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Sex and Race in the Courtroom: Shifting Gender-Role Attitudes in a Changing World

Cameron D. Lippard, J. Scott Carter, Mamadi Corra & Shannon K. Carter

In any social setting, including the courtroom, being a woman or man implies a certain fundamental belief about the acceptability of changing roles for women in U.S. society. We might expect women to be the most understanding and least judgmental of other women who take on new roles such as working outside the home, whereas we might expect men to be less understanding and more judgmental. When race and gender are considered together, however, beliefs and attitudes about the roles of women become a great deal more complicated. How do Black men versus White men respond to changing roles of women in our society? Do Black and White women have different beliefs about women's increased inclusion in the workforce or other areas of society? How do Black and White men compare to Black and White women on issues of gender?

Social scientists argue that due to unique histories and experiences, race and gender work together to create exclusive social categories of people who have different views of society and the world. These different worldviews create different opinions toward various topics, including the changing roles of women (Collins, 2000; Dugger, 1988; Hunter and Sellers, 1998; Kane, 1992). In referring to Black women, Dugger (1988: 425) argues that "racism and sexism should be viewed as combining in such a way that they create a distinct social location rather than an additive form of 'double disadvantage.'" What this means is that we cannot simply "add up" race and gender oppression and conclude that black women are the most disadvantaged in society; rather we need to consider the ways in which race and gender (along with other important social statuses such as socioeconomic status, age, etc.) combine to create distinct social positions in society. These distinct positions provide individuals with different social experiences that shape their attitudes, opinions and world views in different ways.

It is also important to note that life experiences are impacted by social context. Considering it has been several decades since the beginnings of the civil rights movement, life experiences of all groups, including White and Black men and women, have drastically changed in the United States (Kane, 2000). Several factors, including changes in the economy, more women of all races entering college, the workforce, as well as shifts in family structure, have been linked to changing beliefs and attitudes about the appropriate roles of women in our society (Brooks and Bolzendahl, 2003; Twenge, 1997).

This article has two primary goals: 1) to review recent research (Carter, Corra and Carter, 2009) on the interactive effects of race and gender on gender-role attitudes and, 2) to point to findings that might be useful to those in the legal profession. More specifically, we present our research findings on the change in gender-role attitudes of White and Black males and females over a four-decade period. We also discuss possible causes of group differences and reasons for shifts across time. Finally, we discuss the implications of shifting gender-role attitudes by race and gender for the legal profession (attorney-client relations, jury selection, etc.).

The Effect of Race and Gender on Changing Gender-Role Attitudes

Existing research supports the idea that Americans' views of women's roles in various social institutions (such as the workforce, education and politics) have become more egalitarian over time (Blee and Tickamyer, 1995; Bolzendahl and Myers, 2004; Brewster and Padavic, 2000; Chrelin and Walters, 1981; Mason and Lu, 1988; Peek, Lowe, and Williams, 1991; Twenge, 1997; Wilkie, 1993). For example, Chrelin and Walters (1981) find no real attitudinal difference between men and women toward women seeking employment and becoming President in the 1970s. In more recent data, findings show more liberal shifts for men and women in their attitudes toward women entering the work force (Blee and Tickamyer, 1995; Ciabattari, 2001; Twenge, 1997).

There are many possible explanations for this liberal shift. Some researchers pose that this shift in attitudes has followed a shift in "gender expectations about family roles" (Wilkie, 1993:261). Certainly, the United States has witnessed a greater number of dual earner and female-headed families; thus changes in attitudes about the appropriate roles of women may have been born out of necessity. Also, within married households, women and men are expected to take on portions of the household duties because they both work. Moreover, there has been an increasing expectation for women to contribute financially to the family. Researchers have also noted a direct association between gender equality in the workforce and gender equality at home. Others have argued that the liberal shift in gender-role attitudes is not a product of ideological shifts, but due to cohort replacement. That is, older more traditional men and women are being replaced by younger men and women who are more liberal and egalitarian (Brewster and Padovic, 2000; Brooks and Bolzendahl, 2003; Mason and Lu, 1988; Seligman, 1999).

When race and/or ethnicity are considered as possible factors shaping attitudes, it seems likely that shifts in gender-role attitudes will also differ by race and/or ethnic groups. Some researchers argue that race is likely to preempt gender in attitudinal shifts in traditional gender-roles. That is, Black men and women's experience with discrimination and inequality in U.S. society should make them more open to egalitarian gender-role attitudes than their White counterparts (Bolzendahl and Myers, 2004; Kane, 1992). Indeed, Black women are more likely to work outside the home full time (41% of Black women compared to 36% of White women) and are more likely to be head of their households (Farley, 2005). Young Black women from the age of 15 to 19 have higher birth rates than their White counterparts (71.4 and 22.9 per 1,000, respectively). Indeed, Dugger (1988: 426) notes that "[t]wo systems of social relations, that of production and that of reproduction, are primary in the formation of gender-role attitudes and identity [of Black and White women]." Women highly invested in reproduction (i.e., White women) are less likely to participate in the workforce and less likely to see or question social inequality. Moreover, women with greater investment in production (i.e., Black women) are more likely to participate in the workforce and consequently witness or experience social injustices.

With regard to men, the effect of their social location or race is not so clear (Blee and Tickamyer, 1995; Hunter and Sellers, 1998). While life experiences of Black and White males vary (Connell, 2005), the differences may not necessarily translate into distinct gender-role attitudes. Past research posits that Black men may hold less traditional gender-role attitudes because of their sensitivity to oppression in general and may empathize with women more because they develop close relations with them while being raised by single mothers (Kane 1992). Collins (2000) further states that interdependence of Black men and women in the workforce may create greater egalitarian gender-role attitudes than their White counterparts.

Our Research

To conduct research on how the intersections of race and gender affect gender-role attitudes over time, we used data collected by the National Opinion Research Center's (NORC) General Social Survey (GSS), a nationally representative survey of Americans conducted since 1972. The survey includes a battery of attitudinal measures covering abortion, gun control, the death penalty, immigration concerns, and gender and racial attitudes. This survey has been very useful because researchers can compare many of the demographic and attitudinal measures over decades to measure the amount of change and even the impact of American social movements.

We examined change in gender-role attitudes from 1974 to 2006 for White and Black males and females. We pooled the data into decades (1970s, 1980s, 1990s, and 2000s) and created measures that assessed participants' views of, 1) women's roles in politics and, 2) women's place in the home and the impact of women working on children. Several survey questions were used to create two composite index scores that would serve as dependent variables for this research and the views mentioned above. The first composite index, focusing on views of women in politics, used three questions. For example, one question was, "If your party nominated a woman for President, would you vote for her if she were qualified for the job?" The second composite index focusing on women's roles at home and work also used three questions from the GSS database. For instance, one question asked for agreement or disagreement with the statement, "A working mother can establish just as warm and secure a relationship with her children as a mother who does not work." Importantly, however, the politics questions were asked from the early 1970s to the late 1990s by NORC. The questions regarding women entering the workforce and its impact on children were asked from the 1980s to 2006.

Using statistical regression analyses, we included the respondents' reported sex and race as our primary independent variables. From that, we created four social categories, Black women, Black men, White women, and White men, to examine whether the interaction of sex and race mattered in predicting changing gender-role attitudes. Very few respondents in the GSS data reported another race other than White or Black, so we excluded them from the analysis. Regression analysis allows us to control for other confounding variables that may affect our dependent variable (gender-role attitudes), including marital status, age, income, education, place of residency, and religious fundamentalism. Finally, using separate regression models, we compared White and Black males and females across a three-decade period.

The Interactive Impact of Race and Gender

In general, we find that just using race or gender cannot fully explain the shifting views respondents have about women's roles since the early 1970s. It is the combination of the two that yields the most reliable findings. First, and supportive of past research, we find that overall Whites and males exhibit more traditional gender-role attitudes than Blacks and females. When race and gender are considered together, the joint effect on our dependent measure was more complicated. Overall, and the most consistent result, we find Black women exhibit the most liberal views toward the changing roles of women in politics and in the home and in the workplace as compared with White females, White males, and Black males. Looking at respondents' particular views of women's roles in politics, Black and White males are the most traditional and maintain quite similar attitudes. That is, while Black and White males maintain similar traditional beliefs about women entering politics, White females fall somewhat between White/Black males and Black females. While they report more supportive views toward women entering politics than White and Black men, White women express more traditional views than Black women.

With respect to women leaving the home and entering the workforce, White males and Black males continue to be the most traditional; however, Black males exhibit more liberal attitudes than their White male counterparts. White women, again, tend to be more traditional than Black females but more liberal than Black and White males. Consequently, the important finding is that just focusing on the gender or race of the respondent does not completely explain the differences in opinion about the changing roles for women in our society. Instead, the joint impact of the two provides a more thorough understanding.



Trends over Time

The purpose of the trend analysis is to determine whether the gap that separates White males and females and Black males from Black females is lessening significantly over time. By examining the change in attitudes since the 1970s, we find that each of the social groups is slowly growing more liberal over time. However, the shifts are much more noteworthy for some groups than others, and depend on the specific attitudes measured.

White Males Maintain Traditional Attitudes Toward Women Entering Politics

Compared to Black females, we find most notably that Black men and White women are becoming more liberal toward women entering politics over the three-decade period. By the 1990s, the absolute difference between Black females and these two groups appears to be disappearing. However, the difference between Black females and White males appears to be remaining stable, if not growing more distinct. Through the 1990s, White males report increasingly stronger attitudes toward women entering politics, which suggests that White males continue to be more traditional – a trend that appears to be holding over time, at least with respect to women in politics.

All are Becoming More Liberal Toward Women Entering the Workforce

Here, the differences between Black females and all of the other groups, including White males, appear to be diminishing over the three decade period. However, the shift does not appear to be as significant as those mentioned above. Thus, not enough evidence is available to support a growing convergence of the groups with Black females. Black females continue to hold the most liberal views while White and Black men appear to hold the most traditional views toward women moving into the workforce which appears to be holding into the current decade.

While there may be several ways to interpret our findings, we caution the reader from interpreting our findings that being a woman makes one more liberal in their views of gender-roles in contemporary U.S. society. We also see that being White or Black does not necessarily explain the trends. Certainly, being Black or being a woman does make one more prone to support nontraditional gender roles for women because both of these groups have dealt with the social restrictions and stigma assigned to these two identities. In this research, it appears that the more liberal attitudes expressed by Black males may be due to an "investment in gender inequality as providing some compensation for... racial inequality," as Kane (2000:426) noted. In addition, the differences between Black and White women's attitudes could be due to historical situations in which Black women entered the workforce in large numbers much earlier than White women. Thus, the recovery we find in White women's views of gender roles may be due to their more recent entry in the workforce in comparison to Black women who have already been in the workforce. Interestingly, though, while White men's attitudes have become less traditional, they continue to exhibit more conservative views than the other groups. Their more conservative views may result from their positions of greater privilege in the workplace and politics compared to the other groups.

Implications and Applications

It is well established in the social science literature that the intersection of race and gender impacts not only how members of different groups see and evaluate the social world, but also how they are seen and evaluated by other members of society. This body of literature emphasizes that it is important to look at the specific social locations that emerge from the intersections of multiple social categories rather than looking at just one factor, such as gender or race. As eloquently explained by Patricia Hill Collins (2000), who has examined the strife that Black women have faced in America, one concept or factor cannot accurately be used to predict any attitude or belief, or the amount of discrimination or oppression one faces in society. As Collins finds, Black women do face more oppression and discrimination compared to White women. However, Black women often do better in obtaining college degrees and jobs compared to Black men (e.g., Browne and Misra, 2003; Burn and Kao 2008). Thus, there must be more to the issue of predicting attitudes, beliefs, experiences, or even trial outcomes because we cannot determine a single person's worth or rank in American society based on one variable or social identity, but by the interlocking of several social variables. We also must consider that the possibilities of advantage or disadvantage rely on context, in which time and place matter. Thus, our research, as well as that by Collins and others supports the idea that we must consider a number of social and contextual factors in any given social situation to explain any issue we come across in human relations – be it on the street or in the courtroom.

As an example, former Secretary of State Condoleezza Rice did well as an African American woman. However, she came from an affluent background and knew the right people who helped her overcome obstacles based on her race and gender. It also helped that times have changed – women and Blacks can now hold public office. However, Rice is the exception, not the rule. As Collins points out in her discussions of oppression, African American women face a "matrix of domination" (or matrix of power) in which race, gender, and social class heavily determine their fate in America. Again, Condoleezza Rice was able to overcome the oppression associated with being an African American woman but she still had to display a feminine persona. She is also a conservative Black woman, which does not fit with the typical American stereotype of Black women. Thus, her race, class, gender and political ideologies combined in such a way to provide both unique obstacles and unique opportunities.

Of course, opportunities, obstacles, experiences and attitudes differ based on the person or group in question. We should consider other social factors that may be involved in this matrix – including age, sexual orientation, religious affiliation, citizenship status, etc. – to determine shifts in attitudes, beliefs, privileges or oppressions. Collins also instructs us to consider the circumstances of the moment in which things either go right or wrong for a group or person. For example, Blacks are more likely than Whites to get pulled over by police while driving (Tomaskovi-Dewey, Mason and Zingraff, 2004). In this situation, being White is an advantage for avoiding racial profiling or “driving while Black.” But, research also points out that racial profiling is not the only culprit in creating this trend, but also the social class stereotypes associated with certain makes and models of cars, the race of the police officer, as well as whether there is a heavier police presence in minority or majority areas. Therefore, this body of theory and research makes us consider the multiple factors involved in explaining the outcomes of any situation at hand.

Applications: What does this all mean for me?

We see four ways in particular that legal professionals can use our research.

(1) Assessing Clients, Concerns, and Guiding Interactions.

First and foremost, our research can be useful in guiding interactions with clients, assessing clients’ worldviews, and considering how clients will be viewed by others. Obtaining a full background description of your client will give you more insight into how to better prepare your case, as well as understand your client’s concerns and attitudes. This may also build a level of trust between you and the client because it shows you are interested in their circumstances for not only the case at hand but their overall well-being. In other words, really knowing your clients shows sympathy and may allow the client to confide in you information necessary to the case. Recognizing your client’s position in society, and the impact that social position has on individuals’ life experiences and worldviews, may assist you in understanding your clients’ behaviors, goals and desires. This understanding may help you persuade a jury to see the world through your clients’ point of view. In addition, recognizing that race, gender and other social statuses intersect to create specific positions in society can help you assess how your client will be viewed and evaluated by others. As our research indicates, part of the way your clients will be perceived depends on the race and gender characteristics of the individuals who are doing the perceiving. This knowledge can be used to prepare clients to portray themselves in ways that will be best perceived by their target audience. For example, knowing that White men in general are more traditional in their gender-role attitudes than other groups, a female client may gain more sympathy from a jury filled with White men if she portrays a more traditionally feminine persona. The same woman may earn more sympathy from a mostly female jury, especially a mostly Black female jury, if she portrays herself in more non-traditional ways.

(2) Assessing Jurors and Assisting Jury Selection Decisions

As Lisnek (2003) and Kressel and Kressel (2004) point out, there is no such thing as an impartial jury; everyone has opinions and they are hidden in the very folds of our numerous identities and life-stories. The authors suggest that jury decisions frequently go back to "gut instinct," or relying on faith and chance. What this really means is that they may often rely on their own social positions and the attitudes and experiences associated with them rather than the evidence when making verdict decisions. Our research shows that Black women are the most liberal in terms of gender-role attitudes, followed by White women, Black men and White men. This basic trend can be used to quickly assess potential jurors for different cases. Of course, additional information about jurors will need to be obtained, so we do not wish to overstate the implications of our research. Nevertheless, we do observe general trends in attitudinal differences by gender and race that may serve as a useful starting point in selecting jurors.

