.

*Technological breakthroughs give lawyers
a powerful alternative to costly traditional jury research.*

That’s because new online options leverage new technology to drive down costs, while assuring both accuracy and security. In the case of jury research, those savings can run to the tens of thousands of dollars.

“Doing jury research the traditional way – a mock trial in front of a focus group of 25-36 jurors – can easily run as high as \$90,000,” says Mark Sobus, PhD at R&D Strategic Solutions and an expert on jury research. “Online research – customized to exactly what a firm is looking for – can cut costs by well over 50% and in many cases can be completed for under \$15,000.”

For many complex and high stakes litigation cases, traditional mock trial research continues to be a valuable weapon. But for the vast majority of cases tried or settled in a typical year, online tools provide lawyers a powerful way to do jury research without breaking the bank.

In so many aspects of our personal and professional lives, web-based applications are producing incredible results at a mere fraction of previous costs. Jury research is no exception to that trend. And that’s very good news for trial attorneys.

How online jury research works

Online tools give attorneys control over every aspect of jury research. Attorneys pick the jurisdiction from which the jurors are drawn, usually the location where the matter will be heard. They select the number and types of jurors they want to poll. A minimum of 36 people are recruited – but in many cases, it is both economical and practical to recruit triple that amount.

Attorneys can specify the exact make-up of the focus group, selecting the age, gender, income, education, religion, and other demographic characteristics of each juror. Based on all those inputs, the mock jurors simply log onto a secure online environment instead of traveling to a law firm or focus group location.

In addition, attorneys control every aspect of the content. It can take the form of a sophisticated questionnaire, video presentations of arguments and experts, or a combination of both. Jurors are given a set timeframe in which to view the video presentations, complete the questions and provide their reactions to the presentations. They provide in-depth feedback along with detailed information about themselves. Importantly, the technology also allows attorneys and their clients to view jurors’ moment-to-moment reactions to each argument presented.

Answers and insights beyond jury research

Because it is so flexible and affordable, attorneys are using online jury research for a wider range of issues, including the ability to poll on a much larger scale (100-200) and smaller dollar-value cases. And they're leveraging the technology for other phases of case preparation, including to:

- Test a variety of legal arguments, not just one. You can record several distinct story lines to see what resonates best. Test out all your approaches to see if any of them work – before you invest serious time and resources.
- Explore venues – what jurisdictions are best for your side?
- Test your experts – they may have sterling credentials, but how do they play in front of a jury? What kind of jurors find them likeable, credible? Or are they great on paper, deadly in person?
- Determine how your clients fare in front of jury – they may have an actionable claim, but certain arguments do not ring true. Can your case be saved by seating the right jurors?
- Assess damage awards for your fact profile – you can determine with confidence the right amount of damages to expect for your facts in your jurisdiction. For plaintiffs, it means getting the best settlement for your client. For defense, it means getting to a realistic number more efficiently, with far less back and forth.

Online jury research tools put those answers and more within reach of attorneys for whom in-person jury research is too expensive or time-consuming.

From zero to actionable results in four days

Consider for a moment what it takes to put together a good in-person mock jury. It's a matter of weeks of time and effort, at best. Contrast that with an online approach. Attorneys can identify several arguments to test, make short video presentations outlining the key arguments for both sides, and their role is complete. Then an online partner recruits mock jurors to test the arguments (we recommend using 100 mock jurors), and in under a week you have the results in hand. Importantly, the results in a recent online study were dramatic – one argument was clearly the winner, two were non-starters, and the attorneys were somewhat surprised. Literally, in less than 10 days the team went from having some questions about their case to having reliable and detailed feedback from a large representative sample of jurors.

A wealth of data from every online focus group

Whether testing arguments or profiling jurors, attorneys get data from online research that can be mined for gold nuggets in ways they weren't even considering.

Because of all these benefits, the time and conditions have never been better for online jury research. The technology is there to deliver the kind of accurate, actionable results attorneys need for their trial preparation and presentation.

Online jury research will be the way lawyers do research in the future. And companies are doing it at such a sophisticated level that it lets lawyers literally customize the exact research they want – at a cost that makes it a viable option.

Let's Talk: Addressing the Challenges of Internet-Era Jurorsⁱ

Julie Blackman and Ellen Brickman

Julie Blackman, Ph.D. is a social psychologist and the Principal of Julie Blackman & Associates, a national trial strategy consulting firm.

Ellen Brickman, Ph.D. is a social psychologist and the Director of Research at Julie Blackman & Associates.

Consider this pro-race integration excerpt from the lyrics to
"You Can't Stop The Beat!" from the musical Hairspray:

*Cause you can't stop
The motion of the ocean
Or the sun in the sky.
You can wonder if you wanna
But I never ask why.
And if you try to hold me down
I'm gonna spit in your eye and say
That you can't stop the beat!*

*You can't stop today
As it comes speeding down the track.
Child, yesterday is hist'ry.
And it's never coming back.ⁱⁱ*

The courtroom sits squarely atop the Internet superhighway. Jurors carry Droids, iPhones, Blackberries, Treos, or other PDAs with them and turn to them frequently.ⁱⁱⁱ While some courthouses still confiscate personal electronic devices, many do not. In 2008, we wrote a paper triggered by a judge's stunned response to learning that prospective jurors had Googled a case over lunch, in the midst of voir dire.^{iv} Like all those grounded in the history of American jurisprudence, we took the position that precedent ought to prevail, and offered advice about how best to keep jurors off the Internet.

ⁱ We thank Elkan Abramowitz of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, William Brodsky of Fox, Horan & Camerini and Marc Wolinsky of Wachtell Lipton Rosen & Katz for their comments on earlier drafts of this paper.

ⁱⁱ Lyrics by Marc Shaiman and Scott Wittman.

