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The Impact of Graphic Injury Photographs on Liability Verdicts and Non-Economic Damage Awards

by Bryan Edelman

Over the years, the use of graphic, and at times gruesome, visual imagery in the courtroom has become commonplace. In the criminal setting, particularly trials involving violent crime, prosecutors make every effort to put grisly photographs of the victim and crime scene in front of the jury. These photos are typically selected on the basis of their shock value in an effort to portray the horrific nature of the crime. From the prosecutor's perspective, the more abhorrent the photograph the more effective it becomes. In the civil arena, plaintiff attorneys attempt to enter into evidence photographs of their client's injuries. These photographs are often taken immediately after an accident and may be far removed from their client's current condition. Although the use of such imagery has become the norm, the prejudicial nature of this evidence continues to be a contested issue in courtrooms across America. Criminal defense attorneys routinely submit *motions in limine* to restrict or exclude crime scene photos on the grounds they put undue focus on the victim and generate sympathy. Civil defense attorneys submit similar motions, positing that such evidence, which may be relevant for determining damages, has an improper impact on jurors' assessments of liability. Under both circumstances, judges exercise their discretion and usually allow the jury to see some, if not all, of the images.

With the ever increasing availability of photographic evidence and the trend toward the admissibility of graphic visual images, it has become even more important to understand how these pictures influence jurors' verdicts. Little research has been conducted to address this important issue. What research has been completed suggests that graphic photographic evidence can have an improper effect in the criminal arena by influencing conviction rates (See Douglas, Lynn, & Ogloff, 1997; Bright & Goodman-Delahunty, 2006). The literature on the impact of vivid injury photographs in the civil setting suggests that there is a relationship between this evidence and research participants' damage awards (See Oliver & Griffitt, 1976, Whalen & Blanchard 1982).

In civil litigation, photographic images depicting the severity of an injury are submitted during the trial to purportedly help the jury assess economic (e.g., lost wages) and non-economic damages. Photos of a burned hand taken immediately after an accident may help a jury assess the pain and suffering associated with the injury. The application of this evidence is considered proper when used in this limited capacity. However, before a jury weighs damages, it must first find that the defendant was negligent and that this negligence caused injury to the plaintiff. Arguing jurors' improper use of injury photographs to determine liability may mean these images should be excluded under FRE 403. According to 403, relevant evidence is inadmissible if it is found to be unfairly prejudicial (emphasis added):

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The current study examines the proper and improper use of vivid injury photographs in a civil dispute where the evidence favors a defense verdict. We assessed the impact of injury photographs on research participants' liability, causation, and non-economic damages verdicts (i.e., pain and suffering awards). The study also answers a question of strategic value: Can a defendant mitigate the influence that injury images have on liability verdicts and damage awards by providing counter photographs depicting improvement in the plaintiff's condition?

A Study of Impacts in a Product Liability Lawsuit

The research combined three conditions including identical written trial stories embedded with neutral photographs. The fact pattern was developed from a lawsuit that was resolved during trial. The original litigation stemmed from an injury to an 11-month-old infant who received severe, instant third-degree burns to his hands after he put them in the path of steam emitted from an operating vaporizer. The plaintiff (the infant) sued the manufacturer of the vaporizer claiming that: 1) the product was defective and 2) the warning labels were insufficient. The defense addressed both of the plaintiff's claims and asserted a comparative negligence argument against the parents. The final version of the trial story was slightly and intentionally skewed in the defendant's favor.

Injury photographs--two submitted by the plaintiff and two by the defense --were chosen from the original nine images provided by counsel. The plaintiff photographs depicted the burns to the infant's hands taken at the hospital within hours of the accident. In contrast, the defense pictures were taken over a year after the incident, following several successful skin grafts. These photographs illustrated marked improvement from the initial injury.

All three versions of the trial story were identical in content and contained the same neutral photographs of the parties, the vaporizer, and other relevant visual aids. The control condition detailed the injuries from both the plaintiff's and defendant's perspective, but did not offer any images of the injury. The second condition incorporated the two photos taken immediately after the accident into the plaintiff's case-in-chief. Finally, the third condition included the plaintiff photos but also incorporated the post-recovery images in the defendant's damages argument. After reading the online trial story, research participants were provided with the relevant jury instructions and then answered the verdict questions.

Research participants were randomly selected by a web-based survey company. The sample was drawn from a list of volunteers who opted in to complete web surveys for compensation in the form of points. The entire exercise was completed through written materials delivered through internet web access. The final sample comprised jury eligible participants from California, New York, Illinois, Texas, and Florida.

The Influence of Photographs On Juror Verdicts

As predicted, the photographs had a significant effect on final verdicts. The majority (58%) of participants in the first condition, who did not view any of the graphic photographs, found in favor of the defense. However, research participants who saw the plaintiff's injury photographs were significantly more likely to render plaintiff verdicts than participants who did not view the photograph, $\rho = .03$. Fifty-one percent (51%) of participants in this condition resulted in plaintiff verdicts. Yet, the defense was able to counter the illegitimate impact of the plaintiff's photographs on liability verdicts. Sixty-percent of participants who saw both the plaintiff and defense photos found for the defense.

The plaintiff's photographs also had an impact on damage awards. The median non-economic damages award for research participants who viewed the plaintiff photographs was significantly higher than that of those in the no photographs condition, $\rho = .02$. The defense photographs did not attenuate the impact that the plaintiff photos had on non-economic damage awards.

Practical Implications of Injury Photographs in Civil Litigation

The results from the present study indicate that injury photographs can and do have an improper effect on liability verdicts. Further, these photographs, which are ostensibly provided to assist in the assessment of damages, actually strengthen a somewhat weak plaintiff case. From a practical perspective, these findings have important implications. While injury photographs may be relevant for assessing damages, they also appear to spill over and contaminate questions on liability.

Research participants also improperly used photos proffered by the defense to determine liability. This finding suggests that the defendant may be able to mitigate the effects of graphic injury photos by offering photographs of its own. However, the improper use of counter photos does not justify or downplay the dangers posed by jurors using damages evidence to evaluate liability. Further, the post-surgery images submitted by the defense in this study illustrated a dramatic improvement in the plaintiff's condition. Such strong visual evidence is not always readily available to the defendant. Therefore, the defense may not be able to overcome the prejudicial impact that vivid injury photographs have on liability.

The results also suggest that plaintiff injury photographs have a significant, albeit proper, effect on non-economic damage awards. In contrast, defense photographs do not have an attenuating effect. This finding puts plaintiff counsel at a distinct advantage during the damages phase.

Legal Remedies

There are several approaches that could be employed by the Court to limit the prejudicial or improper use graphic photographs. Under the most aggressive scenario, the Court could exclude all graphic injury images on the basis of FRE 403. In light of the current trend toward admissibility, this approach is not likely to be employed any time soon.

Under a second scenario, the Court could provide a clear limiting instruction before photographs are submitted to the jury and an additional instruction before deliberations begin. Although this is the more widely accepted remedy, limiting instructions do not appear to be effective. There is a significant body of research within the cognitive and social psychological literature showing that participants have a difficult time suppressing thoughts when told to do so (See Wegner, Schneider, Carter, Ill & White, 1987).

The third approach calls for the bifurcation of the liability and damages phases, where the jury would only hear damage arguments after making a finding of liability against the defendant. Upon the jury returning a plaintiff verdict, both parties would then submit evidence in support of their competing damages claims. Although defense counsel may continue to have difficulty overcoming the impact that graphic injury photographs have on jurors' damage awards, the improper use of such evidence to determine liability would be eliminated.

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Civil Case Mediations: Observations and Conclusions

By James A. Wall, Jr. and Suzanne Chan-Serifin

"You can see a lot by just looking," Yogi Berra once said, and this adage is quite relevant to civil case mediations. Currently, in the United States, there are approximately 250,000 civil case mediations per year (Wall & Chan-Serafin, 2009), but we know very little about what happens within them. The literature does describe mediation, offer advice to mediators, tout the value of mediation and list its outcomes. Yet there are no empirical studies that report mediators', plaintiffs' and defendants' behaviors in mediation or more importantly that indicate how the various participants' behaviors may influence the process or the outcome. We investigated 62 civil case mediations to address this deficiency.

We began with four predictions. First, we predicted that mediation would, in general, be successful. Second, we reasoned that mediators want plaintiffs and defendants to have realistic aspirations or goals so they will be flexible in making concessions. Thus, we predicted when either of these parties demonstrate high aspirations, the mediators will apply assertive techniques to lower their aspirations. Third, we predicted a chicken-and-egg cycle for the plaintiffs' and mediators' behaviors: plaintiffs typically make higher concessions than do defendants. Experiencing this over the years, mediators expect plaintiffs to make higher concessions in the current mediation and because of this expectation, the mediators apply more assertive techniques to the plaintiffs, which lead plaintiffs to make higher concessions. And fourth, we predicted that mediators would use more assertive techniques whenever they face nonagreements.

Observations Support Three of Four Predictions

To test these predictions, we observed 62 mediations in two cities. The mediators in these cases were 21 attorneys and eight judges who had practiced law for an average of 30 years, had mediated an average of 606 cases over the course of an average of nine years as mediators. One observer accompanied each mediator through every phase of the mediation, recording the mediator's statements, as well as those of the plaintiffs and the defendants, the demands of each party and the agreement (or nonagreement). To test our predictions, trained researchers coded and analyzed the parties' statements.

Our data analyses support most of our predictions. Specifically, we found that over one half of the cases settled but the settlement rate varied significantly according to the case type. Specifically, 89% of liability cases other than motor vehicle and medical malpractice (e.g., slip and falls, injuries from products, accidents on business premises), 69% of motor vehicle cases, and 75% of medical malpractice cases resulted in settlement agreements. Agreement rates for other case types were significantly lower, with 10% of the contract cases and 50% of employment cases ending in settlement. We also found the small cases settled more often than the large ones.

Our observations supported the second prediction as well. Mediators pressed the plaintiffs and defendants with assertive techniques/statements whenever they expressed high goals.
The chicken-and-egg prediction was also supported. Specifically, plaintiffs made higher concessions than the defendants; mediators expected they could get higher concessions from the plaintiffs; therefore, they applied more assertive techniques to the plaintiffs.

The most interesting results came from the test of our last prediction: mediators will use more assertive techniques when there were low concessions and nonagreement. The observations did not support this prediction. Instead we found that two processes unfolded when there was nonagreement. For one set of

cases, the plaintiffs opened with demands that the mediators felt were excessive; consequently, the mediators applied many assertive techniques but were not able to get settlements. Therefore, there were many assertive techniques and few agreements.

In another set of cases - employment and contract, which are very difficult to settle - the mediators became bogged down in the cases or became impatient and instructed the disputants to simply exchange numbers, rather than discussing their cases. Here, the mediators used few assertive techniques and obtained few agreements.

The Most Interesting Discovery: Limited Mediator Influence

While the tests of our predictions yielded insights into the mediation process, the most provocative discovery of our investigation was the failure to detect any effect of the mediators' behavior on the agreements (or nonagreements). This finding is quite noteworthy because mediators' techniques are intended and expected to increase agreements. To investigate this unexpected cleft between the mediators' behavior/techniques and agreements, we re-examined our data and closely read the transcripts of the mediations. When we did so, we found for 27 of the cases, the mediators' behavior had no effect upon the agreements. In 10 of these 27, the mediation stalled immediately because of a disputant's behavior (e.g., the plaintiff refused to make any concession) or an outside factor. And in 17 of the 27, the plaintiff and defendant quickly plowed toward an agreement independent of the mediator's tactics.

For the other 35 cases, the mediators' techniques affected the disputants' behaviors but even in these, there was evidence that the mediators' behaviors were occasionally reactions to - rather than a cause of - a plaintiff's or defendant's behavior. In sum, for about one-half of the cases, the mediators' behavior had no effect on the agreements and even when there was an effect, the plaintiff's or defendant's behavior frequently determined that of the mediator.

Practical Implications for Mediation Participants

When we reflect on our study and its results, we find civil case mediation is a lot like aspirin: it works, but we don't know exactly how. Consider that we found mediation frequently resulted in settlements but the settlement rate was dependent upon the case type. In attempting to obtain agreements, mediators pressed defendants as well as plaintiffs whenever they expressed high aspirations; however, they pressed plaintiffs more strongly than the defendants. But their pressing - like all of their other techniques - appeared to have little effect upon case settlements.

What are the practical implications of these findings? The primary implication - for mediators - is that they should acknowledge that the outcome of the mediation (e.g., agreement or nonagreement) is to some extent independent of the mediator's behavior. This suggestion is consistent with Judge Wayne Brazil's charge that mediators should not exaggerate their responsibility, ability or contribution to the mediation (Brazil, 2007). Rather, they should understand that they are hosting a negotiation process.

Secondly, mediators should anticipate and adjust to the disputants' behaviors in the mediation. Consider a civil case we observed. In a head-on collision between the plaintiff's car and a truck, the plaintiff's child as well as the plaintiff had been severely injured. The mediator anticipated the plaintiff would make a high demand and low concessions because his child had suffered, therefore, the mediator reviewed the "Court

Records" - which reported the amounts awarded in similar cases - prior to the mediation. When the plaintiff, as anticipated, did make a high demand ($600,000) and very low concessions, the mediator indicated he found the recorded awards were much lower than the demanded amount.

The third implication is for plaintiffs and defendants. They must consider that the outcome of the mediation is very dependent upon them and their behavior. Therefore, they should not turn the case over to the mediator, hoping that he or she will perform some legal alchemy. Rather they should arrive at the mediation knowing their own position as well as their opponent's. The parties should be ready to negotiate and expect the mediator to press them whenever they make low concessions or indicate high goals.

Pressed or not, the plaintiffs and defendants need to assist the mediator in the case. One modus operandi is to explain the complex cases. For example, if the case involves a dispute over the validity of a drug test, one of the disputants should take the time to explain to the mediator the steps in a drug test procedure and indicate how the procedure is vulnerable to compromises.

Also in complex cases (e.g., failure to adequately insure against the value decline of a derivative) the disputants should make offers on multiple issues rather than taking issues one at a time. The former approach allows the mediator to construct a package in which one side concedes heavily on some items which it views as low value but are of high value to the opponent. This allows the mediator to ask the opponent to reciprocate and concede significantly on items that it views as low value but are of high value to the other side.

If the plaintiffs and defendants insist on negotiating the issues one at a time - rather than in packages - the mediator will too often be forced to call for a "numbers only" exchange between the parties, rather than constructing win-win packages.

