

LAW ON DISPLAY

by Neal Feigenson and Christina Spiesel

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

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

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

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



Law on Display

The Digital Transformation
of Legal Persuasion
and Judgment

NEAL FEIGENSON and CHRISTINA SPIESEL

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

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

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

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

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

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

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

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

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

References

- Bolter, J. D., & Grusin, R. (1999). *Remediation*. Cambridge, MA: MIT Press.
- Jones, E., & Nisbett, R. (1971). "The Actor and the Observer: Divergent Perceptions of the Causes of Behavior," in E. E. Jones et al. (eds.), *Attribution: Perceiving the Causes of Behavior* (pp. 79-94). Morristown, NJ: General Learning Press.
- Ritter, G. C. (2004). *Creating Winning Trial Strategies and Graphics*. Chicago: American Bar Association.
- Ritter, G. C. (2009). *Powerful Deliberations: Putting It All Together for the Jury*. Chicago: American Bar Association.

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

Jason Barnes & Brian Patterson respond to Law on Display

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

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

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

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

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

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

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

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

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

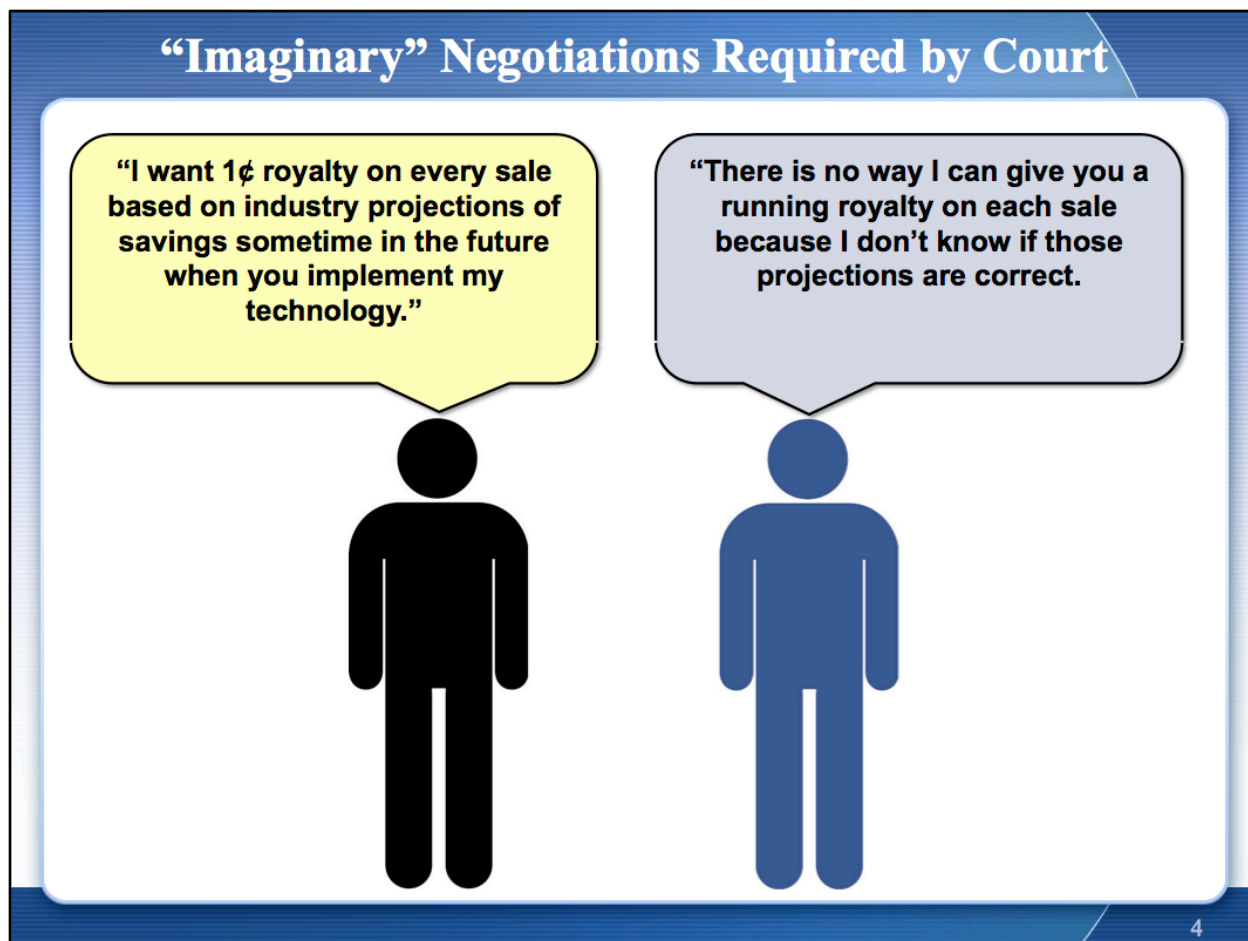
If such a long sequence is cost prohibitive, implementing a change in the short version would be helpful. First, the transition that fades from the video to the animation is deeply flawed. Fading from one to the other only highlights the very obvious discrepancy in the position of the suspect vehicle.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

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

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

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

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

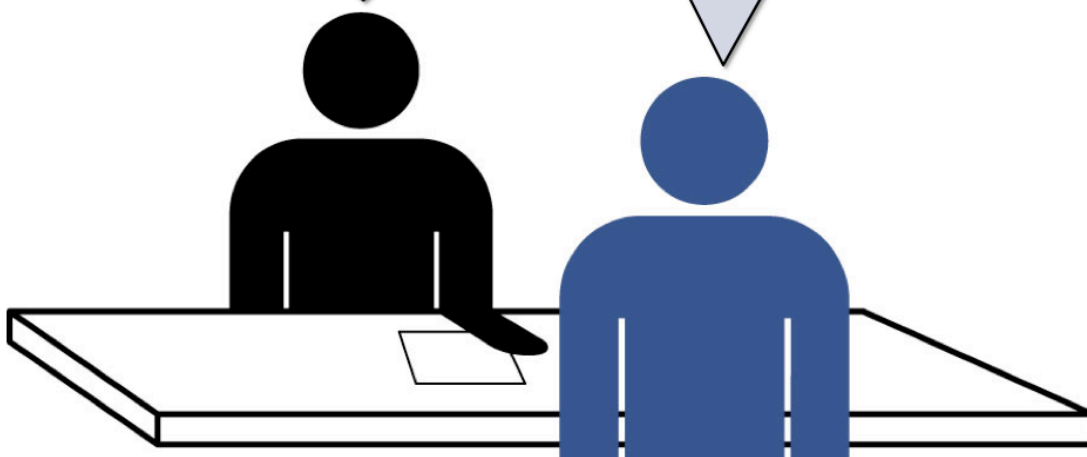


As you see, both parties are equal. Can you tell which party we represent? Can you tell which party we want you to sympathize with? Of course not. One can argue which side, left or right, each party should appear on. A better question is: Which side of the table should the jurors sit on? They should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

“Imaginary” Negotiations Required by Court

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

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



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

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

Ted Brooks responds to Law on Display

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

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

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

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

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



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

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

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Editor's Note

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

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

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

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

Rita R. Handrich, Ph.D., Editor

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