For example, in representing a female client who engages in more traditional female gender roles, such as a stay-at-home mom or a woman fighting for custody of her children, our research suggests that White men might be the most sympathetic to a woman in such a situation because White men hold the most traditional gender-role attitudes. When representing female clients in more non-traditional roles, such as working women with young children, single women or single women with children, women facing workplace discrimination, or women who are being charged with committing criminal acts, our research suggests that female jurors in general may be more sympathetic, particularly Black female jurors, whereas White male jurors may be the least sympathetic. Although our research focused specifically on attitudes toward women's roles, we would expect that those who are supportive of more non-traditional roles for women would also be more supportive of non-traditional roles for men. Therefore, our research can be used to assess jurors when representing male clients as well. A White male juror may be more likely to be more supportive and sympathetic to male clients who engage in traditional roles. Conversely, a male client who engages in less traditional gender roles, such as a stay-at-home dad or a dad fighting for custody, may gain more support and sympathy from women, particularly Black women.

(3) Examining Your Own Social Position and Anticipating Others' Perceptions

As Parks-Stamm (2008) points out in a previous article in this publication, being a successful woman litigator does not mean being perceived by a jury or peers in the same light as male lawyers. The effects of gender are further compounded by other social statuses, particularly race. Recognizing that race and gender impact both how individuals are perceived and how they perceive the world can be useful for determining, in a group practice who may be best received in representing each case, or in an individual practice what kind of persona will be best received depending on the jury, the client, and the issue at hand.

For example, in a case with a female client who does not adhere to traditional gender roles, a predominantly White male jury (who are statistically more likely to maintain traditional views of gender) may be better persuaded by a White male attorney, whereas a female jury may be better persuaded by a female attorney. If such selection is not available, a female attorney and her client may want to portray themselves in more traditionally feminine ways (through clothing and appearance as well as mannerisms and topics brought up) for a White male audience than for other audiences.

(4) Understanding the Changing Trends In Time

Our research demonstrates that attitudes change over time and specifically group views of women's roles in American institutions have become less traditional. Even though men still hold on to more traditional views than women, they can change with decades of exposure to women in different roles. Legal professionals may benefit from staying abreast of changing attitudes. In addition, it is important to recognize that attitudes change in social context. Thus, legal precedents and seemingly impossible shifts in political attitudes do not happen overnight, but instead transform slowly as individuals change their views or as older generations are replaced by younger generations. This is why we see more states slowly passing legislation that recognizes same-sex marriage. The political and social climates are right for change after decades of denial, because same-sex couples are more prevalent in social life and the media, and many believe there are more pressing issues to consider right now, such as health care reform.

One tangible way legal professionals can stay abreast of changing attitudes and beliefs is through local and national news, as well as empirical research, such as that found in this publication. We also suggest you use attitudinal and opinion-based data collections, reports, and research articles as resources in preparing for trial and jury selection. Today, you can find this information through several credible organization websites. For instance, the National Opinion Research Center website (<http://www.norc.org/homepage.htm>), where we obtained our survey data, provides data and publications covering several topics, including issues germane to the criminal justice system. Gallup's website (<http://www.gallup.com/Home.aspx>) is also particularly useful because it has an almost running ticker of attitude questions.



Conclusions

Current social science research and theory demonstrate that a number of social factors and contexts must be considered when predicting behaviors (e.g., attitudes, beliefs, and judgments). Based on our research (Carter, Corra and Carter, 2009), we find that the interactions of race and gender help to explain differences in gender-role attitudes. We also find that these attitudes have changed for many groups due to historical changes that have occurred since the 1970s. This leads us, as well as other social scientists, to suggest that professionals should investigate, consider, or be wary of how any given attitude, belief, or courtroom decision can be influenced by a number of variables. We encourage legal professionals to examine how the intertwining factors of who their clients are and how others will perceive them will impact their overall trial outcomes.

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We asked two experienced trial consultants to provide their responses to this article. On the following pages, Cynthia Cohen & La Verne Morris offer their thoughts.

Cynthia R. Cohen response to Lippard, Carter, Corra, & Carter

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Gender Role Perceptions. "Mommy, boys can't be lawyers!" This comment from Isaac, the five-year-old son of an active trial-lawyer mom and a stay-at-home dad, along with Lippard, Carter, Corra, & Carter's article, highlight shifting attitudes toward working women. Lippard et al.'s literature review makes one reflect on historical social injustice in the workplace and changes in perceptions of gender roles. The smart use of an interaction between gender and Blacks & Whites in assessing "traditional vs. liberal" views gives insight into each group view (i.e., Black Females, White Females, Black Males & White Females) and discusses intervening factors (e.g., SES, birthrates, age). The findings that gender-role attitudes are progressively more egalitarian over the last 30 years is worth noting. There are helpful hints in understanding social status and gender role perceptions. While the authors note that other factors come into play in the courtroom, I'm a bit skeptical of their applications to client assessment, jury selection, and determining who should try the case. Below are suggestions to further those applications.

Venue and Race. While the authors use an interaction between gender and Blacks/Whites and note that numbers from other races were not sufficient for their study, Hispanics are in the majority in many of our venues and Asians have sufficient numbers as well. Blacks are 12.8% and Hispanics are 15.4% in the U.S. Census Bureau's 2008 national estimate. In California, where it is 36.6% Hispanic and 6.7% Black statewide, the venue matters a lot, especially if you break it down by county. Los Angeles County is 47.7% Hispanic and 9.4% Black and in long cause cases, the demographics dramatically change. Other counties in California, Arizona, and Texas have significantly higher Hispanic populations. In some venues race dichotomy as used in Lippard's research would rarely apply. It will be interesting to see what 2010 Census data looks like.

Experience Matters Most. Isaac's mom knows that we all have our own world-view. Experience trumps demographics in world-view and viewing a case. It is best to know the underlying experiences that matter most in the particular trial. Jurors' experiences at the epicenter of cause challenges have the greatest potential strength for influence in deliberations if jurors survive challenges. A trial lawyer ought not use race or gender alone (or even in combination) in jury selection, not only for fear of a *Batson* challenge, but one unmistakably errs when severely stereotyping. When voir dire is restricted and there are no other data points about jurors other than demographics, trial lawyers are forced to consider perceptions of gender roles.

Attitudes are Fluid. I disagree with Lippard's notion that it takes the younger jurors replacing the older generations in the jury box for attitudes to change about acceptability of women in "non traditional" roles. A woman's attitude about gender roles is not set for life by giving birth. Some women enter the work force after raising children and their attitudes as well as their family members' perceptions about gender roles change. A stay-at-home mom who begins a career at 55 may have daughters who started careers in their 20s. An older adult may be very accepting of career women although most of her life she stayed home. Experience in the home environment and in the world matter more than a stereotypic attitude.

Gender Role Perceptions within the Civil Justice System. Lippard's findings of gender role perceptions are most applicable when attitudes toward working women are questioned or judged. Employment cases immediately come to mind, especially if you have someone barred from breaking the glass ceiling or another issue directly related to discrimination. For instance in a sexual harassment case, judgment of the case hinges on perceptions of the parties especially if there are no blatant graphic documents to support the claims. That is, if the sexual abuse lacks red flag email traces or other harassing written documents, scrutiny on the parties is magnified – bring in the gender perception detectors because jurors will be looking at appearance, nonverbal and verbal behavior.

Knowing jurors' gender role perceptions could be helpful in trial strategy. Several levels of gender perceptions operate simultaneously in a trial with the parties, the witnesses, the jurors and the trial lawyers. Choosing an expert witness based on fit between traditional role and gender role expectations is a good idea. We tested mock jurors' perceptions of gender differences in experts' credibility in the 1980s and found male doctors were seen as more expert than female doctors. This finding might parallel Lippard's trend.

Dress Appropriately. Another place to use gender perceptions is whenever someone deviates from traditional roles. If a business trial has a dispute between a male and a female business partner, jurors might suspect a sexual relationship or that someone felt rejected. In witness preparation, evaluate the relationship with the partner to determine behind-the-scenes issues. If jurors suspect the two were romantically involved and the female felt slighted, jurors would evaluate the case based on traditional roles. If the relationship is pure business and the woman aggressively misappropriated funds, traditional values would be jolted. Recommend that men wear a business suit to court rather than a sports jacket and tight pants, especially if there is any sexual innuendo in the personal relationship between the partners. Jurors judge gender roles based on appearance and expectations.



Mothers Have Standards. Women may be more likely to be sympathetic and award damages. Female Blacks tend to award higher damages. My aggregated research shows that not all women show sympathy although women may be twice as likely as men to award damages. Women with children are harder on a mother as a plaintiff who appears to be negligent in a products liability case. For example, a mother not having locks on a kitchen cabinet where poisons are stored or a baby grabbing hold of a beer bottle that explodes. Mothers hold other mothers to high standards in personal responsibility.

Gender Role Perceptions within the Criminal Justice System. Lippard states that juror perceptions of the defendant may be influenced by gender-role attitudes; in that, "Black women are the most liberal in terms of gender-role attitudes, followed by White women, Black men and White men." Since a number of capital cases reveal a gender role bias, it would be interesting to interview the jurors from capital cases. Consider for example, two separate instances in which both women were convicted of killing their respective sons and in which premeditation was undetermined (Heberle, 1999). Darlie Routier, described as an aloof, atypical mother-figure, was sentenced to death while Susan Smith, a feminine, energetic mother was given life in prison even though both women committed the same crime. Heberle (1999) says the way these women were perceived with regard to gender roles had a significant influence on jury verdicts.

Although women commit crimes eligible for death sentences less frequent than men, they are often placed under harsher scrutiny – not because their crimes are considered worse by law, but because they fail to meet gender expectations. Consider Karla Faye Tucker, a Texas woman held to her shocking confession that she experienced orgasm each time she struck her victims. The confession statement sexualized her crimes and underscored the gender-role reversal that she performed before a society with established codes of male/female behavior, leading to the jury's overall distaste of her character (Heberle, 1999). While intuition makes it easier to imagine a jury as more sympathetic towards women facing criminal charges as compared to their male counterparts, being female may have the reverse effect, especially when gender roles are violated.

Conclusions. Lippard et al. make an important empirical point. While it is generally known that race and gender independently affect attitudes and judgment decisions in the legal system, the possibility of an interaction between the two may be useful to trial lawyers or consultants in drawing inferences about how the average White female/White male might conceptualize a case in comparison to his/her Black counterparts. Further, the gender/race interaction may help consultants predict how a case involving violation of gender roles may be perceived by jurors who fit into White/Black male/female categories. However, future research should be inclusive of the expanding Latino race.

The article does a nice job of recognizing that the degree to which individual jurors relate to the defendant, especially in regard to gender role adherence, may bear weight in judgments of character, and, in turn, final verdict or sentencing decisions. However, it is important to be mindful that using stereotypes or generalizations in order to gain insight into how a potential juror might empathize with the defendant does not hold up in all situations. Aside from demographics such as gender and race, case-related facts such as

physical evidence, eyewitness testimony, expert testimony, and the life experiences of individual jurors all play a significant role in final judgments.

Would I use gender role perceptions in consulting on a case? Absolutely. Gender is an everyday consideration when I evaluate the client, when I pick a jury, and when I help determine who should try the case. I would also voir dire Isaac. Why do you want to be an architect instead of a lawyer? Is it because an architect is more creative? Do you think being a lawyer is boring? “No, that’s not why. It’s just, a lawyer – that’s for girls.”

Thanks to the social scientists for making us think about social injustice in the courtroom. Thanks to Amanda Clemente, my intern, for probing discussions while reviewing this article. And thanks to Rebecca Weinstein Bacon for sharing Isaac’s worldview.

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La Verne O. Morris responds to Lippard, Carter, Corra, & Carter

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The basic premise of the authors’ research -- that race and gender impact how one perceives information as well as how one is perceived -- is one that most seasoned litigators and trial consultants agree with and consider in their practices. The literature and data conclude that the combination of race and gender is a more powerful predictor than race or gender alone. While this is true, I believe it is only part of the story, that is, the combination of a multitude of variables is the strongest predictor of juror behavior – race, gender, class, education, socio-economic status to name a few. The authors indicate that context is important in determining outcome, and a multitude of variables need to be considered. That is why when a client asks me, as an African American, how I think African Americans will do on a jury, I cannot give any other answer than “it depends”. No group of Americans is monolithic in its thinking, and certainly African Americans are no exception. It depends on the worldview perceptions and experience of the African Americans within the venue. In other words, this question can only be answered more accurately if more information is available.

The overall politicization of your case

Some cases have more political issues intertwined than others (driving while black, employment discrimination, for example). In such cases, understanding juror views of gender roles in politics and the workforce should be a component of developing a case strategy; you must also consider the venue and other factors impacting the worldview of potential jurors – education, employment, life experiences. The research findings may also prove helpful if faced with a limited voir dire scenario, as in federal court, where you may not get much more than basic demographic information (name, marital status and employment, etc.). Perhaps if all else remains equal, and you are left to decide whether to keep a white male or black female on your jury, you determine your strike based on whether you need someone more or less liberal for your case.

How then can attorneys use the information provided by the research data?

Sympathy is not synonymous with victory

It is quite possible for a juror to be sympathetic to your client, yet render an adverse verdict. Mock trial research data as well as post trial juror interviews confirm this fact. It is not uncommon for a juror to say how bad she felt for the litigant, but she put her sympathy aside (as instructed by the court) and made a decision “based on the evidence”. Juror sympathy, as it pertains to juries more often correlates with juror anger towards the defendant and the amount of any damage award (the greater the anger at defendant and greater the sympathy for the plaintiff, the greater the potential for a large damage award). The authors’ research is more suited to determining whether or not jurors are more sympathetic to your case issues. The best way to determine this is through mock trial research, careful crafting of voir dire questions, and/or through the use of supplemental juror questionnaires.



Jury Selection

Imagine the following scenario: you are a white female defense attorney in a medical malpractice case defending a white female doctor. The plaintiff is a black female mother of two young children who was a full time working mom until her injury. You are questioning a black female single mother for jury selection. You recall that black females are more liberal in gender roles. You think the juror will likely identify with the plaintiff. You say to yourself “I must strike her”. Not so fast – she may be Condoleeza Rice in disguise! (Turns out the prospective juror holds a doctorate in French and was raised in a very exclusive suburb.) The authors’ present findings are that black females hold the most liberal attitudes toward entry into the workplace as well as liberal leanings for the role of women in politics, but the intersection of race and gender in and of itself cannot determine if a juror will be adverse to your case. This is evidenced by the large body of research concluding that

oftentimes women are harder on women litigants than men. Even if you have a hunch she is adverse, don’t be too quick to strike her – there may be someone else on the panel who is far worse that you should use that precious strike on.

It is not possible to control who will be part of the jury pool, therefore the goal of any successful voir dire is to remove the worst jurors for your case. And while the research findings make distinctions as to whether men, or women, blacks or whites may be better suited for certain cases, *Batson* prohibits striking of jurors in a protected class; the reasons for peremptory strikes must be race and gender neutral. Craft voir dire questions designed to reveal preconceptions and world view, and ask open ended questions designed to get jurors talking about themselves so that your decision is based on more than a preliminary juror profile or a hunch. Stereotypes, even the generalizations put forth by the authors, are dangerous unless placed in context.

Most often, the decision as to who will be trying the case, or the substantial portions of it is determined before jury selection begins. Therefore, attorneys will have to assess their need to convey to the jurors their femininity or work behavior accordingly. For instance, a female attorney with a majority white male jury may consider demonstrating some traits associated with femininity as she interacts with the trial team and jurors through gesture and/or feminine touches in dress (Parks-Stamm, 2008).

Case and Witness Preparation

The authors make a good point when they encourage attorneys to take time to get to know their client and develop a better understanding of their client’s worldview. In crafting case themes and the overall story of the case, it is important to remember you won’t be the only one telling the story – you will need your fact and expert witnesses to tell it as well. And you must consider this in tandem with who will be in the audience listening to your story.