The final implication is for scholars as well as practitioners. In the last decade there have been approximately 80 articles that advise mediators on the tactics and strategies they should employ. They are told to control emotions, obtain apologies, overcome perceptual errors, facilitate, define the problem, evaluate, not evaluate, not believe attorneys, be neutral, be fair, improvise, manage risks, focus on central elements, etc. Most of these prescriptions and proscriptions should not be proffered, because they assume the mediators control the mediation process. As noted previously, our evidence, as well as that from other studies indicate mediators do not have substantial control over the process. Rather, it seems that the case type and the plaintiffs' behavior are the more influential factors.

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We asked three experienced trial consultants to respond to Wall & Chan-Serafin's article on Civil Case Mediation. Melissa Gomez, Jeri Kagel and Paul Scoptur offer their thoughts on the following pages.

Melissa Gomez responds to Wall & Chan-Serafin

A jury consultant and owner of MMG Jury Consulting, LLC, Dr. Melissa Gomez focuses her Philadelphia-based practice on the psychology of learning, behavior and decision-making. She has more than a decade of expertise in research design and methodology, as well as in behavioral and communication skills training.

Wall and Chan-Serafin have found empirical support for one of our intuitive perceptions. Specifically, in the jury consulting profession, I and my colleagues spend a good deal of time making sure litigators understand the impact of preconception and experience on decision-making. A juror who is entrenched in a certain perspective (e.g., companies are evil entities that put profits over people) is not going to be convinced out of that belief in a two week product liability trial. We can't change minds set in concrete. So, if jurors are people whose core beliefs are all but impossible to change, why should we expect any different from the folks involved in the litigation. Are they not people too?

Carl Sagan once said, "Where we have strong emotions, we are liable to fool ourselves." This cannot be any truer than in litigation. I have seen clients so entrenched in their position at trial that no one-- not even a mediator-- could sway them from seeing the case any differently. Actually, I find that when mediators employ aggressive techniques with one side or another, the party to which the aggressive technique is directed may assume that the mediator (or arbitrator, or judge) is biased, and will therefore stop listening.

It also makes intuitive sense that small cases settle more than large ones. Especially when dealing with cases of an individual versus a company (it appears that most of the cases this study reviewed fall into this category considering the list of litigation types provided), companies are likely to have insurance policies that will happily pay a small injury claim rather than move forward with the cost of litigation (which can actually end up costing more). On the other hand, large cases often involve insurance policy limits and potential excess carriers. If a plaintiff is unwilling to settle within the limits of an insurance policy, the case is more likely to go forward. No mediator can persuade her way around that.

The truth is, there are many different levels of negotiation within litigation. It is not unusual that attorneys themselves are at the whim of unreasonable clients who absolutely refuse to budge. In these instances, the mediation won't do a thing. If the client won't listen to his attorney, he likely won't listen to the mediator either. In my experience, sometimes the best strategy is to mock try a case before the mediation occurs. I like to call it "the reality check." Even if clients won't listen to their attorneys, mediators or jury consultants, sometimes they will listen to mock jurors.

Mediations can only be successful when each side has a real sense of its risks. While a mediator can try to put these risks into perspective for the parties, it is not surprising that her one voice is likely not going to be enough to make someone "see the light." It just doesn't happen that way.

I think the authors summed it up well, citing author Brazil (2007). Specifically, mediators should understand that they are "hosting a negotiation process," not controlling it.

Jeri Kagel responds to: Civil Case Mediations: Observations and Conclusions

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Mediation is a process designed to help litigants resolve disputes themselves rather than have their "fate" determined by a judge or jury. This article attempts to uncover whether, and if so, how, certain behaviors exhibited by the parties and the mediator affect the outcome. What is more likely to lead to success or failure? What are the implications for attorneys and their clients?

Although their research was done on a very small scale, the authors found that their predictions were mostly correct: mediation is often successful, mediators use aggressive tactics more often with plaintiffs and more often when a party makes low concessions. The article left me with many questions: The authors do not define the behavioral terms they observe during their research: For example, who determines "low concession"? "Aggressive tactics"? Are these behaviors and others evaluated from the perspective of the mediator, the litigant or is some other measure used? When behaviors are described we are not told when, during the mediation, they occurred - the beginning, middle, end? Does it make a difference? Finally, we are not made aware of other factors concerning these mediations - were the mediations all court ordered, voluntary, or some kind of mix? Many questions about the study go unanswered.

The authors also conclude that a mediation's success has little to do with the techniques used by mediators, but instead is based on the type of case being mediated and the "plaintiff's behavior". They found that the techniques used by mediators had little impact , saying "the outcome... is independent of the mediator's behavior." Yet they go on the suggest that litigants, during mediation, should "assist the mediator." Toward what end? If the mediator doesn't affect the outcome, are the authors suggesting that, with litigant's help, mediators will be able to affect the outcome? The article is not clear.

If we take the authors' conclusions at face value, then we are where we began: Mediation is a process where *litigants (themselves) can resolve their dispute*! In my experience, a mediation's success often starts with the intent of each party. When the parties enter the process with the desire to settle - regardless of why they want to settle - they are, in my experience, more willing to make concessions, more likely to be flexible and more often know that the true "value" of their case is not just based their individual wishful thinking.

The article suggests that the power, during mediation, is with the parties, not the mediator. As trial consultants, we help parties learn the most effective ways to "tell their story" to the jury. We do this by helping develop case themes likely to resonant with jurors, by creating powerful visual aids, and by teaching communication tools and techniques to enhance opening statement and trial testimony. Attorneys and litigants will feel empowered and can maximize their efforts toward a successful outcome by being prepared to present their case in many of the same ways at mediation. Although the audience is different, effective cogent, cohesive and convincing presentations at mediation can "assist the mediator" and illustrate for the opposite side what they are likely to encounter at trial.

The article says that plaintiffs make more concessions during mediation than defendants, but does not offer any reason for that observation. One reason may be that because plaintiffs often make the initial demand or offer to settle, they, in some ways, have more room to move than defendants. Through their silence, defendants effectively begin settlement negotiations at zero. Plaintiffs can

start as high as they want, and, in that way, may be more likely to move and may have more room to move than defendants. To know the most legitimate concessions to make, if one wants to have a successful resolution at mediation, it is important to ascertain, before going to mediation, the value of your case. We can help that determination in two different ways: We can assist with verdict research and we can design and implement focus groups or mock trials that center less on trial strategies and more on issues relevant to damages. It is our job as trial consultants to learn how to convey the importance of these "pre-mediation" events to our clients and to make sure that they are cost effective.

The authors conclude that because they interpreted their research to mean that mediators have little impact on the parties' behavior, we should think of mediators as "hosting" the mediation process. In my experience, I have seen a number of mediators from a variety of backgrounds who approach mediation with a range of techniques and skills. I have been unable to see any clear correlation between background and skill level; nor have I been able to discern whether it was a particular technique or any one mediator's ability to use that technique that made a difference in how the parties responded. I also believe that how a party's attorney interacts with a mediator and conveys the mediator's position may also affect how a party responds.

It may be, as concluded by this article, that a mediator is "only" hosting the mediation. In life there are good and bad hosts. A good host prepares for the event, welcomes guests, creates a congenial atmosphere, etc. In much the same way, I experience a good mediator, even if without the power to affect resolution, as one who prepares beforehand by either talking with or reading materials our clients send in, helps keep people involved in the process through their own facilitation skills, and provides opportunities likely to encourage continued discussion Our job is to prepare our clients for the "good" or "bad" host, just as we help prepare them to walk into the courtroom.

Paul Scoptur responds to: Civil Case Mediations: Observations and Conclusions

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Yogi Bera also said, "It's not over 'til it's over". In my experience, many mediations are over before they even begin. The authors have four predictions. The first is that mediation is generally successful. The second is that mediators want the parties to be realistic. The third is that plaintiffs generally make more concessions than defendants. The fourth is that mediators are more assertive and aggressive when the mediation starts to go south.

The four predictions are all interrelated. My experience, as a lawyer and as a consultant, is that the success of a mediation has little to do with the mediator. Mediation is driven by what has been done up to the point of mediation. Discovery, depositions, the relative likeability of the plaintiff and the defendant, these are all the factors that are plugged into the mediation process. What pluses and minuses have come out of discovery? Is the plaintiff likeable? Is the defendant a bad actor? These are the factors that drive mediation, not the mediator.

The defense comes to mediation with a certain authority. They have a plus or minus 10 percent, 20 percent, but their authority is based on what the claims committee or adjuster has given them based on the information available. The success of mediation is not dependent on the skill of the mediator. The success of the mediation is dependent on the realistic expectations of both parties. In my view, the defense generally has the upper hand at mediation.

I have worked with many mediators who come from a past life of being a defense lawyer or a judge. Very few plaintiffs' lawyers are accepted by the defense as a mediator. The problem that I have faced so many times is that even though the mediator agrees with my position, even though the mediator has a "connection", the mediator is unable to move the adjuster and/or the defense lawyer. To me, that is the crucial test for a mediator. Can a mediator move the "rubber band man", the adjuster, the one who can put the rubber band on the file and close it?

In my experience, a mediation results in a settlement under one of three circumstances:

1.It is a case the plaintiff must settle under any circumstances. In fact, I had one just a few weeks ago. The plaintiff was a serial "faller", had two prior slip and falls, and this was the third time that a fall had "ruined her life." This case had to settle for the last best offer. It did.

2.The case is a train wreck for the defense. There is a good plaintiff, good liability, good damages, the perfect storm. Although I have found that even with this type of case, success is 50/50 at best. The defense is banking on a plaintiff lawyer who doesn't want to do the additional work, who wants to put the "rubber band" on his file and accept a settlement for lesser value. I recently had a case settle shortly before trial. At mediation, the offer was $1.5 million. We did the additional work, did the additional discovery and ultimately settled the case for $2 million. The facts did not change in the interim. The mediator couldn't move them to $2 million at mediation. All that changed was that we were closer to trial.

3.The plaintiff is willing to accept less than the case is worth. The plaintiff may be just too sick and tired of the litigation process to continue. It may be that his lawyer convinces him the settlement offer is good, whether true or not (yes, I am cynical at times.) There are lawyers in firms that have to meet their numbers. This often results in a lower settlement for the client, to their detriment.

CONCLUSION

When I first started practicing law in the "good old days", plaintiff lawyers and defense lawyers picked up the phone and negotiated one-on-one. There were no mediators involved in the process. It seemed to work just fine. Mediation has become a cottage industry for defense lawyers and retired judges, a cottage industry that is flourishing in number. However, I concur with the investigators when they conclude that the mediator's behavior most often had no effect upon the ultimate agreement. I also concur that plaintiffs and defendants must consider that the outcome of the mediation is very dependent upon them and their behavior. Judge Wayne Brazil hit it right on the head when he said that, "They should understand that they are hosting a negotiation process." "Would you like some coffee, a soda?" Sometimes mediators will offer their opinions, but more often mediators will simply shuttle back and forth between the rooms where the parties are. Ultimately, authority levels are set both by the plaintiff and the defendant well before the mediation process.

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Identifying Leaders

By Barbara Rich Bushell

You, with juror profile and rating sheet in hand are about to pick a jury. Before exercising your first strike, identify the leaders.

Jurors have sized up their peers by the time they are directed to choose a foreperson. They have already taken into account his race, gender, dress, and appearance. They have even assessed his socio-economic class by listening to him describe his residence, town or neighborhood, occupation, education, military background, marital status, and even his children's accomplishments. Trial consultants observing mock trials marvel at the speed in which the foreperson is chosen. Most often the process takes a few minutes. Jurors make this decision without knowing anything about the foreperson's ability to lead a group.

How do jurors come to this quick decision? Forepersons reflect our society's definition of power and success. They tend to be higher status white males and are often college educated. Many have had prior jury experience. Their behavior and accoutrements (an attache or soft computer case, a collared shirt, or sports jacket) alert fellow jurors that they are high status people. During mock trials, they usually walk into the jury room, take a place at the head or middle of the table, and tend to be the first to inform the group of the need to vote for a foreperson.

Choosing a foreperson is one of the most important decisions the jury will make. This decision affects how the verdict will be decided and the verdict itself. Forepersons bring their personality, ways of dealing with a group, and abilities to the process. Some may be authoritarian and controlling, allowing only a few jurors to express opinions. Others may be open to each juror's ideas or may have experience in facilitating groups. Still others may be so disorganized that a fellow juror will step in to guide, assist or even take control of the proceedings. This is often seen when the Court has assigned the role of foreperson.

Forepersons are powerful. Clever forepersons can call for opinion polls at key moments and create majorities by calling for a vote when the majority of jurors share their verdict preference. Studies show that forepersons participate more than any other jurors in the deliberation process. (Strodtbeck & Lipinski, 1985)
The foreperson determines the form that deliberations take, and that in turn, influences the verdict. Deliberations are verdict-driven, evidence-driven, or a combination of both. Verdict-driven deliberations occur when an immediate verdict vote is taken and discussion following it focuses on verdict options. Rarely does consensus in a verdict-driven jury reverse.

Evidence-driven juries do not vote until an extensive evaluation of the evidence is completed. Studies show that the form of deliberations is associated with final verdict. Kameda (1991) found that verdict driven juries were more likely to find the defendant liable in cases where two legal criteria were needed for a verdict of liability, but less likely when one criterion was needed. The opposite effect occurred with evidence-driven juries. Evidence-driven juries were less likely to return a verdict of liability when two criteria were needed, but more likely when one criterion was needed.

Forepersons also affect the size of damage awards. Boster (1991) and Diamond and Caspers (1992) showed that forepersons' pre-deliberation damage awards are strongly related to final jury awards. Forepersons can also dampen damage awards. (Bevan, Loiseaux, Mayfield & Wright, 1958 and Eakin, 1975).

Voir dire questions pertaining to occupation and leisure activities help identify potential forepersons. Look for managers, committee chairs, foremen, shop stewards, union officials, project leaders, civic and church leaders, and team leaders (bowling, tennis, golf leagues, etc.). Always ask what the panelist does, not just what his job title is, and ask how many people he/she manages.

The Instrumental Leader

While good forepersons move the deliberation process forward, instrumental leaders decipher information for fellow jurors. Instrumental leaders serve as information gatherers, fact interpreters, problem solvers, and even experts. Many jurors rely on their interpretation of the evidence. These leaders shape the jury story by interpreting and weighing evidence. It is important to remember that instrumental leaders' interpretations are products of their own perception, education, experience, intelligence, and level of understanding. At times, information gatherers provide inaccurate information or spout factoids. Naive jurors often accept this information as fact.

