

Jury Thinking: A Juror's Mental Tools for Deciding¹

By Sunwolf, J.D., Ph.D.

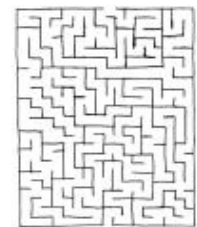


**Thoughts have power. Thoughts are energy.
You can make your world or break it, by your thinking.**

Susan L. Taylor, Editor-in-Chief, *Essence* Magazine

There is no richer intersection *for re-examining* what we think we know about a juror's complex trial task than the place where many disciplines talk to one another. My research on the jury decision-making process takes an interdisciplinary perspective, drawing from communication, social psychology, behavioral neuroscience, linguistics, education, marketing psychology, group dynamics, folklore, and the healing arts, to name a few.

Thinking about juror thinking is a bit like attempting to wade through the complex maze of our own brain, while hoping to get a clearer view of someone else's. The task is worthy, but challenging. Getting to the finish requires acknowledging and getting acquainted with a lot of dead-ends. A map would be useful—but mazes are mapless entities. There exist, however, useful patterns that are worth noticing.



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ONE JUROR, MANY MINDS: HOW CONSCIOUSNESS *REALLY* WORKS

I screamed that I couldn't believe this was happening, that we were possibly going to be a hung jury when in my mind the case was so obvious. Everything was there, DNA evidence, witness testimony. There was no room for interpretation. I was angry. There were words of profanity that came out of my mouth. —Juror describing the fifth day of deliberations (2004)

A juror's mind is not a simple information processing machine. While processing complex data, a juror's mind is simultaneously and profoundly affected by:

- the state of the juror's **body** (internal emergencies and discrepancies),
- **mood** (emotional tensions and conflicts),
- **environment** (climate and physical constraints like wooden chairs),
- **social space** (mood and feedback from others), and
- **prior experiences** (resolved or painful),

to name a few. Further, people change from day to day, from morning to afternoon, before meals and after them. It follows that during jury selection, we are both selecting and de-selecting far more complex human beings than we have generally imagined.

*The cortex was the last part of the brain to evolve.
In the cortex decisions are made, schemes are
hatched, language is heard, music is written,
mathematics is created. The cortex is like a quilt
that covers the rest of the brain, folded so that
it can fit within the small human head.*
—Ornstein²

The Crowd Living in a Juror's Mind

Scientists have been paying more attention, of late, to a **mosaic** view of the human mind. We tend to think of people in simple dichotomies: as emotional or rational, as conscientious or lazy, as honorable or dishonest, as moody or centered, all either/or frames. The answer may be that most of us are, in fact, both sides of such dichotomies. Allowing for a mosaic view of a juror's brain allows for the multitude of frames of mind through which a juror, day after day, may process and make sense of the trial. There are many lobes stimulated in a juror's brain by a new fact or experience, and, consequently, more than one place where the new information is mentally stored.

With a jury of twelve, we may not just have twelve brains around the table, but multiples of twelve, depending upon their moods, attitudes, and dispositional inclinations at any point in time.

It is the crowd inside a juror's mind that is judging the evidence: the juror's sad self, tired self, upbeat self, critical self, empathic self, curious self, attentive self, apathetic self, self-in-pain, and these selves won't all be present at the same time. We impose a *desire* for consistency on jurors, but in learning that they, like us, cannot be consistent during the trial task, we will make better decisions.

² Ornstein, R. (1986). *Multimind* (p. 49). Boston, MA: Houghton Mifflin Co.

Brain Facts/Mind Facts

Many trials depend upon jurors accepting physiological testimony about other people; the myths people hold block acceptance of testimony on these issues.

1. Gut dread. When novel information is received (a regular experience for a trial juror who is actually listening), the mind of the juror will automatically suspend current operations to evaluate the new data. A juror's mind will look to see how the new datum fits an old pattern by referring to a visceral response. Humans are primed to do a scan for threat, first. To see if the new data triggers somatic dread (alarm), it is classified as highly relevant and gets immediate neurological attention.