In preparing witnesses, I cannot begin to count the number of times witnesses have shared information with me which could be used in strengthening our case and that was information useful to developing the case strategy. Attorneys often look at the witness puzzled and ask why they never mentioned the information before. The witness says, “nobody asked me.” What is clear is that no one on the legal team took the time necessary to develop a rapport with the witness beyond the legal elements of the claim or developed an in depth understanding of their view of the case. Instead, a decision was made on how the case would be tried, and the witness will be

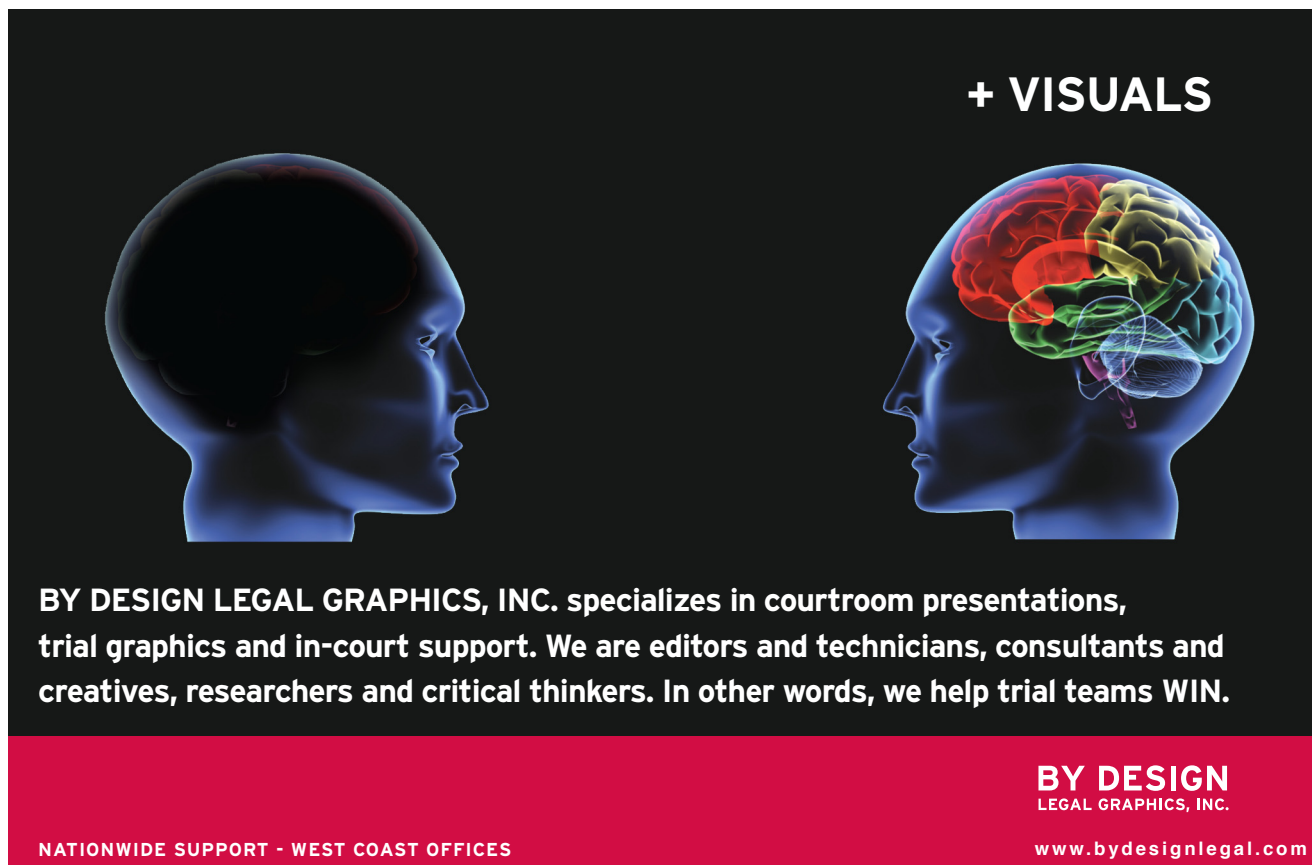
made to fit this blueprint. You will get a huge return on your investment of time building this rapport by uncovering ways in which to examine the witness more effectively, and making sure to include points enhancing the jurors' perceptions of your client.

The authors' research covers four decades ending with the 1990s; however, it must be noted that the new millennium has given us a brand new dynamic to politics – an African American president, a strong female contender for the nomination to the office of president, a female candidate for vice president in a conservative party, as well as a female contender for a position of power and influence at the head of a conservative, traditional values party. It will be interesting if the authors reexamine their research at the close of the decade when additional GSS data is available and see if there is any change in their findings as it pertains to gender roles in politics and the workforce, as well as further implications for African American litigators.

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+ VISUALS

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Online and Wired for Justice: Why Jurors Turn to the Internet

by Douglas L. Keene & Rita R. Handrich

“There is an online quitting-Facebook-for-Lent support group. But how is it possible to communicate support on Facebook without breaking your vow? Serving on a jury is one of those instances when the cell phone and the laptop are best left at home!”

Trials have been being disrupted due to the internet from as far back as 2001 according to the Citizens Media Law Project². The difference in our attention to it now is simply due to a dramatic rise in frequency and in media coverage. The recent proliferation of social networking sites (MySpace, Facebook, Plaxo, LinkedIn, and Twitter, for example) has resulted in a sense of always being ‘connected’. Cell phones are ubiquitous and we can ‘text in’ updates to our status on multiple websites to our friends and followers.

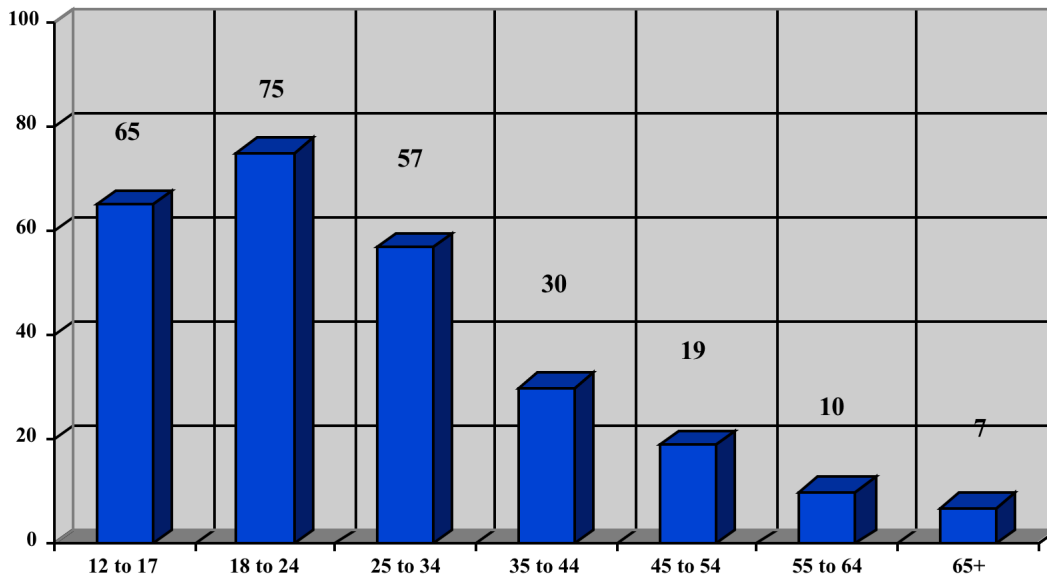
It is amazing how deeply social media has become entrenched into our lives. Adult internet user profiles on on-line social network sites are up from only 8% in 2005 to 35% in January, 2009³. Many of us (more than 34 million American adults) send text messages on our cell phones. The most likely texters⁴ are members of Generation Y, ages 18 to 27.

Courtroom trials⁵ are being ‘tweeted’ live by reporters, 140 characters at a time. Twitter users⁶ are compared to non-Twitter users and found to be more likely to consume news/do research on the go with their internet-enabled cell phones. They are not the only ones, however. In fact, by July of 2009, more than half (56%) of American adults have accessed the internet by wireless means⁷. Cell phone access (32%) is only slightly behind laptop access (39%) and now, on a typical day, 19% of us access the internet on a mobile device. This number may seem low to the uber-connected attorney, but it is up from only 11% in December, 2007—for a growth of 73% during that 16 month period.

An interesting aside: African Americans⁸ are the most active users of mobile internet. 48% have used the internet on a mobile device and, on an average day, 29% go online. Additionally, growth in mobile handheld use on an average day since 2007 among African Americans is twice the national average—up 141% as compared to the 73% average increase.

While parents grossly under-estimate their teen-aged children’s online social networking activity, teenagers⁹ repeatedly monitor social networking websites throughout the day. Baby Boomers are making inroads into social networking, but they complain they feel “left out”¹⁰ and that the experience is not targeted to their age group. Contrary to the media reports saying “Grandma’s on Facebook”¹¹, the experience remains largely the province of the young as illustrated by a recent Pew Internet Project¹² report. Use of social media is most pronounced among those 25 years of age and younger, with sharp cut-offs as we age.

Percentage (by age) with social network profiles



This pattern is also true among attorneys, who are “more connected”¹³ than their cohorts in the general population. Yet, even with higher use among attorneys in general, younger attorneys are more comfortable with social media than their older colleagues. A recent survey conducted for LexisNexis reports that 86% of attorneys between the ages of 25 and 35 are members of social networks compared to only 66% of those over age 46.

In short, social media is a fact of life. If the current patterns hold true, we will see increasing numbers of jurors for whom social networking is so habitual and life-integrated, they will be hard-pressed to see the justification for abstaining from “updating their status” during trial. Really. If a burglar can’t resist checking his Facebook¹⁴ status while in the high-adrenaline process of burglarizing your home, what’s to stop a juror during courtroom tedium? And as you’ll see on the following pages, it isn’t just jurors breaking the rules.

Who’s doing it? Attorneys, judges, witnesses, parties and jurors

While maybe we can understand witnesses, parties and jurors communicating about trials on social media—it seems like attorneys and judges should know better! And most do. There are several examples of both judges and attorneys who became ensnared in social media impropriety.

Judges

Lets start with the magistrate in England¹⁵ who got in trouble for tweeting about his cases—seemingly step by step by step. He ended up being turned in by a fellow magistrate who saw the tweets and complained. So, the judge tweeted his explanation: “I didn’t tweet whilst sitting in court but in the retiring room during the break and at the end of the hearing.”

Another judge met a lawyer in chambers during a divorce/child custody case and then “friended” him on Facebook where they commented on the case via Facebook. The wife in the divorce found out about the “friendship” after the case ended and complained. Oh dear. How about a public reprimand from the State Judicial Standards Commission? *Ex parte*, anyone?¹⁶

And finally, a judge inadvertently made public some of his own off-color humor on his family’s supposedly private web server. A three-judge panel admonished him for being “judicially imprudent”¹⁷ in not securing the web server.

Attorneys

Blogging about a “Judge Clueless,” thinly disguised case facts and client identities resulted in a 19-year assistant public defender¹⁸ losing her job.

Another attorney blogged about a case while he was a juror on that case! Forty-five day suspension, \$14K in legal fees and finally, lost his job¹⁹.

A young attorney asked a judge for a delay due to a death in the family. The judge granted the delay but then checked the attorney’s Facebook²⁰ page and saw partying but no real grieving going on. The lawyer sought a second delay. The judge declined and contacted a senior partner in the firm to share her on-line research. The young attorney has since “un-friended” the judge.

And finally, a Florida attorney blogged about a judge calling her an “evil, unfair witch”²¹. He claimed it was “free speech”. The State Supreme Court begged to differ.

Witnesses

During a video deposition, the deponent (in California) and his pro hac vice counsel (in Michigan) were shown only from the waist up. Turns out they were texting “below the waist”²² and PHV counsel accidentally texted plaintiff’s counsel. Court ordered for the disclosure of the text messages which violated Federal Rules of Civil Procedure.

A mistrial was declared when a Circuit Court judge in Florida discovered a witness texting his boss²³ while still on the stand during a side bar conference. And that’s not all! The same witness had been reprimanded for texting²⁴ another witness in the same case during deposition two months earlier!

Parties

A doctor who blogged under the pseudonym “Flea” decided to blog his own medical malpractice trial. He blogged about the trial, his impressions of the plaintiffs’ lawyer (whom he nicknamed) and said jurors were dozing off. He was on the stand when, in a “Perry Mason moment” the plaintiff attorney said, “Are you Flea?” and he actually admitted he was. The plaintiff’s attorney was obviously prepared to delve into the blog in open court and the case settled²⁵.

The trial of a man being prosecuted for third-degree rape and sodomy ended in mistrial when a juror reported receipt of a text message²⁶ sent from a relative of the defendant. The defendant remains in custody (unless his \$25,000 bond has been paid) and a new trial is scheduled for February 2010.

And finally, a New York model sued a billionaire for pressuring her into sex when she was only 16. Reporters found her MySpace page²⁷ and reported that “she” was in fact, a “he” and was probably much older than 16 at the time of the alleged affair. Her suit against the billionaire fizzled but she then sued the newspaper for defamation. The judge did not support her second suit.

For each of these examples there are countless others. After all that, you may find the stories on jurors to be disappointing! They are, in general, not as colorful as the attorney/judge/witness/parties stories but they have caused a major stir. Juror stories will be presented in two groups: jurors doing ‘research’ and jurors communicating about cases while sitting in judgment. The irony is that in virtually every case, the violator is usually very sincere that their intent was innocent, and (in the case of jurors, at least) they did not perceive what they were doing as being a material violation of the rules.

Jurors using the internet to do research, everywhere, including during jury duty

There are many recent cases where we have learned that jurors have done research and sometimes their research has disrupted court proceedings.

In March, 2009, a federal drug trial was derailed when the judge discovered that nine of the 12 jurors had done internet research on the case. They were eight weeks in when the mistrial²⁸ was declared. When asked why they did the internet research, one juror replied “I was curious”²⁹.

August, 2008 in England: A judge in a manslaughter trial received from a seated juror a Google Earth map of the alleged crime scene and a list of 37 detailed questions about case. In another alleged child cruelty trial, a juror conducted internet research³⁰ on the defendant.

Juror research is not always on the internet. Sometimes it’s done in the bathroom. The recent Widmer case found jurors experimenting to see how long it would take for human skin to dry. The retrial³¹ is scheduled for next year and in mid-September 2009 Dateline NBC³² ran a television show on the case!

Some of the stories about juror misconduct are so outrageous they have taken on the power of urban legend, so be careful of believing too much... especially if you read about it on the internet!



Jurors communicating about cases

These are illustrative only. There are other stories floating about the internet but this sample offers a snapshot of how jurors communicate in violation of courtroom rules.

November, 2008: An English juror conducted a Facebook poll to determine her verdict. A juror was uncertain which way to vote on a jury in a child abduction/sex abuse case so she posted details about the case and then held a Facebook poll to help determine her vote. She was dismissed³³.

September, 2009: Pennsylvania jurors consistently updated their Facebook pages during trial. Defendant was convicted but lawyers laying groundwork for appeal³⁴.

March, 2009: “I just gave away TWELVE MILLION DOLLARS of someone else’s money” tweeted³⁵ a juror in the case against Stoam Holdings in an Arkansas court. Defense asked for a retrial but juror says he tweeted after the trial concluded.

July, 2009: A Bronx juror friended a witness. A Bronx schoolteacher-juror sought out a firefighter witness on Facebook while jury was deliberating and issued a ‘friend’ invitation. The firefighter responded after the trial was over and then reported her. She says “that was a total mistake. I should not have done that”³⁶.

We've seen that both people who should know better (judges, attorneys) and laypeople (witnesses, parties, jurors) can, and do, get caught in the web of social media. It is so easy, so constantly present, we forget the same rules about communication apply to these new forms of communication.

Why is this happening now?

Some would say that people are more self-centered now and do not consider the impact of their behavior on others. This seems an easy explanation (without any empirical support) and the answer is most assuredly more complex than that. We live in an era when access to information is ubiquitous. We are used to having a question cross our mind and checking for the answer³⁷. We do it without thinking. And jurors do too. A recent quote³⁸ in an article on jurors doing research on the internet illustrates the habitual nature of social media in our lives:

“People tend to forget that e-mail, twittering, updating your status on Facebook is also speech. There’s an impersonality about it because it’s a one-way communication—but it is a communication.”