ⁱⁱⁱ "22 million U.S. cell phone users access the mobile Internet on a daily basis," in Gareth Lacy's *Should Jurors Use the Internet?* in the National Law Review, <http://www.natlawreview.com/article/should-jurors-use-internet>; citing Enid Burns, *Internet Usage Becomes the Norm for Many in U.S.*, *Search Engine Watch*, Mar 17, 2009, <http://searchenginewatch.com/3633213>.

^{iv} See Brickman, E., Blackman, J., Futterman, R., and Dinnerstein, J., *How Juror Internet Use Has Changed the American Jury Trial*, *Journal of Court Innovation*, Vol. 1, No. 2, Fall 2008, 287-302.

Like the song lyrics quoted above, however, we now wonder whether it is time to reconsider the simple, “just say no” position of the courts when it comes to jurors who feel the urge to go online. We now take the position that it is time to open a line of discourse based on the reality of jurors’ attachment to the Internet and the distinct sorts of information available on the Internet.

Now Jurors Are Accustomed To the Internet

Jurors are accustomed to integrating the Internet into their pursuits of knowledge, understanding and accuracy. To exclude the Internet from the sources of information upon which jurors may rely may be simply impossible. The question then would become not how best to forbid it, but how best to allow it – to give it its proper, acknowledged, and carefully constructed place. At the very least, we believe that a conversation about the place of the Internet in the courtroom is in order.

While our 2008 paper is less than three years old at this writing, a lot has changed since then. Our early paper about how jurors’ use of the Internet was changing the American jury trial illuminated the fact that some jurors were using the Internet to gain extrinsic information about a case, the dangers inherent in their doing so, and possible strategies to get them to stop.

A New and Costly Term in the Legal Lexicon: The “Google Mistrial”

In the intervening few years, this topic has garnered attention from attorneys, trial consultants and the mass media. Virtually every day the American Society of Trial Consultants’ Listserv includes postings about the intrusion of the Internet into the courtroom. The term “Google mistrial” has been coined to describe the mistrials declared because of jurors’ use of the Internet.^v Some examples of trial courts declaring a mistrial are a 2009 Federal drug trial in Florida in which nine of the 12 jurors admitted to researching the case on the Internet^{vi} and a 2011 murder case in Pennsylvania in which a juror researched the injuries suffered by the victim and relied on that information rather than on the medical testimony presented in court.^{vii} As judicial awareness of this issue grows, we are also seeing cases in which the trial judge denied a motion for a mistrial due to jurors’ Internet contact, but the appellate court reversed. For example, recent reversals have included a manslaughter conviction in New Jersey in which a juror researched the defendants, the victim, and the possible sentence before voting on a verdict, and a Maryland case in which a juror researched the psychological diagnosis given to a witness, to determine the witness’ credibility.^{viii}

The growing number of mistrials has staggering implications. With trials costing many thousands of dollars a day, a mistrial declared after several weeks could represent millions of dollars of wasted funds. Non-monetary costs include the time and emotional toll for all parties. Recognizing this, courts across the country have taken steps to address it, largely through ever-increasing efforts to stop jurors from turning to the Internet to aid in their understanding and decision-making. Other remedies suggested (by us and others) have included barring handheld devices from the courtroom, questioning jurors about their Internet use during voir dire, making jurors responsible for each others’ adherence to rules pertaining to Internet use^{ix}, threatening to hold jurors in contempt over their Internet use^x, and

^v John Schwartz, *As Jurors Turn To Web, Mistrials Are Popping Up*, *New York Times*, 3/17/09.

^{vi} See Deirdra Funcheon, *Jurors And Prosecutors Sink A Federal Case Against Internet Pharmacies*, *Broward-Palm Beach New Times*, April 23, 2009. <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies/2/>.

^{vii} Michael R. Sisak, *Judge Dismisses Juror, Declares Mistrial*. Citizensvoice.com, January 14, 2011. <http://citizensvoice.com/news/update-judge-dismisses-juror-declares-mistrial-1.1090158#axzz1DgawoYP1>.

^{viii} Cases cited at: <http://www.citmedialaw.org/blog/2010/courts-colorado-maryland-new-jersey-florida-declare-mistrials-after-juror-internet-research>.

^{ix} See, for example, Amanda McGee, *Juror Misconduct In The Twenty-First Century*. *Loyola Of Los Angeles Entertainment Law Review*, May 2010, 30 (10), 301-326. <http://elr.lls.edu/documents/08.McGee.pdf>; see also John G. Browning, *When All That Twitters Is Not Told: Dangers Of The Online Juror*. *Texas Bar Journal*, March 2010. http://www.texasbar.com/flashdrive/materials/open_government_forum/WhenAllThatTwittersisnotTold_DangersoftheOnlineJuror.pdf

seeking to get their online IDs and track their Internet use during the trial. As to this last idea, the fact that jurors' Internet use can be traced – unlike reading the newspaper or talking to a friend about the case – gives courts the opportunity for the first time to monitor the extent to which an admonition not to go on the Internet is obeyed. On the other hand, whole new issues are raised about jurors' privacy rights.^{xi} Surely, this tension is grist for the mill in considering how to address the challenges posed by Internet-era jurors.

Things Have Changed and New Instructions For Jurors May Be Needed

As reports of jurors using the Internet come ever more frequently, even amid the widespread adoption of jury instructions that explicitly forbid such behavior, our thinking on this issue has changed. In particular, we wonder if our conclusions and recommendations – while perhaps appropriate at the time when the recognition of this problem was in its infancy – may have been somewhat naïve given the pull of the Internet. Can even the best and most explicit of instructions, coupled with the harshest of consequences and penalties for violation, stop jurors from taking advantage of the vast resources that the Internet has to offer as they try to make sense of what they are hearing in court each day? And equally important, is this an effort worth making? Or, is it time to acknowledge that the world has irrevocably changed, and that it is no longer feasible to expect jurors to quell their impulses to seek information outside the courtroom?