Jurors will often accept the instrumental leader's view if he/she expresses commonly held values and conveys his/her take or interpretation in an understandable logical way. At times, extremely bright or highly educated instrumental jurors are incapable of drawing fellow jurors into their camp because they are incapable of communicating in their language or idiom.

Analyze the facts and issues in your case and identify those jurors who have case-related training, education, or experience. Don't be quick to strike all jurors who know something about case facts and issues. Keep the jurors who will want to and be capable of expressing your views. Patent defense attorneys need defense jurors who have pertinent case experience or education to decipher and point out important differences between a patent and an alleged infringing product. Think outside of the box when looking for jurors who have pertinent knowledge or experience. I have seen a manicurist schooled in gels decipher a patent dealing with dental products and a genuine Hell's Angel explain a mechanical patent to fellow jurors.

Be cautious. Consider the socio-economic class from which certain juror pools are drawn. I have seen jurors rely on nurses' interpretations of complex medical facts. Make sure that the nurse espouses your litigant's stance. Be cautious of self- perceived experts. A juror with prior jury experience often becomes an expert in interpreting the law or jury instructions.

Other types of instrumental leaders are those jurors who take notes, count votes during polling, and at times, gently direct ineffectual leaders by suggesting that it's time to poll or that certain jurors have not been heard. Females usually fill these roles. At times, when the chosen foreperson is ineffectual, these leaders will usurp the foreperson's role by talking over the foreperson's directions and stating their own.

The Emotional Leader

There is a type of juror who listens to and even consoles other jurors when the case is moving into the third or fourth week and jurors have become bored or overwhelmed with ever increasing facts and issues. The emotional leader often acknowledges his/her peers' contributions by nodding his/her head or smiling. This type of leader acts as a negotiator or offers

compromises. He/she sometimes affects damage awards by suggesting the jury average each juror's damage award. This is often done without taking into account specific damage award models.

Attorneys want this type of leader if they need a lot of time to present their case, but should be cautious if there is a question of high damage awards. Scrutinize the panelists and take note of the roles they play at home and at work. Is that panelist a special education teacher, social worker, psychologist, or coach? Watch potential jurors in the court room. See how they interact with their potential peers.

Summary

Jury selection is a misnomer. None of us are fortunate enough to select a jury. We must use our few strikes wisely. A juror profile is useful only when it is combined with a leadership rating. If you are representing the defense, identify plaintiff panelists who are potential leaders and visa- versa. Potential forepersons are generally better- educated males occupying higher status jobs. Note their dress, speech, and accoutrements. Note if they have previous jury service. Take note of what a panelist does and what role he/she assumes during leisure time. People assume similar roles in all walks of life. Find out if the panelist is a leader of his/her organization or if he assumes an instrumental role.

Identify instrumental leaders. Read or listen to a panelist describe his/her job. Listen to how panelists answer *voir dire* questions. Are they articulate? Will they be able to paraphrase your arguments and themes to their fellow jurors?

An accountant during damage discussions will often assume the role of damages expert and a lab assistant in a patent case may assume the position of technical expert. Nurses and nurse assistants often take on the role of medical experts in medical malpractice cases. A juror with previous jury experience may assume the role of an interpreter of jury instructions. These people can help your case only if their profile matches your profile of a good juror (e.g., defense, plaintiff, prosecution juror). Strike these people first if their profile matches the opposing side's good juror's profile.

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Hate Crimes and Revealing Motivation through Racial Slurs

By Gregory S. Parks and Shayne E. Jones

In 2005, Nicholas Minucci - a White man - assaulted and robbed Glenn Moore - a Black man. Throughout the attack, Minucci repeatedly referred to Moore as a "nigger." Based on this evidence, the state prosecuted this as a hate crime. Although tragic, the details surrounding the crime were not the most interesting aspect of this case. Rather, it was the testimony proffered at the trial. Specifically, two Black men were called to testify about Minucci's use of the term "nigger." One was Gary Jenkins, a music producer. The other was Randall Kennedy, a Rhodes scholar, Harvard Law School professor, and author of the book *Nigger: The Strange Career of a Troublesome Word*. Essentially, both testified that the term "nigger" is no longer simply a word used to connote racial animus. Instead, the term is used in a more nuanced way throughout several segments of popular culture. This testimony was important because Minucci's attorney argued to the jury that they should not assume racial animus as his client was immersed in the hip-hop culture, where the term has an ostensibly more benign meaning(Boyd, 2006; Curry, 2006; Kilgannon, 2006).Although the jury found Minucci guilty, this case raises an interesting question: Can we assume that a White person using the term "nigger" is not expressing racial animus? Stated differently, can a White person refer to a Black as a "nigger" and not be demonstrating racial prejudice? Despite the testimony offered in this case, we argue that it cannot. As we explain in more detail below, the use of the term "nigger" by a White person is rarely, if ever, perceived as acceptable by Blacks. Further, when this term is used during the commission of a crime, it should be viewed as prima facie evidence that a hate crime has been perpetrated.

Hate crimes are unique. For most crimes, mens rea and actus reus are the primary components that the state must prove beyond a reasonable doubt. For hate crimes, however, the state must also prove (beyond a reasonable doubt) that the defendant sought out the victim because of some cognizable characteristic (such as the victim's race). Importantly, this bias need not be the sole, or even primary, motivation for committing the crime. Rather, it only has to be part of the reason the offender chose that specific victim (McLaughlin, Malloy, Brilliant, & Lang, 2000).This requires, to some extent, that we peer into the offender's mind in an effort to gauge his motivation. Because of the nature of prejudice, and the more severe consequences of committing a hate crime (i.e., sentence enhancements), it is unlikely that a defendant in such a case will readily admit to any racial animus. Even when the defendant purposely chose the victim because he was Black, Jewish, or gay, a confession substantiating this fact is not likely to be forthcoming. Instead, such motivation is likely hidden from authorities, who must then gather evidence that speaks to this issue. Trying to see that which is hidden can be a dangerous game, however, and one that requires some restraint.

Instead of assuming motivation based on simple facts (e.g., a White perpetrator commits a crime against a Black person), or drawing tenuous conclusions, the best evidence of hate motivation for a crime is that which can be seen or heard. Physical evidence, such as swastikas, a burning cross, or some other easily discernable hate symbol can be used as evidence of hate motivation. We argue, however, that what an offender says during the commission of a crime can be equally revealing and probative. This is particularly true in cases involving a White defendant who victimizes a Black person, and refers to the victim as a "nigger."

One of the most evocative words in the English language is "nigger." Yet, the word (or more precisely, a variation of it, such as "nigga") is widely used among some segments of the Black community. Moreover, the term is peppered throughout different types of popular culture, such as comedy routines, rap music lyrics,

and spoken word. Such use may lead some to believe the term "nigger" has lost much of its power, and no longer carries with it the same degree of negativity. Further, some Whites, especially those who are fans of popular culture where the term may be employed, may mistakenly believe they can use the term "nigger" or "nigga" in much the same way as Blacks. This was precisely the rationale offered in the Minucci case. Yet, there is overwhelming evidence that Whites (and other non-Black races and ethnicities) are expressly forbidden from co-opting the use of this term, even when there is no malicious intent. To the contrary, we argue that the use of the term "nigger" by a White person (in virtually any instance) is inherently malevolent and unacceptable.

The rare situation in which a White person might be able to use the word "nigger" around Blacks and not be deemed racially prejudiced is when he or she has Black friends who are tolerant of their usage of the word around those particular Black friends. However, it is almost unheard of for a Black person to tolerate a White person's usage of the word more broadly. This position can be bolstered by empirically exploring who uses (or more aptly, who does not use) the term "nigger." To assess this question, we examined - via quantitative analysis - rap music lyrics of both Black and White artists. If there is any segment of the White population who might be given some leeway in artistic expression and use of the term "nigger," it would arguably be rap artists. Such individuals are deeply immersed in the hip-hop culture, where the term is often used by other (Black) artists. Despite this familiarity and immersion, we found that White rappers rarely use the term "nigger," and significantly less than Black artists. These findings were bolstered by our content analyses of similar components of Black popular culture (e.g., comedy, the spoken word), which yielded substantively similar patterns. In no instance could we find a venue in which Whites routinely had license to use the term "nigger." If the term can be used by Whites in a non-prejudicial manner, as some have argued, we would not expect this pattern of findings.

Thus, when a White uses the term "nigger" (or "nigga"), what are we to make of it? It may be an instance of ignorance. In some contexts (such as peer relationships described above), this will be quickly corrected (although there may remain a rift between a user and peers). But in the context of a criminal event, such innocuous explanations are less compelling. A criminal event is an inherently arousing situation, for both the victim and the offender. Such ostensibly harmless use of a charged term is not likely. Instead, we argue that using this term is evidence of racial animus. It may be the case that the defendant would be highly unlikely to use this term in most instances. However, when aroused in the context of a criminal event, his guard may be inadvertently let down. That is, his usual cognitive filters that would prevent him from uttering the term are circumvented and it "slips out."

There is a voluminous literature that provides a theoretical and empirical basis to understand what might occur during the course of a hate crime, and why using the term "nigger" constitutes evidence of a hate crime. The literature on implicit racial biases notes that many Whites harbor anti-Black sentiments, much of which lies beyond consciousness (Greenwald & Krieger, 2006).Thus, while explicit racial bias has declined in recent eras, there remain deep-seated attitudes among Whites that are anti- Black. Further, this literature reveals that under normal circumstances, such sentiments remain hidden (perhaps even from those who hold such beliefs) (Greenwald & Banaji, 1995; Nosek, Greenwald, & Banaji, 2006).That is, Whites do not openly express or admit to such biases, and may be fully unaware of the possession of such attitudes. Perhaps the reason for this is that it is no longer socially accepted to hold such biases, and through effortful cognitive processing, Whites are able to interrupt and contravene when such thoughts or beliefs occur. However, implicit biases are much more likely to be revealed when cognitive demands preclude such effortful processing (Friese, Bluemke, & Waenke, 2007).

Furthermore, implicit anti-Black bias predicts self-reported racial discrimination - including verbal slurs and physical harm to others (Rudman & Ashmore, 2007).

As mentioned above, a criminal event is inherently arousing, and it seems reasonable to assume that conscious, controlled, effortful processing is compromised considerably. It is precisely under these circumstances that an individual's implicit biases may be revealed. That is, despite any potential motivation to the contrary, a person may simply be cognitively incapable of engaging in more deliberate efforts to keep such biases from surfacing.

So what are we to draw from this in the context of criminal cases? For the state, any evidence that indicates a racial slur is uttered has probative value regarding the racial motivation of the crime. Although the defendant may claim their use of the word was not malicious, as in the Minucci case, there is simply no compelling evidence that Whites can, or do, use the term "nigger" so casually. Therefore, defense attorneys should avoid employing such a strategy.

Of course, the jury is ultimately responsible for adjudicating whether or not a hate crime has occurred. How might jurors perceive a White defendant who uses the term "nigger" - will they see the use of that term as evidence a hate crime has been perpetrated? Are they likely to accept an argument that the term has lost much of its inflammatory power? Unfortunately, there is little empirical evidence that directly addresses this question. However, some speculation and extrapolation from existing lines of research provide insight. Although there are no studies that address how Black jurors might respond to the use of a White defendant's use of the term "nigger," it seems reasonable to conclude that such jurors would be incensed. Moreover, Black jurors will not be inclined to believe that a White person can use the term in a non-prejudicial manner, and will therefore likely adjudicate guilty on the hate crime charge.

Among White jurors, we would expect similar patterns. On a broad level, Sam Sommers has conducted numerous investigations that explore what factors influence White jurors' perceptions of Black defendants (Sommers & Adekanbi, 2008). He has found that when the circumstances surrounding the criminal event are racially-charged, White jurors seem to make extra efforts at appearing non-prejudicial. That is, under racially salient conditions, White jurors make every attempt to not appear that they are discriminating against the Black defendant. In fact, under such conditions, White jurors convict White and Black defendants at the same rate. Conversely, when the racial salience of a crime is less pronounced (or non-existent), White jurors demonstrate more discrimination against Black defendants (cf, Rachlinski, Johnson, Wistrich, & Guthriett, 2009). Obviously, a criminal event that is labeled as a hate crime is by definition racially salient. Unfortunately, no study to date has explored what factors influence White (or Black) jurors in deciding guilt on a hate crime charge.

There are, however, some studies that explore how mock jurors perceive cases that are implied or explicitly defined as hate crimes. Most of these studies have relied on primarily White samples. In general, hate crimes that correspond to stereotypical notions of what a hate crime is (i.e., a White perpetrator, a Black victim) are more likely to lead to guilty verdicts and longer sentence recommendations than those crimes that are at odds with notions of what constitutes a hate crime (e.g., a Black perpetrator, a White victim) (Marcus-Newhall, Blake, & Baumann, 2002). These studies reveal that jurors, particularly White jurors, may be especially vigilant in not "going easy" on a White defendant who commits a hate crime. Such evidence is consistent with Sommers' research on racial salience. We might also consider such findings in light of the black sheep hypothesis, which suggests that jurors of the same race as the defendant are harsher when that defendant has committed a particularly heinous crime (Kerr, Hymes, Anderson, & Weathers, 1995). The logic is that same race jurors want to distance themselves from the defendant, and this manifests itself in more guilty verdicts. However, there is no evidence that White jurors are harsher on White defendants in hate crimes (or other racially salient crimes). Instead, White jurors are equally likely to convict White and

Black defendants under such circumstances. Yet, both the phenomenon of racial salience and the black sheep hypothesis suggest that White jurors will be unlikely to demonstrate any preferential treatment toward a White defendant who is accused of committing a hate crime (Sommers & Adekanbi, 2008).

Despite the defense strategy employed in the Minucci case, and the testimony offered by two prominent Blacks at trial, the empirical evidence fails to lend credibility to the notion that Whites can use the term "nigger" in an innocuous manner. Moreover, the use of that term, particularly in the context of a crime, is revealing about a defendant's underlying prejudiced beliefs. As such, a White who refers to a person as "nigger" during the perpetration of a crime has engaged in a hate crime.

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We asked two experienced trial consultants to respond to Parks & Jones article on hate crimes and racial slurs. Andy Sheldon & George Kich share their reactions on the following pages.