In Harris County, Texas this year, a tech-savvy court administration decided to provide wireless internet access in the courthouse. What good do we anticipate will come from that? When our access to data via the internet is so available, some wonder if it is even possible to control juror access³⁹ to data any longer. And jurors are not allowed to ask questions in trial. Questions do come up. How can they find the answers they believe they must have to understand the facts presented at trial? Google⁴⁰. Is that witness’ alibi about time to drive from one place to another accurate? Check Google Maps. Complex technology underlying a patent claim? Simplify it⁴¹ via Wikipedia. Jurors may not see this as ‘wrong’ but merely clarifying and unfortunately, less tech-oriented judges may not understand⁴² the technology enough to know how to instruct.

The issues we need to address are juror curiosity and juror naïveté about why such behavior is prohibited. There are good reasons for the rules of the legal system but we have to educate jurors and train ourselves to anticipate the questions that will arise and modify our case presentation to respond to them.

Legal system sentiments

The legal system has reacted with distress to the steady stream of social media/social networking incidents within its purview. The focus has been on revising jury instructions so that jurors are explicitly told to not do internet research. Proposals include multiple ways of modifying jury instructions:

An e-discovery⁴³ blog recommends asking the judge to expand boilerplate instructions to include explicit education about why jurors should not do research (including internet research), what will happen if they do, and that jurors should help the court enforce that restriction.

The Jennifer Strange (water intoxication as a result of a radio station contest) case has resulted in revised jury instructions in a San Diego court that specify, “Do not use the internet”⁴⁴ and jurors are asked to sign declarations saying they will not use personal electronic and media devices (including computers, cell phones and laptops) to research or communicate about any aspect of the case.

The FindLaw Knowledge Base offers a “Motion for the Court to Further Issue Preliminary Instruction to Jurors”⁴⁵ which they recommend be given to jurors at each recess and lunch and perhaps even have the entire instruction re-read to jurors at the beginning and end of each day.

“You may not receive information about this case from any source other than what you are presented in this Courtroom concerning the case. That means do not “google” any party or lawyer or court personnel in this case; do not conduct any research whatsoever on the Internet about this case or the parties or facts involved in it; you may not “blog” about the case or events surrounding the case or your jury service; you may not “tweet” about anything to do with the parties, events or facts in this case or your jury service on this case. Do not send any email to anyone conveying your jury experience or information about this case. In the jury room, you are not to use your cell phone at recesses or lunch to call anyone to ask questions about issues in this case or to report facts about this case. You may not use Facebook, YouTube or any other “social” network on the Internet to discuss your jury service or issues in this case or people involved in the case, including the lawyers. Do not attempt to recreate by experiment at home any evidence which you hear as testimony in this Courtroom. Failure to abide by these instructions could result in your being found in contempt of court, or cause the trial to end.”

A California court had to excuse an entire panel of 600 jurors when several of them admitted they had conducted internet research on a case. Jurors on that panel expressed confusion about whether “not doing research” applied to the internet. San Francisco Superior Court⁴⁶ is proposing a rule that would become operative on January 1, 2010:

"You may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet to obtain or share information."

Others have recommended that the detailed instructions about internet device usage be repeated often⁴⁷ and that they be very specific: “No Blackberry. No Google. No Twitter. Nothing.”

The Michigan Supreme Court is the first to ban all electronic communication by jurors during trial. Their new rule⁴⁸, effective September 1, 2009, requires “state court judges to instruct jurors not to use any electronic communication devices while in the jury box or during deliberations. Jurors will also be told that they cannot use electronic devices to obtain or disclose information about the case when they are outside the courtroom”.



Public sentiment

Public sentiment about this issue is mixed, but falls in three general categories.

The New York Times article on jurors and the internet⁴⁹ gathered almost 300 comments very quickly. Most of the comments were along the lines of “take away their phones!”

A second group (not as large as the first but substantive) thought that the legal system should figure out how to deal with a new issue because it wasn’t going to go away. They saw the expectation that confiscating jurors’ phones would be taken as silly and not really addressing the issue since jurors could simply do research at home after hours.

A small (but very vehement) third group thought that the efforts from the legal system to keep jurors off the internet and from doing research was a systemic effort to keep jurors from learning the truth and that jurors, therefore, needed to dig deeper to uncover the truth. This group was clearly negatively disposed toward the court system, but there was a darker undercurrent of suspicion and governmental interference with real justice.

While the first two perspectives make rational sense, the third is disturbing in the strength of the belief that legal rules in place for years are there to circumvent true justice. While it is a small group, it is a loud and angry group and needs to be considered. A sampling of their comments⁵⁰ follow, but keep in mind that the article to which they are responding was posted on March 17, 2009, at about 2:00 p.m. All of these comments were submitted within 60 minutes of the time the article was published, and there were over 300 at the time the comments were closed:

Take their phones

Dave, Brooklyn, NY, March 17th, 2009, 2:22 pm

Simple solution here: confiscate all cell phones, pagers, cameras, or palm pilots before jurors enter the courtroom. C'mon, is this really that difficult a problem to solve?

Steven, Parsippany, NJ, March 17th, 2009, 2:22 pm

That's nice...in a time when Florida along with the vast majority of other states face record deficits, let's cost the state a fortune by breaking a rule everyone who watches television knows. There's no need to change any rules...these people are just idiots. Everyone knows you're forbidden to research a trial you're sitting on the jury of. This is no different from a juror reading an editorial in a newspaper. Now, luckily, we can catch the jurors.

We have to figure out how to make this work

Csdiego, Washington, DC, March 17th, 2009, 2:05 pm

Jurors have always been on their honor not to look up facts of the case. The difference now is that, with Facebook and Twitter, it's easier to find out when a juror has broken the rule. I admit that when I was a juror a few years ago, I broke the rules and went to have a look at the intersection where the crime took place, just out of curiosity. That didn't influence my judgment at all, and the jury ended up hanging anyway.

Jlt, Ottawa, March 17th, 2009, 2:22 pm

This is the new reality. The legal system will have to adjust; it can't just rely on the rules developed for jurors in medieval communities.

They are trying to hide the truth we can't let them get away with it

Bill, Camarillo, CA (Los Angeles), March 17th, 2009, 2:43 pm

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

James, Los Angeles, March 17th, 2009, 2:46 pm

The entire adversarial judicial system is based on the judge and the attorneys being in the know about everything and the jury being in the dark about some things. Why? Does ignorance make for impartiality? Why does a judge know better than the jury what kind of evidence is biased or not? Isn't it problematic when the trier of fact is given limited facts? The whole ancient system is classist. Messy information cannot be pre-sifted into biased and not. It's a mess and that is why there is an enormous amount of injustice.

Suzanne Cordier, Portland, Oregon, March 17th, 2009, 2:48 pm

Fully informed jurors? Oh, no. How will lawyers manage to continue subverting truth and justice now?

Edward Virtually, United States, March 17th, 2009, 2:48 pm

I'd love to know the justification for allowing judges to exclude evidence not challenged by the defendant, as it seems little more than a way to rig the outcome of the trial by suppressing facts inconvenient to the outcome desired by the judge and/or prosecutor.



Recommendations and strategies for addressing the issue of jurors and the internet

The scope of the problem is large and might seem daunting. But there are a number of things that can be done to improve the likelihood that jurors will abstain from doing internet research on the case for which they sit in judgment.

Keep in mind that due to open records requirements, nearly all pretrial filings are available on the internet, including motions in limine, joint submissions, witness lists, etc. These are clearly matters of great sensitivity, and it is crucial that jurors understand that they are barred from accessing anything related to a case they might be called on.

What is inescapably clear is that instructing jurors to avoid internet activity that touches on the case issues is no more effective than a court instruction to be fair-minded. Most do, but as a practical matter many find it impossible. If it is not dealt with in a very pointed and thorough voir dire examination, there are going to be problems. Instructions are crucially important, but are not going to be enough.

1. Instruct jurors in the initial summons for jury duty that they are to refrain from any effort to learn about cases that may be going to trial at the time of their summons. It must be made clear that this includes newspapers, internet and electronic research, or personal investigations.
2. If the venue makes use of a central jury facility, have jurors re-instructed that they are forbidden from looking up any information about any cases pending before the court, and have them sign statements of understanding that failure to comply with this is a violation of the law and subject to punishment.
3. Add voir dire questions that address actual juror internet use (will they be likely to violate the rule and/or have they already done so?⁵¹)
4. Ask in voir dire whether jurors would abide by judicial instructions not to do internet research on the case. If a juror acknowledges they could not abide by that instruction, they are a cause strike. Note the experience of an attorney in a Kansas City trial⁵²: “During voir dire, we asked whether jurors would abide by instructions to not do research on the Internet, and probably six to 10 potential jurors said they could never abide by that.”
5. Revise jury instructions with specific language about electronic device usage (iPhones, Blackberrys, and other smart phones), internet research (Google, Yahoo, Bing, etc.) and social networking applications (such as Facebook, Twitter & MySpace).
6. Repeat the instructions, at the start of the day and the end of the day, at breaks and recesses. Leave the instructions fresh in the minds of jurors.
7. Have jurors sign declarations that they will not research the case details on the internet.
8. Educate jurors on the importance of hearing a case based only on facts presented in court, reporting any outside research or text messages, and to remind each other in the deliberation room that they are to make decisions based only on what is presented as evidence.
9. Encourage jurors to think of the courtroom as a playing field where both sides have agreed to play by a set of prescribed rules. One of those rules is that the party(s) on trial will be judged only by a set of facts that both sides have had an opportunity to examine and challenge.
10. Make it clear that violations of these rules are a violation of law, for which punishment can be imposed. Make it important, not pro forma, and not merely polite.



11. Satisfying the jurors' reasonable "need to know" can gain compliance with the rules.

- a. Historically, jurors are told what they can't do or what they can't know, without explaining why that is the case. Many jurors take the position of "Really? Alright, if you won't tell me I'll find out for myself!" The level of information provided by the judge is usually discretionary, and many judges are beginning to explain the reasons for the rules. For example,
 1. Why no internet research? "In court, anyone who is accused of something deserves the right to face their accuser. We can't try people by rumor or innuendo. And we can't put Wikipedia on the stand and question why they say what they do..."
 2. Insurance coverage can't be considered? "The reason this can't be considered is that the insurance companies have a right to claim any past expenditures they have made in the case, if the lawsuit results in an award for something they have paid. So it isn't fair or reasonable to consider to consider insurance coverage."
- b. Allow questions by the jury. To the extent that they have reasonable and proper questions for witnesses, they are less likely to conduct research on their own if the witnesses addresses them more completely. Also, they feel more fully engaged in the process, rather than a passive (if not captive) observer.

We can't expect jurors to stop looking for answers to questions that arise for them—they have felt the pleasure of quick and convincing research tools, and many refuse to set them aside. Our mock trial work and post-verdict debriefings of jurors teaches us again and again that jurors take their work seriously and want to do the right thing. We have to take seriously the responsibility of teaching them how to deliberate both effectively and fairly in the 21st century.

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Jury Research for Settlement: The Price Is Right?

By Melissa M. Gomez

Knowledge is power.
Sir Francis Bacon (1561 - 1626)

Debunking the myth

It has been said that a case that goes to trial is the failure of negotiation. Why not help the negotiation along with the most powerful tool available - information? Trial attorneys have increasingly employed jury research to inform theme development and strategy for going to trial. However, there is a misconception among many litigators that such exercises are only relevant right before trial and only for the purpose of developing themes and arguments for trial. In reality, the benefits of jury research are vastly greater, and may be used much earlier in the litigation process, whether the trial team is intending to bring the case to trial or not.

Specifically, jury research designed to assess damages (also called valuation studies) arms litigators with information to guide settlement negotiations. Litigators have used it to convince a stubborn client that settling is in his best interest; assess how high damages can really go; provide a bargaining tool in negotiations with opposing counsel; or even to allow an alternative way to resolve the dispute when done collaboratively with opposing counsel. In any scenario, information gleaned from these research endeavors has proven quite helpful.

The reality check

In a contract dispute case involving a large franchised restaurant chain as the defendant, the trial team struggled with its client. The client, CEO and founder of the restaurant chain, was a strong, stubborn and brilliant professional who had built an empire on his tough negotiating skills and unwillingness to yield when he believed he was “right.” This client was so steadfast in his belief that he was “right” in this case that he refused to settle with the plaintiffs, despite some very damaging evidence. The trial team, knowing that there was a danger of losing the case, put on a full mock trial with in-depth damage assessments to provide the client with hard evidence of the danger that could lie ahead at trial. The research uncovered that most jurors, while agreeing that the defendant was not entirely at fault, did apportion it some blame - to a tune upwards of \$1 million. With data in hand and videotape of all presentations and proceedings, the client could no longer deny that there was a chance that he could lose big. Several weeks after the results were delivered; a settlement was reached.

It is not uncommon that clients, especially successful professionals and tough negotiators who are not accustomed to losing, become so entrenched in their own convictions that they are hesitant to settle a case. Whether they enjoy the thrill of the fight, feel as though settling is admitting wrongdoing, or are so angry at the plaintiff that the thought of voluntarily offering money seems completely out of the question, these clients put themselves at risk of losing big - cutting off their noses to spite their faces. In these kinds of scenarios, research may be used as an investment in “reality,” so that clients can experience first hand their real exposure in a non-binding context, and action can be taken to come to a more favorable resolution. While the client may suffer a blow to the ego, the potential blow to the bank account (in terms of damages and the cost of going to trial) may be softened.

The lotto

In a case involving a tragic accident, an elderly couple was severely injured. The husband did not survive and the wife sustained multiple serious injuries. Plaintiff’s counsel thought this case was worth tens of millions of dollars considering that the elderly woman went through several months of very painful physical therapy, while dealing emotionally with the death of her husband. The defendant, a transportation company involved in the accident, would not settle for such a high demand knowing there were other plaintiffs from the same accident waiting in the wings.

Research showed mock jurors wanted to give the plaintiff whatever she requested. It turned out that, although the defense believed that her age could be a mitigating factor to damage awards, jurors saw her as “everyone’s grandma.” She was very likable, and her story

packed a strong emotional punch. For the defendant, the case was very dangerous to take to trial. Notwithstanding what it had learned in the research, it would not settle for an amount amenable to the plaintiff. As a result, both sides decided to roll the dice, and the case went to verdict. Jurors in the real trial had the same reactions as those in the research, and the plaintiff walked away with the largest jury award to an individual plaintiff in the venue's history.



Especially when punitive damages are in play, the sky can be the limit. Because of frightening case examples like the one above, it is natural for the trial team and its clients to react strongly to the fear of the unknown, especially in cases that have a high emotional impact. Research to assess damages in these cases helps combat the possibility of clients throwing too much money at a scary problem just to make it go away. Jury research designed to assess damages can provide the trial team with an understanding of how high the sky can really be in a particular case, so that informed decisions may be made regarding whether to proceed with trial, and how far to go to try and settle. For many nervous clients, the best way to alleviate fear of the unknown verdict is to replace the unknown with information elicited from potential jurors.

The ace

A large corporation was being sued by a group of minority plaintiffs for discrimination in one of its production facilities. One plaintiff claimed he had experienced severe racial slurs, racist graffiti and other traumatizing discriminatory events at the facility. While the other members of the group admitted that they had not directly experienced events of racism or discrimination, they stated that the knowledge that these events occurred in their place of employment was emotionally damaging. The plaintiffs were suing the corporation for upwards of \$15 million.

Fearful of the impact of disturbing evidence in the case, the trial team wanted to settle and needed information to aid their negotiations. To that end, the trial team conducted focus group research to determine how jurors would assess the damages in the case. As it turned out, while the case for the primary class member (who claimed to have experienced the events directly) was quite strong, jurors were suspicious of the intentions of the other members of the class. As a result, jurors became suspicious of the validity of the case in its entirety. Instead of increasing the damage award, as may be expected, the inclusion of the other class members actually diluted the damages. While jurors did feel that the plaintiffs were damaged, they valued the case at a minimal sum.

Armed with the results of the research, the trial team attended mediation with the other side and chose to reveal what they had found. To prove that both sides had been fairly presented at the research, the team permitted opposing counsel to watch the videotape of the plaintiffs' presentation. Faced with this objective information, the plaintiffs accepted a settlement well below their original damage claim.

Whether or not you plan to show your hand to the other side, research to assess damages may provide a bargaining chip in negotiations. Data on damages provides a context for battle in the settlement arena, and a foundation upon which informed decisions are made.

