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Getting Beyond The Catchy Phrase and Creating a Trial Theme That Truly Works

by Ken Broda-Bahm, Ph.D.

By now, the advice to “use a trial theme” is or should be familiar to any practicing litigator. It is intuitive to discover and use a statement that unifies and embraces your view of the entire case. But crafting the right theme involves much more than thinking of a phrase that rolls off the tongue and sticks in the memory. As important as it is for a theme to do both, a theme needs to do more in order to serve the critical function of being that central representation and reference point for decision-makers.

A Quick Case Study

How a theme works depends to a large extent on the specific challenges faced by your side in litigation. Just to serve as a running example, consider a fictional employment case¹ in which a female worker, Rhonda Webb, was employed in an otherwise male-dominated manufacturing jobsite at a company, Nordick. Alleging

that a co-worker, Frank Wilson, has engaged in an extreme and escalating pattern of comments and unwelcome advances, Webb files a sexual harassment and constructive discharge suit after resigning. In discovery, it becomes clear that the perpetrator considered his frequent sexual comments and occasional touching to fit within the category of “just joking around,” but it also becomes clear that the Plaintiff often willingly participated in workplace horseplay and engaged in an extramarital affair with another employee, her supervisor. It also becomes evident through discovery that many in the company – including managers and human resources personnel – knew of Rhonda Webb’s complaints about Wilson. These complaints were verbal and somewhat informal and Webb did not follow the company’s notice policies by making a detailed complaint in writing to either HR or management.

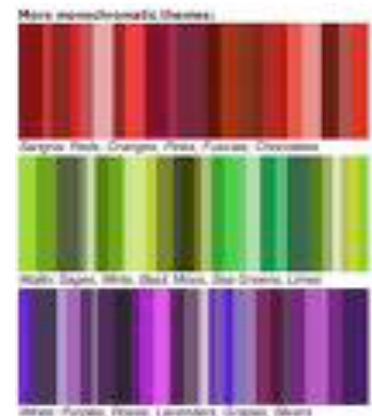
With this brief fact pattern in mind, I’d like to take a closer look at what would and wouldn’t work as a theme and why.

How Does a Theme Work?

The Plaintiff’s attorney likely remembers from trial advocacy CLE’s that she ought to have a theme to address some of these facts. At the same time, the attorney may not know the cognitive and psychological reasons that themes work. There are three ways of looking at why a theme works:

1.) A Theme Works Like a Lens.

A theme is a way of viewing, or filtering information in a given situation. Psychologists call it a “cognitive schemata” or a mental process of bringing emphasis to some aspects and de-emphasizing others. Described as a “recipe for selecting, storing, recovering, combining, and outputting information as they transform diverse and disparate data into a cognitive scenario of ‘what is going on here,’” jurors’ interpretative scheme is central to their ability to organize information and convert it into a verdict. Just as your reading glasses can blur distant objects while bringing closer objects into sharper focus, a good mental construct will sharpen some aspects of a situation while causing others to recede into the background. In Rhonda Webb’s case, is it a story about a mistreated employee, a story about a sexist perpetrator, or a story about a company that failed to act on what it knew? The way the story is told determines what your decision-makers notice first and foremost.



2.) A Theme Works Like an Anchor

Your most favorable language can also work like an anchor, or as a point that jurors start from or gravitate toward. You may be familiar with the concept of an “anchor” in the context of money damages.⁴ Stating a figure like \$20 million won’t guarantee a \$20 million result, but chances are good that once shared, this figure will serve as a starting point for adjustment. As long as the figure is not so extreme that it creates backlash, jurors who hear an anchoring figure of \$20 million will end up with higher damages than those who hear a starting figure of \$10 million. Similarly, if your theme serves as your best-view of the case, it can also serve as jurors’ starting point of view. For example, assuming that Rhonda Webb’s attorney focused the theme generally on ‘a company that failed to act on what it knew,’ then even a juror who failed to buy that theme 100% would nonetheless have a more favorable view of the Plaintiff’s case if the theme helped that juror spend more time thinking and talking about what the company could have done differently, while focusing less on what Rhonda could have done differently.

3.) A Theme Works as a Cue

When repeated, key language can also serve to cue specific thoughts about the case. You are likely familiar with the idea of conditioning: Because Dr. Pavlov rang the bell whenever he fed the dog, the bell became associated with food and before long that hungry dog salivated based on the bell alone. Of course, jurors cannot be programmed quite as easily, but by presenting the strongest thematic language before, after, and during the strongest arguments, Rhonda Webb's attorney can create a theme that cues jurors to recall the best case strengths. "The theme," according to Atlanta attorney Marlo Leach, "allows the jury to listen to the evidence, while at the same time relating it back to the message that you have told them is key to the case."⁵ In this case, the theme is the bell.

What Makes a Theme Effective?

But if the theme is the bell, then what is it about a particular theme that can make jurors salivate the most? It likely isn't found in language that sounds forced or that too overtly calls attention to itself by saying in effect "...*here is the theme!*" If it sounds like a slogan or an advertising jingle then jurors' natural skepticism toward attorneys may prevent it from truly functioning as a theme. Getting to an effective theme means getting beyond the catchy phrase, and any theme chosen should not be an impulsive 'top of the head' or 'gut' determination. Instead, your theme should be carefully vetted based on its ability to live up to five standards: A theme should be:

Targeted

Holistic

Economical

Memorable, and

Easy

1.) A Theme Should Be Targeted

A theme should be targeted in two ways. First, it should be targeted toward your toughest audience (the ones who will need to be persuaded). For the plaintiff, that would mean targeting your theme toward the naturally pro-defense jurors (logical, process-driven, high personal responsibility, etc.), instead of being addressed to the naturally pro-plaintiff jurors who are likely in your corner already. Attorneys will generally need to check the natural tendency to speak to the most favorable group, and instead take aim at the toughest jurors – a few of which will almost inevitably survive voir dire. Second, the theme should be targeted toward your weaknesses. It should give jurors a way of addressing your biggest problems while still finding for you. It isn't a matter of dwelling on the negative side of your case, it is a matter of giving jurors armor against your opposition's predictable emphasis on those weaknesses.

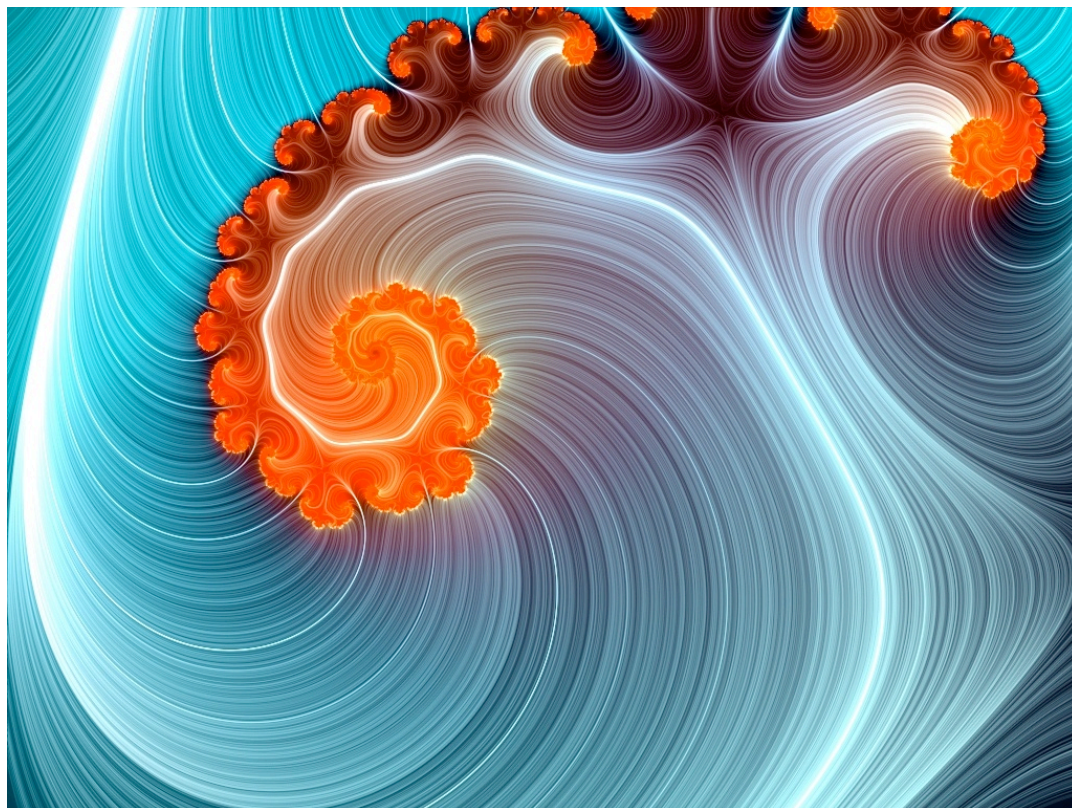
2.) A Theme Should Be Holistic

A theme should not just address one particular issue, but should instead address the case holistically, and comprehensively. A theme which is just about damages, or just about sympathy, or just about causation is not enough to give jurors a general way of viewing the case. Instead, the theme should serve as a way for jurors to put the case together and to see the story in a particular way. That doesn't mean that the theme needs to address

every single issue – it never could – but it should be a way of viewing the case generally, not just a way of highlighting a favored argument, a single specific issue, or a particular piece of evidence.

3.) A Theme Should Be Economical

One of the reasons a theme needs to be general, instead of addressing each issue in the case, is that it needs to be economical. A good theme practices word economy by saying the most in the fewest possible words. If you have the good fortune of having several good candidates for a theme, choose the shortest. As Leach notes, “The theme is your entire case summed up as briefly as possible.”⁶



4.) A Theme Should Be Memorable

Even as a theme aims for conciseness, it should include some element to make it memorable, because a theme that jurors remember and use is more likely to be effective. All of the traditional mnemonic devices (alliteration, assonance, metaphor, familiarity, unexpected turns of a phrase, etc.) may be brought to bear here, but it is still good to remember that art can be taken too far. A subtle approach is generally better, and less likely to lead jurors to feel that

they are being talked down to. For example, choosing alliteration may be better than choosing a rhyming scheme.

5.) A Theme Should Be Easy

Finally, a theme should be easy to use, and by that I mean that it should be effortless and natural to work into your presentation at several points. It should be easy to say and easy to repeat. Importantly, it isn’t a theme if it is announced just once. It is only a theme if it is worked into several points. “For an idea to be a good theme in a trial,” McElhaney writes, “it has to keep coming back throughout the case.”⁷

Sample Themes

In the theme-building process, it is natural to consider several candidate themes before settling on the one that works best. For example:

Candidate Theme: *All Rhonda Webb wanted was a safe environment where she could do her job.*

This theme would have the appeal of casting Rhonda’s complaints in the most reasonable light. Ultimately, however, it is probably an ineffective theme because it just appeals to sympathy instead of appealing

to defense-oriented jurors, and because it could draw attention to a potential defense theme that Rhonda Webb had a pattern of wanting more in the work environment -- like relationships with co-workers.

Candidate Theme: *Nordick didn't know where to draw the line between work and play.*

Again, this theme while it may be quite true as it relates to the company, still makes it too easy to call to mind the Plaintiff's weaknesses (at-work horseplay and romance) and it invites the response, mental or actual "...and neither did Ms. Webb." The theme also risks buying into Mr. Wilson's worldview that harassment is simply "play."

Candidate Theme: *Notice means notice.*

This language, as a play on "no means no," should be familiar in a sexual harassment context, and may be effective in emphasizing the central point that, hairsplitting aside, Nordick knew of harassment issues in the workplace and should have acted on that knowledge. However, those jurors likely to buy into an absolute "no means no" mindset, and to believe that any notice counts as legal notice, are likely to already be Plaintiff-supporters anyway.

Selected Theme: *Nordick knew, but Nordick said "no big deal," and that left Rhonda Webb with no real choice.*

This theme contrasts the Defendant's knowledge with the complacency in its informal responses to the situation in a simple, subtly alliterative phrase that is conversational enough to be repeated at several points in the case narrative. If ultimately chosen, it does the best job so far of meeting the five criteria:

1.) It is Targeted. The phrase "Nordick knew" is an important way of bridging over the question of a formal report to focus on the relevant purpose of any report, and to emphasize that in one form or another, Nordick had that notice. In addition, the emphasis on "Nordick" rather than any particular decision-maker is a way of emphasizing that at all levels, Nordick knew that *at least* there were reasons for further investigation into Wilson's conduct. It addresses two main weaknesses: One, whether Webb did enough to give notice (that doesn't matter, because Nordick knew); and two, the fact that Webb resigned (only because she had no real choice).

It also targets the Plaintiff's harder-to-persuade jurors, because defense-oriented jurors are less likely to be swayed by sympathy or appeals to fairness and responsibility. These jurors are instead motivated by procedure: Did the company follow the right steps? That line of thinking calls attention to the most glaring of the company's weaknesses: The emphasis on the complacency of the company's response (*No big deal*), contrasts with process-oriented pro-defense jurors' expectation that in this day and age, there is a procedure to follow when there is *any* knowledge of a possible sexual harassment situation. Even if jurors also fault Ms. Webb for her conduct or for failing to make a clearer record, they can still conclude that the company erred grievously by relying on informal responses and then assuming, but not verifying, that any problem had been resolved.

2.) It is Holistic. Instead of singling out a specific issue, this theme presents a combined message on harassment, the company's knowledge, the company's trivialization and lack of response, and finally Rhonda Webb's necessity to leave that leads to her constructive discharge claim.

3.) It is Economical. While it is not the shortest of the candidates, the selected theme still boils down to a short sentence. In addition, an even shorter version ('*Nordick knew*') could be used at several points in the case presentation.

4.) It is Memorable. It is mnemonic because it is short, uses some subtle alliteration (*Nordick Knew... No big deal*), and parallel phrasing (...*No big deal...No real choice...*). At the same time, it avoids the perception of 'artfulness' that might lead jurors to see it as over the top or manipulative.

5.) It is Easy. As illustrated in the next section, the theme lends itself to repeated application, either in whole or in part.

Using the Theme Throughout Case

1.) Using the Theme in Opening Statement

The first few minutes of a good opening statement are referred to as the “Silver Bullet” designed to tell the initial story of the case and help set jurors’ impressions while introducing the theme. The following is one example of a Silver Bullet incorporating the above theme.

You will hear that the situation Rhonda Webb faced in Nordick’s workplace went far beyond casual joking. From her supervisor, Frank Wilson, she faced constant sexual comments, continued and unwanted touching of her body, and was held, kissed, and groped: a situation that screams of sexual harassment. Yet the worst part of this situation is not just what Frank Wilson did in the workplace, it is what Nordick knew, and what Nordick considered to be ‘no big deal.’ When Rhonda Webb reported this situation to her supervisor, then to his supervisor, then to the human resources Manager, and then finally to the assistant to the plant manager – Nordick knew. The Nordick plant manager will tell you that he knew about the situation with Rhonda Webb, but he will also tell you he considered it no big deal – he just had a little talk with the shift supervisor, who then had a little talk with the abuser himself...and that’s it. Problem solved. Mission accomplished. No questions, no investigation, no interview, no report, no plan, no verification that the problem had been resolved. Nordick knew, and said ‘no big deal.’ And when that is the only option Nordick pursued, Rhonda Webb had no option but to resign and to remove herself from a situation that screamed of harassment.



But that isn’t the way it is supposed to happen. When Nordick knows, Nordick has no legal option but to follow a process that resolves the problem. Because they didn’t, Rhonda Webb now has no option but to be here today, and to ask you for justice.

2.) Using the Theme in Witness Examination

The thematic goal in cross examination will be to have the witness confirm various elements of the theme. In Frank Wilson’s case, we know that he will not confirm the harassment, or necessarily the fact of Nordick’s knowledge, but he is ideally situated to confirm and embody Nordick’s ‘no big deal’ attitude toward harassment.

In the deposition of the perpetrator, Frank Wilson, he describes the talk that Rhonda’s supervisor had with him, presumably after he had been asked by the plant manager to deal with the situation: “*Other than Ned telling me to leave her alone, no one said anything to me. And the only reason Ned said to leave her alone was because Rhonda was his girl.*” So, to Mr. Wilson, the company’s response is just a case of boyfriend defending girlfriend, no big deal. The opportunity in cross is to demonstrate how Nordick’s response echoed Frank Wilson’s own casual attitude toward the harassment.

Using this as a jumping off point for cross, one way to cross on this theme might be as follows:

A: *Do you recall the shift supervisor asking you to leave Rhonda alone?*

W: *Yes.*

A: *You believed he was asking just because Rhonda was his girl, right?*

W: *Right.*

A: *So you didn't consider this any formal message from management, did you?*

W: *No I didn't.*

A: *...just a comment from a boyfriend?*

W: *Right.*

A: *No big deal?*

W: *No big deal.*

A: *And you never heard from the Nordick human resources manager that you should stop harassing Rhonda Webb?*

W: *No.*

A: *And you never heard from the Nordick plant manager that you should stop harassing Rhonda Webb?*

W: *No.*

A: *So, it seemed to you like it was no big deal to them either?*

W: *It wasn't.*

3.) Using the Theme in Closing Argument

The closing argument should return to the theme in a more pointed and argumentative fashion. Here is one possibility:

You have now had the chance to hear from both Rhonda Webb and Frank Wilson, and they couldn't have described a situation that was more different...or more similar. Different because what Rhonda Webb saw as daily intolerable harassment, Frank Wilson saw as no big deal. But similar because, apart from the way they saw it, they both describe and confirm the same basic facts: constant sexual comments, continued touching of her body, and unwanted holding, kissing, and groping.

I guess it is not surprising that Rhonda Webb and Frank Wilson would see these same facts in two different ways. But what is more surprising is that Nordick chose Frank Wilson's view: No big deal. When Rhonda Webb told her supervisor, then his supervisor, then the HR manager, and then finally the plant manager's assistant – Nordick knew. But when Nordick time after time chose no response or the ineffectual response of a little chat, Nordick said 'no big deal.'

Nordick is forgetting that in today's workplace, any suggestion of harassment, indication, or possibility of harassment has to be considered a big deal. You all know that from your own work experience and the law, what you will hear just confirms that. When a company knows, as Nordick knew, it can't say 'no big deal.'

But Nordick is here today, and in effect Nordick is still saying 'no big deal.' In blaming Rhonda Webb herself for participating in a romantic relationship that Nordick allowed; In

saying 'we needed to hear about the harassment a few more times,' or 'we needed to see it in writing,' or 'the plant manager needed to be told by Rhonda herself and not by his own assistant,' Nordick is still finding lots of ways to say 'no big deal.'

Your verdict today is a chance to finally set the record straight. To say, 'Nordick, you knew, and it is a big deal.'

Ultimately, the best theme flows naturally into your own patterns of argument and advocacy, and fits naturally with the facts of your case. Think of the musical meaning of a theme – not the “theme song” but the theme itself, and there is a definite parallel. The theme from *Star Wars* can be conveyed in only five notes – a sequence that is so familiar it may be creeping into your head right now. That theme is not just relegated to one song or one point in the movie score, it reappears throughout the movies in many different scenes and moods. As a result, it unites and sets a tone. Your best trial theme should do the same thing.

Notes

¹This fact pattern, *Webb v. Nordick*, is owned by the Foundation of the American Board of Trial Advocates and is used here with permission.

² Schutz, A. (1970). *On Phenomenology and Social Relations*. Chicago: University of Chicago Press.

³ Holstein, J. A. (1985). Jurors' Interpretations and Juror Decision-making. *Law and Human Behavior*, 9:1, pp. 83-100. p. 85.

⁴ Hinsz, V., & Indahl, K. (1995). Assimilation to anchors for damage awards in a mock civil trial. *Journal of Applied Social Psychology*, 25, 991-1026.

⁵ Leach, M. O. (2005). Common Themes for a Successful Trial. Tort Trial Insurance Committee News. p. 1.

⁶ Leach, op cit.

⁷ McElhaney, J.W. (May, 2007). Themes That Strike a Chord. ABA Journal.

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How Can We Help Witnesses to Remember More?

by Timothy J. Perfect, Ph.D.

Eyewitnesses play a crucial role in the forensic process. At the outset, the details that they recollect, and the descriptions they provide help to shape the police inquiry, and at the end of the process, the testimony they provide in court can have a significant impact upon the outcome of the trial (Leippe, 1995). Psychologists have been researching the ability of eyewitnesses to provide an accurate account of what they have seen for over a century, with the vast majority of that research conducted since the 1970s. We have learned an enormous amount about the ways in which witnesses can be mistaken, or led into error, but rather less about how to help them to remember well. The current paper bucks this trend, and discusses research into helping witnesses to remember more details, more accurately.

What Is the Problem?

The forensic process requires that witnesses remember the truth, the whole truth and nothing but the truth. It requires both the maximum amount of correct information to be recalled (the whole truth), and the minimum amount of error (nothing but the truth). That human memory is fallible, reconstructive, susceptible to influence and goal-oriented is well established (see Schacter, 1999 for a review). It is not my intention to cover that ground here. Instead, I will take for granted the fallibility of memory, but ask nonetheless, how can an interviewer help a compliant witness to optimize their recall? There are two interrelated problems to overcome.

1) *The interview is a conversational process.*

An interview with a compliant witness is a conversation between two individuals governed by the social norms that apply in everyday conversation (e.g. don't speak when the other person is speaking, maintain an appropriate level of eye-contact, don't wander off the point etc). However, the conversation is not a natural one, and has aims that are not normally met in casual conversation. The interviewer's aim to maximize the amount of information provided by their conversational partner is often undermined by the subtle rules of conversation that govern polite behavior, both on the part of the witness, and the interviewer.