2. Pain. When pain is physiological, people still experience it differently. The wide individual variations in the experience of pain support the idea that the brain has established maps of pain. The "consciousness" people have about pain is significantly different. In one study examining mountain climbers, Nepalese were found to endure much higher thresholds of pain than Occidentals. Both groups' sensory systems were relaying information to the brain in the same way, but once the painful stimulus was inside the brain, the psychological nature of the individual took hold. The Nepalese had simply been inured and responded stoically to stimuli Westerners described as unbearable.³ Social models in childhood for how pain is handled affects how the brain labels pain; those who have seen few negative social models of pain learn similar responses throughout their life.

3. What have you done for me lately? The brain is sensitive to recent information and emotions.

4. Don't call me unless something exciting happens. The brain is more interested in the

sudden appearance of something unknown. Anything in trial that is unchanging (voice, tempo, pace, format) soon gets shunted into the back of the brain.

Tip: Speaking in headlines is attractive to the human brain. Newspapers know this. Newscasters know this. Practitioners who speak in headlines will gain attention, compared to those who speak in written text.

5. Compared to what? The brain constantly judges by comparison, and our judgment depends on what we are comparing it to. A \$1,000 raise is disappointing or wonderful, depending upon the amount of raise we were expecting. We even judge ourselves by checking how others did.

Tip: The attorney who offers an anchor for comparison participates in the juror's comparing processes, while the one who does not leaves it up to the juror. Open with comparisons for every fact you want the jury to pay attention to.

*There's a 'crowd' in a juror's mind,
consequently there will be a substantial
crowd in the jury room.*

6. Get to the point!

The brain prefers the bottom line. Unlike

the literary device of building to a point, the brain tunes out while we take our time getting there. A juror's brain wants to categorize all incoming information; when it isn't clear what the point is going to be, classification is difficult. The brain prefers to throw out what it cannot immediately classify.

Tip: Give titles to each chapter in your direct and cross-examinations. The title is your bottom line. A cross-examination chapter title, "Now we're going to talk about your purse," is not a page-turner. The brain says, "Why?" or "What's your point?" or "Call me when you get to the good part." Compare (as the brain loves to do) that title to "Now we're going to talk about one thing missing from your purse that you didn't mention." A juror is alert.

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³ Gazzaniga, M. S. (1988). *Mind Matters: How Mind and Brain Interact to Create our Conscious Lives* (p. 19). Boston, MA: Houghton Mifflin Company. Ornstein, R. (1986). *Multimind* (p. 49). Boston, MA: Houghton Mifflin Co.

Cognitive Busyness

When a juror is faced with thinking about many tasks, the concept of **cognitive busyness**⁴ describes errors that occur due to the fact that attention is divided. At a single point in time during trial, for example, a juror may be attempting to manage impressions, anticipate relevancy, organize new testimony, read a chart, remember errands that must happen after court, and decide how to handle a frustrated family member. By comparison, a **nonbusy** juror perceiving the trial is one who is devoting full attention to the testimony or argument at hand.

The more cognitively busy a juror is *at any point* in the trial, the less competent the juror will be at complex thinking tasks. Cognitive busyness is not a stable trait within any juror, but rather a description of changing mental activities and levels of attention. Jurors who were *nonbusy* on Day 1 of the trial may be close to tears with *cognitive busyness* on Day 2, for a variety of unexpected situational factors (some related to the trial, others related to a juror's on-going life outside the courtroom).

Every juror's brain has been scanning, recording, replaying, and editing their experiences, since birth.

Divided Attention

Paying attention to the paying attention process is a little unbalancing. There's more to listening than gazing politely at the speaker or nodding your head. We know that the unintended consequences of divided attention are significant for a juror facing the task of trial listening. The situations that repeatedly place jurors into a divided attention disaster, however, are less

clear. How much division can effective juror attention bear?