While we had a draft of this paper in the works, Gareth Lacy, a third year law student at the University of Washington won the Fall 2010 student legal writing contest with his paper, "Should Jurors Use the Internet?"^{xii} Like the lyrics that open this paper, Lacy also spoke to the inevitability of change with reference to the image of an irresistible tidal wave:

"A major question is whether the protective cocoon we want to preserve of the courtroom trial, where jurors calmly and dispassionately receive only relevant and reliable information based on evidentiary rules. . . can viably be maintained in the face of the informational tsunami pressing against it."^{xiii}

Lacy went on to challenge the view that extrinsic information is inherently problematic: "This assumption behind the restrictive policies – that external information is always harmful – should be questioned" (p. 3). Lacy recommended that, "Courts ought to focus on the content and quality of the information jurors receive, rather than on outright bans" (p. 3). That said, as defense attorney Doron Weinberg commented, it is undeniably true that, "The problem with the Internet is that anybody can post anything. Jurors can get information that is partisan and hateful."^{xiv}

In this push-pull world of jurors' attraction to the Internet in all its complexity, we believe it is time to open the door wide to the discussion.

^x See Ginny LaRoe, *Barry Bonds Trial May Test Tweeting Jurors*, *The Recorder: Essential California Legal Content*, February 15, 2011: "Last month, Bonds' defense attorney, Cristina Arguedas, told [U.S. District Judge] Illston that she plans to propose that . . . before voir dire, potential jurors sign a questionnaire agreeing they won't search the internet on Bonds. What she'd like. . . is for jurors to agree, 'I don't go on Facebook, I don't Twitter, I don't tweet, I don't read anything between the time that I sign this questionnaire and the end of this process. And if I did, the court has indicated that I would be in contempt of court and subject to a fine or a jail sentence.'" (p. 2).

^{xi} LaRoe, *ibid.*, With regard to having judges collect online IDs to detect and deter internet use, concerns emerge about the "balance that must be struck between restrictions on internet use and privacy and First Amendment rights." (p. 2).

^{xii} Gareth Lacy, *Should Jurors Use the Internet?* *The National Law Review*, Fall 2010 Student Writing Competition; <http://www.natlaw-review.com/article/should-jurors-use-internet>, 1-7.

^{xiii} Michael Hoenig, *Juror Misconduct On The Internet*, *N.Y.L.J.*, Oct. 8, 2009.

^{xiv} Quoted in LaRoe, *op. cit.*

Reckoning With Reality

Perhaps, it is time to link practice with reality, and while it is hard to set precedent on its ear, it may be that the time has passed when people can be kept from the Internet. It was one thing when computers sat on our desks at home, when we picked up newspapers at newsstands. Now, a world's worth of information is in our pockets and targeted searches may be completed in seconds.

Given the long history of the court's efforts to require jurors to refrain from discussing or investigating anything of relevance to the case, it feels somewhat treasonous even to imagine this new world. Certainly, it feels safer to "just say no." Providing a place for outside information or sources of influence in the courtroom feels like a violation of long-established rules designed to promote the pursuit of truth and justice. Many years of trial practice (almost all of which predate the advent of the Internet) have led to the popular belief that fairness can only be found when judges require that the courtroom environment be pristine, untouched by outside sources of information or others' opinions.

Treason notwithstanding, we feel moved to ask those concerned with trial practice to consider the possibility that we are in the midst of a paradigm shift. As Thomas Kuhn suggested in his *Structure of Scientific Revolutions*, paradigm shifts are preceded by the growing awareness that the existing paradigm is not working.^{xv} We already know that sitting jurors are blogging and tweeting about cases.^{xvi} We know that they are turning to the Internet to research aspects of what they are hearing, sometimes in direct defiance of judicial orders. We already know that the segregation of the trial from other information sources is deeply imperiled.

Advocacy For A New Task Force To Study Jury Instructions

Here, then, we begin by advocating for a new and extended conversation about the role of the Internet in courtroom life, and particularly, for the development of a Task Force comprised of judges, attorneys and social scientists to study this issue and make recommendations about the most effective ways to address it. This Task Force could consider alternatives to the current practice of trying to deter jurors from turning to the Internet by relying almost entirely on judicial instructions and threatened sanctions.

An intensive multi-disciplinary exploration of the issue and the development of a set of recommendations would have multiple goals: To introduce uniformity into the ways that courts handle this issue, to prevent mistrials caused by juror use of the Internet, and ultimately, to promote justice by ensuring that jurors make decisions based on factors recognized and permitted by the laws of our country.

Below, we review some of the substantive issues this Task Force might choose to consider in its pursuit of justice in our new, high-tech world. We consider two broad subsets of issues: The first relates to Internet-era jurors themselves, and the second relates to the nature of the information these jurors may seek out.

The Problem of the Internet-Era Juror's Need To Know More

Jurors are not the same as they used to be. The current jury system is premised on a model of jurors as largely passive until the moment of deliberations. They listen in silence to what is presented to them. They cannot ask questions in real time (and only rarely can they raise questions that the judge might ask at the end of a specified portion of the trial) and are often discouraged by the judge

^{xv} Kuhn, T.S. (1962) *The Structure of Scientific Revolutions*, University of Chicago Press.

^{xvi} Keene, D.L. and Handrich, R. R., *Online and Wired for Justice: Why Jurors Turn to the Internet*, *The Jury Expert*, Vol. 21, Issue 6, November 2009.

from note-taking. They rely on the information they receive in the courtroom to inform their thinking, and they are wholly dependent on attorneys and judges to determine what information they can and cannot hear.

Now, we might think of these jurors as “Pre-Internet” jurors, locked in a system designed for days gone by. Today’s jurors – and particularly those who have grown up in the era of the Internet – are a different breed. They (we) have become accustomed to being active information-seekers, to having their every curiosity quickly satisfied. An essay in a campus newspaper by Akiva Bamberger, a Columbia student, captured this drive perfectly:

The familiar itch comes in surreptitiously, causing my hands to shake. All self-control goes out the window as I open Chrome and begin surfing the Web, moving from Google News to Twitter to Blog and back to Google News. I click links to stories faster than I can comprehend their content. Oh, the information is so good. But, after I read all the stories, I crash. Scared and sad, I force myself to go back to work. I am calm. The room stops spinning. Then, only two minutes later, the itch returns.