From the perspective of the witness, the level of detail that is required in a forensic interview goes way beyond the kind of detail normally provided in conversation. The question, "What did you do this morning?" from a friend would elicit a very different response than if it had been asked by a police officer or a lawyer. Providing a very detailed account of one's activities throughout the morning requires going beyond the normal expectations of



conversation. It requires giving details that would normally be seen as trivial, boring or irrelevant, and it requires dominating the conversation in a manner that would normally be seen as rude.

The interviewer also has a role in this process. In order to encourage the witness to provide the information in the detail required, the interviewer must carefully enable the witness to speak in a manner that contravenes social norms. This is difficult because subtle non-verbal cues typically signal turn-taking, interest, approval and so forth. Thus, the behavior of the interviewer, whether in non-verbal cues such as length and direction of eye-gaze, or verbal-cues such as interruptions or encouragements can impact upon the behavior of the witness. The interviewer also represents a source of distraction from the task of remembering. The most obvious form is interruption: research has shown that the average delay between a police officer asking for a free narrative from a witness, and following up with a question is 7.5 seconds (George, 1991). Thus, just as a witness has re-created a mental event, and has begun describing it, the interviewer interrupts this process. This provides both a direct interruption to recall, but also an indirect cue to the witness about the form the conversation will take, since speakers only interrupt one another if they are unhappy with what the other is saying. However, the interviewer serves as another form of distraction, in that they are a source of visual and auditory input to the witness that can serve to distract the witness from the process of remembering. We return to this point later in this article.

2) Memory control processes distort information reporting.

An interrelated problem is the process by which witnesses choose to report what they remember. It inevitably involves an editing process. Leaving aside the obvious biases in reporting that serve to enhance the status of the witness (downplaying their responsibility for bad outcomes, playing up their responsibility for positive ones), even witnesses with no personal agenda will edit their accounts as they discuss them with their interviewer in order to present information that is sufficiently accurate.

Witnesses can control the accuracy of their memory reports in two ways. One is to vary the “grain size” of the report (Goldsmith, Koriatic & Weinberg-Eliezer, 2002). This means that when they are uncertain of a detail a witness may choose to describe it in a less precise manner. The present author could be described as a 40-45 year old white male with graying brown hair and green eyes, or simply as a middle-aged man. Both are essentially accurate descriptions, but they vary in precision. This editing strategy doesn’t present too many difficulties for an experienced interviewer because further details can be elicited with follow up questions. However, choosing to omit details altogether, either by failing to mention something in a free narrative, or failing to provide an answer to a direct question, presents more problems to an interviewer. If the witness doesn’t mention something, it is hard for the interviewer to know what follow-up questions to ask.

The choice of withholding information, or offering it as evidence, provides the witness with a form of quality control, in the form of a trade-off between amount (quantity) or accuracy (quality). Witnesses can withhold details, thereby increasing the quality (accuracy) of the remaining information. Similarly, interviewers can encourage more liberal responding, thus increasing the amount of information elicited, but at a potential cost to overall accuracy. Several corollaries follow this point. First, the best positioning of response bias may vary depending upon the costs associated with the outcome, and so may vary through the forensic process. Early in an investigation, it is perhaps more helpful for witnesses to be more liberal, since any information they provide will be subject to further corroboration. However, during the trial, there is an onus on accuracy (“nothing but the truth”) and so the witness might be better adopting a more conservative response bias.

Finally, this perspective also makes clear that in evaluating attempts to improve the memory performance of witnesses, one must distinguish between genuine increases in recall from a change in response bias. If an

intervention is successful in improving memory, then witnesses should be able to provide more correct information without a concomitant increase in incorrect details. In contrast, shifting witnesses from a more cautious to a more liberal response bias will result in more correct details, but also more incorrect details. Thus, showing that a manipulation increases the amount of details reported, or even that it increases the amount of correct details reported, is not enough to establish that it is a useful technique to improve memory. That requires consideration of the rates of correct and incorrect information being reported. It is this distinction that has led to the rejection of hypnosis as a memory-enhancing technique.

Improving Memory – The Cognitive Interview

Research on the improvement of performance by eyewitnesses has centered on a collection of techniques called the cognitive interview (Fisher, Geiselman, & Amador 1989), subsequently revamped as the revised cognitive interview (Fisher & Geiselman, 1992). The cognitive interview technique is a formal interviewing method with two major components. There are social techniques designed to reduce witness stress and enhance conversation management, such as giving the witness a sense of control, preventing interruption by the interviewer, using open rather than closed questions and so forth. There are also cognitive techniques designed to help witnesses maximize their recall of the event. These include context reinstatement, multiple retrieval cues, change of perspective and repeated retrieval attempts.



The cognitive interview undoubtedly works. Studies in the laboratory, and in the field, have shown that compared to a standard police interview, a cognitive interview leads to more information. A meta-analysis of 42 published studies, involving over 2,500 participants showed that the cognitive interview substantially increases the number of correct details recalled by a witness, while increasing the number of incorrect details produced much less (Kohnken, Milne, Memon & Bull, 1999).

While the cognitive interview technique has been enthusiastically adopted by police forces around the world, and by other professionals with an interest in interviewing techniques (e.g. Murtagh, Addington-Hall and Higginson, 2007), it is not without problems. One issue with the cognitive interview is implementation. Because the revised cognitive interview is a collection of techniques it requires significant training to implement successfully. It is also quite time-consuming to conduct in practice. Consequently, it is not routinely utilized, and is often improperly implemented (Kebbell, Milne & Wagstaff, 1999)

A second problem is that because it is actually a collection of techniques – both social and cognitive – it is not entirely clear why it works. Attempts to break down the cognitive interview into its constituent parts have not been effective in identifying the components which produce the most benefits (Milne & Bull, 2002). Here, we present our research on one simple technique, largely unexplored, which has proven to be highly successful in improving eyewitness recall: eye-closure at retrieval.

The Eye-Closure Effect

Hypnosis involves both a relaxation stage, an eye-closure instruction, as well as the hypnotic instructions. Researcher have found that any memory benefit of hypnosis might just as easily be attributed to relaxation or eye-closure than to the hypnotic instructions (Wagstaff, Brunas-Wagstaff, Cole et al., 2004). It is worth noting how Wagstaff et al. (2004) tested the effects of eye-closure on memory recall. Participants were put into one of two conditions: an eyes-open condition, or an eyes-closed condition, and asked to answer 17 questions about the televised funeral of Lady Diana, Princess of Wales, which had been witnessed five years before the study. Those with eyes open managed to recall an average of six correct details, while those with their eyes closed got an average of eight details correct: an increase of 33%.



Because the funeral of Lady Diana was a high profile event which was discussed widely, and shown repeatedly on the TV and in other media, we wanted to explore whether the benefits of eye-closure were observable for more mundane events, seen only once – events of the sort a witness may have to describe. We also wanted to know whether the increase in correct details reported by Wagstaff et al. (2004) was due to an improvement in memory, or just a change in willingness to report. In our first experiment, participants viewed a brief video-tape of an event and were asked a series of questions that targeted particular details of the event. There were two experimental conditions: one group of participants were asked to close their eyes throughout the interview (the eyes-closed condition), while the other group were given no such instruction (the eyes-open condition). If participants in the eyes-closed condition did open their eyes at any point, the experimenter reminded them to close them again before continuing. Those in the eyes-open group were not told to keep their eyes open, and we didn't intervene if they did close their eyes as they tried to remember (as some people spontaneously do). Our aim was to compare instructed eye-closure with what happens in a standard interview in which people may or may not close their eyes. In all other respects the procedure was identical for both groups. Each participant was asked a series of 15 specific questions about the video they had seen, and either gave their answer or indicated that they could not remember.

Compared to the eyes-open group, those in the eyes- closed condition produced 44% more correct details, and 32% fewer incorrect details (see Table 1). This result is exactly the pattern that an interviewer desires: an absolute increase in the amount of correct information recalled, without increasing the incorrect details. In fact, incorrect recall actually decreased.

Next, a series of four additional experiments examined various recall of video-taped events as well as live events. The overall take-home message is that the series of additional studies replicated the pattern observed in the first experiment. Averaged across all five studies, participants with their eyes closed recall about 34% more correct details, and 20% fewer incorrect details than participants not instructed to close their eyes. It is interesting to note that the average size of benefit observed in our studies matches that of Wagstaff et al.'s (2004) study of memory for Lady Diana's funeral. The one study not to show this effect was Experiment 2. Closer examination of the data in

this study showed a benefit of eye-closure for the visual details only, with poorer recall of auditory details. However, this pattern was not replicated in the subsequent studies, which each showed equal benefit for auditory and visual details.

Table 1: The number of correct and incorrect details recalled by participants with their eyes closed, or eyes open during recall (and the % difference), in 5 experiments reported by Perfect et al. (2008).

| | Correct details recalled | | | Incorrect details recalled | | |
|----------------|--------------------------|--------|--------------|----------------------------|--------|--------------|
| | Open | Closed | % Difference | Open | Closed | % Difference |
| Experiment 1 | 6.1 | 8.8 | 44% | 5.3 | 3.6 | -32% |
| Experiment 2 | 10.0 | 10.2 | 2% | 1.9 | 2.1 | 11% |
| Experiment 3 | 10.9 | 19.0 | 74% | 2.0 | 2.0 | 0% |
| Experiment 4 | 7.8 | 10.3 | 32% | 3.6 | 1.6 | -56% |
| Experiment 5 | 9.6 | 11.5 | 20% | 0.43 | 0.33 | -23% |
| Average | | | 34% | | | -20% |

The pattern seems to be that eye-closure aids recall of both visual and auditory details, while suppressing recall of incorrect details. Thus, in terms of the distinction between memory and memory report discussed above, it seems clear that eye-closure has a direct effect on how well witnesses are able to access their memory.

There are a number of pleasing aspects to the studies above. First, together with the study by Wagstaff et al. (2004), they show the generality of the effect. Each study used different materials, with different questions, asked by different experimenters. The beneficial effects of eye-closure were apparent both for video-taped films and staged-live events where the participant did not know they were going to be tested. The benefit was also apparent when people gave their own account of what they had seen, and when they answered direct questions. More impressive is the fact that the average magnitude of the beneficial effect was the same as that reported previously for the cognitive interview (Kohnken et al., 1999), yet the eye-closure effect requires no special training and does not complicate the process of interviewing.

Clearly, an interviewer wishing to help witnesses to remember more details from a past event should instruct their interviewee to close their eyes for the duration of the interview.

Our experience is that witnesses don't always feel comfortable with this instruction, presumably because it contravenes social norms about looking at the person you are talking to, or because they feel vulnerable with their eyes closed. Nevertheless, the manipulation is beneficial, regardless of how they feel about it. However, because we are researchers our research questions have not stopped, and we have been attempting to discover why eye-closure is such an effective aid to eyewitnesses.

Why Does Eye-Closure Help Eyewitness Memory?

We are yet to answer this question, but there are several candidate explanations. Some we have ruled out, at least to our own satisfaction, but other ideas remain to be tested. We briefly describe possible explanations, and the relevant evidence we have collected that might be consistent or inconsistent with each.

The plausible explanation: Eye-closure reduces distraction.

Our initial belief was that the eye-closure effect was likely due to a reduction in interference, because visual processing is carried out by the same brain regions as involved in memory imagery. We thought that cutting out visual processing might help visual memory. However, the fact that auditory memory is improved just as much by eye-closure is inconsistent with this idea. Another potential explanation for the effect is that eye-closure reduces harmful social feedback from the interviewer. However, the fact that the eye-closure benefit occurs equally for both direct questioning by an interviewer and free report with little interaction with an interviewer rules out this explanation.

The more likely possibility is that eye-closure reduces distraction from the environment, and so enables greater concentration on the process of memory creation. Memory retrieval, particularly for complex events seen only once, is an effortful process which unfolds over an extended period of time. If this process is disrupted, participants may not be able to satisfactorily re-create the memory for the event, and so be unable to provide details of what happened.

Here we use the term distraction to mean something rather different from interference, as discussed above. Interference is the reduction in resources devoted to a task because they are being shared with a competing task. As



we discussed above, the hallmark of interference effects are that they are related to the similarity of the two tasks engaged in. Distraction is something else. This is the disruption of complex activity, so that it has to be re-started, or recreated. Here, the distracting stimulus may not take resources, but may cause the person to lose their train of thought, or forget what they were going to say. Because the environment contains many potential distractions that might serve this function, it is possible that eye-closure serves to reduce such distraction.

We have run two studies which are consistent with this view. One involved participants watching a videotaped event, before answering questions about it, as in Experiment 1 above. However, participants were required to answer the questions while watching a computer screen, on which were displayed images of moving shapes. The images differed in two ways: the number of shapes displayed, and the randomness of their movement. Although the witnesses were not required to do anything with the images, their ability to recall details of the event they had seen was impaired by both the number of shapes, and the randomness of their movement. The implication from this is that environments that contain more complex, unpredictable events can impair recall. An interviewer fits this bill pretty well, because a human being is both a complex visual object to process, with many variations in pose, expression etc, and is random, since their movements cannot be predicted. Consequently closing one's eyes to the distracting interviewer might be beneficial.

In a second study, we used auditory distraction. Participants tried to answer questions about a previously seen staged event, with their eyes open or closed. Half the participants in each condition also had to cope with random bursts of white noise, played over headphones. What we found was that the white noise impaired people's ability to answer the questions, much as the random shapes had impaired recall in the other study. However, we also found that eye-closure reduced this effect. That is, instructing people to close their eyes helped them overcome the distracting effect of the white noise. This finding is particularly compelling because it contradicts an interference account. Here, auditory distraction is overcome by reducing visual input. Hence it seems that eye-closure is helping in the sense of overcoming general distraction rather than modality-specific interference.

Explanation caveat: Eye-closure influences contextual retrieval

An obvious question that follows our work on eyewitness recall is whether eye-closure *always* improves memory. Recently, we have run a series of laboratory experiments on memory, which have provided the emphatic answer, "No". We ran several studies where participants learned lists of pictures or words, and later recalled them with their eyes open or closed. These studies showed absolutely no benefit of eye-closure at all. Thus, remembering simple lists is not helped by eye-closure, but memory for complex events is helped. This is the theoretical puzzle on which we are currently working. One possibility, in line with that mentioned above, is that memory for simple lists is relatively resistant to distraction. We will be looking at this possibility in our next round of studies. Another possibility that we will also be looking at is that complex event memory requires greater reliance on context. In an event, the details to be remembered are both inter-related, and commonly related to the narrative thread that they share. In contrast a list of items is just that: a list. The ability to recall the fifth item on the list is no help whatsoever in recalling the twelfth item, since they are unrelated. In contrast, recalling that a perpetrator wore a blue shirt may assist in recalling what else he wore, and by extension what he was doing when he was wearing it. Thus eye-closure may help witnesses utilize this contextual binding, but this is of no help when remembering unrelated lists.

Summary

The extent to which an interviewee can provide details about a past event is driven both by the quality of their memory, and their willingness to respond. Interventions designed to increase the amount remembered need to demonstrate that their effectiveness is more than a change in response bias, but actually constitutes improved

memory. The simple instruction to a witness to close their eyes during retrieval does just this. In a series of studies, across a range of situations, witnesses instructed to close their eyes were able to produce more correct information, while producing less incorrect information, than witnesses interviewed in a standard condition. Current research is exploring why this effect occurs, with the most likely explanation being that eye-closure allows the witness to overcome distraction from the environment, and so concentrate on the process of memory retrieval.

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References

- Fisher, R. P., Geiselman, R. E. & Amador, M. (1989). Field test of the cognitive interview: Enhancing the recollection of actual victims and witnesses of crime. *Journal of Applied Psychology*, 74, 1-6.
- Fisher, R. & Geiselman, E. (1992). *Memory enhancing techniques for investigative interviewing*. Springfield Ill, Charles Thomas Publishers.
- George, R. (1991) *A field evaluation of the cognitive interview*. Unpublished Masters Thesis, Polytechnic of East London.
- Goldsmith, M. Koriat, A. & Weinberg-Eliezer, A. (2002). Strategic regulation of grain size in memory reporting. *Journal of Experimental Psychology: General*, 131, 73-95.
- Kebbell, M. R., Milne, R. & Wagstaff, G. F. (1999). The cognitive interview: a survey of its forensic effectiveness. *Psychology, Crime and Law*, 5, 101-115.
- Kohnken, G. Milne, R. Memon, A. & Bull, R. (1999). The cognitive interview: a meta-analysis. *Psychology, Crime and the Law*, 5, 3-27.
- Leippe, M. R. (1995). The case for expert testimony about eyewitness memory. *Psychology, Public Policy and Law*, 1, 909-959.
- Milne, R. & Bull, R. (2002). Back to basics: a componential analysis of the original cognitive interview mnemonics with three age groups. *Applied Cognitive Psychology*, 16, 743-753.
- Murtagh, F. E. M., Addington-Hall, J. M. & Higginson, I. J. (2007). The value of cognitive interviewing techniques in palliative care research. *Palliative Medicine*, 21, 87-93.
- Perfect, T. J., Wagstaff, G. F., Moore, D., Andrews, B., Cleveland, V. Newcombe, S., Brisbane, K-A. & Brown, L. (2008), How can we help witnesses remember more? It's an (eyes) open and shut case. *Law and Human Behavior*, in press.
- Schacter, D. (1999). The seven sins of memory – Insights from psychology and cognitive neuroscience. *American Psychologist*, 54, 182-203.
- Shah, P & Miyake, A. (1996). The separability of working memory resources for spatial thinking and language processing: an individual differences approach. *Journal of Experimental Psychology: General*, 125, 4-27.
- Wagstaff, G. F., Brunas-Wagstaff, J. Cole, J., Knapton, L., Winterbottom, J. Crean, V. & Wheatcroft, J. (2004). Facilitating memory with hypnosis, focused meditation and eye closure. *International Journal of Clinical and Experimental Hypnosis*, 52, 434-455.

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We asked three experienced ASTC-member consultants to comment on the practical relevance of Dr. Perfect's work in witness preparation. On the following pages, Leslie Ellis, Connie Miller, and Kacy Miller provide their thoughts on use of the eye-closure technique to aid in witness fact recollection.

Leslie Ellis, Ph.D. comments on:

“How can we help witnesses to remember more?” [by Tim Perfect]

Leslie Ellis, Ph.D. (lellis@trialgraphix.com) is a Jury Consultant based in the Washington, D.C. office of TrialGraphix | KrollOntrack. She primarily works on complex civil litigation nationwide.

While there has been a substantial amount of research on eyewitness accuracy, the vast majority of the research on improving witness accuracy and recall has focused on criminal proceedings. Aside from the apparent effects distractions can have on witnesses and implications that finding might have for the notoriously inaccurate eyewitness identifications, the technique featured here has implications beyond the obvious. Many of the methods that have been investigated, including the cognitive interview, either cannot or have not translated well into the civil litigation world because of the norms and civil procedure rules governing civil litigation depositions. This research focuses on a method that can easily be applied to civil litigation and is likely put into practice informally every day, as deponents try to recall events that occurred years ago, but could be put to use more formally with better results.



I am always surprised when, sometime after depositions but before trial, counsel sits down with the witnesses and walks them through their stories for the first time. For whatever reason (usually some combination of time constraints and strategy), counsel often does not ask the

“who, what, when, where, and why” questions until after the deposition is over, which can be years after the litigation began. Unlike a criminal investigation, which begins as soon as a potential crime has been identified, civil litigation slogs on, sometimes through years of motions practice, before the key players get thoroughly interviewed by a friendly party. The opportunities for lost information are immense. Further, a witness's complete story might not work well with the bigger picture of the case that has been established on the record, and counsel is then left to figure out what to do about it.

Rather than waiting until trial prep, counsel should consider having a thorough initial conversation with witnesses (much like the thorough, open-ended cognitive interviews) before depositions, strategy permitting. Such a conversation could not only help develop a discovery or deposition strategy, but also recover information before the witness's recall either degrades further or is contaminated by the deposition process. Based on Dr. Perfect's research, it appears that such a discussion should incorporate the eye-closure techniques studied to date.

Witnesses who are particularly anxious or stressed are perceived as less credible than calm witnesses. It's safe to assume that a witness who testifies with her eyes closed would lack credibility with jurors, so the closed-eye interview with counsel would have to be followed by open-eye testimony in deposition and trial. Hopefully, the

authors or others are considering conducting further research into what happens when you follow up the instructed closed-eye interview with a standard open-eye interview. If the effects are long-term and the benefits are realized in subsequent open-eye testimony, closed-eye initial interviews could be a powerful aid to criminal and civil witnesses alike.

Connie Miller comments on:

“How can we help witnesses to remember more?” [by Tim Perfect]

Connie Miller (connie@constancemiller.com) is a 30-year litigation communication consultant and presentation skills coach, working in the Seattle area and internationally. Her background as a professional actress, visual artist and mediator informs her consulting and coaching.

What a well-balanced and clear paper! A joy to read! Coming to trial consulting from the theatre over 30 years ago, I have a healthy respect for the scientific approach with its numbers and distinctions. For instance, I feel as though I am living in my right brain nearly 90% of the time. However I have never tested this. But when Tim says that there is a 33% increase in the recollection of six details, that is just what he means. He has tested it. Very good!

I expect that most other communication-focused trial consultants run up against memory issues in nearly every case. I find myself helping the attorneys learn to ask questions about memory in such a way that it does not prejudice the response. Certainly many witnesses feel, consciously or not, that they need to please or help the (“smart”, “successful”, “busy”) attorney and they look carefully for the attorney’s facial expressions and body language to affirm their responses. The attorney’s naturally and highly trained critical mind is constantly listening for legal issues and can be highly judgmental if the witness either does not give them sufficient or the “right” sort of information: “No, don’t say that!” (Frown, grimace, etc.); “Yes! Say that! (Excitedly, giving weight to what might actually be a minor piece of the recall).