Response to Parks & Jones article

by Andrew M. Sheldon

Andrew Sheldon, JD, PhD [Andy@SheldonSinrich.com] began trial consulting in 1984 after careers as a lawyer and as a psychotherapist. His involvement in the retrials of 7 civil rights murder trials led to his continued study of racial issues in litigation of all kinds.

Dr. Parks and Dr. Jones argue that the use of the N word (as we have come to call it) by a perpetrator during a crime should be viewed as *prima facie* evidence that the crime is a hate crime. They support their argument by noting that, when trying to determine if a crime fits the "hate crime" category, courts will consider things like hate symbols (e.g., Swastika's painted on the victim's house, burning crosses) so why not include offensive, hateful words used by the perpetrator. As they say, "we argue that using this term is evidence of racial animus."

The reason the authors propose that using the N word should become *prima facie* evidence of racial animus in hate crime prosecutions is that "it is unlikely that a defendant in such a case will readily admit to any racial animus."

The alternative, I guess, is to allow the words used by the perp during the commission of the crime to be interpreted by the jury in the broader context of the facts of the crime without *a priori* any special value being ascribed to the words, and without an instruction from the court that use of the N word by the perp is to be taken as some proof of a hate crime that will have to be rebutted by the defense.

Their proposal seems like a common sense notion. Why else would we call a hate crime a "hate" crime if it were not accompanied by the add-ons (like hateful language, for example) that demonstrate the perpetrator's bigotry and racist motivation? Yet I wonder and raise the question whether we will have helped the jury do their duty by lifting the N word out of the general hate vocabulary and placing it in a special category? The law generally does not do the same for the B word in hate crimes against women or the J word in hate crimes against Jews (et cetera.). Is it not sufficient that the jury is able to consider the language used by the victimizer as some evidence of his/her intent in the context of their local usages rather than being told that it is *prima facie* evidence? Maybe it is a fine legal point to be debated and discussed by experts in law schools and legislative committees.

The larger question addressed by Dr. Parks and Dr. Jones is: "Can we assume that a White person using the term "nigger" is not expressing racial animus? Stated differently, can a White person refer to a Black as a "nigger" and not be demonstrating racial prejudice?" Whether or not the N word (and all the other truly ugly words used by hate-filled people in their rage against others) should or should not be granted this new legal status, I really appreciate the authors asking us to think about the use of language in racism and bigotry. This and other issues concerning prejudice and racial hatred are issues too often left under the rug in the popular literature of trial consulting.

Comment on: Hate Crimes and Revealing Motivation through Racial Slurs

by George Kitahara Kich

George Kitahara Kich, Ph.D. (george@bonoradandrea.com) is a trial consultant and partner at Bonora D'Andrea LLC in San Francisco, focusing on witness preparation, theme development and jury selection. He consults on civil and white-collar criminal cases nationwide.

Probing the mindset of anyone is a difficult and never foolproof task. As attorneys and trial consultants, we struggle to do just that during jury selection with sometimes minimal information. Trying to decipher hate motivation in a crime where racial difference, racial animus and use of a racial slur exist seems to pose almost impossible, complex legal challenges. If I were a juror, I know I would have to follow specific jury instructions of legal definitions, evidence and proof[1]. In this comment, I can address two things, of many, that came to mind when I read this excellent and stimulating article by Drs. Parks and Jones. First, are racial slurs always bad? Second, who, if anyone, "owns" a word?

For me, the answers are simple: First, even in this post-modern age of semiotics where sometimes a word is not even itself, I believe that racial slurs are always bad and worse if used in a physically-violent context. Implicit bias research is compelling in showing the depth of the connections between covert animosity and

violent behavior. But, there is no doubt in my mind that racist motivation, animus, victimization and identification with and as the oppressor are involved in a violent act where racial slurs are used. It is simple. I agree with the authors on this point, that "when this term is used during the commission of a crime. . . . a hate crime has been perpetrated".

I also believe that the oppressed own the words that are used to oppress them. One way I came to that conclusion was when I presented diversity trainings in my prior career. I used to conduct a highly-charged in- and out-group experience called, "Words I Never Want to Hear Again." The exercise could be used with any aspect of identity and social interaction that involved power[2]. In the context of large group training, smaller same-race/ethnicity groups would be formed and the participants in each group would talk about the words and phrases they had heard that had been used against them. Each separate group would bring these words and phrases back to the larger group, speaking to everyone and using the word in the sentence, "I never want to hear ____ again, not from you, and not from anyone." Sometimes, it would just be said with little apparent emotion. Other times it would be shouted angrily or with tears. Often there would be a story or an experience that would amplify what was being said. The personal stories made the experiences more meaningful for everyone and increased a sense of relatedness among the participants.

I know that oppressed groups can sometimes re-appropriate words and their meanings as a way to show power over that word, to cleanse the historically oppressive use by a majority, and to re-claim it as new. Does that mean this particular racial slur can or should ever be resurrected? Maybe some words just cannot find a re-empowered use, just cannot be repurposed from their violent and dehumanizing past.

I am cautious when I hear the defense in this case say that such a racist slur, as it was put in the article, was being "used in a more nuanced way." It is hard to imagine that an assault with a baseball bat while using this word was "nuanced" in any way. Any attempt to understand "nuance" about that racial slur must be framed in the context of our post-*1984* age of meta-communication in which we have a post-modern racism, where brutal and blatant racism is legislated against and is no longer socially-acceptable (in most places anyway), but the oppressive force of institutional, covert and duplicitous "nuanced" racism still exists.

I appreciate the two scholars who wrote this short yet thought-provoking article. I also look forward to reading their longer article on this topic[3], as well as Randall Kennedy's book about the "troublesome word." His other book, *Race, Crime and Law*, has been enlightening to me in the past.

Thanks to the Internet, I like that we can cut to the chase about how the general population might think about a topic. I go straight to YouTube for a few straightforward pronouncements by the intentional and often unintentional truth-sayers of our current era: *Editor's warning: These videos contain language which may be offensive.*

> Chris Rock tells us all when a White person could actually use that word: "...between 4:30 and 4:49 am..." from Kill the Messenger shows, South Africa, London and New York. http://www.youtube.com/watch?v=63M34s8afbo
>
> News story: Teacher used it with Black student and tries to defend its use. http://www.youtube.com/watch?v=VY16_nKORb8&feature=related

Interview with Chris Rock who says: "I am the wrong guy to explain.... It is the nitroglycerin of words, and in the wrong hands it can hurt." http://www.youtube.com/watch?v=vIsfjS5KLCE

End Notes (from George Kich's response)

[1] For the NY law about hate crimes; also, Google the Nicholas "Fat Nick" Minucci case in Howard Beach for complexities about the facts of his case: http://criminaljustice.state.ny.us/legalservices/ch107_hate_crimes_2000.htm

[2] People who have been historically oppressed, sometimes called "target groups," would meet separately. The people with privilege and power who personally and historically were not members of the target racial minority can be called a "non-target group" about that particular dimension. A person may have memberships in different kinds of target and non-target groups depending on various often co-existing contexts. Race, class, gender, education, economics, age, etc., can be areas in which people divide themselves into targeted or non-targeted groups. Some groupings have more weight or charge associated with them.

[3] http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=shayne_jones

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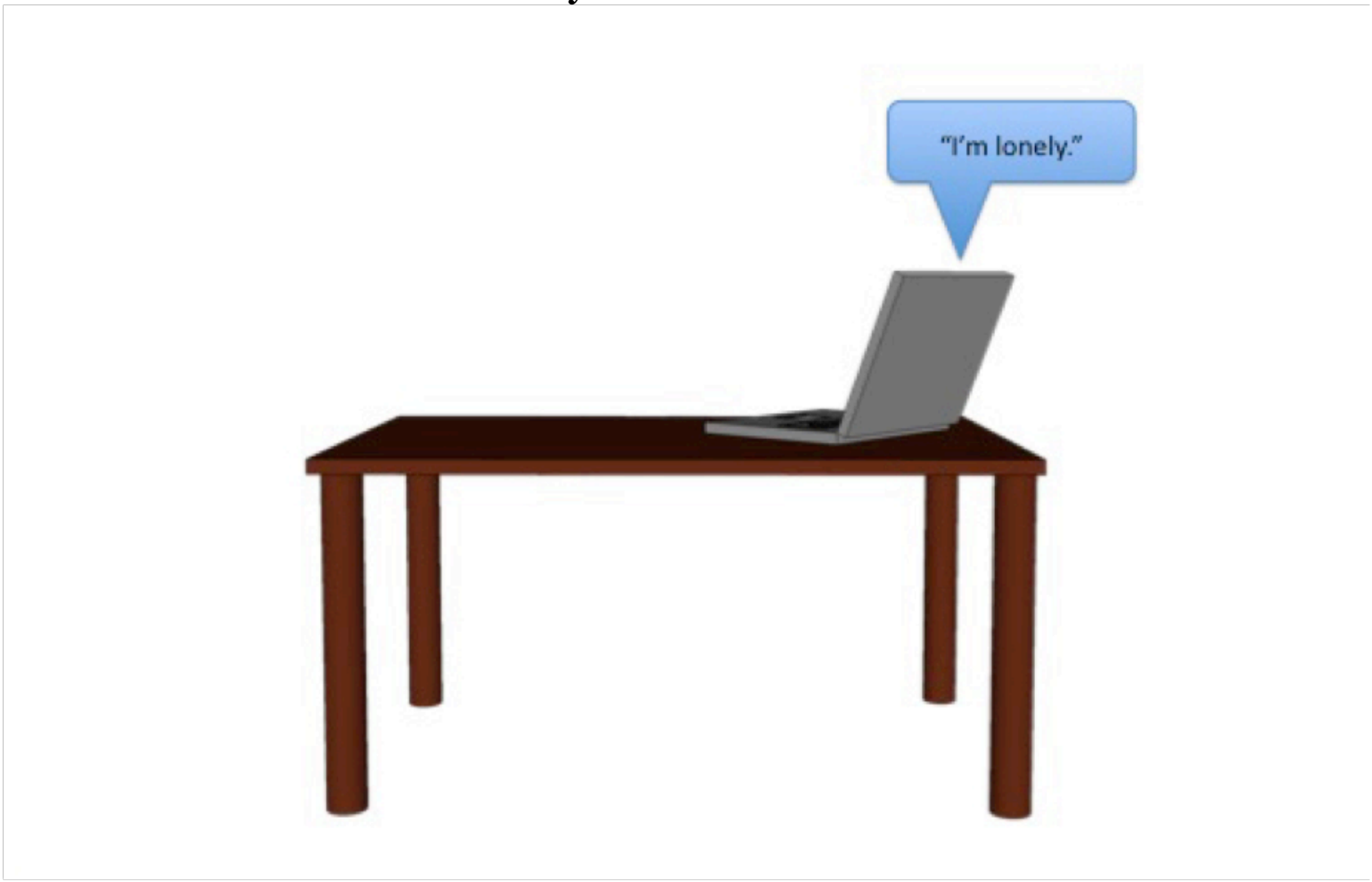
Anthropomorphism in Technical Presentations: Attributing human voice, behavior and motivation to inanimate constructs

by Jason Barnes



Both scientific and legal training stress the importance of avoiding anthropomorphism. We are taught to study and apply the laws of science and society based on facts and logic; to remove our own personal bias from observation and communication. However, that very science, through the study of linguistics, for example, teaches us that human beings think, speak and experience the world through the lens of our own, rather personal, sense of anthropomorphism. In other words, people experience the world through human hands, human eyes and human ears all coupled to a human brain filled with human emotions. We are hard-wired to apply human emotion and reason to all we see and hear.

When it comes to trial presentation, patent lawyers (many with technical training prior to their entry into the law) and technical experts are at a distinct disadvantage. They live by the cold, harsh light of the scientific method, eschewing anthropomorphism in their work. There is nothing inherently wrong with the scientific method. However, to point out the obvious, jurors in technical cases are not typically scientists or technologists. Indeed, any scientifically trained juror is likely to be excluded based on that very training.

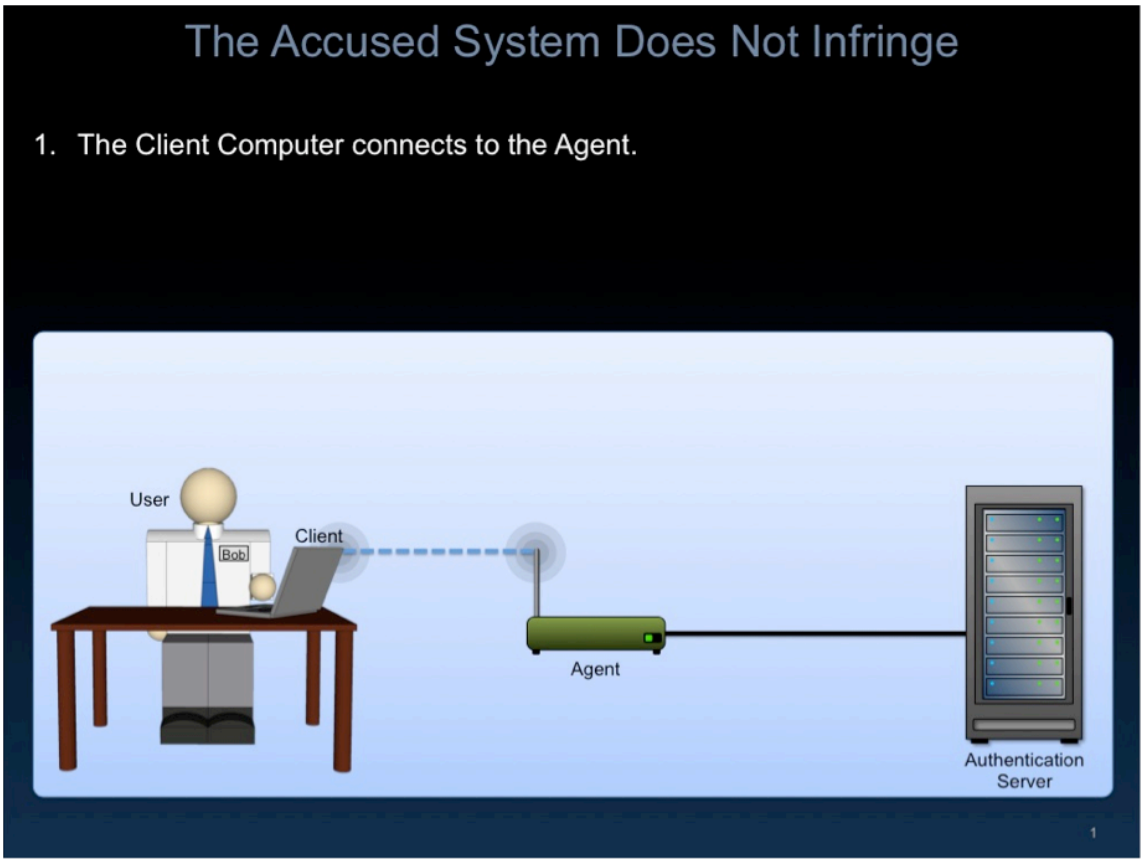
Now that we are faced with a jury of non-scientists and the difficult task of teaching technical subject matter to them, we must switch off the cold light of science, light a warm fire and settle in to tell a story.