It’s a strange thing, this addiction to information. As a kid, I mailed a letter to a friend while in summer camp, and happily forgot about him until a postcard came a week or two later. Today, I get frustrated waiting more than 15 minutes for a text message response. With the proliferation of mobile devices that deliver all forms of peer-to-peer communication and news instantaneously, this phenomenon is becoming more and more widespread. We are becoming information junkies.^{xvii}

While Bamberger’s tongue-in-cheek characterization of his “addiction” might be extreme, the frustration he describes at having to wait for information is very real, and very pertinent to jurors. Information at trial is presented methodically and often slowly and even more often, feels incomplete to jurors. Generations of past jurors simply had to live with that frustration, but today’s jurors do not. They can remedy the situation in mere seconds by opening a search engine and typing in a question, a few words, a name or even just the first three letters of a search term. McGee, in her discussion of the challenges resulting from technology-addicted jurors being told not to seek extrinsic information, noted the dramatic contrast between the ease with which jurors are accustomed to getting information through technology and the long and laborious process of asking questions of the court. We share McGee’s conclusion about jurors relying on the court to answer questions: It would be *rare for jurors to engage in such a process – especially when they have the Internet, and the answers, at their fingertips.*^{xviii}

The combination of the ease of targeted searching, the accessibility of information via home computers, smartphones, PDAs or other mobile devices, and the psychological expectation that every question can be answered instantly, every “itch to know” can be scratched, have combined to create jurors who are not content to rely on what they hear in the courtroom to make decisions about a case. Judicial admonitions notwithstanding, they are taking matters into their own hands and doing research. They are questioning witnesses’ assertions, researching unfamiliar terms, and searching for background information to provide a context for what they have heard in the courtroom. In the Florida case we mentioned earlier, one juror’s Google searches were reported to the judge, whereupon further questioning of the jury revealed that eight others – that is, nine of the 12 jury members – had conducted Internet searches related to the case.^{xix} Clearly, the tide has turned and absent draconian measures that track jurors’ Internet use and punish infractions severely, there may be no going back.

^{xvii} Akiva Bamberger, *Information Junkie*, *Columbia Spectator*, 11/17/09.

^{xviii} McGee, *op cit.*, p. 310.

^{xix} Deirdra Funcheon, *Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies*, *Broward-Palm Beach New Times*, Apr. 23, 2009, <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies>.

The Current Solution: State and Federal Courts Forbid Internet Contact By Jurors

As more and more courts have recognized the challenges posed by jurors who engage in Internet research, they have developed more detailed instructions to forbid such research explicitly. As of September 2010, the U.S. Judicial Conference had sent suggested jury instructions to the entire federal judiciary (absent the U.S. Supreme Court) which included admonitions against conducting any independent research using the Internet (or traditional media). Similarly, twenty states reference juror Internet use in at least some of their standard jury instructions.^{xx} Thus, jurors who nonetheless conduct Internet research often do so in direct violation of judicial instructions. Jurors have been fined as a result and in some cases, judges have even contemplated charging them with contempt for their trial-related Internet activity.^{xxi}

Great Britain's court system takes this a step further: The website for Her Majesty's Court Service admonishes jurors not to speak to anyone about what they hear in court and not to post details of their jury service on any social networking site, and then adds:

You may also be in contempt of court if you use the internet to research details about any case you hear along with any other cases listed for trial at the court.^{xxii}

Clearly, the U.S. is not alone in struggling with the tension between the information superhighway and the highly controlled courtroom environment.

Some Jurors Go Online In the Belief That They Are Promoting Justice

There are those who, when contemplating jury service, believe that the pursuit of extra-courtroom information does not undermine justice, it promotes it. In response to a March 17, 2009 New York Times article about a "Google mistrial," many posted comments on the Times' website. One respondent (Bill, Camarillo, CA (Los Angeles), March 17th, 2009, 2:43 pm) wrote the following:

If evidence and testimony provided to jurors in the courtroom is incomplete, I feel that any rational and responsible juror would seek additional information on their own. The object of any court proceeding is to ascertain the facts and arrive at a fair judgment using ALL facts obtainable by any means available. If I am ever called and sit on a jury, you had better believe that everything said will be recorded and photographed so I can take it home and do whatever research is required to unravel the case using due diligence.^{xxiii}

Perhaps we need to consider the possibility that the straightest path to justice can no longer be found in the separation of the courtroom from the rest of the world, or in the requirement that jurors cut themselves off from outside information or from their own areas of expertise.^{xxiv} Perhaps once, it was possible. Once, the amount of work required to marshal case-relevant information was formidable and created its own barrier to access. The current reality may be that it is simply not realistic or possible to try to keep jurors off the Internet. All practical barriers to access are gone. And, once there, Internet searching will likely bring relevant information to jurors' instant attention.

^{xx} Eric P. Robinson, *Juror Use Of Social Media: A State-By-State Guide*. Blog Law Online, September 13, 2010. <http://bloglawonline.blogspot.com/2010/02/juror-use-of-social-media-state-by.html>.

^{xxi} *U.S. Juror Could Face Charges For Online Research*. Reuters, January 19, 2011. <http://in.reuters.com/article/2011/01/19/internet-juror-idINN1923805320110119>

^{xxii} http://www.hmcourts-service.gov.uk/infoabout/jury_service/contempt.htm, last visited February 11, 2010.

^{xxiii} New York Times Readers' Comments: *As Jurors Turn to Web, Mistrials Are Popping Up*, March 17, 2009; <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html> (See Keene and Handrich (2009) for more on this comment).

^{xxiii} See the 2000 decision *People v. Maragh*, 94 N.Y. 2d 569 in which a conviction was overturned because nurses on the jury shared their expertise during deliberations.