Dr. Perfect’s thesis is compelling. However, closing the eyes, to me, will require the witness to feel safety in the environment and I can imagine that some attorneys lack the sensibility to create that safety prior to asking the witness to close their eyes. I am wondering if Dr. Perfect’s subjects were asked to close their eyes by attorneys or graduate students? I think it would make a difference in the outcome.

And there is another aspect of this question of eye-closing. As a litigation communication consultant and coach, I have been told by attorneys that they don’t like to be asked to close their own eyes during a communication exercise – “too touchy-feely!” So I am wondering if they are uncomfortable themselves with this sort of right-brain process, what sort of administrators of the process will they be able to be?

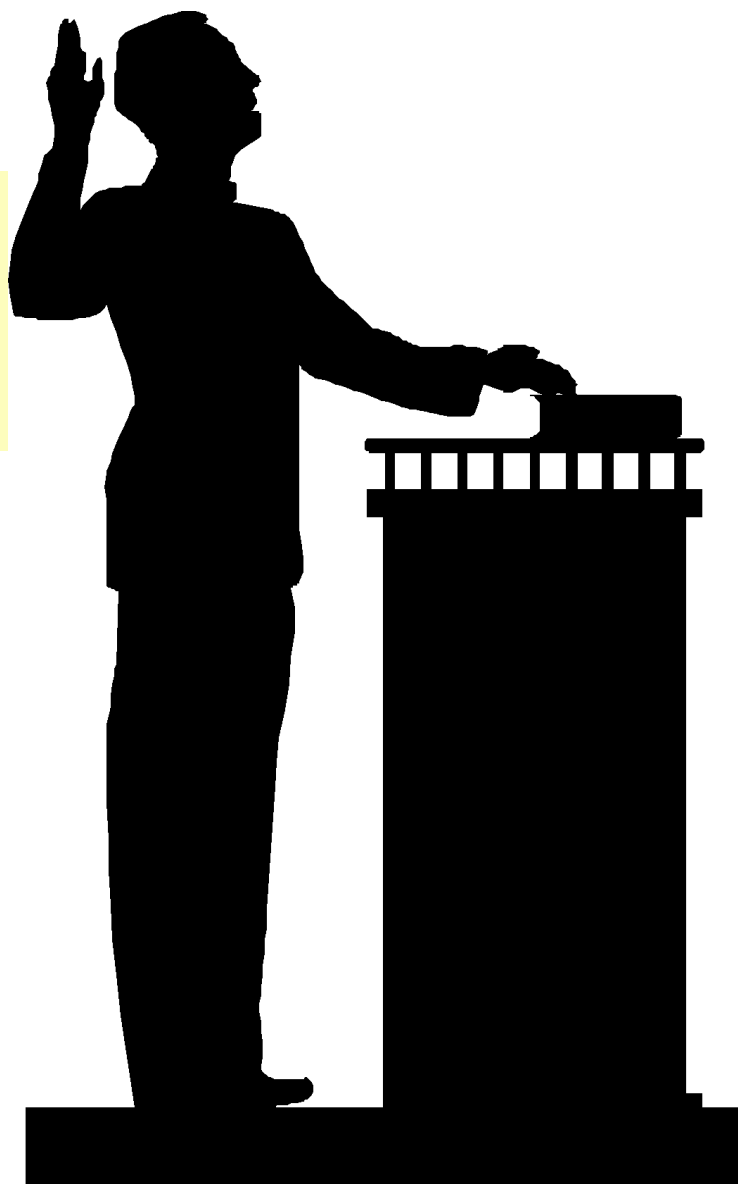
However, I am looking forward to seeing how this all plays out and will be very happy if closing the eyes turns out to be a great tool, embraced by attorneys to the sufficient degree that we all do enjoy more and more accurate recall by our witnesses.

In my own attempts to be of service to my attorney clients and their witnesses I have employed the use of flip charts and colored pens to help with recall. I have found that asking the witness to augment their verbal answers to the attorney with simple sketches of buildings, floor plans, maps, and organizational charts showing the roles of the people involved and their relationships to each other, etc., enhances their recall. The details of their recall are increased and even more detailed, and the process provides great relief to them to be able to tell their story more

effectively. It also takes their focus off the listening and possibly critical attorney and puts it on their own developing picture of what they recall, lessening the potential skewing effect that the questioning attorney might induce. The attorney can then ask them more specific questions about the witness-generated visuals, generating more and possibly more detailed recollections.

In addition to picture-making, I like to ask witnesses to imagine that the environment in which the case circumstances happened is in the interview room. I suggest that they are the director of a documentary film that is focused on those circumstances. I ask them to describe and demonstrate physically what happened, who was standing where or what was placed where, etc., to show us, as in a little film. As they go through this process, they access much more of their memory stored in their body – muscles, nerves and tissues – increasing their recall and producing more details.

I expect that other trial consultants have used these methods as well. We are such a visual and kinesthetic culture, rather than an auditory one. Making pictures and using our bodies to access and express memories works very well in my experience. These processes also give the attorney a rich resource of unique sensory information to use later to tell the case story to the mediator, judge or jury. However, I have no numbers, no statistics on the efficacy of these processes. I hope that Dr. Perfect will do a study on these tools as well!



Kacy Miller comments on:

“How can we help witnesses to remember more?” [by Tim Perfect]

Kacy Miller, M.Ed [kacy.miller@courtroomlogic.com] is the president of CourtroomLogic Consulting, a full-service trial sciences firm located in Dallas, Texas (www.CourtroomLogic.com). Areas of expertise include pretrial research, theme development, witness preparation, graphic development and all aspects related to jury selection.

As I read Timothy Perfect’s article summarizing his recent research on the eye-closure effect, I kept asking myself: “Can I utilize this technique in my trial consulting practice and if so, how?”

The cognitive interview technique is a multi-faceted method primarily used in the law enforcement industry. While I wholeheartedly acknowledge the potential benefit of implementing the cognitive interview and/or the eye-closure technique when interviewing potential eyewitnesses, perpetrators or otherwise delving into the details of a criminal investigation, I will admit that I had a difficult time wrapping my arms around how to maximize the benefits of such a strategy in the world of civil litigation.

In a society where speed is revered and often admired,

we are rarely faced with situations that not only allow—but also encourage—us to slow down, eliminate distractions and give ourselves the permission we need to slowly work through the process of recalling vivid, detailed memories. It's no surprise that anxiety, visual distractions, background noise, physical discomfort and emotional stressors all interfere and impede memory recall.

One key element of the eye-closure technique is that the witness is instructed to close his eyes for the duration of the interview. Despite best efforts to soothe and assuage the anxieties of a nervous witness, I would fully expect a witness to express resistance to the method. However, even though the eye-closure technique undoubtedly increases witness vulnerability, Dr. Perfect's research had one surprising finding: the technique can aid accurate memory recall *despite* the witness's level of discomfort. Even though fraught with discomfort and awkwardness, the witness might actually be able to trigger a memory by applying this technique... and consequently, increase his comfort level with the facts and gain confidence as a witness.

I believe the method is probably best used in the context of a criminal investigation. However, I do think it has limited applications to civil litigation—primarily when facts surround the sentinel event that ultimately gave rise to a lawsuit. For example, in medical malpractice, products liability and personal injury disputes, memory and recall of medical treatments, pharmacology, time and sequence, symptoms and the events leading up to and immediately following the sentinel event can be crucial facts when developing trial strategy.

The key question is *when* to utilize the technique. It is my opinion that the eye-closure technique is best implemented during the *early* stages of fact development and information-gathering—namely, during the initial client meetings, answering early interrogatories and RFPs, and during general discussions aimed at unveiling the details of what happened. The eye-closure technique is, at its core, an investigative tool. In rare instances, an attorney may want to try a modified version of the technique while taking a deposition if the presenting witness is having a difficult time recalling details. Encouraging such a witness to close his eyes may aid in retrieving the data, but at the end of the day, the witness is always in control of what he chooses to share. While the memory may be retrieved, there is no guarantee that it will be articulated. Also, if electing to implement this technique during a deposition, I would encourage careful consideration as to how badly the data is wanted (or needed). Sometimes, the less we know the better.

That being said, I would not, under any circumstance, recommend utilizing the eye-closure technique during actual trial testimony, as the very nature of the technique has the potential to cause jurors to question the believability and truthfulness of the testifying witness. When did you last observe an amazingly credible testifying witness who closed his eyes, took ample time and slowly recalled details on the witness stand? The witness may very well be testifying truthfully and accurately, but if his tone, demeanor and body language fail to communicate that message as well, jurors tend to question the authenticity of the message. The eye-closure technique is one to implement behind closed doors, not in front of a jury.

While the eye-closure technique certainly has interesting implications, it does have practical limitations. However, the mere existence of limitations does not in and of itself suggest an outright dismissal of the method. It is a viable and research-proven tool that I will add to my ever-growing bag of tricks. Do I envision myself using this technique with every case and every witness? Certainly not. But make no mistake... the next time I am working with a witness who is having a difficult time with specific recall, I will absolutely consider implementing the strategy.

Following review of the ASTC consultants reactions to his paper, Tim Perfect responds to their comments and questions on how to use his research findings.

Tim Perfect responds to ASTC-member consultant comments on:

“How can we help witnesses to remember more?”

I'd like to start my response with an admission, followed by an expression of gratitude. The admission is that I know relatively little of the processes or procedures by which individuals work through the civil and criminal legal processes in the US, or even in the UK where I live. My expertise is in experimental psychology, in particular human memory. By preference I have always been interested in the interplay between theory and applied aspects of human memory, and so naturally my research includes studies of the memory of eyewitnesses. However, my focus in this work has always been on memory, rather than application. What a pleasure then, to have such thoughtful and positive commentaries by three experts who are very much focused on the practicalities of interviewing in a legal setting.

My overwhelming response in reading these comments was one of relief that the practitioners see value in the work we have been doing. There are, however, a number of comments they make that I would like to respond to:

When should the technique be used?

Kacy Miller and Leslie Ellis both express concern about the potential for using the eye-closure technique at trial. I couldn't agree more with their comments: the work we have done is very much about getting the witness to report as much information as they can. I agree wholeheartedly with Kacy Miller that it is probably “best implemented during the early stages of fact development and information-gathering”. However, this doesn't necessarily mean soon after the event. My colleague Graham Wagstaff originally demonstrated that eye-closure can aid recall of an event that happened several years ago.

Are the benefits long-lasting?

One question (asked by Leslie Ellis) that follows the use of the technique in the early stages of the legal process is whether the benefits will then be seen at trial, weeks, months or years later. Practical constraints mean that we have not yet done this research. However, other memory research suggests that the effects will be long lasting. It is well established that the act of memory retrieval has a powerful memory strengthening impact. Recalling a fact at one time enhances the likelihood of recalling that fact later, much more than merely re-studying the fact. (In educational settings this is known as the testing effect). Thus, anything that helps a witness recall something early in the legal process is likely help them recall it later.

The stress of eye-closure / Does it matter who does the interviewing?

Connie Miller asked the perceptive question of whether the interviews were done by attorneys or graduate students. I am assuming that what lay behind her question is a concern about the stressfulness of the interview situation when conducted by attorneys. Kacy Miller alluded to this same point in her comments. The straightforward response to Connie's question is that we used student interviewers in all the studies we reported. However, in a small-scale follow-up study, trained police officers carried out interviews to a (mock) crime in either an eyes-closed or control condition, and the same beneficial effect was observed, even though the police officers reported that their interviewee's reported feeling uncomfortable. So, I am optimistic that the eye-closure benefit

occurs despite the discomfort created, and so should occur when legal professionals conduct the interviews. However, further research is clearly needed here to explore a wider range of situations, although the boundaries of what we can do in the lab, compared to what happens in real life, are always constrained by practical and ethical concerns.

Other techniques

Connie Miller outlines a number of interesting memory techniques that she uses to cue memories in her practice. These sound both interesting, and eminently sensible, given what we know about the benefits of varying retrieval cues to aid memory. I hope that she continues to use these techniques, but also considers the potential benefit of eye-closure as another tool to add to her interviewing tool-box.



The Jury Expert wants to thank Dr. Perfect for not only sharing his work but for responding to consultant reactions to its practical utility. This sort of dialogue is precisely the goal of our transition to a digital journal.

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Witness Preparation: Hidden False Assumptions, Real Truths, and Recommendations (Part Two)

by David Illig

Part One of this article was published in the May issue of The Jury Expert ([see it here](#)).

[Editor's note: We continue with this article where we ended in May.]



False Assumption 3) Witnesses are naturally good listeners who accurately hear interrogation questions.

Truth: All humans are **inaccurate** listeners. In fact, the human brain and nervous system that makes up the listening system is what NASA calls an “Error Reduction System.” It is designed to make a huge number of listening errors that gradually get reduced in size upon repeated interactions.

In normal life this system works fine. In litigation, where everything gets written down and where people assume humans hear well and speak well, it creates huge problems. With more stress, and a more skillful interrogator, the listening problem has an even greater effect.

The Interrogation Effect drastically reduces listening accuracy and reduces awareness of errors. It’s a huge problem even for smart people who, ironically,

often have even larger listening problems under interrogation. These listening problems can be so intrusive that their answers often address a different question than is actually asked. And, to compound the problem, witnesses rarely realize it when it happens. The human nervous system works against the witness and needs to be countered by training and practice unless you are happy with a low accuracy rate in witness testimony.

Although some witnesses may intellectually agree that they and other humans are poor listeners, their non-cognitive brain assumes differently. Moreover, the non-conscious brain even assumes that it is a “mind reader.” It assumes that it knows what the interrogator means and again, the witness is often unaware of these assumptions and their consequences. Train your witnesses to listen carefully and to ask questions if they are at all uncertain as to the true question being asked.

A corollary to this assumption is that witnesses listen very *carefully* and with *high intensity* to the questions.

Witnesses, even very successful ones, rarely put great effort into listening very, very accurately. Even in critically important situations. They are used to making errors and correcting them later. And humans are usually unaware of how inaccurate their listening truly is. Humans falsely *assume* they are listening carefully and assume they listen accurately. And we make higher rates of errors under stress.

What You Should Do to Deal with This Assumption: Attorneys need to educate witnesses that they all have a brain that will make many listening errors unless they make some adjustments.

Witnesses need to make adjustments even if they are brain surgeons or CEOs (i.e., “really smart people”). I tell my witnesses that all of us would do better to assume we have a listening problem and that they have to compensate for it in their testimony. It’s similar to a person who needs a hearing aid and finally admits it and starts using it all the time. The witness needs to assume, “I have a listening problem and I have to cope with it and overcome it.” They can’t ignore it and pretend otherwise. It’s not a problem unique to any one of us. It’s simply the way the human brain works.

Many witnesses won’t accept they have a listening problem until it’s clear that they have actually misunderstood the question. Some will only be convinced by a video of the sequence which proves it. It is not uncommon for an MD, CEO, or Ph.D. to miss something so simple as the day, or year, or name of the person a question addresses. Videotape them and give them visual and auditory feedback to illustrate this unconscious, automatic process that must be made a conscious and volitional process.

Teach the witness to use a higher level of intensity, concentration, and focus than is typical. This “Super Listening” is much more intense than normal listening. A person can only use this in special circumstances for a limited time because it’s so exhausting. Part of what automatically occurs as part of the Interrogation Effect is an increase in the problem of inaccurate listening.

It’s interesting that one of the most common interferences to accurately hearing the *question* is the witness prematurely focusing on the *answer*. The simple powerful intervention is to teach the witness to separate the question from the answer. They need to become highly certain of what the question is and what it is asking. Then and only then, after they are certain they know the question, the witness can begin working on the best answer. Human brains and the Interrogation Effect tend to blend together listening to the question and the process of providing an answer. The solution is to separate the two processes. It’s not natural or easy. It takes great effort, but with training and practice a witness can do it.

A simple test you can use with your witness is to have them repeat the question out loud before they are allowed to answer. You will be amazed how often untrained witnesses can’t repeat the question accurately. And if they can’t repeat it out loud, it’s hard to argue that they have heard the question accurately.

Teach witnesses that they need to chew and chew on the question until they are certain what it is actually asking. Teach them to listen at a heightened, intense, unnatural level. Teach every witness that their brain will act as if it can read minds and determine meanings. Teach smart witnesses even more deliberately. Careful and repeated assessment of the question can often allow the witness to realize the brain’s false assumptions and assumed meanings that were not actually present in the question asked. Once they spot these unclear words or statements, unclear meanings or pronouns, they can be taught to either ask for clarification, state that the question as asked cannot be answered, or they can define the word(s) out loud and then answer that question. It often sounds like this: “If you’re

asking me whether I was going inappropriately fast, my answer is no.” It’s basically a statement of the question that the witness proceeds to answer. It may or may not be what the interrogator meant.

False Assumption 4) Witnesses say what they intend to say.

Put another way, witnesses say what they mean the vast majority of the time, and witnesses know what they have said in response to a question the vast majority of the time.

Truth: People, even smart, educated, truthful people, often do not say what they mean to say and prefer to say. All jurors and civilians know this about themselves in normal life situations. Furthermore, humans often believe they have said things very differently than they have actually said them. We are often confidently wrong. As humans, we rarely say exactly what we want to say or communicate exactly what we want to communicate.

The human communication system is designed to make speaking errors and then correct them through a series of interactions with an active audience who responds. The legal setting does not assume these truths about human nature. It assumes accurate listening and accurate speaking with full awareness even though that is not reality in normal life. Therefore, witnesses need to learn a special level of both listening and speaking that is unusual. And you have to help them learn this.



A corollary to this false assumption is that it’s best to say what comes to your mind first because it’s most likely closest to the truth.

Witnesses often erroneously believe that what first comes to their mind in response to a question is what they should state as their answer. They assume that this is most likely closest to their truth. It is folklore (especially in the legal world and criminal world) that what comes to the mind first, especially in response to an interrogation question, is closest to the truth.

The Interrogation Effect actually makes it unlikely that what first comes to the mind is the best. The Interrogation Effect can actually be more powerful than the truth in determining what first comes to a witness’s mind. It is astounding what things honest and smart people will say because of the Interrogation Effect. Making truth the more powerful force takes some special effort.

A second corollary to this false assumption is that witnesses think carefully before they answer.

They may *think* they think carefully before every answer. Yet, most witnesses say what comes to their mind first without thinking carefully -- at least not nearly as carefully as is needed in a litigation setting. The Interrogation Effect pulls out what first comes to their mind. It's like a magical WD-40 that sprays the brain and lips and makes it more likely that the witness will offer an answer that is less than ideal. The Interrogation Effect makes it like trying to walk on a steep mountain and gravity forces you downhill even though you want to go in another direction. And when the third answer that comes to mind is the best, truth-telling answer (after the first answer has already been spoken), then "Houston, we have a problem..."

What You Should Do to Deal with This Assumption: One of the first things is to teach your witnesses the realities of listening and speaking. Teach them how the brain and the Interrogation Effect fool us into listening poorly, into speaking without consideration, and thus not being as effective as we can be on the witness stand.

Teach witnesses that this isn't a personal weakness but a part of our human nature. I especially like to teach very smart and educated witnesses that often a fast brain can cause us even more problems than a slow brain. It's literally a "complication" of a good brain, and a big, fast brain can fool us quickly and certainly with an automatic response. Teach your witness, especially if they're smart, that the most important step is to keep their mouth closed so nothing comes out first because of the interrogation effect. (Now *that* is really being smart.)

Teach your witness that they must write, edit, rewrite, and rewrite their answer again in their mind before they put it out there for the record. Tell them it's similar to writing without being able to edit after you write something down on paper. You have to do your editing, at least most of it, before you open your mouth. That's very different than normal life.

Teach your witnesses that this will be their most careful and thoughtful communication. It's like crawling across a field of well-hidden mines and booby traps. Looking thoughtful looks good on most people and you might want to have your witnesses practice an expression of thoughtfulness.

Teach your witness to generate three possible answers to the question. Teach them to analyze each one silently as to whether or not it communicates their truth. Then have them pick the best of the three, or generate another if all three fall short. You're basically teaching the witness to silently complete the assessment and editing process that normally takes place through discussion and interaction. Because that 'real life' process is not possible and is also too dangerous in this setting, the process has to happen on its own, in the witness's head, and during silence.

A critical truth to teach your witnesses: The secret to becoming a very good witness, even just a safe one, is **silence**. If a witness learns how to use silence they have a chance to become a good witness. If a witness doesn't master silence, they will never be the best witness they can be.

Why silence? Because it's only during silence that the witness can really become crystal clear about the question and the answer it demands. And it's only during silence that the witness can analyze possible answers and make a decision about which one is best. It is ironic that silence terrifies most attorneys. They are so used to fighting for every piece of air time from other attorneys that silence is rare. In fact, attorneys tolerate silence less than most others. You will have a huge edge if you teach your witness to use silence. Talking is easy. Silence is difficult and powerful. Teach it, demonstrate its utility, and allow your witness to practice being comfortable with silence.

It's wise to teach your witnesses to use this model for almost every question. Set the pattern from the beginning, even if it's not necessary. Maybe they don't have to create three answers to every single question but it's worth doing most of the time:

"Where do you live, Dr. Illig?" Under interrogation, if we slow my brain down enough to hear what it's doing... and keeping my mouth closed..... You might hear these three responses:

- 1) "Why are you asking about my home, you jerk?"
- 2) "8311 NW Reed Drive."
- 3) "I live kind of between NW Portland and Beaverton at 8311 NW Reed Drive."

In many settings the third answer will feel best to the jury who hears it.

Your witness may say this is too mechanical, or too unnatural for them. It bears repeating: testifying in a legal situation is not natural.