The collaboration



A wrongful death case in the Midwest was filed against an oil company as a result of the death of a 74-year-old man who was struck and killed by a gas truck that had run a red light. The deceased was an active, well-loved and highly recognized member of the community. The case was set for jury trial, but both sides agreed that they wanted to settle. The problem was that the plaintiff's and defendant's damages estimates were so far apart, that the possibility of reaching settlement looked grim. The defense focused on the deceased's age and retirement status, while the plaintiffs were sure a jury would be willing to award high damages because of his status in the neighborhood and the loss the community felt upon his passing. As an alternative dispute resolution, the two sides agreed to engage in a collaborative effort to research the case, assess damages and use the results to

mediate to a settlement. With the mediator present at the research, both sides presented their cases, damages were assessed, and based on the mock juror feedback and general outcome of the research, the case was settled the next day.

Considering the substantial costs of actually taking a case to trial, alternative dispute resolutions have become increasingly popular. Having both sides engage in a collaborative effort and splitting costs, both plaintiff and defense can present their arguments and gauge how potential jurors evaluate damages. This has proven helpful as a nonbinding exercise to inform settlement negotiations.

The bonus

No matter what the initial purpose of a damages assessment exercise, jury research still provides a comprehensive assessment of the juror perspective to inform key case themes and strategies. It also proves to be a useful tool in the event that negotiations do fail, or in the event that the research results indicate that taking the case to trial may be a worthy endeavor. Regardless of the eventual mode used to resolve the dispute, jury research provides the power of information and insight into the way jurors think, speak and make decisions about a case, so that we can make informed decisions to advocate for our clients.

A jury consultant and owner of MMG Jury Consulting, LLC, Dr. Melissa Gomez (melissa@mmgjury.com) holds a Ph.D. and M.S.Ed. from the University of Pennsylvania. Her expertise is in 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. You can review more information about Dr. Gomez and her practice at www.mmgjury.com.

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Guilty but Mentally Ill (GBMI) vs. Not Guilty by Reason of Insanity (NGRI):

An Annotated Bibliography

by Jennifer Kutys and Jennifer Esterman

Introduction

The mental status of the defendant has long been an issue of interest for legal professionals. Most states have some kind of insanity plea (i.e., Not Guilty by Reason of Insanity [NGRI]). States vary on which guidelines they use to formulate their legislation (most commonly the M’Naghten rule or the American Law Institute’s guidelines for insanity defenses). Regardless of how states develop their standards for the NGRI plea, most have similar outcomes: hospitalization instead of incarceration¹. However, the question remains, what if a defendant does not meet criteria for the NGRI plea, but was clearly mentally ill at the time of the offense?

For these scenarios, the plea of Guilty but Mentally Ill (GBMI) has become an option. While the GBMI plea has received growing press coverage, it is still only available in a minority of states (just over 20 states at the time of this writing). The increase in press on the GBMI option has largely been in response to highly publicized acquittals based on NGRI verdicts (even though these acquittals are somewhat uncommon)². The GBMI plea is most common when there is clear evidence of either a lack of the defendant’s appreciation for the wrongness of their actions, or a lack of understanding of the consequences of their actions. Because defendants who meet both of these criteria often opt for the NGRI plea, the GBMI plea is typically reserved for those who only meet one criterion. The GBMI plea resembles a standard guilty plea, but denotes the fact that the defendant is in need of mental health treatment in addition to punishment for his/her crime.

Controversy surrounds the GBMI plea. Critics claim that juries are under the impression that the defendant found GBMI receives specialized treatment. In fact, these defendants are sent to the same correction centers as other defendants found guilty of crimes. Most critics rally for the explanation of this fact to juries before they deliberate. Critics further argue that with the over burdened mental health services in prisons today, the odds of GBMI inmates actually receiving any specialized mental health care is very low³. On the other hand, supporters of the GBMI plea claim that justice is more served by this trial outcome than in NGRI cases. They claim this is true because inmates who were found guilty but mentally ill are held accountable for their crimes even after they are restored to mental health, unlike individuals who were successful with the NGRI plea⁴.



In recent years, literature has shown that when given the GBMI option, mock jurors are more likely to select that alternative rather than a straight guilty or NGRI verdict⁵. The following is a literature review on recent research regarding both the GBMI and NGRI pleas. It is intended to be a general overview of the available literature on the topic of NGRI pleas versus GBMI pleas.

The authors of this annotated bibliography utilized a rating system ranging from 1 to 5. This rating system is not intended to reflect quality, but instead is intended to reflect usefulness for the authors’ purpose. For example, an article with a rating of ‘5’ would be considered highly useful as a tool for someone interested in learning more about NGRI vs. GBMI pleas or an area within these topics such as juror probability of endorsing these pleas. The audience that would benefit most from each article is mentioned in each annotation. Therefore, an article with a rating of ‘1’ is not a poor quality article, but is an article that did not meet the specific goal of this author at this time (a general, balanced introduction to the topic of NGRI and GBMI pleas). The articles are presented in alphabetical order based on the first author’s last name.

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The authors, a professor and researcher from Russell Sage College, and researchers from Policy Research Associates in New York, examine the effects of the guilty but mentally ill (GBMI) legislation on the use of the insanity defense in Georgia. The authors begin by presenting information on the background of the GBMI verdict, the debates surrounding the verdict, and how GBMI has affects the use of the "insanity verdict." The authors then present a study in which they examine the data in Georgia of all the defendants that entered insanity pleas before and after the introduction of the GBMI verdict. They conclude, in contrast to prior research, that GBMI decreases the likelihood of an insanity verdict. They also find that defendants that receive the verdict of GBMI are typically white males with a serious mental disorder, charged with murder or robbery, in which an unrelated female victim is involved. Lastly, the results suggest that individuals who receive a verdict of GBMI receive a harsher sentence than someone who plead guilty, making the GBMI plea a less appealing option. This article is useful for someone who is interested in the history of GBMI, and the sentencing differences between someone who received a verdict of guilty verses GBMI. **Rating: 4.5**

Grisso, T., Borum, R., Edens, J.F., Moye, J., & Otto, R.K. (2003). *Evaluating Competencies: Forensic Assessments and Instruments*. Plenum Publishers: New York.

The authors, professors at the University of Massachusetts, South Florida, Sam Houston State University, and Harvard Medical School write about the differences between NGRI and GBMI. The authors first explain what is needed to establish that one is guilty of a crime. Then, they discuss the plea of NGRI, the history of NGRI, why it is difficult to convince a jury to render a verdict of NGRI, and the controversy it has created. The authors discuss the history, intent and differences of GBMI as well as the impact it has had on the legal system. This book chapter is extremely useful to someone looking for definitions and background of NGRI and GBMI. **Rating: 5**

Murdock, D. (Producer). (October 17, 2002). *Frontline: A crime of insanity*. [Television series]. Public Broadcasting System (PBS).

As part of the popular television series, Frontline examines the case of Ralph Tortorici, a man with clear mental illness who was convicted of a violent crime. The episode provides information regarding this specific case and uses the highly publicized case as a means to examine the current insanity pleas. The episode examines issues regarding the mentally ill in jail, and the current state of insanity pleas (including statistics of how often the pleas are used, and so on). This educational series presents the information in an engaging manner while still providing a vast overview of the background of the insanity defense, past issues, and emerging topics within the insanity pleas. This episode is helpful for an individual seeking a general overview of the topic. This is particularly true if the individual is less interested in empirical/documentated information and more interested in gaining a general breadth of information associated with the topic. **Rating: 4**

Poulson, R., Braithwaite, R., Brondino, M., & Wuensch, K. (1997). Mock jurors' insanity defense verdict selections: The role of evidence, attitudes, and verdict options. *Journal of Social Behavior and Personality*, 12(3), 743-758.

The authors, researchers from major universities in North Carolina, South Carolina, and Georgia, examine the role of evidence, juror attitudes, and possible verdict options presented to jurors in insanity defense selections. The authors begin by reviewing literature that states that juror attitudes (i.e., high on crime-control, high on death penalty support, and so on) have a direct impact on verdict selections. The researchers then present a study suggesting that the examination and evaluation of evidence had the most impact on whether or not jurors vote for a GBMI verdict. Finally, the authors review other factors that affect juror decision-making (i.e., evidential, extralegal, and attitudinal factors). This article is particularly helpful for individuals aiding with the selection of juries when GBMI or NGRI is entered as a plea. **Rating: 5.**

Poulson, R., Wuensch, K., & Brondino, M. (1998). Factors That Discriminate Among Mock Juror's Verdict Selection: Impact of the Guilty But Mentally Ill Verdict Option. *Criminal Justice and Behavior*, 25(3), 366-381.

The authors, researchers from major universities in North Carolina and Eastern Carolina, examine the verdicts of college students between two conditions: with or without the guilty but mentally ill verdict being an option. The authors begin the article by providing background information on the controversy of using the insanity defense (NGRI), why the guilty but mentally ill verdict (GBMI) option was created, and research regarding when GBMI is likely to be used instead of the NGRI verdict. The authors then present a rationale for their study, stating that it is still unclear which group of jurors is more likely to vote for the GBMI verdict rather than the NGRI verdict. The authors then present a study that suggests when the verdict of GBMI is available for use, there is a reduction in guilty and NGRI verdicts. The authors also suggest that some of the jurors who used the GBMI verdict held that the defendant would be able to benefit from treatment. This supports previous research findings. This article is particularly helpful for individuals aiding with the selection of juries when GBMI or NGRI is entered as a plea. **Rating: 5**



Roberts, C.F., Sargent, E.L., & Chan, A.S. (1993). Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty But Mentally Ill Instructions. *Law and Human Behavior*, 17(3), 261-275.

The authors, researchers and professors from State University of New York at Buffalo, examine whether judicial instructions explaining different verdicts increase juror understanding of the verdicts, and therefore create a shift in the verdicts that are given. The authors begin by discussing how jurors normally make decisions in giving a verdict as suggested by previous research. Then, the authors discuss research findings about the differences in juror construal of the different verdicts offered (guilty, NGRI, and GBMI). Finally, they present a study examining juror construal in a case of a severely psychotic man. They conclude that many of the respondents intend their GBMI verdicts to suggest diminished blame and punishment. This article benefits someone trying to understand how jurors understanding of verdicts effects the verdict they render. However, this article is written in a highly academic tone as opposed to a more readable, engaging tone and requires several readings for comprehension. **Rating: 3.5**

Sloat, L., & Frierson, R. (2005). Juror knowledge and attitudes regarding mental illness pleas. *Journal of the American Academy of Psychiatry and the Law Online*, 33(2), 208-213.

The authors, a professor at the University of Maryland and a psychiatrist at medical hospital, begin by examining juror knowledge of the difference between GBMI and NGRI pleas. They find that even in highly educated jury pools, very few (less than 5%) can correctly describe the difference. They then present a study examining attitudes and knowledge of jurors regarding mentally ill pleas. The study suggests that most jurors have a vast misunderstanding of both the GBMI and NGRI pleas. Participants also seem to be in support of offering jurors more information before they were asked to sentence a mentally ill defendant. This article offers a cohesive, comprehensive review of basic definitions and attitudes regarding pleas and presents a convincing study regarding juror attitudes. It is recommended for individuals interested in learning more about a general overview of GBMI vs. NGRI pleas, and for those in academia who wish to review quantitative studies regarding these two pleas. It is written in a highly academic tone as opposed to a more readable, engaging tone. **Rating: 4.5**

Slovenko, R. (1997). Should 'guilty but mentally ill' replace the insanity plea? *Physician's Weekly: Highlights and Analysis of Medical News*, 14(40).

This article is a short debate between two professionals. First, Abraham Halpern, M.D., a professor of psychiatry at the New York Medical college, argues in support of the GBMI plea replacing the insanity plea. On the other hand, Ralph Solvenko, J.D., Ph.D., a professor of law and psychiatry at Wayne State University, argues against the GBMI plea. The article is a very brief, point-counterpoint argument with facts and opinions supporting each position. This article is particularly helpful for individuals looking for a very brief summary of the proponents and opponents arguments on the issue of GBMI vs. NGRI. This article does not provide a background of either argument nor does it provide references where readers can verify any of the presented arguments. **Rating: 3**

Endnotes

- ¹ Sloat, L., & Frierson, R. (2005). Juror knowledge and attitudes regarding mental illness pleas. *Journal of the American Academy of Psychiatry and the Law Online*, 33(2), 208-213.
- ² Poulson, R., Braithwaite, R., Brondino, M., & Wuensch, K. (1997). Mock jurors' insanity defense verdict selections: The role of evidence, attitudes, and verdict options. *Journal of Social Behavior and Personality*, 12(3), 743-758.
- ³ Slovenko, R. (1997). Should 'guilty but mentally ill' replace the insanity plea? *Physician's Weekly: Highlights and Analysis of Medical News*, 14(40).
- ⁴ Murdock, D. (Producer). (October 17, 2002). *Frontline: A crime of insanity*. [Television series]. Public Broadcasting System (PBS).
- ⁵ Sloat, L., & Frierson, R. (2005). Juror knowledge and attitudes regarding mental illness pleas. *Journal of the American Academy of Psychiatry and the Law Online*, 33(2), 208-213.

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Jennifer Kutys [hinman.4@wright.edu] is a doctoral student at Wright State University, School of Professional Psychology in Dayton, Ohio. Her professional interests are in the areas of forensic assessment, severe mental illness, and the effects of bias on decision-making.

Jennifer Esterman is a doctoral student at Wright State University, School of Professional Psychology in Dayton, Ohio. Her professional interests are in the areas of cognitive and personality assessment; and working with individuals that have experienced trauma. Jennifer also loves football but that may be irrelevant to the reader.

We asked three experienced trial consultants to respond. Of the three responses below, one consultant was a novice to the NGRI/GBMI area (Amy Cluff); one consultant had taught students about NGRI/GBMI (Cheryl Lubin) and one consultant had worked on a highly publicized NGRI trial (Karen Hurwitz).

Amy Cluff responds to the Annotated Bibliography on GBMI and NGRI

Amy Cluff is a Research Associate and Associate Trial Consultant at Bonora D'Andrea, LLC in San Francisco (www.bonoradandrea.com).

I am responding to this article from the perspective of a novice in the area of NGRI and GBMI. As such, I found myself needing an elementary foundation in order to proceed—all of the articles in this bibliography seem to assume a level of knowledge that a novice may or may not have.^a

My very first time in a courtroom, I observed the jury selection proceedings of a capital case for which the defendant pleaded Not Guilty by Reason of Insanity (NGRI).^b Something struck me immediately during the voir dire process: the prosecution had an advantage in being able to uncover opposition to the death penalty with relative ease—people with strong opinions seem to have developed them well before being called as a juror. The task for the criminal defense attorney seemed far more difficult because he had to address both death penalty attitudes as well as NGRI claims. Regarding death penalty attitudes, his job was to reveal jurors who believed that anyone who was found guilty of killing another person should automatically be sentenced to death—the “Automatic Death Penalty” or ADP jurors. While this may be a common attitude, I have seen that it is often more difficult to get judges to understand that jurors can and should be excluded on this basis. The criminal defense attorney also had to address the common perception among jurors that NGRI does not offer true punishment sufficient for the crimes committed.

In any case, the criminal defense attorney with a mentally ill client must help jurors to contemplate and then reveal their views on insanity pleas when many may not have considered the subject before that moment. I gained a greater awareness through reading these articles that the NGRI plea is used not only for violent crimes, but also minor assaults, theft or shoplifting, and other misdemeanors.

Jennifer Kutys and Jennifer Esterman have provided in their annotated bibliography sources covering a lot of ground: from the history of Guilty But Mentally Ill (GBMI) and longstanding criticisms, to empirical research providing insights to case and trial strategy as well as jury selection.

For an introduction to the subject that would be especially beneficial to someone who was new to these issues, I would recommend *Evaluating Competencies: Forensic Assessments and Instruments* (Grisso, et al., 2003) and *Measuring the Effects of the Guilty But Mentally Ill (GBMI) Verdict: Georgia's 1982 Reform* (Callahan, et al., 1992). The former article does well in summarizing the NGRI vs. GBMI debate amidst a wealth of information relevant to attorneys working with forensic expert witnesses. The latter article lays a very good foundation and also offers evidence of an increase in risks for defendants who plead NGRI and receive a GBMI verdict. One of the many concerns raised in this article is that jurors, fearing that an NGRI verdict does not ensure public safety, will use the GBMI verdict to convict defendants who are in fact legally insane.