*The Greatest Challenge:**Reckoning With Extrinsic Information That Is Not Subject To Cross-Examination*

The greatest challenge to information acquired by jurors over the Internet is that it circumvents the process of cross-examination that is at the heart of our country's adversarial trial system. Internet-derived information may or may not be true and without cross-examination its impact cannot be mitigated. In a criminal case, for example, in which jurors acquire information prejudicial to a defendant, the defendant loses his Constitutional right to confront his accusers. Any consideration of loosening the rules about extrinsic information must include an analysis of the implications of allowing unchallenged – and unchallengeable – information to enter into jurors' deliberations. Surely, this is by far the most serious problem the Task Force must address. It would be easy to say that this is an insurmountable problem, and maybe it is. And yet, "just say no" is not working.

Further, we are currently especially aware of the power of the Internet to bring about justice. While Tahrir Square in Cairo, Egypt is no courtroom, it became a crucible for democratic principles thanks to the power of the Internet. Courtroom life is, in some respects, a microcosm for life in our culture. As such, it shares imperfections with the broader society that may well be worthy of Internet attention and redress. Surely people are unjustly accused and convicted in part because evidence is not handled fairly. In courtrooms, evidence may be unfairly hidden, suppressed or precluded. Perhaps the Internet, properly managed, could provide a justice-enhancing check on the otherwise greater power of those who might exclude relevant evidence for the wrong reasons.

Not All Information Is the Same

Courts have long recognized that not all extrinsic information is prejudicial, and this is true for information gleaned on the Internet just as for information obtained from other sources. For example, an Internet search on a defendant that uncovers prior convictions that had been ruled inadmissible at trial would likely pose greater problems than would Internet research on the meaning of a medical term. Thus, any discussion of whether and how to open the door to Internet research must consider where the line is between prejudicial information and harmless error.

The nature of the information that jurors might discover online relates broadly to five categories:

1. Media accounts of the case, which can vary widely in objectivity. This category might include anything from factual statements about the original incident or dispute to editorials advocating for a particular verdict.
2. Virtual physical or other factual evidence. For example, jurors might visit maps of a crime scene accessed on Google Earth, check the length of a trip on Mapquest, or examine fluctuations in the stock market during a pertinent period.
3. Expert opinions. For example, consider the recent cover article of the New York Times Magazine section on shaken-baby syndrome and the impact the corrective view might have had on trials at which experts were overly certain about the meaning of the three identified diagnostic criteria: subdural and retinal hemorrhaging and brain swelling. Recent research has revealed that infections and bleeding disorders can also cause these symptoms.^{xxv}

^{xxv} Emily Bazelon, *Shaken-Baby Syndrome Faces New Challenges In Court*, *New York Times Magazine*, February 2, 2011.

4. Personal and professional information on the parties involved, including the judge, attorneys, parties to civil litigation, or defendants in criminal cases. Such research might uncover prior bad acts, identify a plaintiff's or defendant's financial status that could affect damages awards, or – in the case of research on judges and attorneys - increase the likelihood that factors unrelated to the case at hand could influence jurors' judgments.

5. The law. In courtrooms, jurors are the judges of the facts, not the law and they are explicitly prohibited from knowing certain things, such as the sentences associated with conviction for the particular crime charged. Were jurors to know the sentencing parameters, this might affect their verdicts. Then again, one might argue that perhaps it should.^{xxvi}

Each of these categories of information should be considered in conjunction with the broader challenges considered here to see if the issues raised by Internet involvement are the same or different. For example, to the extent that individual experts' testimony might be countermanded by information available on the Internet, justice might be enhanced by the intrusion of the Internet-derived information into the jurors' deliberations. Even so, the role of the judge as sole arbiter of what may and may not come in at trial is wholly undermined. But, if judges get it wrong – and sometimes they do – perhaps it is simply so much more important to get it right, that it behooves us to figure out how to solve the problem of the Internet in nuanced ways that go far beyond our current, “just say no” posture. True justice may lie in reducing the power of the judge and in changing the laws that govern courtroom life.

*Questions for the Task Force to Address:
Setting Policies and Studying Their Impacts*

Identifying the relevant informational terrain is easy. Determining what to do about it, should the Task Force decide that the “just say no” policy is inadequate to the task, is formidable. Here, we offer a list of questions that could be the starting charge for the multidisciplinary Task Force we have envisioned. Some can be partially answered by looking to existing theories and research; others will require systematic study in the laboratory (with mock jurors) and/or in the real world of the courtroom. Here, then, are some starting questions:

1. Can be jurors be permitted to obtain extrinsic information with the condition that they will always give greater weight to what they learn in the courtroom? Is such a thing even psychologically possible?
2. Can attorneys incorporate Internet searches into courtroom procedures so that jurors' “itch to know” will be satisfied? This way, the justice-check that might come from Internet-derived information could be preserved, jurors could feel that the broader information available online had been explored, and individual searches might be more effectively prevented.
3. How would lifting a ban on Internet research change the pre-trial process for motions *in limine* and judicial rulings on such issues? Does it make sense to fight over excluding information that can then be found online by jurors? Would attorneys opt not to file motions *in limine*, so as to be better positioned to address all issues in the courtroom, rather than having jurors discover this information on their own?

^{xxvi} After Pietro Pollizzi was convicted of viewing child pornography – which called for a mandatory minimum sentence of five years – EDNY Judge Jack Weinstein told the jurors about this sentencing requirement. Four of the jurors then said that had they known this, they would not have convicted Mr. Pollizzi. 549 F. Supp. 2d 308 at 339 (E.D.N.Y. 2008).