Anthropomorphism has a long and great history in storytelling. In the jealous gods of antiquity and the animal players of Aesop, humans relate to the world around them through their natural capacity for anthropomorphism. Within the first five minutes of the Pixar(R) movie, Wall-E, I found that I had emotionally connected with a cartoon trash compactor. To me, the animated machine (twice removed from my own humanity) had a heart, a mind and a soul. He was lonely. My personal experience is not, strictly speaking, "evidence." But the popularity of this and other movies like it should tell us something about our ability to connect with the inanimate in very compelling ways. As trial communicators we should embrace this remarkable ability and exploit its power.

In my practice, I frequently encounter opportunities to anthropomorphize within demonstratives. This is particularly true in intellectual property cases where we need to explain technical subject matter in a way that is easily understandable to a lay jury. Consider these two statements:

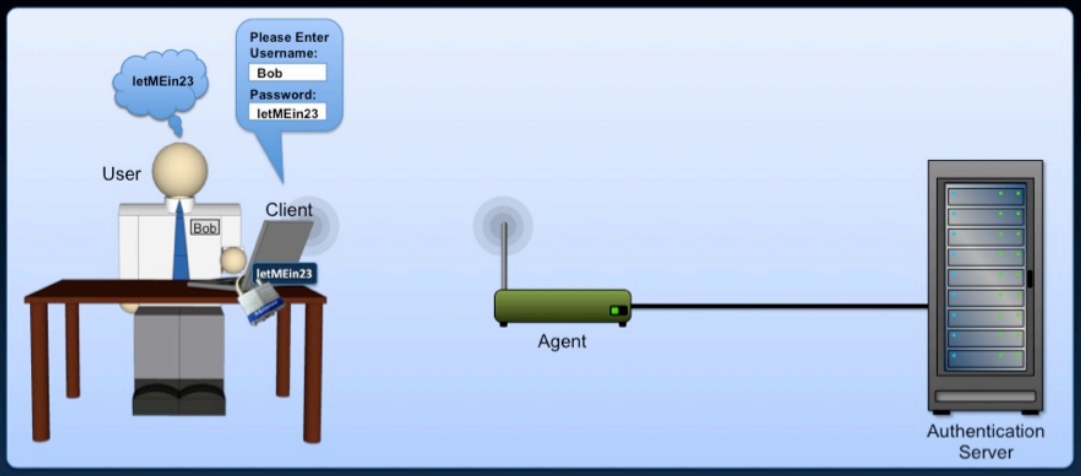
> *1) Once authenticated, a stateful firewall enforces access policies such as what services are allowed to be accessed by the network users.*
>
> *2) The firewall recognizes you by your name and password. It also knows what access privileges you have and will prevent you from doing anything you are not supposed to do.*

In the following example (from a PowerPoint file with five animated slides culled from a much longer presentation), you can see how we have given voice to three computers in a network authentication system. Not only have we simplified the technical description of what is happening, we have also attributed motive and reasoning to the computer systems by portraying a conversation between them. The descriptions at the top of the slide satisfy basic evidentiary and credibility requirements for the expert's testimony. The speech balloons, on the other hand, allow jurors to relate to the computer systems on a personal level.



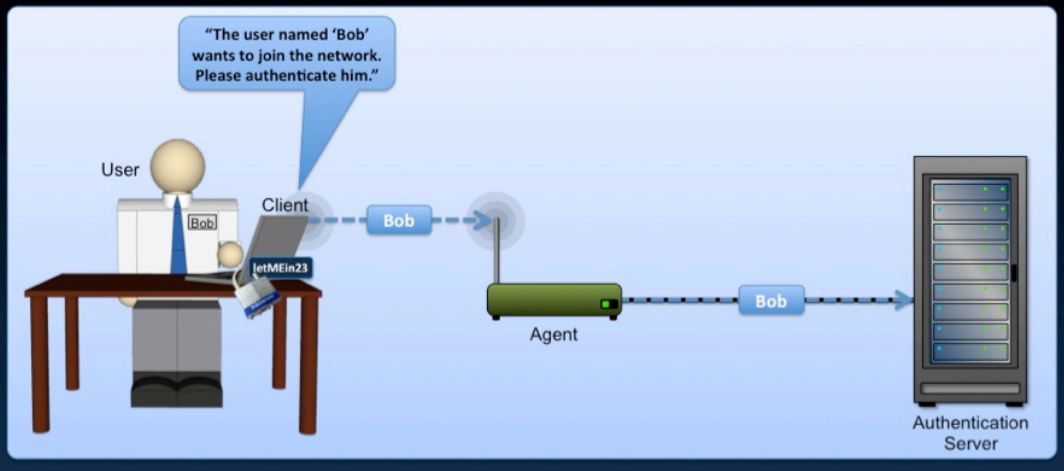
The Accused System Does Not Infringe

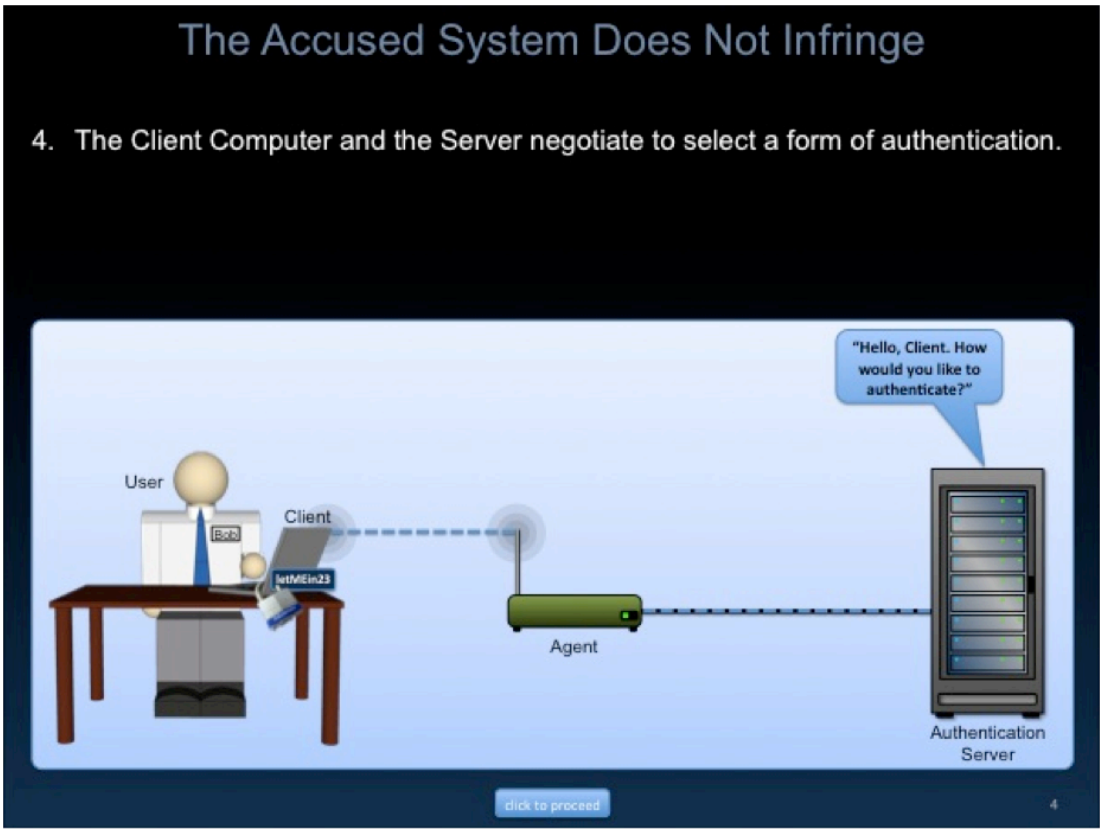
2. The Client Computer system prompts the User to enter his Username and Password. The Username will be sent to the Server. The Password is known only to the User and the Client Computer. The Password is never sent to the Server.

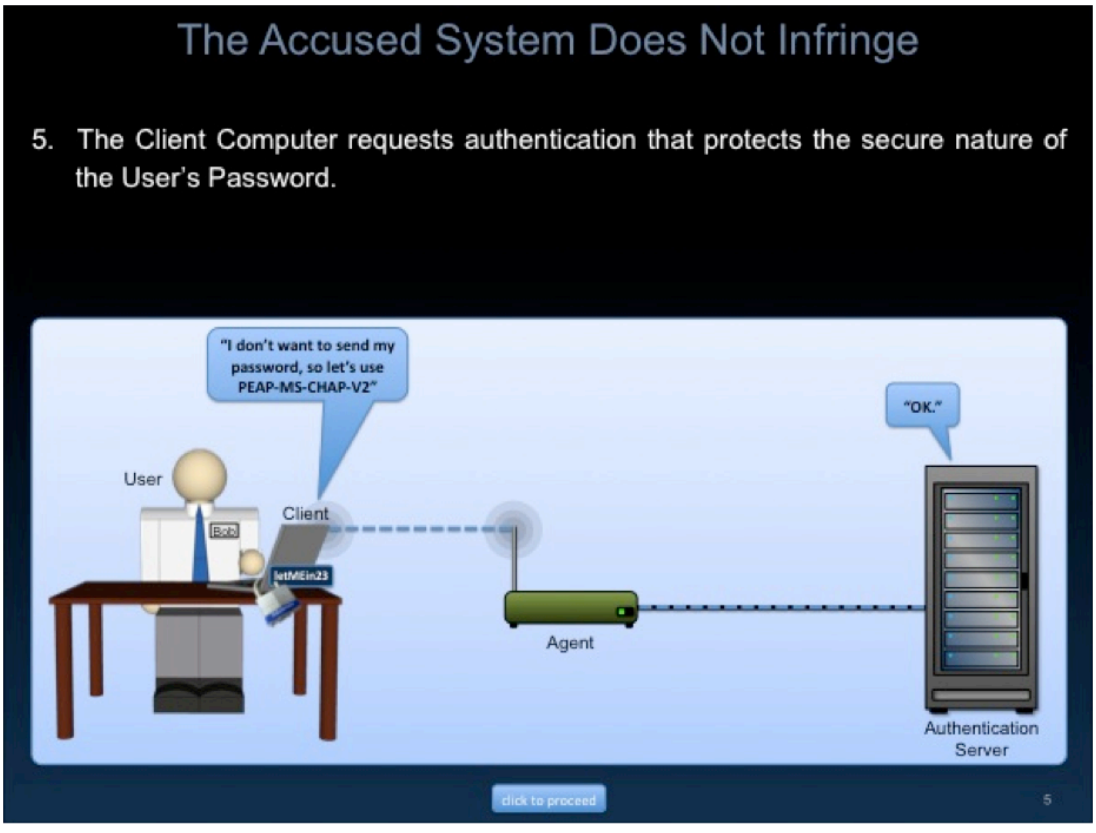


The Accused System Does Not Infringe

3. The Client Computer requests authentication from the Agent and sends the Username to the Agent. The Agent forwards the Username to the Server. The Password is never sent.







Reading the dialogue, we hear our own voice. Unbidden, our brains immediately begin to relate memories, reasoning and emotion to the words. It is possible to read patent language in a dry monotone without inflection or emotion. Dialogue is exactly the opposite. Reading dialogue, whether aloud or silently, we automatically apply changes in inflection, meter and loudness. The words play like a movie soundtrack.

Obviously, it is possible to take anthropomorphism in your presentation too far. Pixar can get away with portraying animated robots as angry or lonely. Who among us has not thought our own computer was behaving belligerently or petulantly when it was not doing what we expected it to do? It would be ridiculous, however, in the context of a trial presentation, to portray our firewall from the example above as being angry when a user tries to exceed her privileges or lonely when no users are connected. Like most things in life, moderation is the key.

I hope that this discussion will prompt you to look at your technical presentations in a new, warmer light. Do you have some good (or bad) examples? Link to them in your response along with your comments. Thank you and good luck!

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Will It Hurt Me in Court? Weapons Issues and the Fears of the Legally Armed Citizen

by Glenn Meyer

In 1995, Dr. Suzanna Gratia-Hupp testified that her inability to legally carry a handgun prevented her from stopping a 1991 Killen, Texas restaurant massacre. Dr. Gratia-Hupp had a 38 SPL Smith handgun in her car and pointed that out to legislators after the murders shook the state of Texas. Her testimony was crucial to passing the Texas concealed carry law. Sharon Jo Ramboz's use of an AR-15 assault rifle to defend her home was not compelling in the 1995 Congressional hearings leading to the Assault Weapons Ban (Homsher, 2001). Did the AR-15 make her less persuasive?

Firearms are ubiquitous in American society. Roughly one in every two households may possess at least one gun and studies indicate that citizens use privately owned firearms in defensive situations much more often than once believed (Kleck, 1997). There has been intensive criminological research on civilian self-defense usage of firearms (Kleck, 1991, 1997). Called a defensive gun usage (DGU), the number of such incidents is arguably in the order of one to two million a year. Legislation allowing the carrying of firearms is now quite common with a large majority of states (40 at the time of writing) issuing easy to obtain permits or licenses for the concealed carry of handguns. Some states issuing these instruments also require instructions for these civilians on the laws, ethics and consequences of using deadly force. Following the November 2008 Presidential election there has been a buying binge of firearms and ammunition. Many have underappreciated the change in American gun culture which, traditionally, has been oriented towards hunters and sportsman. Today, a somewhat separate and large culture of defensive gun users has developed (Wyant & Taylor, 2005).