GBMI has been adopted by 14 states in order to satisfy public demands in response to high-profile NGRI acquittals, with the intended goals of reducing NGRI acquittals and ensuring proper mental health care for those convicted. More states may soon join rank (Washington may be next^c).

For one unfamiliar with the GBMI option, it is helpful to understand the duality that exists. The GBMI plea is a choice for mentally ill defendants wishing to waive their right to a jury trial in the hopes of receiving mental health treatment and a possible lesser sentence.^d At the same time, the GBMI verdict is a boon for the prosecution in that offering this option to jurors increases the likelihood of a guilty verdict (and a possible harsher sentence) (Grisso, et al., 2003).

For those interested in research on the effects of the GBMI verdict option—specifically that a GBMI verdict option displaces both NGRI and Guilty verdicts significantly, resulting in an overall increase of guilty verdicts while the number of not guilty verdicts is reduced, I recommend these three articles from the bibliography (in rank order):

Mock Jurors' Insanity Defense Verdict Selections: The Role of Evidence, Attitudes, and Verdict Options (Poulson, et al., 1997).

Factors that discriminate among mock jurors' verdict selections: impact of the guilty but mentally ill verdict option (Poulson, et al., 1998),

Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty But Mentally Ill Instructions (Roberts, et al., 1993).

An important social policy issue raised by some of the research pertains to the impact of the GBMI sentence on the criminal justice system. Guilty But Mentally Ill creates a new category where criminal intent – a pillar of our criminal justice system – is no longer required. Prosecutors can now gain convictions without demonstrating that the accused had sufficient *mens rea* to commit the crime. This is a potentially dangerous category of criminal sentencing that may open a Pandora's box and result in a withering of Constitutional rights.

The article *Juror Knowledge and Attitudes Regarding Mental Illness Verdicts* (Sloat & Frierson, 2005) is particularly useful for a litigator interested in appellate issues. This piece offers support for the argument that more information should be provided to jurors regarding the impact of the NGRI and GBMI options on the defendant post sentencing. The article *Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty But Mentally Ill Instructions* (Roberts, et al., 1993) lends further support on this issue.

The “Point/Counterpoint” piece referenced in this bibliography (Slovenko & Halpern, 1997) is illuminating in that the proponent of GBMI conditions his support on a hefty list of recommended reform measures. This anecdotally adds weight to the already long list of professional organizations (for a partial list, see Grisso, et al., 2003) opposing GBMI.

My impression from reviewing the bibliography sources is that GBMI raises many legal and ethical concerns. I would want to speak directly with prosecutors and defense attorneys about their experiences in court where GBMI has been used. I look forward to the possibility of conducting juror research myself in this area. There is more to be done in evaluating the issues and it seems that of greatest importance is, as always, to educate the public.

Endnotes

^a My first Google search brought me to Pennsylvania's Criminal Justice Mental Health Statutes (via the Pennsylvania Commission on Criminal Sentencing website: http://pcs.la.psu.edu/mentalhealth_statutes.pdf). Title 18, Part 1, Chapter 3, §314, helped to put both NGRI and GBMI in proper perspective. These provisions vary from state to state, but this was a helpful start for my basic understanding.

^b As California is not a state offering a GBMI provision, jurors in the case I observed did not weigh this option.

^c Hurst, Christopher. (2009, September 28) Washington's justice system needs more verdict options for criminals with mental illness. *The Seattle Times*. Retrieved October 24, 2009 from: http://seattletimes.nwsourc.com/html/opinion/2009959998_guest2ghurst.html

^d A very recent news article on a case involving a GBMI plea:
Bowen, Jennifer A. (2009, October 10) Guilty but mentally ill: Mamino admits delivering baby into toilet, gets 6 years. *Belleville News-Democrat*. Retrieved October 24, 2009 from: <http://www.bnd.com/news/crime/story/960246.html>

Cheryl Lubin: A Trial Consultant's Response to Annotated Bibliography on NGRI/GBMI

Cheryl Lubin, J.D., Ph.D (theater) is founder and CEO of Staging Court, Inc., (www.stagingcourt.com) a firm that specializes in client and witness preparation and courtroom communication techniques. She taught mock trial and debate courses at CUNY, and currently hosts "I Witness", a weekly radio show on blog talk live.

The annotated bibliography compiled by Jennifer Kutys and Jennifer Esterman, titled "Guilty But Mentally Ill (GBMI) vs. Not Guilty by Reason of Insanity (NGRI)" contains a solid and succinct introduction to the theoretical and practical aspects of NGRI and GBMI, which are both conceptually conjoined yet inevitably distinct. During my years as a courtroom communications professor at John Jay College of Criminal Justice, I presided over mock trials in which the defendant's mental issue at both the time of the offense and at the start of trial were assigned for argument and rebuttal to pre-law students. The students commenced such "trials" by reading a packet of background information on the history of the insanity defense and "guilty but mentally ill" as it percolated from federal law to the states in the wake of the John Hinckley trial. Every mock trial featured at least one expert witness (a forensic psychiatrist), who would testify on such issues as the "defendant's" mental capacity for trial, the "defendant's" ability to formulate mens rea, and so forth. As I work on preparing expert witnesses for trial in my work today, I have adopted a three-pronged "test" to determine the viability and relevance of materials that would be most useful for litigators to read:

Does the article or book:

- 1) Provide solid background knowledge on the history of NGRI/GBMI for the litigator in such cases?
- 2) Describe (if perhaps only briefly) how juror responses to notorious, high-profile cases have shaped federal and state legislation in this area?;
- 3) Offer a common language and forensic frame of reference with which expert witnesses would likely be familiar?

Evaluating the annotated works through the prism of this "test", I would recommend the following works cited by Kutys and Esterman most strongly for litigators in this area:

Evaluating Competencies: Forensic Assessments and Instruments (Grisso, Edens, Moye, & Otto):

While it appears a trifle overweening to contend that "GBMI decreases the likelihood of an insanity verdict" (Kutys and Esterman), I nonetheless endorse this book as a critical foundational text for any litigator who is using an expert witness in such cases. The most useful element in the text is the authors' clear exposition of the updated forensic assessment tests, which every litigator in such cases should know. Trial consultants would do well to advise their attorney clients to review the thorough description of the determining factors in "legal competency" mentioned in this book.

Measuring the Effects of the Guilty but Mentally Ill (GBMI) Verdict: Georgia's 1982 Reform. Law and Human Behavior, 1(4), 447-42. While this article's primary emphasis on Georgia's statutes and cases would seem to discourage closer reading by litigators in other states, it is an excellent piece. The text itself is a bit dense and empirical, but litigators would do well to reference it when preparing expert witnesses in NGRI/GBMI cases. Litigators outside of Georgia would of course bear in mind that this is a site-specific study that could be effectively compared and contrasted with the case and statutory law in their own state.

Frontline: A Crime of Insanity. This documentary compellingly blends enough personal narrative to engage the litigator and enough historical foundation of NGRI/GBMI to guide them. Litigators might wish to consult Frontline's archives (and other documentary



sources) for instruction on mens rea/GBMI/NGRI cases in which the fact pattern is more closely related to their case (an example would be the Yates case).

Mock Jurors' Insanity Defense Verdict Selections: The Role of Evidence, Attitudes, and Verdict Options. This article is by far the most pertinent for any litigator or jury consultant. The piece considers, among other things, jurors' responses to expert testimony in NGRI/GBMI-related cases. While many would concur that expert testimony does indeed affect juror attitudes, this piece takes the reader through an evaluation of the array of such responses.

Juror Knowledge and Attitudes Regarding Mental Illness Pleas. This article is a critical reminder for the litigator of just how much high-profile cases might influence juror attitudes in which the mental state of the defendant is in question. The public outcry of the Hinckley case that triggered federal legislation is duly noted and thoroughly covered. Litigators would also find the American Psychiatric Association's stance on GBMI useful, as well as the debates about the appropriateness of modifying jury instructions.

A few other helpful sources I have recommended to my students and clients include:

The Hinckley Trial and Its Effect on the Insanity Defense. (Collins, Hinkebein, & Schorgl). This brief article is part of a website devoted to the history of the insanity defense, the debates over "guilty but mentally ill", the Insanity Defense Reform Act of 1984, the Durham Rule, the M'Naghten Test, the Model Penal Code, and much more. The bibliography attached to this article is a goldmine of outstanding foundational sources as well.

People v. Lantz & Robles. A case from the Illinois Supreme Court (1999), in which claims about the prejudicial effect of a GBMI plea are thoroughly explored in light of a grave but engaging fact pattern. Most criminal defense attorneys and prosecutors would know this case, but it might be important to review it for its extensive exposition on NGRI/GBMI.

Legal Insanity: Assessment of the Inability to Refrain. Donohue, Arya, Fitch, and Hammen. *Psychiatry MMC: A Peer-Reviewed Journal Providing Evidence Based Information to Practicing Clinicians.* March 2008. This is a more recent discussion by a wide swath of professionals on the notion of "volitional control". Most litigators in this area would want to make certain their experts are familiar with the findings in this article, which also features a complete updated bibliography.

Karen Hurwitz responds to the Annotated Bibliography on GBMI & NGRI

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The Andrea Yates trial is one of the more well known insanity trials in recent years. I was fortunate to have had the opportunity to work as a jury consultant for the defense in her retrial, which resulted in a finding of not guilty by reason of insanity (NGRI). Prior to becoming a jury consultant I practiced as an attorney and then a psychotherapist after receiving my MSW. Early in my therapy career I spent a year at a large county psychiatric hospital working with the severely mentally ill, many of whom were under commitment order. Observing and communicating with individuals with severe symptoms of schizophrenia, bipolar disorder and delusional disorder taught me what no textbook could. Based on my experience as a therapist and as a jury consultant who has worked in this area I was asked to provide my opinion on the bibliography as a starting point for a defense attorney and to discuss some of the challenges insanity trials present to the attorney.

The majority of attorneys taking on an insanity case for the first time have probably not had exposure to severe mental illness. Perhaps your client is the first severely mentally ill person you have met or tried to communicate with. This is where the learning begins. Just as most attorneys have not witnessed this level of mental illness before neither have most jurors. How are you going to help jurors appreciate what it means to be so ill that you drown your own children? And what if your client confesses to drowning her children immediately thereafter? Does that negate the insanity argument? Can anyone who is sane and rational really appreciate what is going on inside the mind of someone who is insane? How do we apply the intended logic and reasoning of a written statute to the mind of

someone that is illogical and irrational and that has turned right and wrong on its head? These are a few of the many challenges that you will face.

So how does an attorney prepare for such a case? The first task is to determine the language of the insanity statute in your jurisdiction. Is it an NGRI statute (or the equivalent of such)? If so, what is the test? Or is it GBMI? Or are both available? If only one type of statute is available then you will not need to spend too much time understanding all of the differences between NGRI and GBMI. Beware that while the statute may sound simple and straightforward on its face it is not!

For example, the Texas NGRI statute in essence is the following: “at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.” Every word of your statute is likely to be a source of debate during the trial. What was the mental state of the defendant at the time of the conduct in question? This is the insanity evaluation, which includes a mental status at time of the offense (MSO). It is a retrospective analysis, trying to reconstruct what was happening in your client’s mind when she acted. This is different from the competency evaluation which analyzes mental status at the time of the evaluation. So, in addition to the statute you need to know what competency and insanity evaluations consist of, how they are different, who should perform them and when they should be done.



What constitutes “severe mental disease or defect”? This is where psychiatric diagnoses come into play. You will need to become very familiar with the diagnoses brought into the trial. This will become especially important during cross examination of the treating doctors and forensic experts. This may include diagnoses that your client received in previous psychiatric treatment, in treatment after the arrest, in the competency evaluation and in the insanity evaluation by both side’s forensic expert. And all of the diagnoses may be different. It is not uncommon for clinicians to view patients differently.

Then, there will be a debate about what it means “to know”. Does that include the ability to understand or appreciate? And what does “wrong” mean? Criminally wrong? Morally wrong? What if your client in her delusional mind believes what she did was right but acknowledges that she knows others will find it wrong? These are the types of nuances that will be front and center during trial. Forensic experts in insanity trials are extremely important. Unlike other types of cases where jurors sometimes disregard both sides’ expert witnesses, that is unlikely in an insanity trial. The jury is going to rely on one of the experts to help them infer what was happening in your client’s mind at the time of the conduct in question.

The goal of Ms. Kutys and Ms. Esterman was to put together a literature review of recent research regarding NGRI and GBMI. Given their goal I believe they provide a good starting point for examining relevant research on this particular topic. The book by Grisso (2003) is the most comprehensive item on their list. The chapter on NGRI reviews the law and the science on insanity as well as addresses some of the challenges discussed above. The book also covers competency and insanity evaluations in detail. Of course there are other books that cover similar topics. For example, [Psychological Evaluations for the Courts: A Handbook for Mental Health Practitioners and Lawyers](#) (2007) by Gary Melton and others appears to cover similar material and is written by both lawyers and psychologists. I think it is worth a review.

The research studies highlight the pitfalls of the GBMI statute and the misconceptions jurors have about it. The Callahan and Poulson (1998) research findings showing that the GBMI option decreases NGRI verdicts are critical if you are in a venue where both statutes are available. The two Poulson studies and the Slovenko study are also helpful for jury selection. Poulson’s (1997) review of the literature showing for example the correlation between juror attitudes in favor of the death penalty and their views against NGRI is extremely important. The research studies draw me in and make me want to know what additional and perhaps more recent research exists on the insanity defense.

In addition to the bibliography I would recommend the following:

- 1) Review of the recent ABA publication [Criminal Mental Health and Disability Law, Evidence and Testimony: A Comprehensive Reference Manual for Lawyers, Judges and Criminal Justice Professionals](#) by John W. Parry, J.D. (2009). It includes chapters on Competency, Insanity and Diminished Culpability, Mental Health Diagnoses and Expert Evidence and Testimony.

2) The latest volume of the DSM, the Diagnostic and Statistical Manual of Mental Disorders. The most current version is the DSM-IV. The DSM is the bible of psychiatric diagnosing. You need to be familiar with all of your client's diagnoses or possible diagnoses. And consult with mental health clinicians when you have questions. Don't be afraid to ask basic questions and don't be intimidated by psychobabble. Keep asking until you get it. If you don't get it, your jury won't get it.

3) Talk to other defense attorneys who have tried insanity cases, especially in jurisdictions with similar statutes. How did they handle the statute? Which forensic experts were especially helpful and respected by the jury?

Your jury pool is going to enter the courtroom highly opinionated on the insanity defense. You will have vocal jurors and angry jurors. In the Yates trial we began with a pool of 120 jurors and everyone had an opinion. There were those who understood mental illness and were sure Ms. Yates was insane. There were those who wanted to give her the harshest punishment available. Even in 2006 approximately 10 % of the pool believed that depression was not an illness and that people should basically get over it. I recall one panel member who said he could understand that the defendant might be crazy if she drowned one child, but to drown five children she had to be a murderer. The jurors will say all kinds of things that defy logic and that is understandable. It is hard to make sense of a mother drowning her own children. It does not make sense. That is the whole point of insanity. You need and want to hear every comment, no matter how crazy or callous it sounds. And if you don't lose a lot of jurors on challenges for cause there is likely a problem in the questioning. This is an area of the law with a high degree of bias.

Citation for this article: *The Jury Expert*, 21(6), 28-37.

When Jurors Nod

by Stanley L. Brodsky & Michael P. Griffin

The attention of attorneys and witnesses alike is captured is when jurors nod their heads. When attorneys speak or witnesses testify, often there are individuals on the jury who nod their heads up and down, some jurors nodding rapidly and vigorously and some with a barely visible movement of the head. In our own experiences on the stand, jurors who nod as we testify appear to be affirming the worth of what we are saying and, sometimes voluntarily, we find ourselves maintaining eye contact with the nodding jurors as we speak.