Teach your witnesses that being a good witness means they are *not* using automatic, spontaneous responses. A large part of the Interrogation Effect is to get automatic responses from a witness. That puts the interrogator highly in charge. A good witness should use intentional, manual responses -- the opposite of automatic, habitual or natural responses. A witness should respond to every question thoughtfully, purposefully, and with full intention. This applies even with emotional responses and intense feelings. The goal of a good interrogator is to control the witness. The goal of a good witness is to control themselves and not allow the interrogator to control their responses. To gain control a witness has to get emotional and intellectual separation from the interrogator.

Becoming a good witness means defying behaviors that are normal or typical in everyday life. It takes training and practice under interrogation to achieve effective communication. It can be learned to some worthwhile degree by almost every witness, no matter who they are or what level of education they possess.

Do your training in a simulation format of deposition or trial. With practice and training these approaches can become more comfortable and easier to navigate. But they never get really comfortable or really easy, even if it looks like they do.

Next issue we will cover more False Assumptions and Truths about Witness Preparation and testifying in deposition and trial. Start using these ideas today.

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The TJE July 2008 Favorite Thing!

We don't think there's much to ponder, think about, consider, or ruminate on here. We don't think it matters if you are partial to redheads right now. We do think that once you take a look at our TJE Favorite Thing for July, you'll be partial to redheads in a big way.

Our July Favorite Thing is a blog written by ASTC's own Anne Reed entitled *Deliberations*. Anne is an attorney and a trial consultant (and a bit of a technical guru and blawger). She's a 2007 ABA Journal Blawg 100 Honoree and a consistently fun and thought-provoking read.

Upon what does Anne deliberate? You name it. She deliberates. Topics like her favorite applied social sciences journal; the jury system in Japan; courtroom cameras; technology and the attorney; new court decisions soon after they come down; findings in the social sciences research; news items; and more. You'll also find a collection of supplemental jury questionnaires from various trials, a guide for trial lawyers to social networking sites, and recommendations on *voir dire*.



You truly do want to go see why Anne Reed is our July Favorite Thing.

While there are instructions on how to subscribe via RSS in Tammy Metzger's article in this issue of TJE, you don't have to have a "blog reader" to see *Deliberations*: you can also subscribe via email. Just go to this URL and we bet Anne Reed will still be your Favorite Thing even after the calendar page turns.

See the 'Deliberations' blog here: <http://jurylaw.typepad.com/deliberations/>

ASTC member Lisa DeCaro of Courtroom Performance, Inc. recommended our July Favorite Thing.



Editor's Note: This article represents the first in a recurring series of articles written by graduate student members of ASTC who are interested in various aspects of litigation advocacy. We call them Q&A's because common questions (Q) are posed, answers (A) provided based on the research; and application (A) of the research to practice is discussed. We appreciate these contributions from those closest to the research and look forward to additional contributors.



What We Know Now: An Overview of Recent Eye Witness Research

by Kristin Finklea

The true level of eyewitness accuracy in the legal system has been debated by researchers and laypersons alike. Specifically, the role of eyewitness identifications in false convictions has come under examination (e.g. Conners et al., 1996; Innocence Project, 2001). While we do not know the relative conviction rate of guilty defendants compared to innocent defendants, expert opinion has proposed that the primary cause of false convictions may be faulty

eyewitness memory; other causes of wrongful conviction include coerced false confessions, prosecutorial malfeasance, and inadequate representation (Innocence Project, 2001).

Researchers have suggested that false convictions may be reduced by decreasing the rate of false positive identification via one or both of two scientifically-based interventions (e.g. Wells et al., 1998). Firstly, during trial, jurors can be presented with expert testimony regarding factors presumed to decrease eyewitness accuracy. Secondly, the diagnosticity of identifications can be improved by collecting eyewitness identification evidence with valid procedures known to reduce the rate of false positive identifications. For this first installment in *The Jury Expert*, I will focus on some of the most fundamental questions surrounding expert testimony about eyewitness identifications.

Question: What is the difference between a system variable and an estimator variable?

Answer: When talking about variables that may affect the accuracy of eyewitness identification, *system variables* are those variables that may be under the control of the criminal justice system (Wells, 1978). Examples of system variables include the lineup type, the method of selecting foils/fillers for a lineup, and the instructions given to a witness before the administration of a lineup. The most common lineup types are simultaneous lineups (live or photo), sequential lineups (also live or photo), and showups (essentially a one-man lineup). Foils are typically selected for a lineup in one of two ways: 1) they are matched to a picture of the suspect or 2) they are matched to a witness's physical description of the suspect. When the issue of pre-lineup instructions arises, one of the primary variables is the presence or absence of witness admonishment; was the witness instructed that the actual culprit may or may not be present in the lineup?

System variables differ from estimator variables in that *estimator variables* are those variables that are not under the control of the criminal justice system (Wells, 1978). Examples of estimator variables include the presence or absence of a weapon during the commission of a crime, whether or not the witness and the perpetrator are of the same race, and the level of stress experienced by a witness at the time of the crime. The weapon focus effect refers to

whether or not the presence of a weapon impairs a witness’s ability to later identify the perpetrator (e.g. Steblay, 1992). The own-race bias (or cross-race effect) is a robust finding that people are often better at recognizing faces of their own race than faces of another race (e.g. Meissner & Brigham, 2001). Another robust finding is that extremely high levels of stress/arousal and extremely low levels of stress/arousal both inhibit an individual’s ability to perform a task (and that task, in this case, is to correctly identify a face) (Deffenbacher et al., 2004).

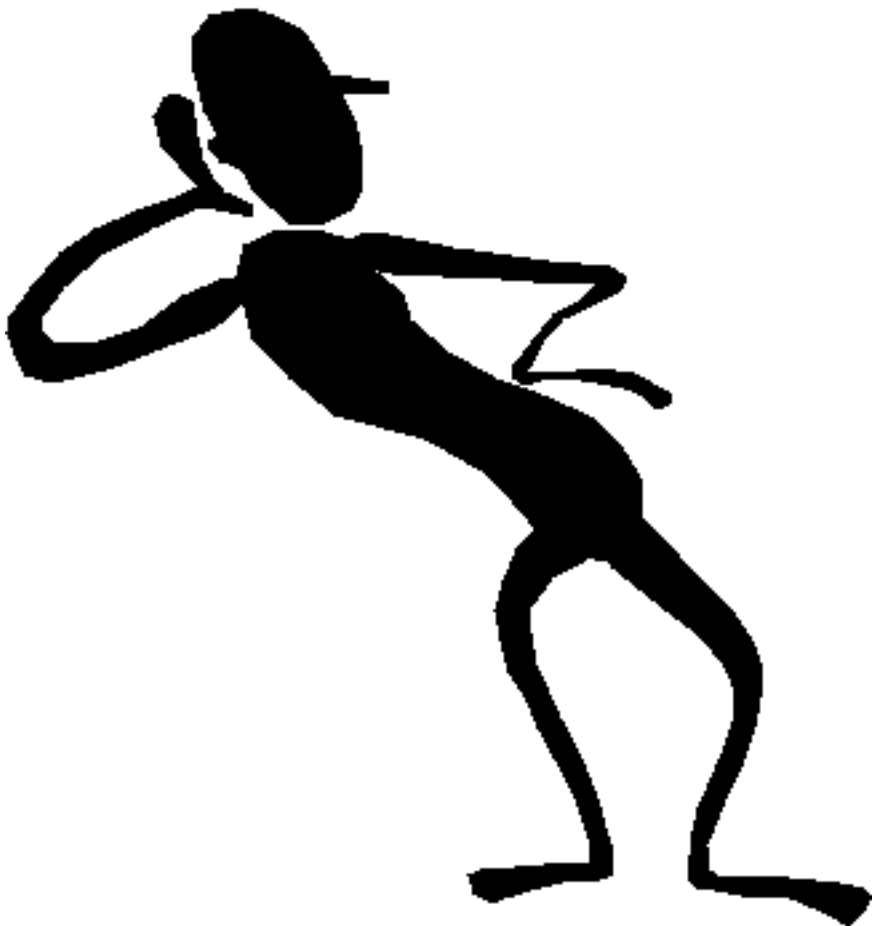
There are a multitude of system and estimator variables, which I did not mention, but are equally influential in determining whether or not a witness accurately identifies the culprit from a lineup. It is important, however, to understand the distinction between these two types of variables.

Application:

Why do we care about the difference between system and estimator variables when both categories of variables appear to ultimately affect the accuracy of eyewitness identifications?

When an eyewitness expert is asked to testify in court, he or she will review the case to determine those variables present in the case at hand. If an expert testifies about a system variable, should s/he be careful if this testimony appears to attack the credibility of an eyewitness?

The question is, do jurors interpret testimony about system variables as testimony that is attacking the credibility of an eyewitness or do they interpret this testimony as evaluating the credibility of the justice system in charge of obtaining identification evidence from this witness? This is an empirical question yet to be answered. On the other hand, if an expert testifies about an estimator variable, the question of whether jurors interpret this testimony evaluating the credibility of an eyewitness or evaluating the criminal justice system does not seem nearly as significant.



Question:

Which phenomena in eyewitness identification research have received the greatest consensus from eyewitness experts, and which have received the lowest?

Answer:

The most recent survey of the experts was conducted by Kassin et al. (2001). In this survey, experts were questioned about the research findings from 30 topic areas in eyewitness research and asked to rate the reliability of those findings. Research findings from ten topics were rated as 90% reliable or more. Those issues, followed by their generally accepted take-home messages (taken from Kassin et al.), are:

- 1) Wording of questions – An eyewitness’s testimony about an event can be affected by how the questions put to that witness are worded.

- 2) Lineup instructions – Police instructions can affect an eyewitness’s willingness to make an identification.
- 3) Confidence malleability – An eyewitness’s confidence can be influenced by factors that are unrelated to identification accuracy.
- 4) Mug-shot-induced bias – Exposure to mug-shots of a suspect increases the likelihood that the witness will later choose that suspect in a lineup.
- 5) Post event information – Eyewitness testimony about an event often reflects not only what they actually saw but information they obtained later on.
- 6) Child suggestibility – Young children are more vulnerable than adults to interviewer suggestion, peer pressures, and other social influences.
- 7) Attitudes and expectations – An eyewitness’s perception and memory for an event may be affected by his or her attitudes and expectations.
- 8) Hypnotic suggestibility – Hypnosis increases suggestibility to leading and misleading questions.
- 9) Alcoholic intoxication – Alcoholic intoxication impairs an eyewitness’s later ability to recall persons and events.
- 10) Cross-race bias – Eyewitness’s are more accurate when identifying members of their own race than members of other races.

Research findings from seven topics were rated as 50% reliable or less. Those areas (also taken from Kassin et al.) are:

- 1) Older witnesses – Elderly witnesses are less accurate than younger adults.
- 2) Hypnotic accuracy – Hypnosis increases the accuracy of an eyewitness’s reported memory.
- 3) Identification speed – The more quickly a witness makes an identification upon seeing the lineup, the more accurate he or she is likely to be.
- 4) Trained observers – Police officers and other trained observers are no more accurate as eyewitnesses than is the average person.
- 5) Event violence – Eyewitnesses have more difficulty remembering violent than non-violent events.
- 6) Discriminability – It is possible to reliably differentiate between true and false memories.
- 7) Long-term repression – Traumatic experiences can be repressed for many years and then recovered.

Application:

We must be cautious when evaluating our own experts as well as others’ experts. If an expert testifies with confidence about an eyewitness memory phenomena with low general consensus among experts (i.e. older witnesses), it is imperative that we question this expert’s testimony. If older witnesses, for example, are only less accurate under certain condition X, it is imperative that condition X exists in the given case. If an expert testifies about the decreased reliability of older eyewitnesses and condition X is not present, we must increase our skepticism regarding the expert.

This principle of scrutiny should hold true not only when experts testify about phenomena receiving low general consensus among the experts (the obvious grounds for suspicion), but also when experts testify about those research findings receiving high expert consensus. Take the mug-shot-induced bias, a trend that most experts deem to be reliable. This bias is dangerous only when the suspect in a lineup is an innocent suspect and not the actual culprit. We must first determine the likelihood that the suspect in the lineup is the guilty suspect. If the suspect’s guilt is corroborated by physical (i.e. DNA or fingerprint) or other evidence, then the mug-shot-induced bias may not be as

malignant as thought. In essence, it is imperative that we examine both the level of consensus among experts for each phenomena on which an expert testifies, as well as those specific conditions under which the phenomena truly affect eyewitness identification accuracy.

References

- Conners, E., Lundregan, T., Miller, N., & McEwen, T. (1996). *Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial*. Washington, DC: National Institute of Justice.
- Deffenbacher, K. A., Bornstein, B. H., Penrod, S. D., and McGorty, E. K. (2004). A meta-analytic review of the effects of high stress on eyewitness memory. *Law and Human Behavior*, 28(6), 687-706.
- Innocence Project (2001). Available from <http://www.innocenceproject.org/>.
- Kassin, S. M., Tubb, V. A., Hosch, H. M., & Memon, A. (2001). On the 'general acceptance' of eyewitness testimony research: A new survey of the experts. *American Psychologist*, 56(5), 405-416.
- Meissner, C. A. & Brigham, J. C. (2001). Thirty years of investigating the own-race bias in memory for faces: A meta-analytic review. *Psychology, Public Policy, and Law*, 7(1), 3-35.
- Stebly, N. M. (1992). A meta-analytic review of the weapon focus effect. *Law and Human Behavior*, 16(4), 413-424.
- Wells, G. L. (1978). Applied eyewitness-testimony research: System variables and estimator variables. *Journal of Experimental Psychology*, 36, 1546-1557.
- Wells, G. L., Small, M., Penrod, S., Malpass, R. S., Fulero, S. M., & Brimacombe, C. A. E. (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads. *Law and Human Behavior*, 22, 603-647.

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How Attorneys Can Use Religion to be More Effective at Trial

by Samuel C. Lindsey, Monica K. Miller, R. David Hayward,
Alayna Jehle, Julie A. Singer, Alicia Summers

In every trial, lawyers have to make important decisions about which jurors to choose, and what evidence to submit. Sometimes these decisions are based on experience, gut instinct, folklore or advice handed down through trial advocacy manuals. Sometimes these decisions can be difficult and controversial. This is the case when lawyers consider whether to eliminate a juror based on his/her religious characteristics or whether to submit evidence of a religious nature (e.g., the defendant has converted to Christianity since being arrested). Some decisions can significantly help a lawyer's case, while others can be detrimental. In this article, we discuss how religion can help lawyers be more effective in two critical areas: during jury selection and when introducing evidence and testimony at trial. Within each area, we discuss (1) how religion has been used in court, (2) in which situations lawyers are allowed or not allowed to use religion, and (3) how lawyers can use research on religion and the courts to be more effective.

Use of Religion in Jury Selection

Lawyers are often given the opportunity to remove jurors who may be unsympathetic to their client. In most jurisdictions, lawyers can use a potential juror's religious affiliation or characteristics to select a favorable jury. When lawyers know the right questions to ask they are able to unveil religious biases that predict how a juror may vote.



How Has Religion Been Used In Jury Selection?

During the jury selection process, some attorneys have excluded potential jurors based on their religious affiliation and characteristics, often when the trial will involve religion. For example, jurors' religious affiliations were an important consideration for the defense in the trial of Mary Winkler, the Tennessee woman convicted of voluntary manslaughter in the death of her husband, who was a minister in the Church of Christ (Associated Press, 2007). In the trial of Zacarias Moussaoui (who was accused of playing a role in the September 11 terrorist attacks) federal prosecutors surveyed potential jurors about their religious affiliation (e.g., Jewish, Muslim) and characteristics (e.g., strength of beliefs, frequency of attendance at worship services, and knowledge about Islamic beliefs) (Markon, 2005; McNulty, 2005). A lawyer in California is said to have removed Jewish jurors based on his belief that they would be less likely to give the death penalty (Associated Press, 2005).

Most exclusions are made by prosecutors who assume that highly religious people will be more lenient toward offenders. For instance, the prosecutor in *State v. Fuller* (2004) dismissed a potential juror because he had been a missionary. In other cases, potential jurors have been excluded because they expressed strong Christian beliefs (*U.S. v. DeJesus*, 2003) or identified themselves as Catholic (*State v. Purcell*, 2001), Muslim (*State v. Hodge*, 2001), Jehovah's Witness (*People v. Martin*, 1998), or Pentecostal (*Casarez v. State*, 1995).

Are Lawyers Allowed to Use Religion During Jury Selection?

Using religion as a reason to exclude potential jurors is controversial. Circuit courts have allowed (e.g., *Fisher v. Texas*, 1999; *U.S. v. Williams*, 1996), prohibited (e.g., *U.S. v. Greer*, 1991; *U.S. v. Somerstein*, 1997), and declined to rule (e.g., *U.S. v. Berger*, 2000) on religious-based peremptory challenges. State courts reflect a similar divide with

some allowing (e.g., *State v. Davis*, 1993) and others prohibiting (e.g., *State v. Fuller*, 2004 (NJ); *Thorson v. State*, 1998 (MI); *People v. Wheeler*, 1978 (CA)) the use of religion in jury selection. The U.S. Supreme Court has denied certiorari on this issue (*Davis v. Minnesota*, 1994). These rulings illustrate the controversy of using religion during jury selection; thus, lawyers must be careful to consult the case law in their jurisdiction before using religion as a basis to exclude potential jurors.

Should Lawyers Use Religion to Select Juries?

Research on religious affiliation and characteristics can help lawyers be more effective when selecting a jury. Characteristics including literal interpretism, devotionism, and fundamentalism can help lawyers select the most favorable jury.

Affiliation. A juror's religious affiliation may affect her decision making. Religious affiliation refers to the religion with which a juror is associated (e.g., Muslim). This is a title only and is a separate issue from a juror's religious characteristics (e.g., the devotion of a Muslim juror to Islam) which will be discussed later. Lawyers often believe that the more similar a jury is to the defendant, the more lenient they will be (Wishman, 1986). Research reviews confirm these assumptions (Wrightsmann, 1987), namely that juries are less punitive toward defendants with whom they can relate. Kerr, Hymes, Anderson, and Weathers (1995) found that both Jewish and Christian mock jurors were less punitive toward defendants who shared their religious affiliation than to defendants who did not. Further, Jewish mock jurors, more so than Christians, were more likely to offer leniency across many different issues. Gonzalez-Perez (2001) found that there was little relationship among Catholic, Baptist, and other Protestant potential jurors on death penalty attitudes. Miller and Hayward (2008) found that Protestants mock jurors were more likely than Catholics to support the death penalty.

Lawyers can use this research during jury selection by asking jurors their religious affiliation. If the potential juror belongs to the same religion as the defendant, the juror may be less punitive. If the potential juror is Jewish, she may be more lenient to the defendant across many issues. In death penalty cases, prosecutors should remove Catholics and defense attorneys should remove Protestant potential jurors.

Literal Interpretism. Literal interpretism is the belief that "the Bible is the actual word of God and is to be taken literally, word for word" (Young, 1992, p. 82). Studies have consistently shown that literalists are more likely to give a death penalty verdict (Leiber & Woodrick, 1997; Miller & Hayward, 2008; Young, 1992) and are generally more punitive (Miller, 2006). Literalists also are less supportive of rehabilitation for prisoners and more supportive of punishment (Applegate, Cullen, Fisher, & Vander Ven, 2000).

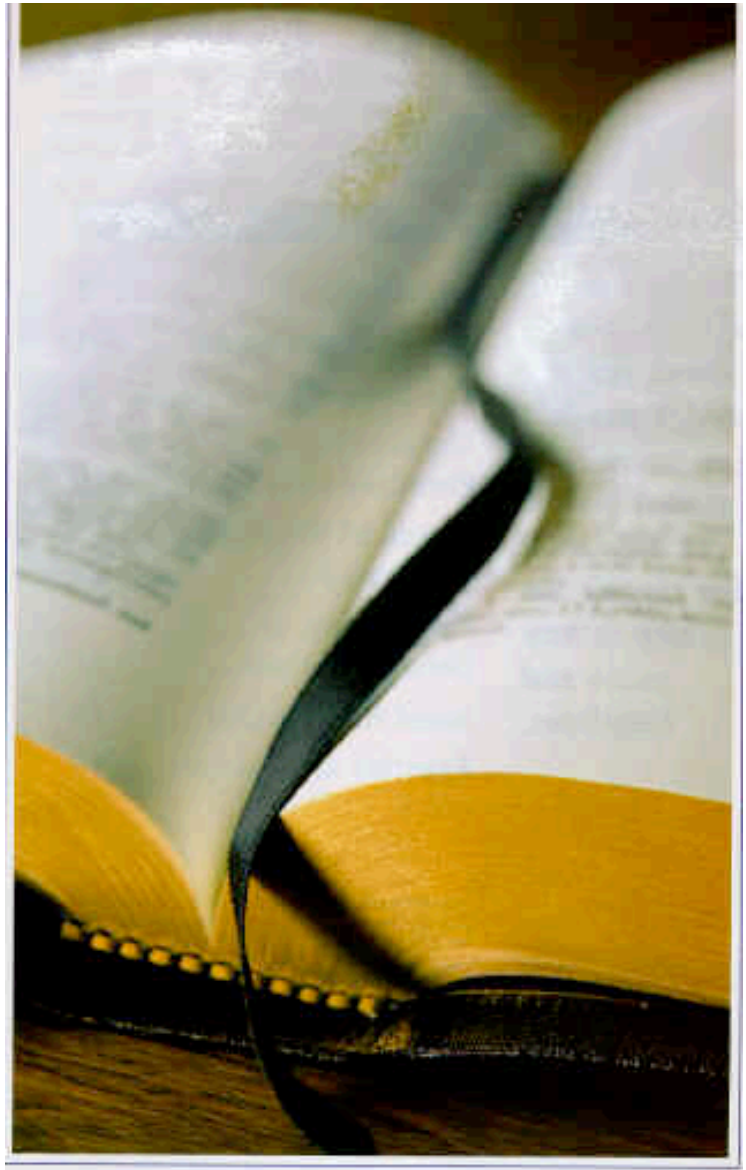
Because each of these studies has found that literal interpretism is related to increased punitiveness, a lawyer can simply ask, "Do you believe the Bible is the literal word of God?" If the juror answers affirmatively, he will most likely benefit the prosecution and not the defense.