Predictably, the defensive gun culture is concerned with the legal ramifications of gun usage. Popular gun magazines are full of legal cautions by their columnists such as Massad Ayoob and with tales of defensive usage such as the American Rifleman's Armed Citizen column. Understanding these ramifications is important to gun users and legal professionals for a variety of reasons, and understanding how defensive gun usage affects others' views of gun users is equally important.

There has been a small but coherent set of studies relating to the psychological factors of firearms usage and influence on social cognition. A firearm's appearance can have a powerful psychological impact on decision-making and memory . Eyewitnesses to a crime may focus on the gun to the detriment of recalling other details (weapons focus effect - Kramer, Buckhout, & Eugenio, 1990; Pickel, 1998; Steblay, 1992). Firearms also can prime aggressive ideation and reactions (weapons effect). The mere presence of a weapon may cause folks to act more aggressively to others (Anderson, Benjamin & Bartholow, 1998; Berkowitz, 1993; Berkowitz and LePage, 1967).

Weapons-related Factors and Gender Can Influence Jury Decisions

Researchers have concluded weapons presence can influence legal proceedings through jurors' evaluation of motives (Berkowitz & LePage, 1967). Dienstbier, Roesch, Mizumoto, Hemenover, Lott, and Carlo (1998) found with increased weapon salience, due to more direct exposure, mock jurors attributed more guilt and assigned longer sentences to the gun user - in that case an armed burglar. Females gave longer sentences and were more affected by weapons exposure.

Branscombe, Crosby, and Weir (1993) conducted mock trial research involving a homeowner who shot a burglar, and found incompetent male shooters and competent female shooters were dealt with more harshly

than the reverse pairing. The interaction seemed due to whether or not homeowners breached stereotypical standards (males being competent shooters and females incompetent). Shooters who violated gender roles were perceived more negatively for their use of a firearm than those who did not breach normal gender roles.

Can the appearance and characteristics of a firearm influence a jury decision? Legal scholars have suggested that appearance of excessive force in a self-defense situation (i.e. the martial arts) can affect tort liability (Whitaker, 1995-1996) and that might apply to firearms. Certainly, there is ongoing discussion of banning so-called 'assault weapons' even though past legislative endeavors seem to have no effect on crime rate indices (Koper & Roth, 2001).

Weapons appearance has been discussed in criminal cases. In a recent Court TV televised trial (Florida v. Roten, 2000), the defendant was accused of a hate crime shooting. Roten used a modified SKS (an older Soviet pattern 7.62 mm semiautomatic military rifle) with accessories that might make the rifle appear fiercer than some. A commentator asked why anyone would need such a weapon.

Many people believe that certain types of guns are "good for only one thing - to kill" (Kleck, 1997, p. 16). Self-defense writers discuss in the popular gun press whether an aggressive looking weapon can influence your trial with articles such as "Firepower: how much is too much?" (Ayoob, 2000) and commented on how juries can be influenced by media impressions of assault rifles (Rauch, 2004). Owners of such weapons are portrayed as deranged and militarized appearing weapons are demonized. Even in the overall gun culture there can be a dichotomy of views. Bartholow, et al (2005) found that hunters had negative views about assault weapons as compared to guns primarily designed for sport. A gun writer - Jim Zumbo unleashed a firestorm on himself when as a hunter he denounced assault rifles and later had to recant (Zumbo, 2007).

A weapon's appearance can also be a concern to police. There has been significant debate over whether military style weapons are appropriate for civilian law enforcement (for example: Associated Press, 2002). Assault weapons' paramilitary appearance can color the public's attitude towards their usage. Clearly, some believe the decision to use a certain weapon type may be an indicator that a user's mindset is more aggressive than simple self-defense.

However, whether such factors actually influence jurors' perceptions of civilian and police gun users is an empirical question. We tested this in our article that recently appeared in the *Journal of Applied Social Psychology* (Meyer, Banos, Gerondale, Kiriazes, Lakin, & Rinker, 2009). We explored the influence of various types of weapons on simulated juror decisions. Are defendants judged more harshly if they use a more fearsome seeming weapon? It would be a likely prediction. We also varied the gender of the mock jurors and the shooter. We would expect that women may give harsher sentences but that might interact with defendant gender. Last, we tested weapons effects with civilians and police officers. The latter are more familiar with the use of deadly force.

An Empirical Study of Weapons Effects

We conducted three experiments on whether the type of weapons used in a home defense scenario would influence a jury. All used the same classic defensive gun use conundrum that is ubiquitous in firearms training and similar to that used by Branscombe, et al, (1993) and Dienstbier, et al. (1998). Mock juror participants were presented with detailed written descriptions of a burglary scenario including defensive gun usage. The written presentations were created with the input of legal and law enforcement professionals to

ensure that the arguments were valid and are comparable to other jury simulation methodologies (Bornstein, 1999; Roesch, Hart & Ogloff, 1999).

First, the written presentation described the incident in factual terms: A homeowner hears a sound at night, downstairs, and investigates. The homeowner comes to the foot of the stairs and is armed. A burglar is discovered in the act of stealing a VCR. The homeowner challenges the burglar by pointing the firearm at him and ordering him, "Don't Move". The burglar responds with a curse and a threat to kill the homeowner. The burglar does not have a visible weapon. The homeowner then shoots the burglar twice, killing him. After the shooting, the homeowner calls 911 immediately and informs the police of the actions of the burglar described above.

The scenario is ambiguous in regards to the need of the homeowner to shoot. While laws may vary state to state (Kleck, 1991, 1997), in many this would be a defensible shooting if the homeowner saw the threat as credible. However, the homeowner did have the burglar at a disadvantage and another jurisdiction might indict and try the homeowner. The scenarios also contained additional factual descriptions of the firearm, the layout of the home, the fatal injuries and other details.

Second, mock jurors read the prosecution's and the defendant's portrayal of the incident. The prosecution emphasized that there was no need to engage or shoot the burglar and there was the possibility of retreat. The District Attorney brought the charges of Second Degree Murder with a possible penalty of up to a 25 year sentence against the defendant and argued he was never truly in danger of grievous bodily harm, could have retreated, or at least waited before firing the weapon.

The defense emphasized that the homeowner feared for his life or felt in danger of grievous bodily harm and did not have the duty to retreat. When the burglar turned, he feared that this younger man might rush him. The distance of 15 feet could be closed in a second's time. Thus, the defendant felt there was sufficient disparity of force (difference in physical abilities) that if the burglar could quickly put him at risk of significant harm. The defendant was also operating under the "Castle Doctrine": A person's home is his or her castle and one does not have to retreat in one's own home nor should one be compelled to hide if one suspects an intruder is present.

The studies incorporated six different weapons used by the homeowner. Images and descriptions are presented in Figure 1.

Figure 1. Firearms used in the studies and their characteristics. Not to scale. From Meyer et al - *Journal of Applied Social Psychology*, 2009.

Importantly, folk wisdom may discriminate between good and bad types of guns (Kleck, 1997). Good guns are used for hunting and sport purposes. Bad guns are designed explicitly for inflicting pain and death on others. AR-15s are commonly called assault rifles due to their military ancestry. Their appearance may suggest a sinister purpose (Kleck, 1997, p. 16; Owen, 1996), and some see them without any justifiable civilian purpose and as a societal threat. We hypothesized that the AR-15 would be the most effective firearm in priming negative attributions to the defendant (as per Bartholow et al., 2005).

The other guns were chosen for various characteristics that might mediate their effect on participants. For instance, the Ruger Mini-14 rifle is equivalent in power and lethality to the AR-15 but it is a wooden stocked rifle of a more sporting appearance. It serves as an important comparison to the AR-15. Shotguns were used because they are common in American households and the two handguns were chosen as many people own these type of handguns purely for protection (Kleck, 1991, 1997). For each pair of weapons, one is more likely to be perceived as an aggressive weapon or menacing weapon.

Finally, after the case presentations, participants were asked to render a verdict by assessing guilt and/or assigning a sentence. Mock jurors were drawn from two separate populations: college students at Trinity

University - a liberal arts college in San Antonio, Texas; or community college students at the Alamo Community College, also in San Antonio, Texas. In the first study with Trinity University liberal arts students, the burglar was male and the homeowner was male. We presented the case scenarios and asked mock jurors to recommend sentencing judgments (time periods of incarceration) for the homeowner-defendant based on six different possible guns used in the shooting.

The Effects of Juror Gender and Weapon Type

Women delivered the homeowner defendants higher sentences than men (Male average = 3.9 years and female average = 5.7 years). Importantly the average recommended sentence when the homeowner used the AR-15 weapon was 7.2 years for male subjects and 8.5 for females. This was significantly higher than any of the other gun types. The handguns had the lowest recommended sentences (in the two to four year range).

We replicated the experiment with students from the local community college who were older and had different socio-economic status and life experiences than liberal arts students. We focused on two gun scenarios, the AR-15 and the Ruger Mini-14. Both are equally potent but the latter looks less aggressive to some. We also analyzed judgment of guilt versus innocence. In direct comparison - the AR-15 yielded significantly longer mean recommended sentences in the order of seven to nine years as compared to the Ruger (approximately two and a half years). On the verdict side, the percent of guilty judgments was approximately 65% for the AR-15 vs. 45% for the Ruger.

The Interaction of Juror Gender, Shooter Gender and Weapon Type

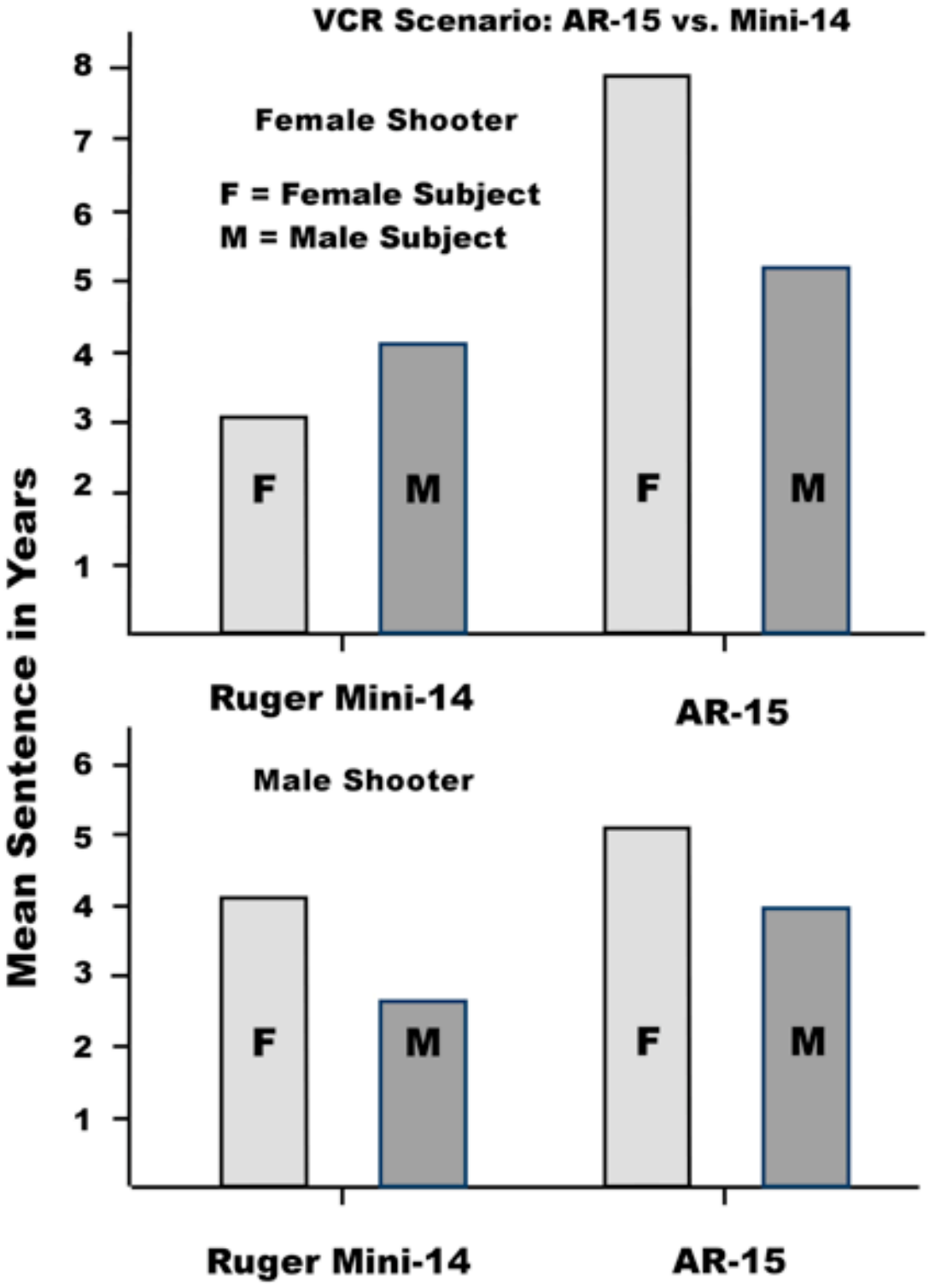
In the third and final experiment of the burglary series we added a female shooter to the mix. Women's armed self-defense has become a focus in the firearms world for marketing purposes. There is also a strong literature on empowering women to defend themselves in the feminist, sociological and psychological literature. Some do not view being a passive victim as an acceptable alternative for women, even though some society values seem to still encourage it (Hollander, 2009). In fact, some frown upon a woman taking a strong position of self-defense. The literature also suggests that gender differences can be potent in firearms based decisions and societal attitudes towards women's use of force (Homsher, 2001; Howes & Stevenson, 1993; McCaughey, 1997; Stange & Oyster, 2000). While unprecedented numbers of women are learning to maim, knock out and shoot men who assault them (McCaughey (1997), not all feminists enthusiastically endorse gun usage. Anderson (2001) argues that teaching women to use guns dis-empowers them. Analyses of popular culture is useful as well. In an analysis of women, guns and film, Dole (2000) states: "Despite widespread support for strong images of women in the media, mainstream film viewers and academic feminists alike have hesitated to celebrate cinematic women with guns, even those who are upholders of law" (p.11).

Thus, we tested the same burglary scenario with a female homeowner/shooter in addition to a male. Based on Branscombe, et al (1993) we expected mock jurors to judge female shooters more harshly. Interactions with weapon type might be expected as using the AR-15 might violate gender stereotype more than the Mini-14.

Participants in this study were students in introductory psychology classes. The same materials and procedure were used again in this experiment. Participants were asked to make a guilty/not guilty judgment. Next, participants where asked to assign a sentence assuming the defendant was found guilty, that could range up to 25 years. Except for the mention of the homeowner's gender, no specific points about risk based on being a female were made. Each participant saw only one scenario.