Paying attention is the most important task a juror has in the courtroom. Whereas **hearing** is a physiological process (a juror may have, for example, physical hearing impairments), **attending** is a psychological one.

- People pay attention most carefully to messages when there's a known payoff for doing so.⁵
- When attention is divided, accuracy suffers.⁶
- Under conditions demanding divided attention, people often switch to selective attention, disregarding one thing in favor of another.⁷

THE BIOLOGY OF A JUROR'S BELIEFS

Our brains' processes and tools are profoundly physical. While our beliefs may seem to flicker like candlelight and our opinions flash like drunken butterflies, our brain's *physical machinery*

is producing each one. The human brain communicates with its partner, the body, in a stream of images and **back talk**. Back talking to ourselves, in fact, is the most frequent

conversation any of us have with anyone. Studying the origin of consciousness, Julian Jaynes⁸ suggested that originally when people received their brain's back talk, they believed they were hearing voices inside their heads from otherworldly beings, telling them what to do.

Back talk both produces and reproduces beliefs. It is worth paying attention, then, to

⁴ Concept first coined by the researchers in Gilbert, D. T., & Krull, D. S. (1988). Seeing Less and Knowing More: The Benefits of Perceptual Ignorance. *Journal of Personality and Social Psychology*, 54, 193-202.

⁵ Smeltzer, L. R., & Watson, K. W. (1984). Listening: An Empirical Comparison of Discussion Length and Level of Incentive. *Central States Speech Journal*, 35, 166-170.

⁶ Under divided attention conditions, people in one study were unable to recognize faces they had been shown previously. An excellent study for preparing cross-examination for witnesses who experienced divided attention. Reinitz, M. T., Morrissey, J., & Demb, J. (1994). Role of Attention in Face Encoding. *Journal of Experimental Psychology: Learning, Memory, and Cognition*, 20, 161-168.

⁷ Hawkins, H., & Presson, J. (1986). Auditory information processing. In K. R. Boff, L. Kaufman, & J. P. Thomas (Ed.), *Handbook of Perception and Human Performance* (Vol. 2, pp. 26-1—26-64). New York: Wiley.

⁸ Jaynes, Julian (1990). *The Origin of Consciousness in the Breakdown of the Bicameral Mind*. Boston: Houghton Mifflin.

the *biology* of every juror's beliefs, because the brain's physical engine drives, *sub rosa*, a juror's judgments. The human brain contains about 100 billion neurons, consumes a quarter of the body's oxygen, and spends most of the body's calories, while weighing only three pounds; in a single grain of brain sand, 100,000 neurons play at a billion synapses.⁹ As a juror encounters new facts, new people, new situations, and new rules, that juror's neurons are firing more rapidly than when it experiences familiar places or performs familiar tasks with familiar structures and known outcomes. The brain's neural reaction to novel situations is a circus of activity, since the neurons become excited. That neural "excitement" is, physically, what closes the synapses and sends information. Rapid back talk begins.

A trial experience is like TiVo® for jurors.¹⁰ While a juror's brain is more wonderful and impressive than the fanciest digital recording device ever devised, yet that brain is remarkably similar in function.

What a juror **believes** is always a function of the settings of that juror's TiVo® Brain. *Becoming aware of this built-in mechanism* is the first step to helping jurors manage their brain's TiVo® hardware, both during trial and during deliberations.

Automatic Search, Record, and Fast-Forward Come Standard

What is the *perceptual technology* of the brain that every juror has had since birth? Since the human brain attempts to organize the vast barrage of data that flings itself at us in every waking moment, factory settings are selected for numerous mental filters and mental short cuts. Our brains are doing their best to avoid

the calamity of message overload. Jurors, like all of us, are largely unaware of these settings or how they skew the data of life we store in our brains.