Devotionalism. Devotionalism is how devoted individuals are to their religion. Generally, it is measured by how frequently a person practices religious acts. However, there is some discrepancy on how devotionalism should be measured. It is not surprising that because there is variation in how devotionalism is measured, research does not consistently conclude what devotionalism does and does not predict. Evans and Adams (2003) found that when religion is salient in the daily life of individuals, those who believe in a punitive God support harsher punishments. Bjarnason and Welch (2004) found that the more often a Catholic (the Catholic Church opposes the death penalty) juror attended church, the less punitive he was in death penalty trials. Young (1992) found that the less an individual attends religious services, prays, and reads the Bible, the more supportive he was of the death penalty. Other research has found that

religious devotion did not predict actual sentencing decisions (Miller, 2006; Miller & Hayward, 2008). Overall, whether there is a relationship between devotionism and a trial outcome depends on how the trait is measured (Miller, Singer, & Jehle, in press).

Selecting jurors based on devotionism may not be particularly useful, even though some studies did find relationships between certain measures of devotionism and verdicts. If lawyers desire to use this religious characteristic in jury selection, they should ask jurors questions based on the specific measures used in these studies.

Fundamentalism. Fundamentalism is the strength of an individual's orthodox religious beliefs (Miller & Hayward, 2008). Most studies found that fundamentalists are more punitive (see Miller et al., in press). Miller & Hayward (2008) found that Christian fundamentalism was positively correlated with death penalty verdicts. Grasmick and McGill (1994) also found that Christian fundamentalist attitudes (e.g., tendency to attribute blame to individuals rather than situations) predict a more punitive orientation. This is consistent with other research on Christian fundamentalism (Ellison & Sherkat, 1993; Grasmick, Cochran, Bursik, & Kimpel, 1993). Yet other researchers found no relationship (Leiber & Woodrick, 1997; Miller, 2006). This discrepancy in the research may be due to differences in how fundamentalism and types of punishment were measured.



Lawyers can ask jurors, on a scale from 1 (strongly disagree) to 7 (strongly agree), to what degree they subscribe to specific fundamentalist beliefs (e.g., life after death) or to what degree they believe a crime is committed because of a personal attribute of the offender rather than the situation. Jurors that have higher ratings (6 and 7) may be more punitive and better for the prosecution.

Use of Religious Evidence and Testimony

Lawyers are charged with the responsibility of knowing when evidence and testimony should be introduced, and when it should not. Certainly, in many jurisdictions, lawyers are allowed to use religion in trial, and religion can be used effectively as evidence and in witness testimony. Selecting the appropriate religious evidence and testimony is critical to an effective strategy in certain situations. In other situations, lawyers should not use religious evidence and testimony at all.

How Has Religion Been Used as Evidence and Testimony?

Several defendants have recently claimed that they committed their crimes because they experienced hallucinations involving instructions from God. In June 2008, a case ended in a mistrial when jurors could not agree

whether Naveed Haq was guilty or insane when he killed one woman, seriously wounded five others, and kidnapped a teenage girl at gunpoint inside the Jewish Federation of Greater Seattle (Johnson & Ho, 2008). Haq claimed God sent him on that mission to influence the wars in Iraq and Lebanon. Haq’s attorneys introduced evidence that Haq had converted from Islam to Christianity eight months prior to the shooting (Gutierrez, 2006), and should be considered insane rather than convicted of a hate crime fueled by his Pakistani origin and Islam background (Cochran & Thompson, 2008). Other defendants have also drawn attention to their religious conversion, hoping it would distance themselves from their crimes. Terry Nichols, the Oklahoma City bombing accomplice, converted to Christianity while imprisoned. His jury deadlocked because some jurors felt that his conversion indicated that he did not deserve to die (CNN.com, 2004). Nichols was spared the death penalty.



Finally, some lawyers have offered opinions about how God feels about the crime, in attempts to sway the jury. In the trial of Andrea Yates, who drowned her five children in her bathtub (CNN.com, 2006), prosecutor Kaylynn Williford told the jury, “[i]t was wrong in the eyes of God and it was wrong in the eyes of the law.” Prosecutors have quoted the Bible directly, using such phrases as “[w]hoso sheddeth man’s blood, by man shall his blood be shed” (*Carruthers v. State*, 2000) to argue that murderers should receive the death penalty. Defense attorneys have responded, for instance by referring to the following quotes from Jesus: “You have heard that it [has been] said ‘[an] eye for an eye and [a] tooth for [a] tooth...But I say to you . . . [i]f someone strikes you on the right cheek, turn . . . the other also.’” (*Bennett v. Angelone*, 1996).

Are Lawyers Allowed to Use Religious Evidence and Testimony?

During the trial, the prosecution and defense offer evidence and testimony in an effort to persuade the jury. Lawyers can introduce religion by offering character evidence, evidence of insanity, and biblical appeals.

Character Evidence. The Supreme Court has ruled that sharing testimony regarding the defendant’s religiosity is allowable because it helps the jury understand the defendant’s character (*Commonwealth v. Daniels*, 1994; *Locket v. Ohio*, 1978). At trial, prison chaplains and inmates have testified regarding a defendant’s religious conversion, founding of prison ministries, and writing of religious books (see Miller & Bornstein, 2006).



Evidence of Insanity. Lawyers have introduced evidence and testimony to persuade jurors that religious delusions lessened the defendant’s personal responsibility and his sentence should therefore be less punitive (see Miller & Bornstein, 2006; Miller et al., in press). In some instances, defendants acknowledge that what they did was wrong, yet they remain resolute that God commanded them to act. In this type of case

defense counsel has argued for the court to recognize the defendant as an exception to the standard for legal insanity with a *deific decree*. This decree allows the defendant to be considered insane even if she knew the offense was illegal because “due to mental disease or defect” she believed God ordained her actions (*People v. Serravo*, 1992).

Biblical Appeals. Courts do not agree whether biblical appeals should be permitted. Court rulings range (see Miller & Bornstein, 2006) from prohibiting all religious appeals (e.g., *Sandoval v. Calderon*, 2000), allowing all religious appeals (e.g., *Bussard v. Lockhard*, 1994), and providing guidelines, such as permitting biblical appeals as long as lawyers do not prejudice the jury (*Cunningham v. Zant*, 1991) or if the defendant has first offered religious evidence or testimony (*Boyd v. French*, 1998).

When biblical appeals are prohibited, courts often cite a violation of the Eighth Amendment (e.g., *State v. Alston*, 1995) or a violation by following a law that contradicts state law (e.g., *Commonwealth v. Daniels*, 1994).

Should Lawyers Use Religion as Evidence or Testimony?

When lawyers debate whether they should use religious evidence or testimony, it is important to consider evidence of character and insanity as well as biblical appeals. In this next section we will summarize the research on these topics and tell lawyers how they can use social science research to be more effective in court.

Character Evidence. Defendants have the right to share character evidence that could justify their actions (*Lockett v. Ohio*, 1978). A defendant who converts to Christianity may be shown mercy, while a defendant who is a lifelong Christian may not. Miller and Bornstein (2006) found that mock jurors were the least punitive toward a defendant who had converted to Christianity in prison as compared to a defendant who did not convert or a defendant whose lawyer quoted biblical appeals for mercy. However, Miller and Bornstein (2006) found that jurors were not more lenient to a defendant who gave evidence that he had been a lifelong Christian. Johnson (1985) found these lifelong Christian defendants were perceived to be more responsible by jurors and received harsher sentences than non-Christians.

Defense lawyers should introduce testimony of conversion experiences that occur after the crime was committed. However, they should be very cautious of giving evidence that the defendant has been religious throughout his life because such evidence will lead the jurors to be harsher, or at the very least will have no impact. However, detailing the lifelong religious nature of a defendant may be an effective strategy for the prosecution.

Evidence of Insanity. Whether a defendant is judged to be insane may depend on the type of hallucination he experiences; specifically, it might depend on the entity that orders him to commit the crime. Participants' rated the likelihood that a criminal was insane based on whether God, the president, or a dog commanded him to perform the crime (Miller & Jehle, 2008). A criminal who commits a killing spree or robs a bank was more likely to be judged sane when he followed orders from either God or the president (as compared to a dog). Additionally, an individual who vandalized a church was more likely to be sane when he followed orders from God as compared to either the president or a dog. Thus, hallucinations containing orders from God are less likely to indicate insanity, especially when the order involves a crime to the church.

Defense attorneys should be cautious with linking insanity to "instructions from God" because religious hallucinations make the defendant seem more sane, especially when the crime is related to religion (e.g., vandalizing a church). Evidence of insanity may be most effective at securing an insanity verdict when it involves accepting instruction from a figure other than God.

Biblical Appeal. A biblical appeal is any biblical quote or account used by a lawyer to sway the jury. Research has shown that such appeals offered by either the defense or the prosecution do not affect jurors' decisions (Miller, 2006). More concerning is the finding that defense appeals can even backfire; mock jurors were more punitive toward a defendant when his attorney quoted biblical scripture prescribing mercy (Miller & Bornstein, 2006). The jurors may have felt that the appeal was a misuse of religion.

Biblical appeals may be more likely to sway jurors who believe the Bible to be the literal word of God; however, they are ineffective in general. Defense attorneys should not quote the Bible to recommend mercy for their

client because jurors are resultantly more punitive. Prosecutor appeals to scripture also are ineffective, so it is generally recommended that all attorneys avoid them.

Conclusion

Consulting social science research empowers lawyers by providing them with knowledge of how and when to use religion in the courtroom. For best results, lawyers should ask questions and use trial strategies as close to those used in the research cited above. Trial consultants should continue conducting research specific to the case at hand to provide individualized advice. As researchers continue to learn how religion influences juror decision making, lawyers are wise to pay attention to their results. As a result, lawyers will be more effective when they understand how and when religion affects trial outcomes.

References

- Applegate, B. K., Cullen, F. T., Fisher, B. S., & Vander Ven, T. (2000). Forgiveness and fundamentalism: Reconsidering the relationship between correctional attitudes and religion. *Criminology*, 38, 719–753.
- Associated Press. (2005, March 21). Ex-prosecutor says he kept Jews off juries. *Foxnews.com*. Retrieved June 10, 2008 from <http://www.foxnews.com/story/0,2933,151064,00.html>
- Associated Press. (2007, April 10). Domestic abuse early focus for murder trial: Potential jurors asked about subject at trial of Tenn. preacher's wife. *Msnbc.com*. Retrieved June 10, 2008 from <http://www.msnbc.msn.com/id/18039561/>
- Bennett v. Angelone*, 92 F.3d 1346, 1347 (4th Cir. 1996).
- Bjarnason, T., & Welch, M. R. (2004). Father knows best: Parishes, priests, and American Catholic parishioners' attitudes toward capital punishment. *Journal for the Scientific Study of Religion*, 43, 103–118.
- Boyd v. French*, 147 F.3d 319 (4th Cir. 1998).
- Bussard v. Lockhard*, 32 F.3d 322 (8th Cir. 1994).
- Casarez v. State*, 913 S.W.2d 468 (Tex. 1995).
- Carruthers v. State*, 528 S.E.2d 217, 221 (Ga. 2000).
- CNN.com (2006, July 27). Yates not guilty by reason of insanity. Retrieved June 17, 2008 from <http://www.cnn.com/2006/LAW/07/26/yates.verdict/index.html>
- CNN.com. (2004, June 15). Juror: Sympathy spared Nichols. Retrieved June 10, 2008 from <http://www.cnn.com/2004/LAW/06/12/nichols.react/index.html>
- Cochran, A., & Thompson, T. (2008, June 5). Mistrial for Naveed Haq for shootings at Greater Seattle Jewish Federation. *Counterterrorism Blog*. Retrieved June 6, 2008 from http://counterterrorismblog.org/2008/06/mistrial_for_naveed_haq_for_sh.php
- Commonwealth v. Daniels*, 644 A.2d 1175 (Pa. 1994).
- Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).
- Davis v. Minnesota*, 511 U.S. 1115 (1994).
- Ellison, C. G., & Sherkat, D. E. (1993). Conservative Protestantism and support of corporal punishment. *American Sociological Review*, 58, 131–144.
- Evans, T. D., & Adams, M. (2003). Salvation or damnation?: Religion and correctional ideology. *American Journal of Criminal Justice*, 28, 15–35.

- Fisher v. Texas*, 169 F.3d 295, 303 (5th Cir. 1999).
- Gonzalez-Perez, M. (2001). A model of decisionmaking in capital juries. *International Social Science Review*, 76, 79–91.
- Grasmick, H. G., Cochran, J., Bursik, R. J., Jr., & Kimpel M. (1993). Religion, punitive justice, and support for the death penalty. *Justice Quarterly*, 10, 289–314.
- Grasmick, H. G., & McGill, A. L. (1994). Religion, attribution style and punitiveness toward juvenile offenders. *Criminology*, 32, 23–46.
- Gutierrez, S. (2006, July 29). Shooting suspect was baptized: Just part of the enigma he proved himself to friends. *Seattle Post-Intelligencer*. Retrieved June 16, 2008 from http://seattlepi.nwsource.com/local/279424_convert30ww.html
- Johnson, S. D. (1985). Religion as a defense in a mock-jury trial. *Journal of Social Psychology*, 125, 213–220.
- Johnson, T., & Ho, V. (2008, June 4). Retrial promised in Haq case mistrial: Issue of insanity left jurors hopelessly deadlocked. *Seattle Post Intelligencer*. Retrieved June 6, 2008 from http://seattlepi.nwsource.com/local/365756_jewishfed05.html
- Kerr, N. L., Hymes, R. W., Anderson, A. B., & Weathers, J. E. (1995). Defendant-juror similarity and mock juror judgments. *Law and Human Behavior*, 19, 545–567.
- Leiber, M. J., & Woodrick, A. C. (1997). Religious beliefs, attributional styles, and adherence to correctional orientations. *Criminal Justice and Behavior*, 24, 495–511.
- Lockett v. Ohio*, 438 U.S. 586 (1978).
- Markon, J. (2005, November 29). Moussaoui's prosecutors draft slew of questions for jury pool. *Washingtonpost.com*. Retrieved June 10, 2008 from <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/28/AR2005112801591.html>
- McNulty, P. J. (2005). Government's proposed jury questionnaire. Retrieved June 10, 2008 from <http://news.lp.findlaw.com/hdocs/docs/moussaoui/usmouss112805juryq.pdf>
- Miller, M.K. (2006). *Religion in Criminal Justice*. New York: LFB Publishing.
- Miller, M. K., & Bornstein, B. H. (2006). The use of religion in death penalty sentencing trials. *Law and Human Behavior*, 30, 675–684.
- Miller, M.K., & Hayward, R.D. (2008). Religious characteristics and the death penalty. *Law and Human Behavior*, 32, 113–123.
- Miller, M.K. & Jehle, A. (2008, April). *Religious Hallucinations and the Insanity Defense*. Research report presented at the Western Social Science Association conference, Denver, CO.
- Miller, M.K., Singer, J., & Jehle, A. (in press). Identification of circumstances under which religion affects each stage of the trial process. *Applied Psychology in Criminal Justice*.
- People v. Martin*, 64 Cal. App. 4th 378 (Cal. 1998).
- People v. Serravo*, 823 P.2d 128 (Colo. 1992).
- People v. Wheeler*, 583 P.2d 748 (Cal. 1978).
- State v. Alston*, 461 S.E.2d 687 (N.C. 1995).
- Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000).

State v. Davis, 504 N.W.2d 767 (Minn. 1993).

State v. Fuller, 862 A.2d 1130 (N.J. 2004).

State v. Hodge, 726 A.2d 531 (Conn. 1999).

State v. Purcell, 18 P.3d 113 (Ariz. 2001).

Thorson v. State, 721 So. 2d 590, 594 (Miss. 1998).

United States v. Berger, 224 F.3d 107, 120 (2d Cir. 2000).

United States v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003).

United States v. Greer, 939 F.2d 1076, 1086 n.9 (5th Cir. 1991).

United States v. Somerstein, 959 F. Supp. 592, 596 (E.D.N.Y. 1997).

United States v. Williams, 44 M.J. 482, 485 (C.A.A.F. 1996).

Wishman, S. (1986). *Anatomy of a jury: The system on trial*. New York: Times Books.

Wrightsmann, L. S. (1987). *Psychology and the legal system*. Monterey, CA: Brooks-Cole.

Young, R. L. (1992). Religious orientation, race and support for the death penalty. *Journal for the Scientific Study of Religion*, 31, 76–87.



Use of Religion in Jury Selection

| Research Findings | How to Implement |
|---|--|
| <p>Affiliation: Religion with which juror is associated</p> <ul style="list-style-type: none"> Jurors that belong to same religion as defendant may be less punitive Jewish jurors are more lenient toward defendants across many issues In death penalty cases, Catholics are more lenient and Protestants are more punitive | <p>Ask, “What religion are you affiliated with?”</p> <p><i>Prosecution:</i> Remove Jews; remove Catholics in death penalty cases</p> <p><i>Defense:</i> Remove Protestants in death penalty cases; select jurors of same religion as defendant</p> |
| <p>Literal Interpretism: A belief that scripture(s) is/are literal</p> <ul style="list-style-type: none"> Literalist jurors are consistently more punitive Literalist jurors consistently give death penalty verdicts | <p>Ask, “Do you believe the Bible to be the literal word of God?”</p> <p><i>Prosecution:</i> Select literalist jurors</p> <p><i>Defense:</i> Remove literalist jurors</p> |
| <p>Devotionalism: The frequency of a religious act</p> <ul style="list-style-type: none"> May not be useful because of inconsistency on how devotionalism is measured | <p>Generally not recommended</p> |
| <p>Fundamentalism: Strength of an individual’s orthodox religious beliefs</p> <ul style="list-style-type: none"> Fundamentalists are generally more punitive Christian fundamentalists are positively associated with death penalty verdicts | <p>Ask, “To what degree do you believe in life after death?”</p> <p>1 2 3 . . . 7</p> <p>Strongly Disagree Disagree Slightly Disagree Strongly Agree</p> <p><i>Defense:</i> Remove jurors with 6 and 7 rankings.</p> |

Use of Religious Evidence and Testimony

| Research Findings | How to Implement |
|---|--|
| <p>Character Evidence:</p> <ul style="list-style-type: none"> Jurors are more lenient toward defendants that convert to Christianity after the crime was committed Jurors are more punitive toward lifelong Christians | <p><i>Prosecution:</i> Detail lifelong religious nature of defendant</p> <p><i>Defense:</i> Detail client’s conversion if it occurred after the crime</p> |
| <p>Evidence of Insanity:</p> <ul style="list-style-type: none"> Jurors are less likely to judge defendant insane if instructions allegedly came from God Jurors are more likely to judge defendant insane if order came from someone other than God. | <p><i>Defense:</i> Be cautious of linking insanity to instructions from God; it is better to detail how defendant followed instructions from someone or something else</p> |
| <p>Biblical Appeals: Use of biblical quote or account</p> <ul style="list-style-type: none"> Biblical appeals have not been shown to affect jury decisions Jurors are more punitive when defense uses biblical appeal to mercy | <p><i>Prosecution:</i> Avoid biblical appeals</p> <p><i>Defense:</i> Avoid biblical appeals, especially when asking mercy for client</p> |

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We asked several experienced ASTC-member trial consultants to respond with their thoughts on the relevance of Lindsey et al., for trial work. On the following pages, Andy Sheldon, Gayle Herde and Phil Monte offer their thoughts, experiences, and perspectives on the issue of religion in the jury box.

Andrew Sheldon comments on:

How Attorneys Can Use Religion to be More Effective at Trial

[by Lindsey, Miller, Hayward, Jehle, Singer and Summers]

Andrew Sheldon, JD, PhD [Andy@SheldonSinrich.com] began trial consulting in 1984 after careers as a lawyer and as a psychotherapist. He is interested in the junctions between religion, mental health and law (as in the Andrea Yates case) and in the role that religious training plays in juror decision-making.

There are some good jury selection pointers made by the six authors of this literature review and a few that may cause a trial lawyer some concern. The good pointers, first.

The basic premise that religious beliefs can be important to a juror's decision making is bedrock true in my experience. Any litigator who is not paying attention to the history of religion in a juror's life is missing out on some key information about that juror. Whether religion is part of the issues that are being decided in the case (e.g., a criminal case defended on the grounds that female circumcision is part of a defendant's tribal religious practice yet is considered spousal abuse in the United States) or not, religious training affects the values many people rely on in both considering testimony and in making decisions.

Lindsey, et al., take us into difficult territory, however, when they advise that "In death penalty cases, prosecutors should remove Catholics and defense attorneys should remove Protestant potential jurors." In my experience, that is an over simplification. Religious affiliation *per se* is a demographic and we all know that you can shoot yourself in both feet by making deselections based on demographics.

However, taking the Bible literally is, as the authors point out, a very good signpost for deselection in both death penalty cases and when gauging punitiveness, generally. We have found this deselection criterion useful because it reflects a belief that goes deeper than simply being a Baptist or an Episcopalian.

The authors' third criterion, "devotionalism", has always been heavily weighted in our selection decisions. This is because when it is considered in conjunction with "literalism" and/or with their final criterion, "fundamentalism," one can really begin to accumulate valuable information about a potential juror. "Devotionalism" is a productive area because it is measured by frequency, i.e., how many times per week a person attends church, reads her religious texts, etc. In fact, we like to clarify the picture further by adding "role" (i.e., is the juror a deacon, Sunday School teacher, or church elder?) when evaluating this criterion so that we can know is likely to be a leader.