New psychotherapists are routinely taught to nod their heads, as a sign of affirmation and acknowledgment of clients' thoughts and feelings (O'Brien & Holborn, 1979). At conferences, members of an audience agreeing with a speaker may be seen moving their heads up and down in shared open patterns of acknowledgment. Indeed, head nodding is seen in western cultures as a nonverbal expression of approval or level of agreement (Feldman, 1985; Helweg-Larsen, Cunningham, Carrico, & Pergram, 2004).

One older study reported that research participants who nodded their heads while listening approved more of the message than those who remained still (Wells and Petty, 1980). Various scholars, such as Harper, Wiens and Matarazzo (1978), Malandro, Barker & Barker (1991) and Richmond & McCroskey (2004), have placed the head nod under the general rubric of gestures, and within that grouping, head nods are described as complex in form, cultural in meaning, and contextual in interpretation. Richmond and McCroskey identified two categories of gestures into which the head nod may be placed. The first simply communicates, "you are being heard" and the second category is an expression of positive and affirming emotions.

Axtell (1998) reported cultural exceptions to the common understanding that nodding the head up and down indicates yes and side to side indicates no. Brodsky (1987) described the cultural equivalent of the affirmative head nod in south India as taking the form of the head-shake from side to side or sideways and up and down in a shallow figure eight.

Induced head nodding has even been reported to produce positive thoughts towards a neutral object. Participants who stared at a pen while nodding their heads had a more positive attitude about the pen than participants who shook their heads sideways (Tom, Petterson, Lau, Burton, & Cook, 1991). The explanation provided by the authors for the increase of positive thoughts is that head nodding influences an individual's judgments while an overall opinion is being formed. Incorporating nonverbal cues of agreement, such as nodding, increases positive thoughts about an issue.

One frame of reference is that head nods may be understood as self-validating behaviors. In a series of studies, Briñol and Petty (2003) reported that "... one's head movements can serve as an internal rather than external cue to the validity of one's thoughts, and thereby provide an alternative mechanism by which head movements can affect persuasion" (p. 1124). They found that nodding increased confidence about whatever one is thinking if the message was strong but decreased confidence when the message was weak.

Briñol and Petty told undergraduate psychology students that they were testing how well stereo headphones performed on sound quality and comfort. Half of the subjects moved their heads up and down (as instructed) about once a second, supposedly to test the headphones, while the other subjects moved their heads from side to side. The critical independent variable was either a strong message or weak message arguing that student identification cards should be required for admission to classes, the library, and other facilities. Head-nodding students had more favorable responses to the strong message, and head-shaking students had more negative ratings of the weak message.



In our own research, we investigated whether head nodding versus stationary head positions on the part of mock jurors would influence the persuasiveness of expert witness testimony. Positive results for the nodding would provide expert witnesses and attorneys with a tool in interpreting how well their arguments are received by a jury.

We drew on 244 undergraduate students from Introductory Psychology courses at a large state university, with 53% of them female and 77% White and 16% African American. A 20-item witness credibility scale (Brodsky, Griffin and Kramer, In Press) with high reliability ($\alpha = .95$) was used to test the results.

Our mock jurors in the nodding condition were instructed to move their heads up and down at the rate of about once per second while watching and listening to a video of an expert witness testifying. Participants in the control condition were instructed to refrain from moving their heads and were monitored to insure they did so. The text of the witness testimony was drawn verbatim from the Krauss & Sales (2000) study of the impact of actuarial and clinical testimony about dangerousness. The testimony began as follows:

“Defense: Good morning. I have several questions for you. Dr. Hoffman, are you absolutely sure that Steven Jones represents a continuing danger to society?”

“Expert: I'm reasonably sure. In my field you can never be 100% sure but I've seen enough psychopaths like Mr. Jones to know that he will continue to present a danger to society.”

There was an overall effect of head nodding on judgments of credibility and on agreement with the expert's testimony ($F(3, 245) = 3.71, p = .012$). The mock jurors who were instructed to nod rated the expert testifying as being more credible than did the control jurors ($t(247) = 1.996, p < .05$). ‘Agreement with expert’ as a dependent variable was also examined. Participant agreement with the testimony based on whether they nodded their heads or did not was not significant ($t(247) = 1.15, p > .05$).

This study is a first step towards investigating the impact of head nodding in the courtroom. We found that juror assignments of expert credibility followed nodding, meaning jurors asked to nod during testimony rated an expert as more credible compared with jurors who did not nod during testimony. However, we did not investigate whether nodding follows credibility. Every attorney, every judge, and many witnesses have observed various ways jurors nod their heads during attorney arguments and during testimony. Multiple meanings are possible; Axtell (1998) points out that “nodding and shaking the head mean different things to different people” (p. 65).

From our own observations, at least four interpretations are possible in the United States context when jurors nod their heads.

1. The jurors are expressing agreement with the statements or testimony.
2. The jurors are indicating they are attending to the nature of the communication.
3. The jurors are indicating they are cognitively and personally present, much as school children say “here” or “present” when their names are called. In these instances, no particular attitude is present. Some people nod their heads absentmindedly in conversations even though they are daydreaming and devote only partial attention to what is being said.
4. Head-nodding jurors are expressing habitual patterns of nodding, fully apart from agreement, approval, attending, or signaling. Just as people may automatically intersperse their verbal statements with words such as “like” and “you know,” some people also have well-established habits of nodding their heads. This category of head nodding does not lend itself to any particular interpretation, and does not necessarily reflect even the expression of attention.

These four categories of head nods should caution us not to assign approval meanings automatically to juror head nods. Nevertheless, our strong and significant results about credibility serve to signal that juror nodding is an important behavior to which witnesses should indeed attend.

In the future we plan research to examine contrasting effects of head nodding and head shaking. Further, we are aiming at using live testimony because it may have a stronger effect than videotaped testimony in its direct attempt to engage the participants. During live testimony reciprocal eye-contact can be made with the mock jurors. In any case jury consultants and attorneys would be well advised to consider head nodding both with promise and caution as a source of information about whether a juror is predisposed to accept their side of the case more than the opposing argument.



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Everything I Ever Needed To Know About Live Communication I Learned From Konstantin Stanislavski: Common Mistakes and Best Practices

by Katherine James

I am a lucky woman. I have been an actor since I was five years old. I have had the great fortune of working with and studying under some of the finest disciples and practitioners of the great master of modern realistic acting: Konstantin Stanislavski. Studying and practicing acting involves learning how to make oneself believable, memorable and persuasive to audience and fellow actor alike. Twenty years into learning, honing and practicing the art and craft of acting I discovered that the wonderful lessons I had learned and was learning in the theater were actually the cornerstones of “live communication”. Further I realized that this “theater as live communication” lesson not only applied to real life but it applied to yet another discipline – the practice of advising lawyers and their witnesses as a trial consultant. And I’ve been applying, studying, learning, failing and succeeding at these lessons in life, onstage, in meeting rooms and as a courtroom advisor ever since.

In this article, I break down three of the great acting lessons I learned from my great teachers and directors into their live communication components. I hope that the deconstruction of each acting principle into its definition followed by its application to the theatre, real life, the meeting room and the courtroom will be useful to both trial consultants and attorneys. I also suggest exercises to perform and sign posts to consider when improving your own communication as well as the communication of your clients with each of the great acting lessons.

One of my friends has changed the old adage, “I teach best what I most need to learn” into a newer saying I embrace with this piece: “I teach best what I learn best – and I love what I teach.” It is in that spirit that I pass what I have learned and am learning about live communication on to you.

- **The Hardest Character To Play Is Yourself**

The Principle

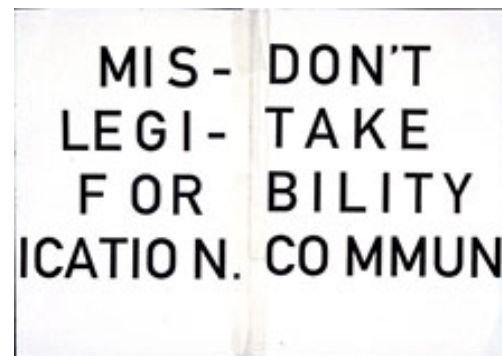
You need to strip away everything that is artificial and be “yourself”. If you are “fake” or “false” or “unreal” you are not really acting. You are “indicating” or “too big” or “overacting”. The problem is, of course, it feels so good to be fake onstage. Sigh. But... your fellow actors will know you aren’t acting like a person, the audience will know it, too, and the whole show will suffer.

In the Theater

In the theater, a young actor can spend a huge amount of time learning to be himself or herself onstage. That’s the purpose behind almost all beginning acting exercises: to get the actor “out of his or her head” and into “reality”. I must confess, if I had a nickel for every time a theater director or an acting teacher had to tell me to stop being so “over-the-top” I would be a rich woman today. I love filling a room up with my energy, pushing past everyone else’s flat little performances and just fearlessly flying without a net center stage. Although I have gotten better and better at being myself over the past 54 years of my life in the theater, I always go to some extreme over-the-top place sooner or later in rehearsal. I try to stay “grounded” in performance (even more difficult with the splendid magic of a live audience). There are other actors who have a different kind of problem: they are stiff and wooden. There is yet a third group who basically spend a whole part of the rehearsal process as if they are hardly even in the room – it is like there is a ghost onstage with you. A place holder for an actor you hope is going to show up on opening night. All three of these types: over-the-top, stiff and wooden, and too shy to be onstage are not “real” and will likely never be believed or trusted by their fellow actors let alone an audience.

In Real Life

In real life, this problem manifests itself in many ways. Think of that person in your life with the odd defensive laugh. You never know or trust exactly that he or she is being truthful with you. Or how about the person who greets you stiffly and distantly? Isn't your first response, "That guy hates my guts."? The shadow of a personality often makes others think, "This one doesn't want to be here. Okay. Moving on." In real life, these "fake" personas are all at their base some kind of shyness. This kind of shyness needs to be overcome if the person who manifests one of these "false fronts" wants to be believed.



In Meeting Rooms

Being fake can be lethal to communication. Have you ever been accused of acting like a "used car salesman" when you are meeting with a potential client? Think how quickly your mind wandered the last time someone made a presentation in a meeting you attended who was stiff as a board. You might have felt sorry for the person for about five seconds and then your mind started wandering to what was for dinner and you missed the whole middle of the speech. And as for the "zero" personality type – think about the number of times when adding up who was "in the room" this type of person was so "not memorable" that you left him or her off the list?

In The Courtroom

The courtroom holds a huge amount of danger for those who are not "real". Any attorney or witness who can't be "real" risks the conclusion by any judge or juror that he or she is lying. People are in court to judge whether people are lying or telling the truth. If a person can't act truthfully, why should anyone believe them? I think of past painful moments in court after the trial team on which I was playing came in second place (I refuse to call it winning and losing – I prefer to think of it as a competition with blue ribbons and red ribbons at the moment, thank you very much). A juror commented that one attorney, "Had that creepy pushy fake smile all the time – like a pediatrician about to give you a shot." About another attorney a juror said, "I stopped listening after he introduced himself in *voir dire*. He was stiff as a board. God, he was boring. Is he married? How can his wife stand it?" When asked about an argument made by a "disappearing" type yet another juror said, "Really? She said that? Huh. I don't remember that part at all."

Best Practice

It isn't easy to find the real you. There is a wonderful acting exercise that I highly recommend. First, get in mind the speech or the oral argument you are going to deliver. Next, get in mind a story from your real life that you remember vividly – for example, the first time you met your spouse or the best times you had with your favorite relative or something of that nature. Now, turn on a video camera. Talking to the camera, alternate at about a paragraph at a time the opening/speech and the story of the memory. Now play it back and watch yourself. Do you have two personalities – the "fake" one who delivers the speech/argument and the "real" one who talks about the memory of the loved one? The goal is to work with the camera until eventually you are able to deliver the speech/argument as the "real" you.

- **Acting Is Reacting**

The Principle

Listen with your eyes first and then your ears second to what the other actor is saying to you. Then say your line out of what you see and hear rather than because it is your next line.

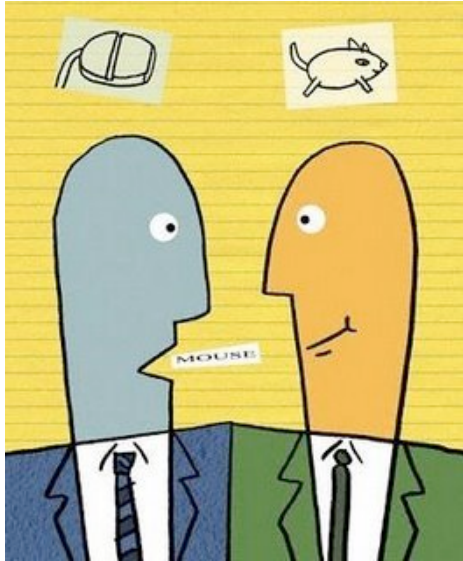
In the Theater

In the theater, one of the first mistakes a young actor makes is to only memorize his/her lines and to just wait to say them when it is his/her "turn" to talk. The automatic lines come out with no connection to what the other actor is saying either with body language

or the other actor's lines. In one of the funniest plays about the theater, *NOISES OFF* by Michael Frayn, the character of Brooke Ashton does just this causing howling laughter in every audience who sees the show.

In Real Life

How often in real life do we make this same error? How often does it turn out to be “not that funny”? I am on my daily early morning walk in my neighborhood. I always see a number of likeminded early morning walkers – we are all “regulars”. I greet them one by one with, “Great day for it, huh?” Each has his or her standard line back to me. The woman in her eighties always chimes back brightly, ““Oh, my, yes – aren't we lucky?” and then we laugh. It really is like doing a show – eight shows a week, same lines. Only this is real life. Last week I greet her with, “Great day for it, huh?” and then I see that she is walking slowly, crying softly, her face a puddle of fear as she mumbles, “Oh, my, – oh my, oh my.” So the script changed that day. Why? I actually listened. If I had listened with my eyes first instead of just spewing out my line like a bad actor, I might have seen that she was totally distraught and changed the words before I automatically spoke them. I felt less like a total live communication “zero” when she told me I was the first walking “regular” to notice that there was anything wrong.



In the Meeting Room

In the meeting room this live communication error can completely alienate and shut down the person with whom you need to communicate almost before you begin. I am in a meeting room with an attorney and a witness in a witness preparation session. The witness is barely concealing his anger. I know that because his lips are pressed together, he narrows his eyes, he thrusts his hand to me and says, “How are you?” Before I can say, “I would be happier if I was meeting you at a wedding!” the lawyer is already talking for me. “She’s fine – whatever – let’s get started,” and is off and running with a list of rules about deposition. I watch and listen as the witness gets angrier, more and more distant and distraught. I force my way into the “speech” of the lawyer who is on a kind of automatic pilot that would have made any theater director who made the mistake of hiring him as *HAMLET* fire him on the spot. “Let’s talk about why he’s so angry first,” I say. The lawyer comes out of the automatic pilot coma. I can tell because he stops talking and he doesn’t have that glazed look in his eyes anymore and he actually looks at the witness. I don’t celebrate by patting myself on the back. I’m old enough to admit that I’ve made errors like this myself. This time it was the lawyer’s turn and not mine.

In the Courtroom

This, of course, is lethal in the courtroom. I am watching an attorney question a juror in voir dire. I love that the “script” is really great – open-ended questions, follow up questions – just like every litigation consultant’s dream. But wait – why are the jurors shutting down one by one instead of opening up one by one as they should be with this “ideal” voir dire script. The attorney is looking at the question, reciting it, and then vaguely looking up at the jurors. The jurors know that the attorney will just go on with them or without them. If the attorney had only looked first... assessed the body language of the jurors... said something radical like “Good afternoon” and noted who responded and started with those jurors... wow... but it is all over in an instant. And that moment is lost forever. I’ll never forget the look on a juror’s face who once told me in a post-verdict interview, “I hated that guy from voir dire. He was like a bad party guest – you know – the kind of person who is just waiting for your lips to stop moving so that they can talk about themselves?”