During trial, a juror's TiVo® Brain (without being specifically asked) "knows" what that juror's preferences will likely be and scans the evidence and testimony to find "programs" that juror (based on past experiences) might like. *In other words, not everything during trial is getting recorded.*

Grab the remote -- it turns out there are, indeed, Trial Viewing Options for a juror's brain.

The most likely events to be filtered out of our real world television TiVo® worlds are *advertisements*. A juror's TiVo® Brain

will filter out anything perceived to be *sponsored ads* during trial, recording only events that seem to be straight information or entertainment.

As a result, it is worth paying attention to the language we use, as lawyers, that signal to a juror, "*Now, a word from our sponsor.*" Few jurors may be listening to that argument, witness, or demonstration. On the other hand, "*There's one thing you left out of your report, sir, isn't there?*" promises both information and drama. Listening happens. A juror's TiVo® Brain doesn't register and scan out an "advertisement" that is interrupting the preferred program.

Early life experiences of abuse, abandonment, betrayal, exclusion, poverty, or struggle will set the brain's programming differently. Similarly, early life experiences of security, appreciation, accomplishments, loyalty, and inclusion set our brain's programming to recognize and expect that life has been that way for others. *Our perceptions are always only partly based on reality.* People emerge from childhoods that were blessed or cursed with caretakers. Consequently, the settings in our TiVo® Brains vary considerably, yet, as adults, we remain unaware that we are

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⁹ Ackerman, Diane (2004). *An Alchemy of Mind: The Marvel and Mystery of the Brain*. p. 41. New York: Scribner.

¹⁰ Calling its product the "Brain inside the Box," TiVo® is the registered trademark for both a television service and a box that automatically finds and digitally records up to 140 hours of programming all while we're out living life—with features that include pause, rewind, and slo-mo live TV. www.tivo.com.

actually *choosing* what to record and what our brains have edited out.

Practice Tip: Talk TiVo® to Jurors

During jury selection, an attorney can raise awareness of the unconsciousness settings in our brains and still avoid glassy-eyed stares from a “brain cognition lecture.” Use TiVo® as the analogy:

- How many of you have used TiVo®? [hands] How many are willing to admit, with me [your hand raised] they have TiVo® at home, but we leave it to someone else to do the settings? [hands, humor] What do you know about how it works? [call on someone] How does the Box seem to know what you want to watch? [discussion]
- Do you think that our brains might work a little bit like TiVo®? [call on a likely juror who could make that comparison] That’s an interesting thought, isn’t it?
- If that’s true, if our brains are scanning and editing, how could that be a little bit dangerous at trial, while jurors are listening to lots of evidence over many days? What could happen? [call on someone] What should we do about that? [collaborative discussion on how to listening differently, what to be aware of]
- If that’s true about our brains, do you think each juror might easily bring real different memories of the evidence into the jury room? It’s only natural, right? [call on someone] What can we do about that? [collaborative suggestions]
- Does it help, a little, to realize before deliberations that each of you is scanning and recording the trial a little bit differently? [call on several] How?

Teaching Jurors How to Use their TiVo® Brains

When we are teaching jurors about how to consciously set their TiVo® Brains, keep in mind that we are also thinking about how to present evidence and argument in the courtroom that

acknowledges that some settings for our jurors are stuck. Voir dire, in fact, can help us find out what the **mental pre-settings** are for these jurors and use our challenges more wisely.

TiVo® Thinking has a lot of explanatory power. (Some of our cases need a lot of explaining.) Here’s a new way of thinking about the wonderful and frustrating TiVo® Brains of jurors, witnesses, judges, clients, advocates, and, yes, our relatives, and even ourselves:

TiVo® Brains in Court: A User’s Guide¹¹

Notice existing settings.

1. Reset all preferences.
2. Learn the replay function.
3. Consciously push record!
4. Delete junk.
5. Fast-forward rarely.
6. Replay regularly (to see if it’s actually working).
7. Recheck settings often.