The final issue, "Fundamentalism" is one most of us are very familiar with and find helpful in evaluating the depth and strength of a person's orthodox religious beliefs. We need not expand here on their description.

In the final section of their article, the authors move beyond jury selection issues into the "use of religion in trial," a primer on and review of various U.S. Supreme Court rulings in which religion has played a central role. While the review is helpful, and the blend of actual cases and anecdotes is interesting, their advice to lawyers does not reflect a strong experience base. Purporting to "tell lawyers how they can use social science research to be more effective in

court,” the authors fall victim to a strategy that dilutes the application of their social science research results and ultimately, the utility of their advice.

Gayle Herde comments on:

How Attorneys Can Use Religion to be More Effective at Trial

[by Lindsey, Miller, Hayward, Jehle, Singer and Summers]

Gayle W. Herde, Ph.D. (gayleherde@comcast.net) is a trial consultant based in Denver, Colorado. She works on civil cases nationwide, as well as working with entrepreneurs, corporations and college sports conferences as a communication and research consultant.

I was very interested in the article by Lindsey, et al. and appreciate them bringing to light a thorny subject. The information is intriguing, as the religious observance of the jury pool and, especially, of defendants does not receive much attention. I'd like to take this opportunity to expand somewhat on the well-laid foundation by this article by addressing a few points found in the first half of the article, *Use of Religion in Jury Selection*.

How Has Religion Been Used?

My first point refers to the statement that “prosecutors [] assume that highly religious people will be more lenient toward offenders.” In my opinion, this is a serious mistake. Many religions and Protestant denominations are highly authoritarian in structure and belief (more about this in a later TJE article). When defined as “the belief in one inerrant set of religious teachings,” religious fundamentalism is strongly related to authoritarianism (Altemeyer, 1996; Altemeyer & Hunsberger, 1992; Kirkpatrick, 1993; Laythe, Finkel & Kirkpatrick, 2001).¹ Staunch adherents to these belief systems have a deep-seated respect for those in authority; as a result, those jurors are more likely to demonstrate that respect by siding with the prosecution as the representative of the state, as well as of law and order.

Affiliation.

I recently happened across a website that listed the number of Christian denominations by country.² I asked my husband how many he thought there were in the United States alone and he responded, “There have to be a lot; maybe 200, 300?” The answer is **635!** This is only Christian, mind you, not Hindu, Islam, Buddhist or divisions within other faiths. The country closest to the US is India with 263, followed by Britain with 253. Not even close.

My point is this: the article tends to gloss over the distinctions within Protestantism,³ probably due to space constraints, to which I am entirely sympathetic. I would like to clarify some of the major denominational differences and why attorneys must be aware of them.

By way of historical reminder, in early times, around the second and third centuries, there was the Roman Catholic Church, which had substantial sway across Europe. There was a split, around the fourth century, out of which came the Eastern Orthodox tradition (for your Greek-American jurors), leading eventually to the Russian Orthodox tradition (important to your Russian-American jurors). Following that came the Reformation in the 16th century, a “protest” against certain Roman Catholic practices. But it is a mistake to lump all Protestant denominations together. According to one website, Protestantism is “less a denomination than a general branch of Christianity encompassing numerous denominations and a wide theological spectrum *ranging from conservative to liberal.*”⁴ (Emphasis added.) While some Protestant denominations retained many of the doctrines and practices of their Roman Catholic parentage (e.g., Anglicans and Episcopalians), many others thrust off all association with Catholic liturgy and symbolism (e.g.,

Baptists, Presbyterians, and Methodists). It should be noted that at least one item that non-Roman-Catholic denominations share in common is a rejection of the authority of the Roman Catholic pope.

Literal Interpretism.

While exploring the question of literalism is one way of identifying conservative or fundamental Christians, there are other issues that are as important and may be more distinctive. For example, in a comparison of major Christian denominations, a chart of questions of “official beliefs” included that of the Divine inspiration *and inerrancy* of Scripture.⁵ There were some major differences, even among the same denomination: Scriptures are God’s inspired revelation (Roman Catholic); Scriptures are inspired by God but only in the original languages (Orthodox), Scriptures are inspired and inerrant (Lutheran Missouri Synod, Wesleyan), inspired but not inerrant (Evangelical Lutheran), and so on. It is plain, then, there are many facets of belief in this issue to which literalism is linked.

There is a doctrinal issue that may be more telling than literalism, i.e., that of the means of salvation. One of the basic tenets of Christianity is the primacy of the meaning of Jesus’ death. However, when asked about whether other religious observers outside Christianity are heaven-bound without Jesus, a different attitude emerges. There will be two major divisions: those who believe that Jesus is the only way to heaven and those who believe there are other ways. Although all Christian denominations listed in the belief chart mentioned above state or imply that Jesus’ work was salvific, Roman Catholics, Orthodox Catholics, Evangelical Lutherans and American Baptists believe that adherents to other faiths “have a chance.” On the other hand, Southern Baptists and Missouri Synod Lutherans state unequivocally that Jesus is the only way. The Presbyterians and Methodists do not mention other faiths in their doctrinal statements, while the Anglicans “waffle” a little by addressing only the subject of “cooperating” with other kinds of believers. While in these politically correct times it is difficult for many people to state a belief that sounds narrow-minded and/or exclusionary, those who are willing to do so will be highly entrenched in their belief system.

Devotionalism.

Religiosity is not just a matter of attendance at services. As the authors rightly pointed out, attorneys need to know how invested the potential juror is in their belief system. Attendance, reading Scriptures, and praying is a start, but there are other indicators. For example, does the juror invest his/her time by participating in committee work, relief work in or out of town, or in teaching classes? Is the potential juror monetarily invested? I’m not referring to the obligatory guilt-assuaging dollar bill in the collection plate every week, but someone who financially supports their congregation’s efforts to build a new building, send members to foreign countries to work with orphanages, or support their local church with a “tithe” (one-tenth or more) of their income.⁶

Attorneys need to be aware of the major, influential belief systems in their venue, whether it is a large collection of Muslims in Michigan, Amish in Pennsylvania, Jews in New York, or Southern Baptists in Georgia. This is where local counsel can be indispensable to the out-of-town trial team. Alternatively, one member of the team can be assigned the task of researching the religious composition of the venue and understanding the doctrinal beliefs, as well as the ethical positions, of the region. It is also helpful to know whether there is a denominational headquarters or major seminary in the venue.



One factor that is no longer very helpful for analysis of belief systems is the actual name of the venire-person’s church. In an effort to appear more inclusive and to attract the curious seeker, many have dropped denominational titles

(e.g., Main Street Baptist Church) and, instead, use either the name of the street it's on, or use "Community" prominently in the title (e.g., Main Street Community Church).

All this doesn't begin to scratch the surface. I haven't mentioned yet the Charismatic movement that developed out of Protestantism, comprised chiefly of Assemblies of God and Pentecostals, for whom feelings and emotionalism play a large part in their worship. This tendency could possibly also be found in their decision-making processes. And then there are the so-called "cults," Mormonism, Jehovah's Witnesses, Scientology, rejected by "mainstream Christians." Could their possible feelings of religious marginalization affect their orientation? Additionally, there are the New Age and Neopagan religions, including Wicca, atheism (which, contrary to what one might think, actually requires a great deal of personal faith), agnosticism and a host of others.

The "rub" in all of this, however, is how to *get at* the information during voir dire without raising objections. As the authors state, there is everything from wide latitude to no latitude regarding religious issues unrelated to the case matter, depending on the jurisdiction. In venues where juror questionnaires are allowed, one good method of understanding is to inquire about group membership and to ask, not just whether the person has a leadership position within the congregation, but in what activities the person engages. The additional advantage to a questionnaire is that often you can get the name of the congregation. Many (dare I say, most?) churches have their own websites, many with doctrinal information available to the public.

Religion is not a construct that can be ignored, despite our social ideas that religion is to be kept private and makes for "inappropriate dinner conversation." According to Barna, 47% of Americans in 2005 attended a church service in the past seven days, excluding special events such as weddings and funerals, up from 43% in 2004.⁷ Even more telling, nearly three out of five (58%) say they are "deeply spiritual" (2005).⁸ This is an important part of their value systems and will most definitely influence their decision-making. I believe the conversation should start here in *The Jury Expert*. I would very much like to see contributions from readers of experiences that worked (and when they didn't work) to sensitively and non-judgmentally garner information in voir dire.

It is the purpose of this response to demonstrate that religiosity is a very complex grid of influential criteria in the lives of potential jurors. There exists a whole constellation of unique, varied and powerful religiously-based belief systems within virtually all Americans. Broad brushstrokes would be nice, but in this realm are not realistic.

Notes

¹ Wink, P., Dillon, M., & Prettyman, A (2007). "Religiousness, spiritual seeking, and authoritarianism: Findings from a longitudinal study," *Journal for the scientific study of religion*, 46(3), 321-335.

² <http://www.worldchristiandatabase.org/wcd/about/denominationlist.asp>

³ I have no intention to overlook or ignore other belief systems. However, Protestantism is within my personal sphere of reference and will be my focus here. It is as much a mistake for an attorney to be ignorant of the major differences within Islam, e.g., Sunnis, Sufis, Shi'as, Ahmadiyya, and Nation of Islam, or within Judaism, e.g., Conservative, Orthodox, Hasidic, and Reform, as it would be to ignore differences within Christianity.

⁴ <http://www.religionfacts.com/christianity/denominations/protestantism.htm>

⁵ http://www.religionfacts.com/christianity/charts/denominations_beliefs.htm

⁶ As a note, the juror's *children's* attendance probably is not quite as informative, especially if the parent doesn't attend with the child, as this could be the result of a type of felt social need rather than genuine devotion.

⁷ <http://www.barna.org/FlexPage.aspx?Page=Topic&TopicID=10>

⁸ Ibid.

Phil Monte comments on:

How Attorneys Can Use Religion to be More Effective at Trial

[by Lindsey, Miller, Hayward, Jehle, Singer and Summers]

Phil Monte, Ph.D., J.D. (montepf@floridastate.com) is a practicing lawyer in Tallahassee, Florida and a former state criminal prosecutor. He has studied courtroom behavioral dynamics since 1988, and wrote a doctoral dissertation on the social psychology of religious conservatism.

The authors perform a useful service in sensitizing trial lawyers to the role that religion plays in conditioning how jurors understand a case. Of necessity, they simplify some of the academic research findings in the field, and practitioners should avoid stereotyping jurors based on religious belief and practice (“religiosity”). While it would be tempting to adopt a “one size fits all” generalization that would allow for easy classification of a potential juror as desirable or undesirable based on characteristics such as religious affiliation or frequency of worship, to do so runs the risk of courting disaster in the jury box.

Any trial lawyer would benefit from reviewing the research summarized by the authors and following up with their own study regarding the social psychology of religion. The article’s bibliography can serve as a very useful starting point in this respect. A more general text on the sociology or psychology of religion would also serve as a good place to begin. The effort involved might best be put to work not in trying to locate some elusive rule of thumb that simply facilitates rote religious stereotyping, but rather in developing a series of voir dire questions designed to elicit individualized information about each member of the jury.

It is worth noting that there remains a dearth of research regarding the role that religion plays in the lives of African Americans. While the situation has improved over the past two decades since I first began studying religion from an academic perspective, much remains to be discovered. An attorney interested in how religiosity influences jury dynamics should keep in mind two important caveats when considering the psychology of potential African American jurors. First, traditionally black denominations often carry the same or similar names as mainline denominations, even though the practices and beliefs of each differ significantly. Second, the belief systems vary widely on a number of different dimensions. African Methodists¹, for example, tend to be much more politically liberal than their counterparts in the white mainstream United Methodist Church. As a consequence, the attorney must be especially careful to have black venirepersons elaborate upon their initial responses when asked about their religious affiliation since a simple answer such as “Methodist” often does not tell the entire story. (While the same of course holds true when examining jurors of any race about their denominational membership, the opportunities for making a serious mistake seem to be more serious when examining African Americans – perhaps due to our relative ignorance regarding black religiosity.)



Where religion is likely to be a significant issue in a case in one form or another, the use of a supplemental juror questionnaire (“SJQ”) and sequestered voir dire is essential if one is to fully explore how potential jurors’ religious behavior and beliefs are likely to influence how they understand the case. Much of how we experience religion (or do not experience religion) is a very personal and private matter. As an extreme case, I recall being involved in a sequestered voir dire where a Catholic priest was on trial on criminal charges in an archdiocese wherein the Catholic Church had been accused of covering up child abuse allegations against the clergy. This occurred sometime after the various Church abuse scandals had started to become public. A venireman under examination confided in a closed courtroom that he had undergone abuse as a child, and he clearly held strong feelings against the Catholic Church.

There is little doubt in my mind that he would not have disclosed this information in an open courtroom. On a more routine basis, decisions to leave a denomination, doubts about the theology that one has learned since childhood, and other such phenomena are much more likely to be disclosed in private on a questionnaire or in a closed, “safe” environment.

On a related note, I would emphasize how important it is that attorneys demonstrate a sincere respect for the religious beliefs -- or lack thereof -- expressed by any potential or actual jurors on a panel. Such respect is not something that is easily faked -- we’ve all seen and probably experienced intolerance in the form of religious or anti-religious bigotry. Trust me, jurors will immediately discern whether your investigation of this significant part of their lives is conducted with the intent to cynically manipulate, or rather with the intent to truly understand.

Finally, I take issue somewhat with what may be a too-strong admonition to avoid arguments that reference biblical or theological themes. It is dangerous to create hard and fast rules in this regard. Arguments based on generalized religious themes and imagery can resonate in the jury box. I would recommend that any practicing lawyer review sociologist Robert N. Bellah’s work regarding the concept of “civil religion.”² Briefly, Bellah describes an overarching set of religious principles to which the three major religious traditions in this country -- Protestant, Catholic, and Jewish -- adhere. These can often be successfully raised during closing argument. And while most of my legal practice and research has occurred in the South, where the population tends to be more conservative in belief and practice than in the rest of the country, I have often seen relatively strong religious appeals -- including references to Scripture -- successfully argued by a prevailing party in a case.³ Though religious practice continues to grow more diverse in this nation, such concepts as “love thy neighbor,” “thou shalt not steal,” and similar rules of conduct ring just as true among persons from nontraditional religious backgrounds (e.g., Muslims, Hindus, atheists, etc.). However, the careful practitioner should bear in mind that narrowly sectarian appeals can alienate jurors and are nearly always best avoided.

Notes

¹ Two prominent churches in this faith tradition include the African Methodist Episcopal Church (“AME”) and African Methodist Episcopal Zion Church.

² See, e.g., *Varieties of Civil Religion* (1980).

³ The authors correctly point out that certain types of appeals based on religion may be illegal or at least frowned upon in some jurisdictions. One such example I can recall involved a District Attorney in Fulton Co., Georgia, who argued that a defendant was “the Lapdog of Satan” during a death penalty case. The lawyer was severely chastised by the appellate court that reviewed the case.

Following review of the consultant responses, the first two authors responded to comments made by each of the ASTC-member consultants.

Response to Sheldon, Herde and Monte by Samuel C. Lindsey and Monica K. Miller

We’d like to thank *The Jury Expert* for this opportunity to discuss a topic that we find not only academically significant, but pragmatically meaningful. Like many others, we are convinced that at the crossroads of religion and law lay important discussions on how individuals use their religion to make life decisions. We think religion plays a crucial role among many of the everyday decisions, and many of the more significant decisions in our lives.

We appreciate the responses by Drs. Herde, Monte, and Sheldon. They offer valuable insight and real world expertise that is important for lawyers to consider when using religion in the courtroom. The following are our responses to their commentaries.

Gayle Herde Commentary: Dr. Herde commented on the statement “prosecutors [] assume that highly religious people will be more lenient toward offenders” and proceeded with a discussion of how this might be inaccurate because of research on authoritarian characteristics of religious people. We agree with Dr. Herde that the prosecution may not be applying tried-and-tested theory to their jury selection choices, and may in fact be removing jurors that could potentially be very sympathetic to their case. Whatever the reason, however, prosecutors have removed highly religious jurors as discussed in the cases we cited.

Herde offers an excellent observation on affiliation. The denominations of Protestantism are much more numerous than we included. However, among the hundreds of Protestant denominations, the research on punitiveness is lacking. We can therefore only make general statements from what exists. As noted by Herde, this is a limitation to our research summary on affiliation. We think it important in the future to research the intricacies of these and other individual affiliations which will clearly be more informative than stereotypical assumptions arising from grouping all Protestants together. Overall, Herde delves into great detail on several aspects of the article which we think helps make it more complete.

Phil Monte Commentary: We are grateful for the additions offered by Dr. Monte. He rightly appreciates the purpose of the article as a starting point and invites lawyers and trial consultants not to oversimplify, but take the information provided and build on it as they conduct individualized research to the case at hand. It is important to emphasize how Monte acknowledges the interaction between African-Americans and religion. This interaction has been overlooked in the literature. Similarly overlooked is the interaction between devotionism and affiliation. By themselves, devotionism and affiliation have inherent limitations; however, the interaction between the two (e.g., understanding differences between someone who is highly Jewish and someone who is highly Catholic) may be much more useful. In sum, studies looking at the interaction of race and religion, as well as devotionism and affiliation, have been overlooked and future research in this area will be valuable to helping us better understand the predictive power of religious affiliation and characteristics toward verdicts.

Dr. Sheldon Commentary: We believe that trial consultants who tailor trial strategy with jurors’ religious beliefs in mind will be more successful than those who do not. Sheldon confirms our position by offering his experience applying religion in the courtroom. He offers a helpful perspective on religious affiliation and fundamentalism that adds to a broader discussion on this topic. We agree that religious affiliation is a difficult method by which to remove potential jurors because in the lives of jurors, religion is more than just a title. Religion is layered with many beliefs, attitudes, and personal experiences that meld together into the decision a juror makes. Sheldon advises that removing jurors from death penalty cases on the basis of religious affiliation may be overly simplistic. This may well be true. Our advice to lawyers in the affiliation section is not our strongest advice. The one research study we cited which investigated the punitiveness of Catholics versus Protestants is most likely not strong enough to support our conclusion that the prosecution should remove Catholics and the defense should remove Protestants. The Miller and Hayward (2008) study only showed that Protestants were *more likely* than Catholics to support the death penalty. This conclusion only supports the comparison of two religious affiliations and does not necessarily predict the punitiveness of each affiliation individually. With Sheldon’s help, we recognize our advice to lawyers would be stronger if we would have restricted our advice to the following: In death penalty cases, Protestants will provide more favorable verdicts than Catholics for the prosecution.

Sheldon's summary concludes with, "The authors fall victim to a strategy that dilutes the application of their social science research results and ultimately, the utility of their advice." Sheldon brings up an important point that we would like to clarify. The topic of religion and law is a relatively new field of study. At present there is simply not enough research on this topic, and our advice in each section is often based on one or two studies. The research is not strong enough to match lawyers' present need for guidance on implementing strategy based on religion in the courtroom. The advice we offer is based on cutting-edge research, most being conducted within the last ten years. So wherein the research lacks in volume, our advice is still useful because it is at the forefront of showing predictive patterns lawyers can use before this information is widely known. We hope lawyers and trial consultants will recognize that religion affects the way jurors make decisions, and as more research is conducted, it will be an even stronger foundation for courtroom strategy.

Conclusion: We appreciate the opportunity provided by *The Jury Expert* to have a dialogue with Drs. Herde, Monte, and Sheldon, who have had first-hand experience applying religion in the courtroom. We believe that, ultimately, the most useful information is that which brings together research with expertise of those in the field. Surely their commentaries reflect a small sampling of the comments and concerns likely similar to those of the readers. We hope our response helps clarify our positions and the purposes of the article. We also hope our readers will appreciate the controversial dynamics and limitations of using religion in the courtroom. Employing social science research on religion and law can provide a starting point which will help them develop their own methods to improve their effectiveness at trial.

The Jury Expert wants to thank Mr. Lindsey and his co-authors for not only sharing their work but for responding to consultant reactions on its practical utility. The willingness to discuss (and even courteously disagree over) religiosity in this venue is appreciated.

Citation for this article: *The Jury Expert*, 2008, 20(2), p 33-50.



Forensic Virtual Models in the Courtroom-An Introduction

by Eugene Liscio

Over the years technology has pushed the evolution of demonstrative evidence to the point where it can effectively bring the events of an accident or crime scene to the jury. Understandably, the pace of change has been slow, but even today most lawyers and accident reconstructionists are familiar with 3D forensic animations and have come to expect them in certain circumstances. There have been some articles written on the subject and most lawyers (especially those who deal with vehicular accidents) know that proper use of such a persuasive tool can often influence the outcome of a settlement or trial. Some have embraced the technology and have used it personally in litigation and others are still apprehensive about the idea. Nonetheless, technology marches on and presents alternate and advanced ideas that need to be explored. One such idea is the use of Forensic Virtual Models.

Forensic Virtual Models (FVMs) are the next evolution of forensic animations in litigation. They can be best explained as the migration of 3D content (i.e. the data used to create a forensic model or animation) into an interactive application with a real-time graphics visualization engine. Unlike regular video, film or forensic animations which are passive (i.e. the user sees only what the animator wants to show), FVMs are viewed in real-time and the user can interact with the animation by moving the camera view in the scene as the animation is playing. The visualization engine may allow for smart links and object intelligence so that when the user gets close to or interacts with an object, it can react in a pre-specified manner.

There are many parallels between forensic animations and 3D FVMs. They both have a very similar initial development process, both are driven by the computer gaming industries, and they are governed by similar rules of admissibility. However, a main distinction between the two is that a forensic animation is a passive visual experience whereas the FVMs offer the user a dynamic and immersive experience which is parallel to modern day video games.