We found the overall effect of gun type was significant. AR-15 shooters were given longer sentences. The most telling finding was that female mock jurors gave female AR-15 shooters the harshest sentences - a mean of approximately eight years as compared to a male average of five and a half years. In comparison, the lowest average recommended sentence was for a male shooting a Ruger Mini - about two and a half years. Thus, gun type and gender could be a potent combination in sentencing. See the summarized data presented in Figure 2.

Figure 2. Mean sentences in Experiment Three: Intruder stealing VCR. From Meyer et al - *Journal of Applied Social Psychology*, 2009.



Our analyses of guilty and non-guilty verdict decisions found that females were more likely to find the defendant guilty (regardless of defendant gender). The other effects didn't reach statistical significance (though some were close) but there was some indication that the AR-15 usage was detrimental to a defendant's chances of acquittal. The female shooter with the AR-15 did receive the highest percent of guilty verdicts (about 75%). The literature (Diamond, 1997) suggests that simulations using dichotomous variables may not be that sensitive, even though yes/no on guilt is of obvious importance in the courtroom.

Police Perceptions of Weapon Types

An intentional but mistaken shooting of civilians by police is traumatic for all involved. The best known case is that of Amadou Diallo who on Feb. 4, 1999 was shot 19 times and killed near his Bronx apartment building when police mistook his wallet for a gun (Cooper, 1999). Police use of assault rifles like the AR-15 is also controversial - and has increased after notorious shoot-outs (like the North Hollywood Shout-out) and as a response to terrorism and rampage shootings.

So we explored a research scenario in which research participants were law enforcement officers with real world experience using lethal force. We tested a police shooting gone awry. The basic scenario was that an officer arrived at the scene of a convenience store robbery. Three people fled through the front door and the officer shot them in mistake, thinking they were perpetrators. The shots could have been fired from an AR-15 or a Glock (a standard police pistol). The officer was put on trial for aggravated assault. The participants in this study were, in fact, police officers - not college students.

In summary, we found that weapons and gender effects are relevant to police officers as well as civilian mock jurors. The male officers using an AR-15 were sentenced harshly but not as harshly as females using a Glock. Women were also more likely to be viewed as guilty using the Glock. Overall, the results are consistent with gender based expectations. Men should be competent with a rifle but one might not expect women to be. However, they should be competent, at least, with their service side arm. The fact that a female shooter made a shooting mistake with a simple handgun may result in more negative views of that shooter by male police officers.

Conclusions and Practical Applications

Our results pull together various threads in the professional and popular literatures. First, gender is an important factor to perceptions of weapon use. Gender main effects in several of the experiments were significant, with women participants judging shooters more harshly. Gun type is also an important factor. We found some level of risk associated with AR-15 guns in all the experiments that applied to both male and female shooters. The increased risk for civilian women with AR-15s is consistent with previous findings of harsher judgments of women who violate gender-based weapon use stereotypes (Branscombe et al., 1993). Using an AR-15 was likely to be such a violation. McCaughey (1997) in a feminist analysis of women who train in self-defense tactics suggest they are at risk at trial for not seemingly womanly and victim-like. Branscombe and Weir (1992) argued that behavior which does not fit classic schema of the female stereotype will be construed as abnormal. It is then easier to assign alternate outcomes and blame to the supposed victim. In short, shooters using an AR-15 may violate the perceived norms of someone in a defensive mode. Mock jurors may not see an AR-15 as a 'normal' defensive weapon for the typical homeowner. This viewpoint may be even more damaging for women.

The police findings are interesting, and puzzling in part, as there was clearly an effect of the AR-15 for the male officers as defendants in the sentence judgment. Sentences for male officer defendants who used the AR-15 were twice as long as those of male officers who used the Glock 19. However, if anything, the female officer defendants were more harshly evaluated for using the Glock 19, the standard handgun, in both

sentencing and guilt ratings. In many departments, AR-15s are not usually issued. The findings might be a special case of Branscombe et al's (1993) competent shooter effect. Male officers are expected to be more competent than females by many male law enforcement officers. Thus the misuse of a specialized firearm by a male may be seen as more grievous than by a female. Similarly, the handgun usage should reflect at least minimal competence as a basic tool of an officer. The female who cannot show that minimal competence is more harshly treated, especially if she violates a perceived male domain. Unfortunately, we could not gather enough females participants to investigate the effect of participant gender. The data from the male officers are of interest. It is the case that above analysis is speculative in the case of the Glock 19 effect for females.

Our findings confirm the general role of gender stereotype in decision-making. Also, weapons priming of negative attributions are extended to specific weapon types. Legal applications are varied. Prosecuting and defense attorneys may want to consider weapons and gender interactions during *voir dire* and trial. Law enforcement officers and homeowners may want to consider the interaction of weapons appearance and legal risk. This is not to say that effective weapons should not be used, but one would be foolish not to have knowledge of potential problems. As Branscombe et al. (1993) points out in response to suggestions that females not use guns, as they may be at an increased risk at trial, a defense attorney should be cognizant of these weapons effects. The defense attorney may then use appropriate arguments and experts to diffuse them. It is important to note that the AR-15 was not specifically discussed as being an assault rifle or in some way unusual but only in technical terms and matched with equally lethal weapons. A law enforcement officer suggested that for the issue of weapons type to be important at trial, an attorney would have to bring it up and a judge might not allow that. However, our studies and earlier studies indicate that the simple presence of the weapon can be influential. Attorneys should be cognizant of the gun presence, gender and gun type effects/gender interactions so as to mount an effective defense for their client.

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We asked two experienced trial consultants to respond to Glenn Meyer's article on jurors, gender and guns. Wendy Saxon & Kevin Boully share their reactions on the following pages.

Response to Juror Perceptions of Guilt and Severity of Sentencing Based on Gender of Juror vs. Shooter By Wendy Saxon

Wendy Saxon, PhD, CT, CTS (drwsaxon@charter.net) is a trial consultant based in Los Angeles County. She has been picking juries since 1977.

Dr. Meyer submits valuable information for those who choose jurors to hear these types of cases. He hypothesized that the AR-15 would be the most effective firearm in priming negative attributions to a defendant. We are not ready for women wielding AR-15 assault rifles and are slightly less accepting of women willing to own, handle, and use any type of assault weapon. Though it makes little sense, women are expected to become proficient with tiny (by comparison) handguns if they want a weapon for home and/or personal protection. These are "competent" female gun handlers and there may be a degree of envy involved in mock jurors' censoring (men because they are not as good and women because the TV cops are so attractive). And in terms of suspicion as to motive, there is indeed a priming effect: why have a weapon whose only purpose is to kill human beings, unless you are itching to do so? And what decent woman would be itching to kill? As Dr. Meyer notes, "Clearly, some believe the decision to use a certain weapon type may be an indicator that a user's mindset is more aggressive than simple self-defense."

Many people opine that assault weapons are "over the top" and unsportsman-like for hunting. In many people's minds, assault weapons are equated with images of slaughter/an uneven "playing field." Perhaps the solution is for women to rely on shotguns, which many male and female jurors, despite their current gun control views, remember fondly from trips to see grandparents. Besides, that "racking" of a pump gun is the nonverbal equivalent of saying, "you have been warned." If a homeowner does find himself/herself charged with second-degree murder, this would be a viable aspect of defending one's actions. There is indeed a large and separate group of emerging gun owners who are concerned with home and personal defense. We may see an increase in these types of cases, with innocents also

being erroneously identified as intruders and harmed or killed. These statistics will be interesting to see in November 2013 at the five year mark, given the astounding increase of sales of guns and ammunition.

Female jurors may differ from male jurors in perceptions of firearm possession and usage, to be sure. Restricting analysis to the deceptively simple case scenario of a person awakening to the presence of a burglar in their home, a female juror may experience more identification with either sex of shooter (based on vulnerability) than a male juror inasmuch as most females do not have combative skills and feel that lethal force is the solution to finding a male intruder in the middle of the night. This is especially true because male burglars will "size up" a woman instinctively as easier to "take down" than another man.

The following variables are most likely to be salient when assessing a female juror with this scenario. Where was the juror born and raised? Was she accustomed to firearms in the home and community? Did she handle firearms herself, and if so, by what age, and for what purpose? If she did not handle firearms, was she comfortable with firearms in the home? Are there currently firearms in the home? If so, does she handle and/or has she ever fired them? Doe she own any firearms herself? For what purpose? How comfortable is she, handling her firearm(s)? What are her thoughts on the possession of firearms for home and personal protection? Has she ever been the victim of, or witnessed, a violent crime? Is she opposed to civilian possession of firearms? How knowledgeable is she about different types of firearms?

The same questions are pertinent to male jurors, however there is much more at stake with female jurors, as men generally have well-formed thoughts on these issues, and females may never have thought in depth about the possession and use of firearms. Ironically, men may be more accepting of the lethal use of force by females than women, as the average female is more likely to have unrealistic thoughts about using peaceable means to negotiate with intruders and/or perpetrators.

The choice of firearms used by Dr Meyer are excellent. Knowledgeability of firearms goes a long way with either male or female jurors. Best would be the pump action shotgun, as there is no deterrent better than the sound of a shotgun being racked. Moreover, both .223 assault-style weapons are liable to go through walls and harm neighbors. Women are better served by "long" guns in general, as pistols require much more skill and a steady hand. The 9 mm is easier to be accurate with, but there is always the chance of a jam. The .38 is more reliable but harder to be accurate with, due to the barrel length. So a trial lawyer may want to "school" the jurors on the fact that while the .38 is "cuter" the "mean" looking pump action is a much better weapon for both men and women.

In a "bad" police shooting, women will be seen by both males and females as probably over-reacting and misperceiving the nature and extent of a threat in an ambiguous situation. This is because we aren't entirely out of the woods with our stereotype that when something goes horribly wrong, women are less able to think in a cool and rational manner. Police officers themselves often react this way when hearing of either friendly fire or shooting of an innocent bystander during a crime in progress.

In many regions of this country, men and women hunt side by side (witness the LL Bean catalogue) and many web sites market directly to women (witness Kahr Firearms "Thin is Sexy" ad). Both "short" and "long" guns are now being made in "pink" for women. We are witnessing a dramatic upsurge in the number of women recruits to both the military and all arms of law enforcement. Sigourney Weaver started the trend of "Female Warrior" in "Alien" and TV currently has several hit dramas that regularly show women drawing their duty weapons, e.g. Law & Order, NCIS, Saving Grace, Cold Case, Without a Trace. These characters, as well as the females portraying physicians, e.g. HOUSE, Grey's Anatomy, Private Practice, are the role models for today's generation.

The deceptively simple scenario of the home intruder does not factor in the "fight or flight" psycho-physiological responses to the potentially life-threatening event (see The Stress of Life, Hans Selye) and the trial lawyer would do well to evaluate carefully the defendant's life history and experiences, and the impact of same on decision-making. Actually, a higher standard should be applied to those with training (such as police and military) as opposed to the average civilian, male or female, who is functioning with great fear. This must be conveyed to jurors through scene re-enactment, experts, and defendant testimony.

Response to Meyer by Kevin Boully

Kevin Boully, Ph.D. (krboully@persuasionstrategies.com) is a trial consultant with Persuasion Strategies and Associate Editor of The Jury Expert. He works on primarily civil cases nation-wide.

I don't know much about guns. Meyer's articulation of weapons effects in criminal cases confirms a lot of what we know about jurors - both civil and criminal - and how they make decisions. In many respects, it doesn't matter if we're talking about boys, girls, glocks, gray hair or greed - human bias invades and influences juror decisions about victims and their alleged perpetrators as well as civil litigants from corporations to careless drivers. Human as these biases are, they obviously reach far beyond but have specific application in the confines of the courtroom.

So how does Meyers' discussion of weapons and gender effects influence us in practice? First, something tells me gun users are unlikely to stop and think about how potential jurors may perceive their use of a firearm before choosing between two different assault rifles, or reaching for their bedside glock when something goes bump in the night. But, Meyer suggests, "Prosecuting and defense attorneys may want to consider weapons and gender interactions during *voir dire* and trial." And I say, absolutely. And here are a few other ways to apply Meyer's discussion to juror decision-making more broadly.

1) Violating juror expectations can be an excellent persuasive tool.

> Under the surface or out in the open, juror expectations are always operating and influencing information processing and decision-making. Meyer writes, "Branscombe and Weir (1992) argued that behavior which does not fit classic schema of the female stereotype will be construed as abnormal. It is then easier to assign alternate outcomes and blame to the supposed victim"
>
> Sure, violated juror expectation can result in negative responses to the violator. And when you're talking weapons effects, as Meyer notes, "This viewpoint may be even more damaging for women." However, juror expectations can work in your favor. A surprising or even shocking message from a trial attorney or witness can violate jurors' expectations in a positive way and result in greater credibility and persuasive power. Embracing obvious case challenges and juror "givens" is often the best way to pique juror interest and take a position of strength in spite of your perceived weaknesses. Jurors are often positively surprised by candor and openness, whose positive effects can outweigh the negative effect of any supposed admissions.

2) Jurors often make the most out of what you discuss the least.

Meyer writes, "A law enforcement officer suggested that for the issue of weapons type to be important at trial, an attorney would have to bring it up and a judge might not allow that. However, our studies and earlier studies indicate that the simple presence of the weapon can be influential."

In most instances, a simple revelation of the facts without any TV drama or unnecessary histrionics gives jurors exactly what they need to decide on their own what is important (e.g. a victim's weapon type, that an employee's pattern of past behavior is critical to his termination, that a corporation's consistent push to exceed government standards is relevant to its safety performance, etc.). Most soft pedal issues are predictable, and mock jury research is a great way to help identify how to handle them with greater confidence and give jurors exactly what they need to absorb your trial message.

3) Black sheep judge black sheep most harshly.

Others have written more authoritatively on juror gender and black sheep effects in both civil and criminal cases, but Meyer's article is a good reminder that juror dynamics can be nuanced and counterintuitive. We know jurors often judge most harshly others who are most like themselves and it can be a fine line between finding a juror who is sympathetic and a juror is dangerously critical. Taken generally, the fact that females judge most harshly other females who violated norms (by using an assault rifle) is not surprising. Expect exactly that phenomenon across many types of litigation and across many case specific circumstances.