There are myriad opportunities to help jurors understand and make better choices about their own TiVo® Brains. When deliberations become frustrating, some jurors may “get” why they all can’t agree: they didn’t record the same trial. This can lead to more compassionate listening to one another, as well as rethinking of positions.

Practice Tip: TiVo® Talk to Jurors about a Witness’ TiVo® Brain

Voir dire, opening statement, cross-examination, and closing argument are all excellent opportunities to point out the errors of someone’s TiVo® Brain.

- Prep jurors to look for (scan setting) the pre-settings that might explain why an eyewitness, doctor, company president, or plaintiff has incompletely recorded an event in his or her memory. What got edited and why was that only natural?

¹¹ Inspired, twisted, and adapted from one of my favorite thinkers about the challenges and illogic of everyday living, Martha Beck, who is the author of *Leaving the Saints*, *The Joy Diet*, and *Finding Your Own North Star*.

- Cross-examine witnesses using the TiVo® analogy, if you brought it up during jury selection. Jurors get it, it is accessible, and memorable.
- Theme cases or issues around TiVo® analogies: No one noticed his TiVo® settings; the expert forgot to reset his preferences; she couldn't move off the replay function from long ago; he's was always on fast-forward, and so missed what really happened; too many people were messing with the settings.

The viewing options for jurors at trial can be both expanded and continually re-set. In fact, they must be.

DR. SUNWOLF (M.A., Ph.D., University of California; J.D., University of Denver) has been fascinated with juries since her first trial in 1975 and serves on trial advocacy faculties nationally. An Associate Professor of Communication at Santa Clara University, she teaches group decision making, conflict, interpersonal relationships, and persuasion. Her book, **Practical Jury Dynamics: From One Juror's Trial Perceptions to the Group's Decision-Making Processes** (LexisNexis, 2004), offers a first look at juror cliques, evidence anxiety, invisible jurors, a juror's un-thinking task, gender in the juryroom, and juror misconduct. Her newest book, **Jury Thinking** (LexisNexis, 2005), describes the effects of jurors' religious beliefs, the cognitive process of changing minds, the paradox of choice, metaphor and thought, and the effects of jury reform on a juror's task. Dr. Sunwolf is the originator of Decisional Regret Theory, which explains how jurors cope with the anxiety of anticipated verdict-regret by telling one another counterfactual stories about the case. She is a Visiting Professor at Santa Clara School of Law, teaching "Jury Law and Strategies," which is devoted exclusively to thinking about jurors. The complete Tables of Contents for her books are offered by LexisNexis at www.jurythinking.com (books also available from www.barnesandnoble.com). Professor Sunwolf may be reached at Sunwolf@scu.edu.

Quick Courtroom Tips

By
Bob Gerchen

It Can Be Death to Tell Jurors What They "Have" to Do, or What They "Can't" Do

No one likes being dictated to. It smacks of condescension and it can easily backfire.

There are ways to soften a "have to" or a "can't."

Bad: "You might be tempted to split the difference. Well, you can't do that."

Fair: "You might be tempted to split the difference. Well, the law says you can't do that."

Good: "You might be tempted to split the difference. But the law tells us that we have to calculate damages independently, not by average."

In the bad example, you're dictating to the jurors.

In the fair example, you've deferred to higher authority; it's not you telling them directly.

In the good example, we're joining with the jurors in deferring to higher authority; we're all in it together.

Recommend, ask. Don't dictate.

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For more information on Bob's new book, **101 Quick Courtroom Tips for Busy Trial Lawyers**, visit www.CourtroomPresentationTips.com.

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Confuse or Clarify? Examining The Effect of Attorney Questioning

By Debra L. Worthington, Ph.D.