4. Would a lifting of the ban on Internet research disproportionately empower younger, more Internet-savvy jurors who will then have access to more and different information than their older and lower-tech peers?
5. Would there be any benefit to instructing jurors that they may conduct some types of Internet research (e.g. looking up unfamiliar terms) but not others (e.g. reading media coverage of the trial)?
6. Would there be value in allowing jurors to be more active in the fact-finding process by, for example, allowing them to share their questions and concerns about what they have heard with the Judge? Would this alleviate the natural curiosity and frustration that presumably accounts, at least in part, for jurors taking things into their own hands and conducting Internet searches?
7. Would jurors' urge to search the Internet be assuaged if all of the trial evidence (e.g., transcripts of witnesses' testimony, documents) were placed on a website that the jurors could peruse? Would it be possible to limit their case-related Internet activity to this website?

Complexity Notwithstanding, A Call for Exploration

The questions listed above are just a beginning. Surely many other questions will emerge as the Task Force undertakes its mission. One might say that a minefield of questions must be addressed as we move forward in thinking about how to handle juror Internet use. The increasingly frequent reports of juror internet research and Google mistrials suggest that the Googling juror is here to stay. One of the open questions is whether these jurors can be stopped by more stringent judicial instructions or the threat of sanctions. Another question about jurors' privacy rights is waiting to be addressed as courts consider asking jurors for their online ID's and the chance to track their internet activity.

We cannot avoid reckoning with this new reality. If we do not rise to meet this challenge, if we bury our heads in the sand, jurors' choices alone will shape the landscape and trials will be modified *ad hoc* and *de facto*. Serving justice is the ultimate goal and in some ways the Internet may facilitate this goal. That said, it is surely easier to imagine the many ways in which the Internet may subvert it. It is reasonable to believe, though, that the Internet is here to stay. It is time for those of us who make our livings in the well of the courtroom to step up, ask the questions and test the answers that will bring the reality of the Internet-era and the laws on trial practice together.

Rather than increasing the threat-level of the court's instructions (something that might well have other unintended consequences in terms of jurors' sense of the government's reach and power in their personal lives), this may be the time to begin the conversation that will seek ways to encourage jurors to put information from the Internet, from the media more broadly, or from others in its proper place.

Perhaps, judges could instruct jurors to put extrinsic information in its place – a place of less weight -- like this:

As you may be aware, it has been the practice in courtrooms to ask jurors not to follow media accounts of the case outside the courtroom, not to read about the case online, and not to discuss it with others. The reason why this has long been the practice is that literally centuries of experience have taught that the surest way to search for the truth is to subject it to scrutiny in court, subject it to the process of cross-examination. This tradition is enshrined in the Bill of Rights to our Constitution, which requires that a criminal defendant has the right to confront each and every witness against him or her in open court.

The practice of the courts is changing, and we are now asking something different of you. We are asking that you give the information you learn here in the courtroom paramount weight. To the extent that you gather general information that may have some relevance to this case outside the

courtroom, we ask that you consider this information to be secondary in importance – to be of lesser weight. Any specific information about this case discovered outside of the courtroom, however, may not be considered.

What is specific information? Any account of what happened, any comments on the testimony or on evidence that was presented or that was excluded would be specific information that you should not consider at all. You should not consider comments about the case whether you happen upon them in the newspaper or on the internet in the form of articles, blogs, or postings about the case. The reason that I am instructing you on this is to preserve the guarantee that a defendant has the right to confront any and all witnesses that testify against him or her. It would be fundamentally unfair if this guarantee were eroded by your considering information or views about the case that developed outside the courtroom and were not subject to cross-examination.

As you probably already know, information on the Internet may or may not be true and accurate. People express opinions there that cannot be governed by the rules of evidence and that may not be true.

Information that may be generally true, such as medical information that applies to large groups of people, may not be true for particular individuals. Just as your doctor's advice to you, based on examining you, must be given more credence than Internet-based medical advice, so you must give more credence to what happens here in the courtroom than to anything else.

What you learn here in the courtroom about the specific circumstances of this case therefore must control. No outside news source, no website will have the direct access to testimony and other evidence that you will have here in the courtroom. If you choose to seek general information that may have some tangential bearing about an issue in this case outside the courtroom, please bear this in mind.

Also, the law imposes certain guidelines for the information that you may consider when it comes time to reach your verdict. You must follow the law as I give it to you, and give lesser weight to any information that comes to you from outside the courtroom. Sometimes outside information may be inconsistent with what you learn here. What you learn here will always deserve greater weight in your thinking.

During the trial, some of you may think that you can find answers online to questions that you feel have not been adequately addressed during the trial. As matters of law, some questions are not to be answered in the courtroom. You are not to give more weight to information that comes from the Internet than you give to the testimony and other evidence presented to you here in the courtroom. You are not to allow Internet-based answers to questions that have gone unanswered in the courtroom to affect your deliberations. The limits of courtroom evidence must set limits on what you consider as you deliberate.

The courts have made the decision to permit jurors to access outside information because the court acknowledges that it is hard to do otherwise and because the courts have taken the position that as responsible citizens, as people doing your highest civic duty as jurors, you will give the events of the courtroom the weight they deserve. While you may seek information beyond these four walls, you must always and without hesitation give greater weight to the information you acquire here in this room – testimony from the witness stand and any other evidence that the attorneys in this matter put before you.

A Final Note:

Distinguishing Between Taking Information In and Putting Information Out

While this paper has focused primarily on issues related to jurors as information-seekers, we must also consider the complications and challenges that arise from jurors as information-sharers. In the past several years, a few cases have ended in mistrials not because jurors were searching for

information but because sitting jurors were posting or blogging about the case. The most egregious example of this was the British juror who posted about her case on Facebook and asked her friends to cast verdict votes, promising she would follow the majority in rendering her own vote.^{xxvii} “I don’t know which way to go, so I’m holding a poll,” she wrote. In this case, this juror was dismissed and the trial continued on with 11 jurors.

It is unlikely that other cases will rise to this level of interactivity, but even less extreme modes of communicating about a case can be problematic. Traditional admonitions to jurors not to discuss a case until after a verdict is rendered are designed to ensure that jurors do not engage in discussions that might then cause them to reach an early verdict, or ultimately influence their verdict during deliberations. Thus, jurors are not even supposed to discuss the case with each other prior to deliberations, much less with friends, acquaintances, or random strangers unassociated with the case at all.