Unfortunately for some, any mention of the gaming industry tends to provoke negative thoughts for use of the technology in litigation. Ironically, the same software used to create some incredibly creative and extraordinary games can also be applied to an industry where the creed is adherence to the facts. However, the gaming industry is responsible for driving some of the most stunning advancements in 3D visualization technology used in the medical, military and training simulation industries. During the late 1990s when forensic animations began to grow in use, there were similar arguments against this tool due to the prejudicial nature of this form of demonstrative evidence. Today, most of these issues are better understood and have been overcome by a better educated industry.

For lawyers, even more important than the technological advancements is the value that a 3D virtual model brings to the courtroom. Whenever a tool can be used to help better clarify facts in a persuasive, immersive and interesting nature, a jury is more likely to pay attention. Facts are more likely to be remembered and it may be easier to understand the key points of the presentation. An example for the use of an FVM would be a case where a large crime scene involving various persons inside a building had taken place. Instead of presenting a large number of drawings and sketches, a lawyer could do a virtual walk through of the entire crime scene at his/her own pace, entering different rooms and clicking on important pieces of evidence to trigger subsequent events. A forensic animation would also help to visualize the scene, however the control of the presentation is now in the lawyer's hands and not predetermined by the footage in the animation or drawings. A lawyer could easily move to a part of the scene, inside or outside that perhaps needs further clarification which only enhances his presentation.



Click [here](#) for a YouTube link demonstrating a simple 3D virtual model.

The development process for a FVM is similar to a forensic animation. The difference is in the back end and delivery. The diversion between the two technologies occurs at the point where the scene is ready to be “rendered”. Rendering is the process of calculating each frame of the animation. This would be the final step (excluding any video editing) for a forensic animation. However, a FVM requires that it be packaged in a self-contained viewer and requires some programming to make the scene interactive. The amount of programming is simply a factor of what the lawyer or client wants it to do.

From a cost perspective, both a forensic animation and FVM are similar depending on a number of factors. Many articles have been written on the cost factors associated with forensic animations and all would be more or less applicable to the FVMs except for where the two development processes diverge (i.e. from the end of the scene preparation onwards). The programming portion of an FVM and any subsequent inclusion of text, links, actions, etcetera will all be incorporated into the programming step. Delivery of the final FVM can only be viewed on a computer and not on a DVD player.

Another simple example is the use of 3D forensic models such as a damaged vehicle. The vehicle could be recreated and displayed as a virtual model such that the lawyers, accident reconstructionists, opposing counsel and the jury can all inspect the vehicle as if a scale model were in the palm of their hands. Of course, having the real piece of evidence for inspection would be the ideal situation, but there are clearly limitations to the size or nature of evidence being brought into court. In some cases, the evidence may have been destroyed, deteriorated over time or is simply unable to be handled (such as medical data captured in CT or MRI scans). In each of these cases, the FVM plays an excellent role.

As with any novel technology, there are new factors which must be taken into account in the courtroom. A traditional forensic animation is passive and fixed so that all parties know exactly what will be shown. The animations are reviewed by each side in a court case and the expectations as to what will be shown are known. In the case of a complicated FVM, the entire presentation needs to be well planned with a clear objective and strategy beforehand. One could conceivably become lost in a complicated presentation and any errors in this type of evidence could quickly become apparent by the jury or opposing counsel.

XML

FVM of a patient made from CT and MRI data.

The model is completely rotatable and features can be magnified for closer inspection.

There is also the question of admissibility. Although one could argue that FVMs are nothing more than watching a video from several user controlled perspectives, the interactivity of the FVM could be made out to be prejudicial in nature depending on the circumstances. The opposing counsel may not be aware of the intent, and could raise objections to any surprises during the course of the trial. When in doubt, it is best to follow the same rules and strategies of admissibility as for any piece of demonstrative evidence. It is imperative to reveal the nature and intent of the FVM well in advance of trial so that opposing counsel has an opportunity to review the evidence.

Of course, there is some explanation and instruction required into the use of the technology for both sides in litigation. Since it is not as simple a matter as pressing “play” on a DVD player and is more of an immersive experience, opposing counsel must be involved so they can explore and become familiar with the FVM and its proposed intent. Preparation of how to implement and display this new technology into a court strategy is key to a successful presentation.

One must always weigh the value that technology brings against the challenges that may be presented. In some instances, it does not make sense to use technology for the sake of technology. However, as lawyers and accident reconstructionists continue pushing towards dynamic presentations of video, text, documents and other forms of evidence, it seems Forensic Virtual Models will become a very effective alternative to the sketches, drawings and photographs traditionally used to portray demonstrative evidence in the courtroom.

Eugene Liscio, P. Eng. is the President of AI2-3D Animations based near Toronto, Ontario (Canada). Eugene is a registered engineer in the province of Ontario and actively promotes the use of forensic virtual models, animations, photogrammetry and other visual solutions for the courtroom. He has written several articles on forensic visual technology and has recently launched a forum with articles and informative resources to assist clients in understanding and making informed choices. For further information, please e-mail Eugene at eliscio@ai2-3d.com, visit the AI2 website at www.ai2-3d.com or forums at www.ai2-3d.com/Forums.

We asked two trial technology ASTC-member consultants to respond to Eugene Liscio's article on Forensic Virtual Models. On the following pages, Laura Rochelois and Brandon Colburn share their reactions.

Laura Rochelois comments on:

Forensic Virtual Models in the Courtroom (by Eugene Liscio)

Laura Rochelois [lr@bydesignlegal.com] is a principal at By Design Legal Graphics, Inc., a full-service courtroom graphics vendor serving a national client base from its offices in San Francisco and Portland, Oregon. For more information on By Design Legal Graphics, Inc., see <http://www.bydesignlegal.com>.

The novelty of FVM is “real-time”. The ability to modify and interact with 3D visual assets in the moment is exciting and could prove to be very beneficial. If properly applied, the technology has the potential of making the process of developing visuals both more efficient and more effective. Better, faster and cheaper, pick three!

For instance, FVMs could become a useful tool upstream in our process to generate and guide discussion, get ideas on the table and enhance the productivity of visual strategy sessions. FVM could also be used as a rapid prototyping tool, not unlike those common in product design to generate a short list of initial options in a cost effective manner. Such tools both open up the discussion and then quickly help provide focus. When it is all said and done we may wind-up with a single POV and visual storyline at trial, but having different vantage points available in real-time without added cost represents a great improvement over traditional forensic animations.

FVM can also improve upon physical models in many instances. Flexibility, time and cost come to mind. Physical models have the characteristic of being tangible and “real” and certain circumstances will call for them. This trade-off will have to be evaluated on a case by case basis.

Finally, the author indicates that FVMs offer a more immersive experience for the audience. I don't think that is necessarily true. The interactive and dynamic qualities of this technology are appealing but the risk of distracting from the content and being off-putting to the audience must be kept in mind. Don't let the gizmo take over the stage! Remember that the audience experience drives design choices, not the presenter experience.

In closing, I think this is a promising technology. It has a time and a place in the process and can improve both how we go about our work and enhance the impact of visual information at trial. But it is also only that, a technology, and the benefits will be realized from our selective application of its capabilities.

Brandon Colburn responds to:

Forensic Virtual Models in the Courtroom- an introduction

By Eugene Liscio

Brandon Colburn [Brandon@Legalsized.com] is a senior trial consultant in Phoenix, AZ with www.Legalsized.com, Inc. He works on civil cases nationwide.

Remember the days when 3-dimensional virtual reality and “holodecks” were nothing more than the fantasy of Star Trek fans? That technology has long since been developed and has recently proven to be a viable, cost effective tool in forensic investigation as well as a powerful weapon for litigation. As with most technology, it took time for 3D animation to gain a foothold in the legal system, but what’s next?

The average juror is not an expert in medicine, engineering, physics, or law; by design, they come from all walks of life. What they do have in common is the expectation of being dazzled with compelling evidence and graphic demonstrations as seen on popular television. This phenomenon of expectation is so common it has been dubbed ‘The CSI effect’. Modern people (aka potential jurors) choose to learn using the Internet and television, so why then does our legal system try to teach them using lecture, argument, and outdated blowups?

In post trial interviews, jurors agree that properly executed trial presentations are more credible than the average expert witness (and will probably cost you less). Most litigation consultants have seen glassy eyed jurors slouched over, fighting testimony-induced sleep, suddenly lean forward and pay attention to a simple 3-D model or animation. The interactive experience of these animations provides entertainment AND education; satisfying the modern juror’s expectation of visual stimulus while effectively persuading them.

Forensic Virtual Models simply take 3D animation a step further offering users mobility during the presentation. You can take the court on a guided visual tour of any scene from any angle: a vehicle, an intersection, a construction site, or an office building can all be re-created digitally and programmed to demonstrate various information from a multitude of angles. While previous generations of 3D animation followed a scripted path, these new FVMs provide the flexibility of a user-controlled experience. You can now ‘choose your own adventure’ each time you present it, making the legal applications endless.

With great power comes great responsibility, and with any new technology the versatility of the new forensic virtual model must be weighed against the cost and uncertainty of its execution. A complex case will require a very complex model and many hours of practice are necessary (with both the attorney/user and the programmer/digital consultant) before a seamless presentation can be made in front of a jury.

Due to the technology’s relative infancy, a forensic virtual model is probably a bit out of reach for most legal applications. The cost is still too high to add enough additional “bang for your buck”, but FVMs are the future; just like basic 3D animations were ahead of their time five years ago. New technology becomes less expensive, more advanced, and accessible as time passes.

Mr. Liscio writes, “...it does not make sense to use technology for the sake of technology.” However, some cases *demand* a 3D animation just to be fully understood by the layperson sitting in the jury box. When you have triable issues of fact that hinge on mechanics of movement, medical injuries, laws of physics, etc. you need to think long and hard about how you will deliver your strategy to the jury. As the application matures, the Forensic Virtual Model should become an extremely valuable tool for litigation.

Eugene Liscio responds to Laura Rochelois and Brandon Colburn:

Most people believe that the costs of FVMs are generally too expensive. However, they are in the upper range of what one would normally pay for a high quality forensic animation. The cost of presenting in a courtroom comes down to a modern day laptop computer and a video projector. Of course, there needs to be an investment in "handling" the FVM and preparing a presentation strategy.

FVMs are an extension of forensic animations brought on by modern day video game technologies. They should not be confused with "virtual reality" where participants wear special goggles, gloves and a body suit. FVM technology is in fact, quite mature, but its use in legal settings is not. There needs to be some consideration about how this form of technology is adapted and presented in the courtroom and how it will be admitted as demonstrative evidence. I believe Laura Rochelois makes a good point about "generating discussions". This is a much understated point! There are two extremely valuable benefits of FVMs that are less emphasized by most authors, yet, they are most apparent in practice.

1. Getting it Right

After having handled an FVM, it is not uncommon to find that an attorney or expert witness will change his/her position on some points since it becomes clear that something did not happen the way it was originally anticipated. There are also circumstances where blatant errors and miscalculations are found after having handled a FVM. This often saves attorney or expert witness from an embarrassing situation during trial and provides a perspective to something closer to the "truth".

2. Taking a Second Look

A second benefit of a FVM is that different scenarios can be considered. Since one can easily experiment with different assumptions, evidence and variables, areas of strength can be emphasized and areas of weakness can be better defended. This also helps to raise important questions for the attorney to ask the opposing counsel. It is a question of preparedness that all too often gets overlooked due to any number of reasons.

The visual check provided by having a user controlled perspective in real-time is where the true value of a FVM comes out. The process of going through and analyzing a FVM means an attorney is engaged in valuable discussions and is better prepared to face any unexpected scenarios which may arise in court.

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ASTC's New President: Douglas L. Keene, Ph.D.

Every July, a new ASTC President takes office. This year our new President is Doug Keene of Keene Trial Consulting based in Austin, Texas. Take a look at Doug's agenda for the next year and his thoughts on the ASTC 2008 Conference in Chicago [here](#).

ASTC 2008 Conference Audio, Video, and Course Materials are [Now Available!](#)

Here is Doug's description of the conference:

"The June conference of the ASTC was the best-attended in our 27 year history. Entitled "Advanced Tools for a Changing World", it offered a diverse array of workshops, lectures, and demonstrations designed to help any trial consultant become more skilled. Some of the most notable litigation consultants, researchers, and experts in the country offered their insights not only into the most effective strategies or interventions for graphic design, witness preparation, jury selection, or creating a compelling trial story, but more importantly they offered the reasons why one approach has a different impact than another.

This year also marked the first long-form program in the conference history, with 3-90 minute sessions being devoted to a simulated consultation on a case, growing from initial consultation and case strategy sessions through jury selection, opening statement, and witness preparation. To observe the differences of approach, style, and perspective that this large team of senior litigation consultants from all over the country brought to these tasks was illuminating.

Our keynote speaker embodied much of what ASTC has offered to litigation professionals since its inception: The very finest integration of research, academic analysis, and practical application in the courtroom. **George Lakoff** is one of the world's most distinguished writers and researchers in Linguistics. His lecture on the reasons that some messages are more readily internalized and accepted and others encounter resistance was challenging and useful, and was followed by a terrific panel discussion in which litigation consultants asked him to reflect on the way his research informs juror comprehension, persuasion, and decision-making.

As usual, the richness of the conference offerings was both a boon and a frustration. At best, you could only attend half of the offerings, and difficult decisions had to be made. For those who were not able to attend, or those (like me) who didn't get to hear and see everything we wanted to, there is good news: This year also marked our first video-recording of many of the sessions, in addition to the audio recordings. So if you are a person who likes to learn while you commute, or study the lessons of our gifted program speakers on your computer screen or television, or review the fantastic depth reflected in the conference papers and materials, all of this is available to you still. See [the website](#) for purchase information.

To the dozens of people who assisted in the planning of the conference and making it happen, I thank you deeply. Your efforts bore great results. To the additional dozens of speakers and teachers of the art and science of litigation consulting, I thank you for sharing so freely the craft you have worked so long and hard to master. And to all who read this message, I look forward to seeing you in Atlanta next June!

RSS: Your Easy Button for the Internet

by Tammy Metzger, J.D., M.A. and Carin Tabag

[Editors Note: Technical issues prevent the hyperlinks from working correctly in this full issue pdf of The Jury Expert but those wishing to use the article to sign up for RSS feeds as described herein can download the individual pdf which does work. Just go to the main Jury Expert webpage and download the individual article pdf that is next to the abstract for this article.]

Imagine having an entire research team that works around the clock, scouring the internet to compile and organize a personalized newspaper -- just for you -- every day. Relevant information is immediately organized into a familiar, easily searchable format and there are no ads. Does that sound too good to be true? “Wait, there’s more!” It is quick and easy to set up and it’s free. Welcome to the world of RSS (Really Simple Syndication).



RSS works and looks like your email inbox, so there is a short learning curve. You control exactly what is sent to you, so you never receive spam and unsubscribing is simple. You can choose from thousands of useful, interesting feeds that will help you with your law practice, keeping you current and saving you time. It will only take you 10 minutes to get started. I have included an extensive list of recommended legal feeds, organized by practice area, to make this as easy as possible for you. First, let me tell you a little more about RSS, why Bill Gates says email and web sites are the old way of communicating and that RSS is an invaluable tool for the new, far superior, way of communicating, with blogs and newscasts.

RSS Looks and Works Like Email

RSS is a web format that sends content directly to you -- as soon as it is created. It is very similar to e-mail. When you are sent an e-mail, it arrives in your inbox, waiting for you to read it. With RSS, website creators put their content in the RSS format (called a “feed,” “web feed” or “channel”) and it is automatically sent out directly to anyone who subscribes to it. Your RSS reader (also called an “aggregator” or “feed reader”) is your inbox for RSS information and it picks up information for you 24 hours a day, storing it for you to read when you need it. Google Reader is the easiest reader to set up and use.

RSS Saves You Time

RSS is vastly more efficient than browsing the internet manually. How much time have you wasted searching for obscure articles, checking for nonexistent updates, dodging popup ads and trying to locate an article you read a month or two ago online? That history button on your browser is not very helpful when you visit hundreds of sites a month. With RSS, you can quickly find those articles (and unread feeds) by searching through your RSS library with specific keywords. This does not take up space on your hard drive because Google’s servers store this information online,

which means you can access it from anywhere, including your cell phone. If you want to store your information on your own hard drive, download [Google Gears](#) so you can use the reader offline.

Readers make organizing your feeds easy. You can create subject folders and flag (or star) key feeds, just as you do with email. Deleting feeds is also painless. The reader's "subscription trends" table will display the least used feeds and all you have to do is click on the trash can icon to delete that feed. They will also recommend new feeds that may interest you, based on your viewing habits, so you do not have to search for more yourself. You can also use your reader to publicly share particularly useful articles with your invited Google "friends," without having to email everyone.

Your Own Personalized, Constantly Updated Library

I subscribe to over 60 feeds, so I receive hundreds of articles, podcasts (audio) and video clips a day, automatically, without searching the web and manually checking for updates. I know of people who scan through thousands of headlines a day with "List View," reading only those articles that interest them. If this sounds like an email nightmare, it's not. You don't waste your time with spam and you do not have to reply to any messages. In fact, you don't have to read it at all!

I do not actually read the majority of my feeds because I only need daily updates from a few of the sites. I primarily use my reader as a library, where I store legal, technical and news feeds into folders that I can search later. Reader searches return relevant information faster than an internet search because I've already narrowed the scope down to my 60 source feeds. Google Reader's search function is one of its best features. *(Note that most websites do not yet offer RSS, so a reader search would make a good starting point, quickly returning relevant information, but is not comprehensive. Furthermore, you would only search the text in the feed, not necessarily the entire article).* Let's get started setting up the easiest reader, Google Reader.

Setting up Google Reader (this takes 2-5 minutes)

1. Create a Google account at <https://www.google.com/accounts/NewAccount>

Note: If you already have a Google account (including Gmail), skip to step 5.






2. After clicking on the link in a verification e-mail, you'll be taken to a page where Google confirms that your account is verified and gives you a link to manage your account profile. Click on it.
3. Edit your personal information (if you wish) then look to the list of features on the right. With your Google Account you have access to all of them. Scroll down to the "More" Link and you'll see a long list of useful features Google offers.
4. Find the "Reader" link under the category Communicate, Show and Share. Click on it. (Skip to step 6).
5. *For current Google Account holders:* [sign in](#) to your account. Click on the "more" drop-down menu link at the top of the screen and select "Reader."
6. You'll see your blank reader and have the option to watch a short video (less than a minute) introducing you to Google Reader. Click on the triangle to watch it or click "Take a tour" to read a more informative, yet brief,

overview. There is a more in-depth guide to [using Google Reader](#) in this article. It's quick and easy to get started because the reader works and looks like your email inbox.



7. There is no content to view because you haven't subscribed to any feeds yet, but your reader is ready to start receiving them. To import Google bundles on news, sports and many other topics click on "Get started by adding subscriptions." If you are not interested in these bundles, click the "Home" link in the top left side bar of your reader and we'll start adding legal feeds to your reader.

Let's Start Subscribing

Subscribing with the RSS Icon




This is the fun part of RSS: subscribing to feeds from your favorite websites. There are many ways to subscribe to a feed, but the easiest way is to click on the RSS icon , and let Google reader subscribe to the feed for you. Feed links are also displayed as  (and other colors besides orange and red), ,  and .


To practice this way of subscribing we'll use a general legal news site, <http://www.cnn.com/LAW>. I've set this link to open in a new window when you click on it. (You can also right click on a link "Open in New Window.") You can toggle between the CNN window, this one and your reader by simultaneously pressing the "Alt" and "Tab" keys on your keyboard.

In the middle of the CNN page you'll see a box entitled "All About..." with a list of topics and red RSS icons (). Find a topic that interests you and click on the associated  button. You'll probably open a new page with the name of the feed and a list of the latest articles. (If you are directed to a page with html code, read the next section "Subscribing Manually to Google Reader.")

Scan through the list of articles to make sure you want to subscribe to this feed. If you decide to try it out, your reader will pick them up for you once you subscribe. At the top of the screen you'll see the words "Subscribe to this feed using" following by a drop down box. If Google isn't already selected using the drop down box, select "Google." Click the "Subscribe Now" button and click the blue button "Add to Google Reader." You've just subscribed to your first feed and it will immediately appear in your reader.

Subscribing Manually to Google Reader

If you click on the  icon and see a page filled with html code you can easily enter the feed manually into your Google Reader. We'll practice this with another popular legal news site, <http://www.law.com>. Links to feeds are often located on the right side of the screen, near the top. This is where you will see  on [law.com's](http://www.law.com) website. Click on it to open a page filled with descriptions and links to the different feeds their website offers. You'll notice that some of their feeds, such as [IP Law](#) and [Employment Law](#) have subscription fees. You can see abstracts in your reader but you will not be able to view the entire article until you sign up for their 30-day trial. For now, pick one that is free, such as [Legal Blog Watch](#) or [Newswire](#), by right-clicking on  and selecting "Copy Link Location" if you have Mozilla Firefox or Netscape or "Copy Shortcut" if you have Internet Explorer.

Go back to Google Reader and on the left sidebar find the  [Add subscription](#) link and click on it. In the blank box, right click and select paste (which should paste the link location you copied) and click “Add.” Voila! You’ve added another feed.

Unsubscribing
















If you do not want these feeds, click the link entitled “[Manage subscriptions >>](#)” underneath your list of subscriptions at the bottom of the left sidebar. Locate the subscription you want to delete and click the trash can to its right. Click “Ok.” Then click on “[<< Back to Google Reader](#)” in the orange menu bar to return to your home page.

For more help with subscribing see the [Finding RSS Feeds](#) and [Troubleshooting](#) sections at the end of this article.