Certainly a major component of any trial is the direct and cross examination of witnesses. We know that evidence from eyewitnesses is important to decisions to convict or acquit defendants. Research indicates that jurors see eyewitness confidence as an important indicator of eyewitness accuracy. The courts often highlight this factor as a key criterion for assessing eyewitness identifications in criminal trials. However, what some attorneys may not realize is that they may actually be their own witness' worst enemy. Recent research suggests that when attorneys ask confusing questions, they can negatively impact witness confidence and accuracy.¹

Obviously, it's important that eyewitnesses provide the most accurate testimony of events they can, so ideally justice will prevail. But many of the common questions asked by attorneys, such as negative, double-negative and leading questions, as well as the use of complex vocabulary, can confuse witnesses, reducing their accuracy and decreasing their confidence levels. Confidence levels are important because jurors tend to find witnesses who are confident more believable, even when they're actually wrong!²

After being asked one of these confusing questions, few witnesses will ask attorneys for clarification, even when they can. Why not? Witnesses might not ask for clarification because they may not feel that they can or should. The courtroom setting leads witnesses to believe they must provide a definite answer. In addition, witnesses may think they would not have been asked the question if they were not expected to provide the answer. As a result,

witnesses in search of a response may "hem and haw," fidget or simply look like the proverbial deer in the head lights. Their confidence is diminished, often leading jurors and judges to question their accuracy and believability. It is no surprise then that attorneys should carefully consider the questions they want to ask, with particular attention to how they word them.³

1. Keep questions clear and concise to avoid vague or ambiguous responses.

Instead of:

"For what period of time did you keep surveillance over the defendant, the subject in question?"

Ask:

"How long did you watch Mr. Ki?"

2. Avoid asking for too much information or asking compound questions. Try asking each question separately. You do not want your witness to leave out wanted information and require prompting to provide it. Such prompting may lead jurors to think your witness is hesitant, thus reducing their view of the witness' credibility and accuracy.

Instead of:

"Ms. Worthington, can you tell us about the cell phone calls you received in your office, in your car, and then later that evening?"

Ask:

"Ms. Worthington, did you speak to Mr. Ki on the phone the morning of January 14th?"

"Did you speak to Mr. Ki on your cell phone on the way home from work that day?"

"Did you speak to Mr. Ki again that evening?"

3. Avoid double negatives. Ask a straightforward question or series of questions instead.

¹ Kebbell, M. R., & Johnson, S. D. (2000). Lawyers' questioning: The Effect of Confusing Questions on Witness Confidence and Accuracy. *Law & Human Behavior, 24*(6), 629-642.

² Brewer, N., & Burke, A. (2002). Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments. *Law & Human Behavior, 26*(3), 353-364.

³ Matlon, R. (1988). *Communication in the Legal Process*. NY: Holt, Rinehart & Winston.

Instead of:

“Is it not true that you were not available for consultation with the defendant when he called you in order to try to meet with you on the day he attempted suicide.”

Ask:

“Dr. Worthington, did Mr. Smith call you on the day he attempted suicide?”

“Why did he call?”

“Were you able to meet with Mr. Smith?”

4. Avoid “pretentious verbiage,” that is, words or phrases essentially designed to confuse both witnesses and jurors.⁴ Examples include:
- client
 - direct your attention to
 - with respect to
 - is it correct that
 - contact with
 - previous to
 - consecutive with

Terms such as these are often extraneous and can simply be deleted.

Ron Matlon⁵, a respected trial consultant and communication scholar, suggests that attorneys periodically review their own trial transcripts looking for the types of questions and phrases described here, as well as other stilted language, awkward words and phrases that obfuscate rather than illuminate (i.e., confuse rather than clarify). The suggestions here are relatively simple, but can have great impact on witness examination and ultimately on jurors’ views of witness confidence and accuracy. Trial preparation for witness examination should go beyond simply planning what to ask to include how to ask it.