It is likely that a Task Force examining the question of juror Internet use and whether the rules should be loosened will see a distinction between the implications of loosening rules regarding what information jurors can acquire from the Internet and what information they can disseminate. One could argue that the cost-benefit analysis of allowing jurors to satisfy their “itch to know” carries more potential benefits than allowing them to satisfy their “itch to tell.” We think this is a topic worth examining, along with the question of whether the courts could lift the Internet ban on “knowing” and still reasonably expect jurors not to “tell.”

Conclusion

We hope that with this paper, we will begin a line of discourse that will enable those concerned with courtroom justice to ask whether the current paradigm is working, and if it is not, to discuss how to fix it. We think that the de facto, unregulated intrusion of the Internet into courtroom practice and jurors’ thinking is a problem serious enough to require a major paradigmatic shift in American jurisprudence. We think it is time to reckon with the reality that some jurors will seek information outside the courtroom. It is time to think about new instructions designed to help jurors handle this extra-courtroom information in order to give the trial its fair due. In the brave new world of the courtroom set atop the Internet superhighway, justice may be best served by letting reality in. At least, we should talk about it. Perhaps, the American Society of Trial Consultants could spearhead this effort.

So, we end this paper where we began, with the recognition that “*Yesterday is hist’ry, and it’s never coming back.*” The days of the pre-Internet juror are gone, and our courtrooms will never return to a time when information is not easily accessible at the touch of a button, and jurors are not accustomed to having their need to know satisfied instantaneously. In his recent reviews of two books in the New York Times, William Saletan wrote:

Humanity is migrating to cyberspace. In the past five years, Americans have doubled the hours they spend online, exceeding their television time and more than tripling the time they spend reading newspapers or magazines. . . .^{xxviii}

Jurors are, literally and virtually, in a different place these days. There has been a sea change in the way that Americans think and learn, and it is as evident in the courtroom as anyplace else. Just as classrooms and boardrooms have adapted to this change, so too must the courtroom. We do not know yet what form that adaptation will take, but we believe it is time to pursue the conversation in earnest.

^{xxvii} Urmee Khan, *Juror Dismissed From A Trial After Using Facebook To Help Make A Decision*, The Telegraph, Nov 24, 2008.

^{xxviii} William Saletan, *The Computer Made Me Do It*, New York Times, Sunday Book Review, 2/13/2011. (The two books were Virtually You: The Dangerous Powers of the E-Personality by Elias Aboujaoude, and Reality Is Broken: Why Games Make Us Better and How They Can Change the World by Jane McGonigal).

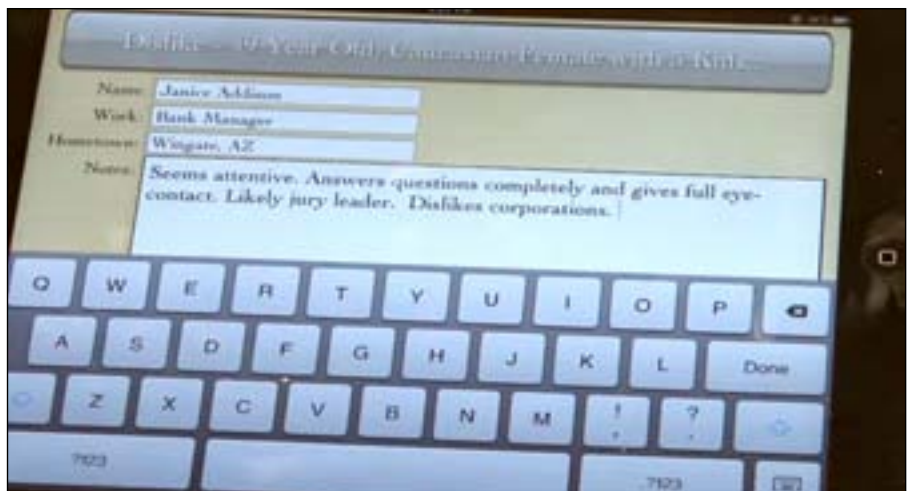
A Video Review of the 'iJuror' and 'Jury Duty' Apps

by Ken Broda-Bahm

Ken Broda-Bahm, Ph.D. is a litigation consultant based in Denver, Colorado with the firm Persuasion Strategies, a service of Holland & Hart LLP. He provides comprehensive services including trial messaging strategy, focus group and mock trial research, community attitude surveys, witness preparation, jury selection, mock bench trials and mock arbitrations. He has worked in a broad array of litigation types specializing in commercial, employment, construction and energy litigation. You can read more at www.persuasionstrategies.com.

Apple's iPad is a revolutionary device in the true sense of the word, and now in its second incarnation, it is continuing to change the way people interact with computers. But for lawyers and trial consultants engaged in the jury selection process, the question is whether this revolution is ready for the courtroom. Commentators in a number of different fora (e.g., [Tablet Legal](#), [Macs in Law Offices](#), [The Mac Lawyer](#), and [iPhone J.D.](#)) have offered a wealth of ideas and reactions on the ways that new tools including the iPad can change the practice of law. The specific challenge during voir dire is to make the best decisions using the information available – information gleaned from juror questionnaires and from oral questioning in court. At first glance, it would seem that a fast, touch-based device, housed in a small and unobtrusive package, would be ideal for the task, and the early offerings in the form of [iJuror](#) and [Jury Duty](#) are impressive by any measure. My focus, however, in testing these two applications, and comparing them to our own experience with both paper-based systems and in-house PC-based tools for the task, is to focus on function rather than capability. In other words, it isn't about whether new and impressive feats can be performed on screen, it is about whether these new apps allow the iPad to perform up to the point that it can improve upon the other more traditional methods in the courtroom.