Useful Feeds for Lawyers

 [Links to RSS feed, *word* to web page & !\[\]\(29658d981ebdf5edc259074cbf6110e0_img.jpg\) to Google Reader](#)

General Legal News



-   [Find Law](#) A good site for legal news. Choose your reader () from the list on the right sidebar or click on the RSS icon in your browser’s address bar.
-   [ABA Daily News](#) American Bar Association’s feed
-   [Jurist: US Legal News](#) University of Pittsburgh School of Law publication
-   [Jurist: World Legal News](#) University of Pittsburgh School of Law publication
-   [CNN Law](#) This is where we began (**already entered**), look for the icon on the page.
-   [Newswire](#) Daily summaries of top legal news (**already entered** above)
-   [The Wall Street Journal Law](#) (requires a **paid subscription** to view full articles, but even if you don’t subscribe, the headlines and short descriptions are worth reading.)

Best Web Sites to Browse for Quality, Focused Feeds



- [Blawg 100](#) The ABA Journal Blawg 100 (2007) ABA’s recommendations of the top legal blogs (blawgs).
 - [LexMonitor](#) Offers the most comprehensive feeds on blawgs and journal articles. Select feeds from the 30 practice areas listed on the left, or subscribe to their more narrowly focused tag feeds.
 - [Mealey’s News Feeds and Litigation Reports](#) Free headlines and short description, **subscription fee**.
- Harris Martin does not yet have a feed, but as soon as it is available, I will post them to my “[New Legal Feeds](#)” feed.



Blawgs (Blogs for Lawyers) and Legal News



-   [Legal Blog Watch](#) Compilation of the top legal blogs into one RSS feed.
-   [Wall Street Journal Law Blog](#) Full blog in feed, with links to interesting reader comments.
-   [The Legal Underground](#) Subscribe to this site’s RSS feed or use it to search for relevant blawgs with RSS feeds.
-   [How Appealing](#) Interesting appellate blawg.



  [LexMonitor: AmLaw 200 Blogs](#) This site offers the most comprehensive legal blogs and news feeds with legal subcategories on the web.

Trial Consulting Articles



  [Deliberations](#) Anne Reed’s website is an incredible resource and this feed is listed in the ABA’s top 100 blawgs.

  [JuriSense](#) Jury selection, scientific evidence and communication articles written by yours, truly.

  [New Legal Feeds](#) This is my feed on feeds. I will post new feeds into my JuriSense website’s [copy of this paper](#). To save you from looking through that list, you can subscribe to receive just the new, quality legal feeds.

  [The Jury Expert](#) This feed gives you access to all articles in the new digital *Jury Expert*.

American Bar Association (ABA)

  [Daily News](#) (already listed under general legal news)

  [Top Stories](#)

  [American Bar Association](#) Useful websites and technical news for lawyers

  [Law Practice Today](#) Online ABA webzine articles.

  [Section of Litigation](#)

  [Section of Environment, Energy and Resources](#)

  [ABA Journal Magazine](#)

American Association for Justice (AAJ, formerly ATLA) The AAJ site did not have an RSS feed, but it linked to the [Consumer Union](#) feeds, which are listed below. As soon as the AAJ feeds are available, I will post them (as well as other updated feeds) into my online copy of this paper at my [JuriSense website](#). You can also subscribe to my “[New Legal Feeds](#)” feed for those updates.

Recommended Legal Sites by Practice Area

Administrative Law

  [LexMonitor: Administrative Law](#)

Admiralty & Maritime Law

  [LexMonitor: Admiralty & Maritime Law](#)

Advertising Law

  [LexMonitor: Advertising Law](#)

Alternative Dispute Resolution Law

  [LexMonitor: Alternative Dispute Resolution Law](#)

Antitrust Law

  [LexMonitor: Antitrust Law](#)

Bankruptcy

  [Bankruptcy Professor Blog](#)

Business

  [California Small Business Blog](#)

  [U.S. Securities and Exchange](#)

  [Securities and Law Professor Blog](#)

Civil Rights and Privacy Law

  [LexMonitor: Civil Rights & Privacy Law](#)

Class Actions

  [Class Action Defense Blog](#) Up-to-date information on class actions

Consumer Law



  [LexMonitor: Consumer Law](#)

Corporate & Commercial Litigation Law

  [LexMonitor: Corporate & Commercial Litigation](#)

Criminal Law



  [LexMonitor: Criminal Law](#)

  [Crime & Consequence](#) One of the few, quality criminal law sites discussing the prosecutors' perspectives. Listed on ABA's top 100 blawgs of 2007.

  [Criminal Law](#)

  [Sentencing Law and Policy](#)

  [Criminal Professor Blog](#)

  [Houston Criminal Defense Lawyer Blog](#) An interesting blog about the art and science of criminal defense trial lawyering by Matt Bennett.

Divorce & Family Law

  [LexMonitor: Divorce & Family Law](#)

Education Law

  [LexMonitor: Education Law](#)

Election Law & Political Commentary Law

  [LexMonitor: Election Law & Political Commentary](#)

Electronic Discovery Law

  [LexMonitor: Electronic Discovery Law](#)

Employment & Labor Law

  [LexMonitor: Employment & Labor Law](#)

Environmental Law

  [LexMonitor: Environmental Law](#)

  [Sustainability Law Blog](#)

  [Environmental Law Professor Blog](#)

  [Land Use Professor Blog](#)

  [LexBlog Climate Change Insights](#)

General Counsel Blogs

  [LexMonitor: General Counsel Blogs](#)

Immigration Law

  [LexMonitor: Immigration Law](#)

Insurance Law

  [LexMonitor: Insurance Law](#)

  [Declarations and Exclusions](#) California insurance law blog

Intellectual Property Law

  [LexMonitor: Intellectual Property Law](#)

International Law

  [LexMonitor: International Law](#)

Judiciary Law

  [LexMonitor: Judiciary Law](#)

Media, Entertainment & Sports Law

  [LexMonitor: Media, Entertainment & Sports Law](#)

Law Firm Management & Legal Marketing

  [LexMonitor: Law Firm Management & Legal Marketing](#)



Personal Injury & Medical Law

  [LexMonitor: Personal Injury & Medical Law](#)

Probate & Estate Planning Law

  [LexMonitor: Probate & Estate Law](#)

Products Liability

  [Product Liability Law 360](#) The newswire on product liability law.

Real Estate & Construction Law

  [LexMonitor: Real Estate & Construction Law](#)



Tax & Financial Law

  [LexMonitor: Tax & Financial Law](#)



Technology



  [LexMonitor: Technology](#)

Torts

  [Day On Torts Law Blog](#) Published by John A. Day. Great articles, not just relevant to Tennessee, but elsewhere. There are also links to many other blawgs (legal blogs). Type in a keyword in the search box on the right sidebar and search the website for links that interest you.



  [Toxics Defense](#)

  [Metzger Law Group Blog](#) Information on benzene, leukemia and other public health issues.

  [Mesothelioma Watch](#) A comprehensive consumer resource concerning abestos & Mesothelioma.

  [Mass Tort Litigation Blog](#)

  [Torts Professor Blog](#)

  [The Pop Tort](#) Plaintiffs' tort news "so civil justice isn't toast."

Trial Practice

  [LexBlog Trial Lawyer Resource Center](#) Trial tips from great trial attorneys.



  [The \[non\]Billable Hour](#) Useful practice information.

Whistleblower Law

  [LexMonitor: Whistleblower Law](#)

More Recommended Legal Feeds

Legal Technology for Law Firms

  [Legal Technology](#) Technological information that pertains to a legal practice, such as e-mail security and electronic discovery.

  [Robert Ambrogi's LawSites](#) a blog that keeps abreast of new legal resources on the internet.

U.S. Government

  [SCOTUS](#) U.S. Supreme Court blog

Monitor bills via RSS as they move through Congress at [GovTrac.us](#).

Trackers are available for every [person](#), [bill](#), [subject term](#) or [committee](#) in Congress. Find the *Add Tracker* box on the appropriate page. A picture of a tracker box is shown to the right. Click the *Add Tracker* button to subscribe to events that are relevant to that page. Your [tracked events](#) page also includes a link to an RSS or Atom news feed customized to the trackers you've chosen.

There is a list of [subject feeds](#) on GovTrac.us. The site gives you a choice of 3 feed formats. Google reader can handle any of them, but RSS 2 is probably best. The most popular subjects are:

-   [Immigration](#)
-   [Abortion](#)
-   [Illegal Aliens](#)
-   [Civil Liberties](#)
-   [Environmental Protection](#)

  [DC Dicta](#) Great site that features legal news in Washington DC

California Legal News and Blogs

  [Legal Pad](#) California Law blog

  [Legal Pad LA](#) National Law Journal, focusing on the Los Angeles area

  [California Punitive Damages](#) Horvitz & Levy



  [Cal Biz Lit](#) Business litigation in California



  [California Business Litigation Blog](#)

  [Daily Journal Corporation](#) Headlines. This is a **fee-based** subscription.

Science, Technology and the Law

  [Science and Law Blog](#)

  [Oxford Journals: Law, Probability and Risk](#) Collection of British articles on Law, Probability and Risk but with relevant information on Daubert for American cases.

  [SKAPP](#) (Scientific Knowledge and Public Policy). This group examines how science is used and misused in government decision-making and legal proceedings.

Law Firm Marketing

  [ALM Research Online](#) Legal Marketing website

Home Office Lawyer



  [Home Office Lawyer](#)

Legal Writing

  [The \(New\) Legal Writer](#) Great resources here.

  [Wayne Scheiss's](#) legal writing blog

Legal Ethics

  [Legalethics](#) Focusing on the ethical issues associated with the use of technology by legal professionals. Includes a list or RSS feeds on 40 topics, including:

  [Advertising](#)

  [Lawyer Referral Services](#)

  [Confidentiality](#)

  [Ethics Opinions](#)

There are many more feed groupings, such as by subtopic and state. Just click on the “states” topic and select one. (Here are direct links to [California](#) & [New York](#) subscriptions).

Legal podcasts (audio that can be downloaded onto your computer, an iPod or other MP3 player)

[ABA Journal Podcast Directory](#)

[Blawgs.fm](#) searchable directory of law blogs and podcasts


[Suffolk University Law School Podcasts](#)

Journals and Academic News

[WorldCat](#) is useful for legal research. It is a comprehensive list of 1370 law journals, each has its own RSS feed that lists the titles of current articles. What’s really handy is the link to the closest libraries that subscribe to that journal. You can also select multiple journals to combine into one feed.

  [LII Legal Information Institute](#)

  [LexMonitor: Law Professor Blogs](#)



[Law Professor Blogs](#) There are over 50 subject areas, written by and for law professors, and most have RSS feeds. You may need a new web browser that detects RSS feeds to subscribe to these sites since the  icon does not always work properly.

Other Useful Sites



Medical



  [Medicine.net](#) Health news.



There are also specific feeds on medical topics such as cancer.

  [Cancer](#) You will have to search your reader for more specific terms, such as leukemia.

Academic Publications

  [SpringerLink](#) 1,954 Journal publications on Science, technology and medicine, including subject collections on [Chemistry and Materials Science](#), [Biomedical and Life Sciences](#), [Engineering](#) and [Medicine](#). Some titles link to abstracts. This is a **fee** to read the entire article.

  [Ingenta Connect](#) Comprehensive collection of scholarly research materials, including Springer publications; good search capabilities of archived articles. For example, they list 1,788 journals regarding [medicine](#), including 56 regarding [toxicology](#) that all have RSS feeds of article titles in the latest issues.

  [Informaworld](#) Source for specialist information for the academic and business community. Includes journals, eBooks, abstract databases and reference works published by Taylor & Francis, Routledge, Psychology Press and Informa Health care. For example, you can subscribe to feeds that send you article titles from [Psychology, Crime & Law](#) and the [Journal of the American Planning Association](#). You can search key words to find specific journal articles.

Psychology Articles and Abstracts

  [APA PsycNet](#) Issues on psychology, public policy and law

  [Psychology Today Blog](#) Insightful blog dealing with psychological issues from a personal to a professional perspective

  [APA Psychology in the News](#)



  [APA Journal: Emotion](#) (abstracts only)









  [APA Journal: Group Dynamics](#) (abstracts only)

[American Psychology Association journal feeds](#) (list of 50 journals, abstracts only)











Consumer Union - Nonprofit publisher of Consumer Reports

  [Product Safety](#) includes recalls





  [Scribbler](#) A consumers union open discussion forum where anyone can post their thoughts and opinions on consumer union issues.

-   [Health](#) Consumers union feed focusing on relevant health issues that informed consumers need to know.
-   [Cover America Tour](#) Blog aimed at unveiling the problems with our nation's health care system through strikingly personal stories and cases.
-   [Daily Dose for Reform](#) Prescription drug blog
-   [Get the Lead Out!](#) Toy safety blog

General News

-   [Topix](#) allows you to tailor your own individual online newspaper. It collects news stories from 60,000 sources. Many readers post comments after the news articles so if your case (or a similar issue) is in the news, you can read what people think about it. This is not a substitute for quality pre-trial research, but it is interesting and will help you generate ideas.
-   [CNN](#) “The most trusted name in news.”
-   [MSNBC](#)
-   [Fox News](#)
-   [Newsweek](#)









Financial

-   [Morningstar News](#)
-   [Morningstar Stock Analyst Notes](#)

Sports

-   [Fox Sports](#)

Fun

-   [The Onion](#) Fancies itself as “America’s Finest News Source.” Visit this page, pick which RSS topic interests you and subscribe. You’ll agree with their slogan in no time.
-   [YouTube Blog](#) Great for YouTube related news and developments. Visit this page and click the RSS icon to subscribe. Find out what YouTube is up to besides showing you how bulldogs ride skateboards.
-   [The Daily Show Videos](#) A wonderful collection of everything hilarious in the news world caught on camera and spun with John Stewart’s clever commentary. Visit this page and directly subscribe.
-   [Slate](#) Witty daily online magazine.

This list may contain all the feeds and links to feeds that you want. But if you want to learn more about finding specific feeds, see the [Finding RSS Feeds](#) section of this paper; however, this can be time-consuming. For your convenience, I will post new quality legal feeds into my online copy of this paper at my [JuriSense website](#). You can also subscribe to my “[New Legal Feeds](#)” feed for those updates.

Using Google Reader

Google Reader offers an enormous amount of storage space and gives you several ways to read, organize and share your information. It is a web based RSS reading service that you can access from any computer with internet access. You can also download Google Gears to store your information on your own hard drive, for offline use.

Searching Articles in Your Reader

Google is known for its search capabilities so of course Google Reader also has a great search feature. This is handy if you use your reader as a library. Your Reader you can search all your articles (old and new) using keywords to find specific content. On the top, center area of your reader you’ll see a blank search box and a drop down box next to it saying “All items.” If you want to search your CNN subscription for articles pertaining to environmental exposure, just enter ‘environmental exposure’ into the search bar and click the arrow of the drop down next to the search bar and select your CNN subscription. You’ll get results for every article that matches your inquiry within CNN. If you want to search all your subscriptions, don’t touch the drop down box and it will search all items.

Getting Google Reader to work Offline (Google Gears)

Google gears is a new program that allows its users to use Google services (including Google Reader) offline. It installs a database that stores data locally so you don’t need an internet connection to receive your Google Reader content. Gears periodically synchronizes data on the internet with data in your database, storing content that is as updated as possible at every moment. Once your internet connection is severed and then reconnected, Gears will synchronize new information immediately. If you want articles from your Google Reader to be available offline, you can download Google Gears [here](#).

Downloading Content into Your Cell Phone is Easy

1. Go to <http://www.google.com/mobile/default/reader/#>
2. Enter your phone number in the blue box (ex. 1-XXX-XXX-XXXX)
3. Google will send your phone a text message containing a link that connects you to your reader via your phone.
4. Using your phone, visit the link Google provided you in the text message. Sign in to your Gmail account (enter in your e-mail address and password) and you'll receive your reader's content.


Finding RSS Feeds

Finding specific feeds can be time-consuming, which is why I listed so many in this article and will continue to publish updates as I discover quality legal feeds. So you may want to skip this section. Read on if you want to learn a few more methods for finding RSS feeds that interest you. It's not difficult; it just takes time to find them.


There is not yet a standard that all web creators follow, so a page with a feed may not have an RSS icon and pasting the website's homepage web address into your reader manually may not work. Sometimes you will have to hunt around to find the feed's address (the link location, the URL that is visible in your browser's address bar, e.g., <http://www.jurisense.com/blog/?feed=rss2>).

Using your browser to find feeds

Like subscribing, there are many ways to identify if a site offers RSS feeds of their content. The easiest way is to let your internet browser detect feeds on pages for you. To do this, you'll need either the latest version of [Internet Explorer](#) (IE7) or the latest version of [Mozilla Firefox](#) (Firefox 3.0). *(Note that you should have these newer browsers for security reasons, to avoid Web-based attacks by criminal hackers. If you use IE7 you still need monthly automatic updates to reduce your risk. The current IE7 browser displays a [green address bar](#) when you are visiting a verified business site.)*

We'll subscribe to a feed using one of these browsers by visiting <http://jurylaw.typepad.com/> as an example. This blog features great information on law, news and thoughts, juries and jury trials by Anne Reed. Visit <http://jurylaw.typepad.com/> using one of the browsers and take a look at the address bar. You'll see the site's URL, but to the far right you'll see the orange RSS icon . If you click on that icon, you'll be directed to the page allowing you to select Google Reader and subscribe to the feed. Click Subscribe Now.

Manually finding feeds on websites

If your browser doesn't detect a feed right away, but you're not ready to give up on finding a feed, you can search manually for a feed by scanning the homepage of the site and looking for two things: the icon  (which can be other colors besides orange) or a link saying **RSS**. If you find one of those, click on it and you'll be able to subscribe.

Locating these things on the homepage is sometimes difficult, but if there are any feeds associated with a site, the web designer will probably link to it on their homepage. For example, there is no RSS icon in the address bar at <http://www.jurisense.com> because the feed does not originate from the home page, but you'll clearly see the RSS icon to the right side of the screen.

Searching the Web for RSS feeds

Searching the web for RSS feeds is not simple. Without getting into the technicalities of how web crawlers find sites and how web designers register their sites, I'll just recommend that you use <http://blawgsearch.justia.com/>, <http://www.abajournal.com/blawgs/>, <http://www.blawg.com/> or <http://www.theblogsoflaw.com/> for law-related feeds or Google searches *without* typing in "RSS" as a search term. For [Google](#) searches, you'll have to look through the top hits for your search terms and check to see if these top sites have RSS feeds. This is time consuming, which is why I listed so many RSS feeds to get you started. Good general RSS search engines are <http://www.feeds4all.com>, [July 2008](http://</p>
</div>
<div data-bbox=)

www.rssfeeds.com and <http://blogsearch.google.com/> but these are less likely to return legal feeds than those listed above.

[Subscribing Manually to Google Reader](#) (links to prior discussion)

Troubleshooting

Scenario: You click on the RSS icon and are taken to a page filled with html code.

Solution: Ignore the code. Copy the URL of the page and paste it into the “Add Subscription” bar of your reader.

Scenario: You click on the RSS icon in your browser and are given a drop down selection of different versions of RSS (usually RSS 1 or RSS 2 or Atom).

Solution: These versions matter mostly for the feed creators and for certain, picky types of RSS Readers. Google can read all these versions but just select RSS 2 and it’ll work fine.

Scenario: You click on an RSS link or icon and are taken to a page filled with a lot of icons for different readers.

Solution: Find the Google Reader icon () and click on it. Hit Add to Google Reader

Scenario: You click on an RSS link or icon and nothing happens.

Reason: The link is bad and either the feed is inaccessible or you’ll have to find another link to the feed that works.

Scenario: You click on the RSS icon in your browser and your Reader is flooded with too much general information.

Solution: Your browser probably subscribed you to all the feeds on the site. Navigate the site page to find their specific options for RSS feeds and subscribe to the one(s) that interest you.

Other RSS Readers and Mac User Information

Google is the dominant name in most free, web based services today, but Google Reader is not the only RSS reader out there. [My Yahoo](#) Reader is also popular as well as [Bloglines](#) reader. Web based readers such as these, are accessible to PC and Mac users, but if you want a desktop based reader, you’ll want to find one that is compatible with your operating system. [NewsGator](#) is a popular desktop based reader for both PC and Mac users that can even sync with your Outlook e-mail in windows.

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Tammy Metzger (tammy@jurisense.com) is the principal of JuriSense, a trial consulting firm based in Long Beach, California. She primarily works on environmental, toxic tort and products liability cases, specializing in pre-trial research, jury selection and communication skills. She speaks at legal conferences and workshops, teaching attorneys how to conduct *voir dire*, explain scientific evidence to laypersons and overcome bias. You can read more online articles, subscribe to RSS feeds and learn more about JuriSense trial consulting services at www.jurisense.com.

Thanks for looking at the July 2008 issue of TJE. This month we are pleased to bring you not only diverse but international perspectives. This issue of The Jury Expert has authors from England, Canada, and all across the United States.

This time we're all about witness preparation, the eye witness research literature, a new 'secret weapon' for ensuring your witnesses remember facts as accurately as possible, religion in the jury box, case themes, a new form of forensic animation, and understanding RSS without any real work on your part. Plus our July 2008 "favorite thing" is hidden away inside.

We appreciate the feedback you've given us and are eager for more! Tell us what you think or what you'd like to see in The Jury Expert by simply sending an email to the [Editor](#).

Upcoming issues are filling up and promise to be intriguing and relevant to your practice. If you like us, tell your colleagues and friends about us and encourage them to subscribe. You can forward this pdf document to them or send them to our URL: (<http://www.astcweb.org/public/publication/>). And thanks again for reading TJE!

[Rita R. Handrich, PhD](#)
Editor, The Jury Expert



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