Glenn Meyer responds to Wendy Saxon & Kevin Boully

I would like to thank Drs. Saxon and Boully for their kind comments. Picking a firearm for self-defense is a complicated issue due to the legal and technical ramifications. Appropriate training is recommended most highly. It is particularly important for women as they can get a great deal of 'male' oriented puffery when they engage the issue. Shotguns are fine guns but may be difficult for the untrained to use. It is true that Kleck found that most defensive gun usages are deterrent but what if deterrence doesn't work? In any case, the gold standard as a reference for women choosing firearms (and controlling for male exuberance) is http://www.corneredcat.com by Kathy Jackson. Ms. Jackson is a recognized expert, magazine editor and author in the self-defense domain.

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2009 ASTC Conference DVDs are now available!

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Alternative Cause Strategies in Product Liability Litigation: The Need for Affirmative Defenses

By Sean Overland

In the July issue of *The Jury Expert*, Tenney, Cleary and Spellman presented the findings of their research on the power of alternative explanations in criminal defense strategies. They found that "TODDI" ("This Other Dude Did It") strategies significantly reduced mock jurors' perceptions of the likelihood of a defendant's guilt. A similar strategy may be used in civil litigation, when a defendant may portray a plaintiff's loss or injury as the result of the actions of a third party or even the plaintiff herself.

However, this defense strategy is not without pitfalls in product liability litigation, because jurors often see an alternative cause explanation for an accident and injuries as insufficient without affirmative defenses of the company's products and actions. By breaking a corporate defendant's case down into its component parts, including an explanation of any alternative cause(s), we will see how jurors view these component parts and why each is needed for a complete and persuasive defense strategy.

Breaking Down the Case

First, let us consider a hypothetical lawsuit against a large "widget" manufacturer. Let's assume that the owner of a widget has filed the suit, claiming that a design defect in the widget caused an accident in which the owner was severely injured. The plaintiff has also alleged that the company knew about the potential dangers of its defective widgets, yet refused to fix the problems or to adequately warn its customers. The plaintiff is therefore seeking compensatory and punitive damages from the manufacturer. In its defense, the widget manufacturer will not only attempt to refute the plaintiff's claims, but will also present evidence that, at the time of the accident, the plaintiff was not using the widget according to the manufacturer's instructions, and that the plaintiff's actions therefore caused the accident and the resulting injuries.

In this example lawsuit, the defendant's case can be broken down into three main parts. These three parts are:

1. "Alternate Cause" - this part explains why the plaintiff's actions, rather than any alleged defects in the widget, caused the accident and injuries.

2. "Product Defense" - this part defends the widget's safety. It explains the widget's design and its safety features, favorably compares the widget's safety record to similar widgets made by other companies, and describes the widget's compliance with company, industry and government standards and regulations.

3."Company Defense" - this part explains and defends the company's actions. It outlines the motivation for developing and marketing the widget, describes the widget's design process, discusses the safety testing the company conducted on the widget, shows the instructions and warnings the company provided with the widget, and describes the steps the company took to investigate and address any customer complaints about the widget.

To tell a complete and persuasive story about why the defendant deserves to win this case, the defense must present all three parts, because the presentation of each will affect how jurors perceive the others.

The Pitfalls of the "Alternate Cause" Case

A major part of the defense strategy will be the presentation of the alternate cause case. The defense will argue that the plaintiff was misusing the widget at the time of the accident and that the plaintiff's own actions therefore caused -- or at the very least contributed to -- the resulting injuries. A common reaction to this kind of evidence is to see it as dispositive. That is, if the plaintiff caused the accident, shouldn't that be enough to win a defense verdict? Why even bother presenting anything else?

The answer is that the alternate cause case is a necessary, but not sufficient, part of a winning defense strategy. Mock trial research and post-trial juror interviews consistently show that a defense strategy that relies solely on an alternative cause explanation often leads to a plaintiff verdict in these types of product liability lawsuits, even when jurors are convinced that the plaintiff contributed to the accident and resulting injuries. The problem with relying exclusively on an alternate cause approach is that it fails to address the allegations made by the plaintiff. In our hypothetical case, the plaintiff's main allegation is that the widget is defective. A defense case based solely on the plaintiff's responsibility for the accident fails to rebut that central claim. As a result, jurors are often left with the impression that the defendant has no answer for the defect allegations. In the absence of any affirmative defense of the product's design, jurors can easily conclude that the plaintiff's defect allegations are probably true.

Once jurors believe that the plaintiff's defect allegations have merit, the defendant's alternative cause case can backfire. Instead of a powerful part of the defense case, arguing that the plaintiff is responsible for the accident and injuries begins to look less like a plausible explanation of what happened, and more like a weak excuse or an attempt to shift the blame away from the company and onto the victim. Jurors are then prone to perceive the defendant as careless and desperate to avoid responsibility for the horrendous injuries caused by its defective product. Even if jurors are convinced that the plaintiff contributed in some way to the accident, jurors may still hold the defendant liable for the lion's share of the responsibility for the plaintiff's injuries. As a result, the defendant's once-promising alternative cause case collapses and the defendant is exposed to a large damages award.

The Need to Defend the Product and the Company's Actions

To employ an alternate cause case most effectively, a defendant must also defend the safety of the product and the actions of the company. An affirmative product defense can include, for example, evidence on the many safety features of the product, its excellent safety record, and any positive evaluations of the product's quality and performance from independent reviewers or government agencies. A defense of the company's actions could center on discussions of the company's extensive product testing protocols, the clear and thorough warnings included on the product, and the company's history of addressing customer concerns about its products.

But there's a catch to presenting these affirmative defenses: even with strong product safety evidence, the defense probably won't "win" these arguments. That is, the defense is unlikely to convince a majority of jurors that the product is as safe as it should be. Plaintiffs are often able to show that different, newer, or more comprehensive features could have been included in any product at a minimal cost that would have made the product even safer. As a result, jurors in mock trial and real courtroom settings often report wanting to see more safety features and stronger, more robust product designs.

This suggests also that jurors hold large companies to a very high (and probably unrealistic) standard of conduct. Jury research consistently shows that jurors expect much more caution and foresight from a large

company than they ever would from an individual. As a result, no matter how much testing a company performs on its products, jurors often believe that there were other tests that should have been done. Similarly, no matter how many warnings the company included with its products, jurors often want to see more.

The Benefits of a "Losing" Affirmative Defense

Given the uphill battle to convince jurors about the safety of their products and the responsibility of their actions, it is understandable that corporate defendants are reluctant to dedicate much time and effort to these aspects of the case. *However, these affirmative defenses are critical, because they enable the alternative cause case to be most effective.* Even though jurors often believe that products could have been safer and companies should have done more, presenting affirmative defenses is often enough to raise questions in jurors' minds about whether or not any perceived shortcomings of the product are bad enough to constitute a defect. Moreover, the affirmative defenses often convince a majority of jurors that the defendant company itself believed its products were safe. Jurors are then less likely to see the company's actions as negligent, and more likely to believe that the company tried hard to "do the right thing."

Only after jurors have heard these affirmative defenses are they ready to receive the alternate cause evidence without rejecting it as the excuses of a greedy or desperate company. With the more complete context provided by the affirmative defenses, jurors no longer see the alternative cause evidence as an underhanded attempt to shift the blame or avoid responsibility. Instead, the alternative cause case explains to jurors the defendant's legitimate beliefs about why the accident and injuries occurred. Rather than the result of some far-fetched defect claims, the accident is more likely to be seen by jurors as a freak accident caused by the plaintiff's momentary inattention or misuse of the product. In short, only by presenting strong affirmative defenses of the product and the company itself can the decisive alternate cause evidence be most effective.

The difficult strategic gambit to identify is that "losing" the affirmative defense does not necessarily lead to a verdict against the defendant. Even if a majority of jurors are persuaded that the product is not as safe as it should have been, or that the company did not do as much as it should have done, this "loss" of the affirmative defense, combined with a winning alternate cause case, can be enough to achieve a favorable defense verdict. In these scenarios, jurors often conclude that although the defendant company probably could have done more to make its product safer, the plaintiff was primarily to blame for the accident and injuries and that the plaintiff is therefore undeserving of any monetary award.

Conclusion

Like all human beings, litigators instinctively try to simplify and condense complex information to make it more understandable. However, this natural tendency to simplify can easily lead attorneys preparing for trial to become too focused on what appear to be the one or two "key" aspects of a case. While certain evidence is certainly vital, the other aspects of the case often give that key evidence its context and power. In the discussion of the example lawsuit above, we saw that a persuasive defense strategy requires not only the key alternate cause evidence, but also the context provided by the affirmative product and company defenses.

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September 2009 Favorite Thing

(This month's favorite thing is from *The Jury Expert* Editor, Rita Handrich, PhD who also contributes regularly to the Keene Trial Consulting blog: The Jury Room.)

Despite warnings that it's on the way out (since growth is tapering off), that 20% of content is marketing (I'd guess more than that), and that only people with too much time on their hands use it--we beg to sound a voice in the wilderness (or at least in *The Jury Expert*).

So, without further ado....our September 2009 Favorite Thing is: Twitter!

Why?

Because despite the high 'noise' ratio (e.g., "I'm sitting on the porch"), Twitter has become a terrific source for legal information, idea exchange, and resource sharing. Yes. You have to spend a little time to identify just who you want to listen to and who gets the virtual earplugs--but for daily news on juries, polls, breaking news relevant to litigation advocacy, and insight into who is (and especially who is not) going to be on Santa's list this year--Twitter is a marvel.

If you are not familiar with Twitter (and recent estimates say only 6% of attorneys use it), it is a website that allows you to 'instant message' (aka 'tweet') anyone following you using only 140 characters per message.

Here's what you do in simple steps:

1.Go to http://www.twitter.com/ and sign up for an account.

a. Hint: Use your real name or firm name. That way your 'Twit' friends will recognize it (and you) when they see it.

2. Start by following *The Jury Expert*! We post tweets (almost) every day and focus on issues relevant to litigation advocacy & improving trial skills.

a.While logged in to your new Twitter account, go to this URL: http://www.twitter.com/thejuryexpert.

b.Click the icon that says '**follow**'. You will now see all our tweets when you log in to your Twitter account and go to your 'home' page.

Here is our 'official' *TJE* Twitter logo. When you see this, you know you're in the right place.

Some language lessons. As in any new world you enter, Twitter has some jargon. Here are the most important 'words' which are mostly abbreviations:

Followers: This sounds very cultish. It is Twitter language for how many people subscribe to your Twitter account. When you first sign up, it's zero. Over time, it will grow.

Following: This is simply a list of those YOU follow. (Hint: As a new Twitter member, you can find good folks to follow by going through lists of whom others follow.)

1. You simply click on the profile and review their tweets and if you like what you see, click 'follow'. Some folks follow you back, others don't.

2.If you find them annoying, self-involved, pedantic or too prone to pontification, you UNfollow them--that is Twitter's term for unsubscribing.

Social Networking: Twitter is a form of social networking. You become 'known' through what you tweet, how you tweet it, and how helpful and friendly you are. (Hint: Be nice. Be interesting. Be helpful. It comes back to you.)

DM: This stands for 'Direct Message'. It's private. Only you and the recipient/sender see it. One caveat, to send a direct message, the person has to be one of your followers. If you want to send a direct message to us, for example, you would type this in the status box on your Twitter page:

DM @thejuryexpert Your tweets are so wonderful. I assiduously memorize each & every one.

@: This is Twitter shorthand for 'Reply' (aka 'at-ting someone'). This goes out into the public timeline (it's like posting on someone's Facebook wall). Everyone sees it. It's used to communicate publicly with others. Be careful what you say and how you respond to @'s. Everyone sees it. (Hint and a warning: it's also sometimes used to bait you publicly and tug you into an argument.)

RT: This stands for 'Retweet'. If you like a tweet you see out there, you can 'Retweet' it. Basically that means you forward it on so your followers see it too. (Hint: It is good manners to RT rather than to simply repost information someone else found as though it were your own. Twitter can always benefit from more good manners.)

#FF: This is an abbreviation for 'Follow Friday'. It's a Twitter activity that happens every Friday. People post lists of Tweeters they find interesting, fun, or valuable to follow on Twitter. (Hint: If someone you follow, endorses someone you don't know about, it's a good idea to check those #FF recommended Twitterers out to see if you'd like to follow their tweets as well.

One more tip: Limit your Twitter time! For many people, it's a great way to procrastinate and can become addictive. (We don't want that.) Think of Twitter as *ONE* approach to networking and marketing that you can do while staying informed about new lines of thinking, breaking news, new and relevant research, and a few other things along the way.

There are many more things to be said about Twitter. It's not all good. It's not all bad. Used as described above, it can be a terrific source of information on legal news, perspectives, ideas, and information. Try Twitter out for a month. See what you think. See what you learn. And if you like what we do here at The Jury Expert, then follow us on Twitter!

If we still haven't convinced you, you can benefit from Twitter without actually signing up. You can see everything The Jury Expert's Twitter feed posts at our Twitter page (http://www.twitter.com/thejuryexpert) or by simply going to TJE's front page on the web and scrolling to the bottom of our front page (http://www.astcweb.org/public/publication/). We hope you enjoy our September 2009 Favorite Thing!

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On civility, racial slurs, graphic pictures & anthropomorphism

Recent days have been filled with news about (very public) rude and/or disrespectful behavior from athletes, celebrities, and politicians. Pundits and pollsters are telling us what it means about our society and about the deepening political divisions in our country. Media outlets are covering the frenzy intently and 'civility' is being talked about as a behavior sorely lacking in our society today. It does make us stop and think about how each of us is responsible for our own behavior and for treating each other with respect.

Our goal with *The Jury Expert* is not only to help you increase your trial skills but also to offer information that helps you pause and ponder from time to time. This issue features diverse and provocative pieces that we hope will make you stop and think about hate crimes, racial slurs, graphic injury photographs, and assault weapons as self-defense tools.

In addition, we have terrific pieces on the contribution of the mediator to the negotiation process; how to identify leaders in the jury pool; the benefits of humanizing complex evidence through anthropomorphism in technical presentations; considering the need for alternative cause strategies in product liability litigation; and a primer of sorts, disguised as our September 2009 Favorite Thing.

Read us cover to cover (or web page to web page)! Tell your friends and colleagues about us. Help *The Jury Expert* travel to offices in venues where we've never been before. And, as always, if you have topics you'd like addressed in upcoming issues, let me know.

--- *Rita R. Handrich, Ph.D.*

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