One important clarification is that there is no such thing as a machine that will make correct decisions on who to strike and who to pass in voir dire. There isn't one, and we wouldn't want one. At the end of the day, it is a matter for human judgment: a best estimate of who poses the greatest risks to your case based on factors that are necessarily subjective. But where the machine can serve as a tool is this: it can help you capture, organize, and prioritize the information so that your judgment is



based on a complete and accurate picture of everything a given member of the venire has disclosed in voir dire. The technology should help you make, sort, share, and apply a record of that information. More specifically, there are five criteria that I would offer for assessing the performance of an iPad, or any other on-screen application in jury selection, based on the functions we're already meeting with paper notes, and Post-It grids.

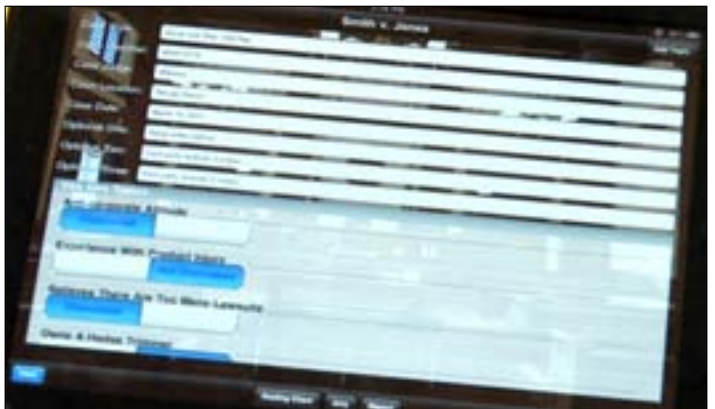
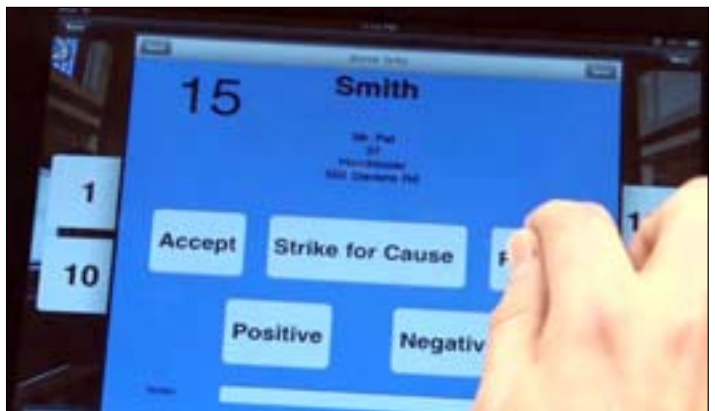
1. **Record juror information.** You need to capture basic information from questionnaires, as well as the responses that jurors offer to the specific questions asked in court (yes/no, as well as specific comments and language).
2. **Record a group response.** For example, when a number of people raise their hands in response to a question in voir dire, there should be a way to easily update your notes on each responder.
3. **Assess the importance of responses.** The technology should help you weigh what matters more and what matters less. This would be a replacement for the circles, asterisks, or numerical scores we might give on paper notes.
4. **Produce a report.** A record for each item of interest or for each potential juror should include the information you need to decide on a strike or a challenge.
5. **Rank the jurors.** The end result is that you want a list of individuals to target with a strike or a cause challenge, so you need some way to prioritize that list of jurors from worst to best from your perspective.

Because this is one area where it is better to show rather than just tell, my review is contained in the video embedded below.

Ultimately, it is the collective experience of those who work in courtrooms keeping track of information during voir dire that will determine a future role for on-screen applications. If you have used either of these applications, or if you have thought about using them, please share your experiences and thoughts in the “comments” section below.



http://www.youtube.com/watch?v=BDvcrzTSMH4&feature=player_embedded



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A Note From the Editor

Spring has sprung and *The Jury Expert* is all dressed up for spring with a new design interface! Our hope is that you'll be much more able to search for what you are looking for and that you'll find this platform easy on the eye. We are deeply indebted to our programmer (Phil Stolle) and our designer (Emily Keene) for the creativity and perspiration they have expended on all our behalf. We also have two new Editors. Jason Barnes joins us with a background in visual evidence and Jason Schwartz also joins us with a background in visual graphics. Jason Barnes will be editing your article submissions and helping us with making the website look prettier. Jason Schwartz is producing our pdf version of *The Jury Expert* and it looks much better than my feeble attempts at pdf design! We are pretty excited about our new look and eager to hear your feedback!

This issue is just full of good stuff. Remember that news explosion on the 'nerd defense'? Basically what it said was that if you put eyeglasses on your criminal defendant the jury would not believe such a studious looking defendant was capable of heinous acts. But not so fast! We have an article from the author of that original research and what he has to say about his work will prove much more interesting than a straightforward 'nerd defense'. We have three trial consultants and a trial lawyer responding to that research. We hope you'll offer your opinions as well. This is fascinating research still in development. You'll notice in the article that the author includes a summary of some as yet unpublished data on corporate defendants and eyeglasses. You'll want to read it.

In addition to the 'nerd defense' piece, we have articles assessing the efficacy of bullet-points in presentations, on voir dire (both an overview and a strategy piece), on responding to jurors and the internet (since what we are doing now doesn't seem to be working that well), on online jury research, on jurors with Attention Deficit Disorder, and finally a video (we are using our new web platform!) review of a couple of jury selection apps for your iPad!

So read away! We are brand new. And happy about it!

Rita R. Handrich, Ph.D.

A M E R I C A N S O C I E T Y O F T R I A L C O N S U L T A N T S



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The *Jury Expert* logo was designed in 2008 by:
 Vince Plunkett of *Persuasium Consulting*

Editors

Rita R. Handrich, PhD — Editor
rhandrich@keenetrials.com

Kevin R. Bouilly, PhD — Associate Editor
krbouilly@persuasionstrategies.com

Jason Barnes — Associate Editor
jbarnes@barnesandroberts.com

Jason Schwartz — Assistant Editor
jschwartz@zmf.com

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