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Juror Research

By
Thomas P.
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Shifting Comparative Fault with Research Design

The Case: Chrissy is the mother of three children: Mary, 17 months; Joey, four years old; and Tim, eight years old. In July, Chrissy was told her husband had been seriously injured at work and was being admitted to the hospital. It was approximately 7:30 p.m. and Chrissy wanted to proceed to the hospital immediately. She called her best friend Alice, who lived in a nearby apartment complex, and asked her to please watch the children while she went to be with her husband. Alice immediately came to Chrissy’s house and picked up the children. She then took the children to her apartment.

Alice and her husband John lived in a moderately upscale apartment complex that had a large swimming pool and spa. Officially, the pool and spa hours terminated at 10:00 p.m., but it was an unwritten rule that as long as people did not make noise and bother other residents, they were free to use the pool as late as they wished. At approximately 9:40, Alice and John took the three children down to the swimming pool. After about an hour, Mary became cranky and John decided she needed to be changed and put to bed.

John went to the edge of the pool and told his wife he was going to put the baby to bed and he would see her in the apartment in a little while. Still carrying Mary, he walked to the gate and Joey walked with him. At the gate, he stopped and told Joey, “You stay here with Alice and come up when she comes up.” John then went upstairs and left Joey behind; he believed Alice was aware that Joey was left at the gate. Alice was unaware Joey had been left poolside, and she continued to play with Tim in the pool. Approximately ten minutes later, Joey’s body

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⁴ Matlon, p. 228

⁵ Ronald J. Matlon, Ph.D. is the Executive Director of the ASTC and Senior Trial Consultant with Matlon & Associates in Phoenix, MD.

was found floating in the spa. Paramedics were summoned, but Joey was pronounced dead on arrival at the university hospital.

A sheriff's homicide team conducted an investigation and determined that Joey had died of an accidental drowning when he fell into the unlit spa. No criminal charges were brought against anyone.

The design of the swimming pool area was intentionally low-light. There were no traditional deck lights lighting the walking area around the swimming pool and the pool lighting consisted of three underwater lights and one underwater light in the nearby spa. The only other lighting was low-voltage light located amongst shrubbery around the fenced area. This left the pool area generally dark, even with the underwater lights on.

On the night in question, none of the pool or spa lights was operating due to an electrical problem. The management at the apartment complex was aware of the light problem and had been trying to get it fixed for over a week. As the civil suit progressed, depositions were given by other apartment residents. These depositions brought forth testimony that the lights usually did not work and several complaints had been made to management over the prior three months.

The Research: The research for this case was undertaken by looking at the case from the plaintiff point of view. The financial circumstances were very clear: Alice and John had no funds and the apartment complex had deep pockets. Plaintiffs would surely want to increase the size of the damage and increase the comparative fault, as much as possible, onto the apartment complex. This jurisdiction does not have joint and several liability. That portion of the damages assessed against the young couple would be uncollectible funds.

The research design showed there was

liability on the part of Alice and John for several reasons.

1. The couple did not maintain positive communication as to who had control of Joey in the dangerous environment of the dark swimming pool.
2. It was late at night, when the children should have been in bed, rather than outside on a dark evening.
3. Both Alice and her husband admittedly consumed several drinks throughout the course of the evening; however, neither appeared to be intoxicated.

Liability on the apartment complex existed because of the unsafe lighting conditions.

Governmental code requires that semi-public pools be sufficiently lit from underwater; the same rule applies for spas. The apartment complex had known for at least several

days that the lights were not working, and may have known for as long as several months and failed to act appropriately.

The research design was a four-panel study, with the first two panels receiving the facts of the case in a light most favorable to the defense. The presentation was then modified based upon the discovered strengths and weaknesses and presented to the third and fourth panels a week later.

The first study showed an award slightly in excess of one million dollars, with comparative fault of 50 percent on Alice and John, and 50 percent on the apartment complex. It was clear the surrogate jurors saw this as a tragic accident and were not particularly angered. Also, as they often do, the jurors decided that each side had some fault, and therefore "split the baby" and divided the fault equally.

The second presentation was modified and the results were startling. Surrogate jurors in the first simulation wanted to know more about

Two visual aids, a lock and a length of chain, were enough to cause anger among the surrogate jurors and the award substantially increased.

the details of maintenance records over the six-month period leading up to Joey's death. An examination of these records revealed that several of the work orders for that period of time could not be accounted for. They were simply blank, with all information missing. This information was presented to the second group of surrogate jurors, with the inference that it was very convenient for the apartment complex that this information was now lost. Additionally, jurors were told there is an instruction in this venue that if records are lost, jurors must assume the records would be harmful to the defense. Surrogate jurors made the easy leap that someone had destroyed records pertaining to complaints about the lights in the pool area.

The first surrogate juries also wondered, during the course of their deliberations, why the pool was not shut down when the lights were not working. This tactic was well-used in the second group: the inference was made that the apartment complex, in an effort to keep the apartments filled, kept the swimming pool open even in dangerous conditions. Maintenance personnel did have a length of chain and a lock which could have been used to secure the pool gate so no one could have gone in on the night of the drowning. The plaintiff's attorney showed the surrogate jurors the length of chain and its lock and told them, "If someone had just put this chain on the gate, Joey would still be alive." These two items were enough to cause anger among the surrogate jurors and the award substantially increased.

During their deliberations, the second group of surrogate jurors independently arrived at the conclusion that this was not a traditional drowning. A traditional drowning occurs when people are purposefully in or on the water. This was a case of a child, lost in the dark, who fell into a hole in the ground that was filled with water and called a spa. The surrogate jurors

decided the child was simply walking away from the pool and, in the dark, tumbled into the hole. They decided this was not a drowning, but a death caused by the neglect of the apartment complex. If appropriate deck lights had been

in use, Alice would have seen the child was left behind. If the spa had been lit, Joey would have seen the hole and not fallen in. To make matters worse, the maintenance records had been destroyed by someone in management to try

to cover their tracks. Several surrogate jurors stated over and over, "All they had to do was lock the gate."

Case Findings: The second set of surrogate jurors awarded more than five million dollars, with 80 percent responsibility on the apartment complex. This research design clearly illustrates the need to present a case to learn about its weaknesses, then re-present the material, addressing these weaknesses, to another group of surrogates. In this case, the research increased the plaintiff's value of the case from \$500,000 to \$4 million.

Conclusions: When designing your research strategy, you should always consider performing research based upon the best defense case; then re-present the case as a plaintiff's best case. This will clearly disclose the strengths and weaknesses of each side. This will give a consultant the necessary tools to guide their client to the best decision: trial or settlement. A clear, clinical picture must be presented to the client so they can make the best business decision available. Pride and ego must be discounted; only the cold facts should be used in the decision-making process.

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Note From the Editor:

Welcome to the first redesigned issue of *The Jury Expert*! We have been working hard to bring you an unparalleled selection of articles, essays and practical tips — all designed to help you in your trial practice. And we will continue to bring you broader and deeper coverage of mock jury research, witness work, jury selection strategies, storytelling techniques, effective jury instructions, powerful courtroom technology and more.

Now, we are pleased to present a redesigned layout of *The Jury Expert* that is sharper, more service-oriented and engaging.

I would like to acknowledge my task force for their help with the redesign process: Ralph Mongeluzo, Karen Lisko, Debra Worthington and Kevin Bouly.

The ASTC and the *TJE* Task Force also want to thank Renee Larson of Newsletters, Etc. for redesigning the newsletter template, and Jason Schwartz, Senior Multimedia Designer at Zagnoli McEvoy Foley LLC, for designing our new logo.

We welcome your comments and suggestions. If you have ideas for content you are looking for, or things that would help you in your practice, please contact me at the e-mail address below.



Thanks for reading *The Jury Expert*!

If you have recommendations for future content coverage, please feel free to contact me at the e-mail address below.

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