Best Practice

Look. Make eye contact. What information are you getting from the person to whom you are about to speak about their emotional state, about their ability to get new information in this moment, about whether or not they like you enough to listen to what you have to say? Listen. Is this person talking? Is what you are about to say a response? Could it be? Are you willing to put aside what you “must” communicate for a moment and start your conversation based on what this person is saying to you first? I suggest you try this in your professional life first and then let it spill over into your real life. In your professional life there is often some semblance of control whether it is a meeting room or a courtroom. Real life – so unpredictable! Once you get the hang of it you are going to want to do it all the time – but – you are never going to be perfect. Oh, well.

- **An Actor Always Needs To Be Heard And Understood**

The Principle

Your words need to be heard and understood by the other people on stage with you and the audience.

In the Theater

“Understood” has two meanings in the theater. One has to do with literally hearing every word because it is properly “projected” and “articulated”. A director will admonish the actor, “stop whispering!” with the first issue and “get the marbles out of your mouth!” with the second. Stanislavsky, despite rumors to the contrary by some of his American disciples, never encouraged actors to speak softly and to mumble.

The second meaning of “understood” in the theater is the language being used needs to be easily understood by the audience. Clear, active, simple, regular English is not only ideal, it is generally expected that this is what is delivered to the actor by the playwright. This is also the norm when actors create their own dialogue through improvisation.

In Real Life

In real life, not speaking up and not articulating cause real problems. “You would think that medical professionals would be professional enough to speak up and stop swallowing their words,” snaps my mother as we stand by my father’s hospital bed. In real life, speaking words that are not understandable in meaning by the audience can be a nightmare. “I think he has been telling us for years that we could either give the money to the government or we could put it in our SEP IRA’s,” says my husband to me. “Really?” I say. “I don’t think he ever said that.” “You’re right – he just said it in English today. I think he has been telling it to us in Accounting all this time.”

In the Meeting Room

In the meeting room, not speaking up and not articulating cause great misunderstandings. I am thinking right now of a certain trial consultant who said great things but no one heard her. Literally. She had the vocal projection of a television on mute. The lips were moving, but she couldn’t be heard. After a great brainstorming session, the client requested that she not be included as a part of the trial team in the future. “Why not?” I said. “I thought her ideas were great!” “What ideas?” he said. “She never opened her goddamned mouth.” Who has not been in a room with someone who sounded as though he or she was speaking a foreign language? Pat McEvoy of Zagnoli, McEvoy, Foley told me a brilliant apocryphal tale of a study in which it was determined that 100% of the time anyone who is speaking believes that what he or she is saying is clearly understood by everyone in the room... and that 80% of the time, at least one person in the room doesn’t understand what is being said.



In the Courtroom

In court, not projecting the voice and mumbling can mean the difference between life and death. I’ll never forget one of the first trials I observed 32 years ago when starting my trial consulting business. It was a death penalty case. It was the defense attorney’s closing argument. I couldn’t hear much of what he said... but then, I was in the gallery. The judge leaned over halfway through and said, “You’d better speak up, son. No one’s heard a word you’ve said so far.” Worst part? The attorney didn’t choose to start over so that his client’s case could be heard. My most humiliating articulation story concerns the time I let a witness on the stand keep saying over and over again that one of the unique properties of a certain patented material was it’s “whiskers”. He was from The South so it sounded like he was saying “whiskahs” to me. I’ll admit it did cross my mind that it was a little weird that this material would have whiskers but – hey, I am a creative type and the pictures of it looked to me like there were whiskers. The judge was the savior in this story, too. He said, “Are you saying ‘whiskers’ – like a cat?” “No,” replied the witness, “Whiskahs – like ‘sticky.’” “Oh – viscous,” said the judge. I got two strikes that day – because “sticky” is not only easier to pronounce, but everyone knows what it means. The attorneys had all heard

“viscous” but the judge and I had heard “whiskers”. Thank God someone was smart enough to figure out that whiskers probably weren’t a part of this patent. Too bad I didn’t catch it early enough to be able to keep from violating the second meaning of the word “understand” – clear, active, regular, simple English.

Best Practice

Being heard means that your voice has to reach the ear of the person with whom you are communicating. Imagine you are speaking from the center of your body, just below your belly button. Take a breath into that place. Now exhale and speak from that center and aim for a spot just behind the head of the person to whom you are speaking. This keeps your voice from landing at your own feet or somewhere between you and that person. Articulating means that you are understood as far as the actual mechanics of producing speech are concerned. I often advise people with this issue to over-enunciate words as though they are talking to someone who has forgotten to wear his or her hearing aids. If you have ever had experience with those people (and if not, let me introduce you to every female relative I have ever had on my mother’s side of the family) the procedure is as follows: 1) make eye contact, making sure that the person can see your mouth. 2) speak as though they are reading your lips. Being understood as far as the meaning of the words is actually trickier. You can say over and over again, “Do you understand what I am saying to you?” and get nods and smiles and encouragement that the person does understand what you are trying to communicate. Sometimes this is just a lie. They are just hoping against hope that you will start saying something that they do understand. I know that’s what we did with our accountant. Your best bet is to always speak as simply as possible. If you want to make sure you know what simple speech is, go to the Children’s section of your local library. Enter the non-fiction section. Pick out a book on a topic about which you know absolutely nothing at about a third grade level. Isn’t it amazing how after you read it you understand the topic? That’s because the words are so simple and clear.

- **Conclusion**

The three acting principles that I have discussed here are just the tip of the iceberg of what I have discovered while applying theater to live communication in the past decades. I imagine I have raised a few “ah ha!” moments from your own past with the stories from my own. I hope that as you work with the Best Practices exercises and tips that you find new and valuable ways to improve not only your own communication, but that of your clients as well.

Katherine James with husband and partner Alan Blumenfeld is the founder of ACT of Communication, a litigation consulting firm that specializes in live communication skills for lawyers and witnesses. An active theater artist, she acts, writes and directs. ACT's website is www.actofcommunication.com.

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“Don’t Poke Scalia!”

Lessons for Trial Lawyers from the Nation’s Highest Court

By Tara Trask & Ryan Malphurs

As an institution, the Supreme Court stands apart from other courts in status, grandeur, and influence, representing both the power and idealism of law in America. For most lawyers, arguing before the Court is a rare opportunity and represents the pinnacle of a legal career, which would lead one to expect a superb level of performance from advocates. Unfortunately, Supreme Court advocates often commit a number of fundamental errors during oral arguments, and at the Supreme Court these mistakes can prove costly. Over the course of nearly sixty oral arguments, we have witnessed some ill-advised behavior by Supreme Court advocates, but this term’s opening week of oral arguments held a number of unusual mistakes. In observing these errors and the Court itself, we were struck by the similarities in what we see in State and Federal courts across the country and contemplated what a trial lawyer can learn from the highest court in the land.

Consider the following deliberate jabs from two advocates in *Salazar v. Bruono*, and *United States v. Stevens*:

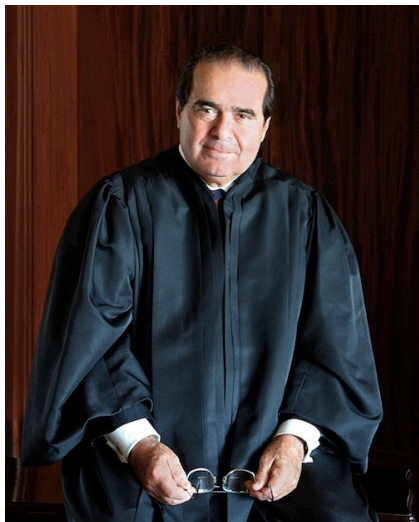
Justice Scalia: “I assume [the cross] is erected in honor of all the war dead. The cross is the most common symbol of the dead . . .”

Mr. Eliasberg: “Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew. (laughter).” (Salazar v. Bruono p. 38-9)

Justice Scalia: “What if I am an aficionado of bullfights, and I think, contrary to the animal cruelty people, I think they ennoble both beast and man, and I want to persuade people that bullfights are terrific and we should have them. . . .”

Mr. Katlyn: “Congress itself said – the legislative history, which I know will not be of relevance to you, but may to others on the Court [(gasps and laughter)]” (U.S. v. Stevens p. 12-3).

These two instances drew raucous laughter from the audience, immediately angering Justice Scalia, whose reddened face could be seen by all. Following these jabs, Justice Scalia began a more aggressive assault on the advocates’ arguments, hampering their persuasiveness and reducing the time in which advocates might address more open or sympathetic justices. The advocates had clearly made a powerful enemy in Justice Scalia and in turn hurt their case.



As we reflected on the various arguments observed over the week, the simple maxim: “Don’t poke Scalia,” emerged from the obvious danger related to angering a Supreme Court Justice, or any judge, or jury. Too often Supreme Court advocates insulted one of the justices with a sarcastic response, and found themselves fending off the attacks of a formidable opponent; not unlike a trial lawyer inadvertently angering jurors. The mistakes of Supreme Court advocates prompted us to identify primary principles that trial lawyers can learn from the Highest Court in the Land. These principles relate to areas of preparation, an understanding of one’s audience, credible argumentation, and legal professionalism. While topically these areas may appear obvious, the mistakes we observed at the Supreme Court emphasize the difficulty surrounding the mastery of these principles. We hope our research and observations will help lawyers avoid future mistakes by adhering to the fundamental principles we discuss. So without further ado,

“Mr. Chief Justice and may it please the Court . . .”

Communication Matters

Oral argument before the Supreme Court is likely to be one of the most difficult communicative tasks humans engage in, but a trial lawyer's articulation of a complex case in an intelligible, engaging, and persuasive manner to a jury is an equally challenging feat. Like a jury, the justices must reach a conclusion that resolves the problem at hand, and they often look to the advocates for assistance in resolving the current and future potential cases. Some may argue that oral arguments serve as an empty ritual and believe that "oral arguments [do not] play a significant role in the decision making of the U.S. Supreme Court" (McGuire 2005, pp.107-109) (Rhode and Spaeth 1976; Segal and Cover 1989; Segal and Spaeth 1993; Segal and Spaeth 2002). Skeptics may recognize the limited utility oral arguments hold in reversing a justice's tentative voting position, but communication influences human cognition in more subtle ways by impacting decision making within specific voting boundaries, such as in the writing of an opinion (Cohen 1978, Schubert et al. 1992, McGuire 1995, Songer and Lindquist 1996, Epstein et al. 2001, Johnson 2001, Johnson 2004, Johnson et al. 2006, Collins 2007, Wrightsman 2008). While we do not necessarily subscribe to the notion that cases are won or lost in opening statement, the importance of framing a case at the beginning and tying it together at the end cannot be ignored. Similar to the debate about the importance of openings and closings, there may be disagreement regarding the influence of oral argument at the High Court, but perhaps most importantly, the justices themselves believe oral argument is a valuable activity that assists them in resolving complex issues. Just as Supreme Court justices view oral argument as a valuable activity for decision-making, juries also find instructive a lawyer's opening statement and closing argument that frame the case in an approachable fashion.

Lessons Learned

1. *Comprehensive Preparation, Testing, Knowing your case and your opponent*

Perhaps one of the most impressive aspects of elite Supreme Court advocates is their extensive preparation for oral arguments. Top advocates, such as David Frederick, Miguel Estrada, and Maureen Mahoney, spend between 80 and 100 hours preparing for their arguments, and argue before three to five moot courts, before ever appearing in front of the justices. A comprehensive knowledge of a case is crucial for these advocates to respond to any conceivable question the justices may ask. The persistent practice and delivery of arguments enables top advocates to reduce the essence of their case to a few sentences. Chief Justice Roberts recommends working "very hard on those first few sentences" when delivering opening remarks because "you're only guaranteed usually a minute, minute and a half before a justice is going to jump in," so "you want to convey exactly what you think the case turns on and why you should win . . . so they understand right from the beginning," your primary argument (Roberts 2006). We could not agree more. It is our view that if a lawyer cannot articulate in simple terms the essence of their case in four or five sentences, he or she does not properly understand the case.

Like Supreme Court justices, jurors need to grasp a basic understanding of the crucial elements of a case within the first few sentences in a lawyer's Opening Statement. Unfortunately, we often have seen lawyers, both in trial courts and before the Supreme Court, state their primary points at the very close of their available time. At this point, the primary arguments have been lost on the audience and are worth little to the effectiveness of your case. We witnessed this issue in *Maryland v. Shatzer* where petitioner's counsel delivered a stunningly clear and concise argument summary, capturing the essence of her argument, in the last remaining minutes of her allotted time. The justices, who had dismissed her early on because of an inability to answer their questions, were clearly struck by the clarity and compelling nature of her argument. Unfortunately, it occurred too late; the justices had already committed themselves against her arguments. The advocate had squandered a valuable opportunity at the opening of her argument, laying forth the case's facts, a topic the justices were already well versed in, instead of articulating the case's primary arguments.



At Georgetown's Supreme Court Institute and at the National Association of Attorney Generals, advocates refine their arguments and test their persuasiveness, much like trial lawyers use focus groups or mock trials. At a minimum, focus groups and mock trials force lawyers to prepare arguments and statements earlier than usual. Despite the grumbling we often hear from our clients about preparing for a mock trial, they almost always appreciate it afterward, emerging more prepared to move forward and with a clearer view of their path to a positive resolution. Feedback from moot courts and focus groups allows lawyers to set the course for their case. Cases may have enticing areas the lawyer would initially prefer engaging, but that area may not appeal to judges or jurors. Like feedback from moot courts, trial lawyers need to rely on research from focus groups and mock trials to establish a course for their case.

Once a lawyer gains an understanding of a case and establishes the strategy, the process of successfully navigating a case becomes easier, and judges and juries will be more likely to rely upon a lawyer who can articulate their case in a clear and concise manner. As Justice Kennedy has mentioned, “I’ve learned that judges really want your help,” and we can assure you that juries both want and need a lawyer’s help to make sense of their case (Kennedy 2006). Juries and judges so often are caught up in discerning complex ambiguous cases, and if lawyers can present them with a clear argument and direction early on, judges and juries will turn to the lawyer who presents the most comprehensible position by which they may understand the case.

2. *Justices and Juries are Human*

After the awe of the justices’ entrance wears off, it becomes suddenly apparent that these nine men and women are supremely human. Although most nonagenarians would succumb to exhaustion Justice Stevens appears to be running on energizers; Justice Alito dozes off frequently; Justice Breyer shakes his head and shrugs his shoulders in silent disagreement; Justice Ginsburg struggles to be heard above the advocates and other justices; and Justice Scalia jests and jousts with advocates. Justice Ginsburg fell asleep during oral argument for the Texas redistricting case, and was woken up after a number of minutes by a gentle hand from her friend Justice Souter¹. Although the justices’ human qualities are readily apparent to the audience, advocates often overlook this quality, caught up in their own arguments and a pressing time limit. Trial lawyers as well often forget about the boredom and general distraction that overcomes jurors.

Maintaining a jury’s attention and gaining jurors’ trust requires making eye contact and delivering arguments in an entertaining and intelligible fashion. Legal jargon can cause juries to ignore arguments. Like reading Derrida, juries will often gloss over jargon, piecing together their own collage of a lawyer’s statements in order to make sense of the case. At the Court, the language difference between justices and advocates is striking. Where the justices speak in plain language, the advocates sound as if they are bogged down in legalese, and the justices often struggle to clarify what an advocate means when using a certain term. Trial lawyers do not have the luxury of knowing what language confuses jurors and should remember to use plain language whenever possible. Trial lawyers must remain attentive to their audience, shaping their language accordingly. However, trial lawyers must be cautious about not falling into a pattern of stereotyping audiences, recognizing the unique qualities of the case and making sure they do not rely too heavily on how other jurors acted in prior cases. These same mistakes can be seen at the Supreme Court. The advocate for *Bruno* was not expecting Justice Breyer to be as supportive of his case, but Justice Breyer offered the counsel an alternative position to justify his claim that seemed to more closely reflect Justice Breyer’s sentiments. The quotes from the article’s opening also display the quick judgment of Justice Scalia by the advocates in *Bruno* and *Stevens*, and the advocates’ improper behavior angered a justice who may have been less of a nuisance had they not poked him. Just as advocates must be careful to not anger justices, so too must trial lawyers ensure that they do not anger jurors.



Another example of dangerous judgment is the popular view that Justice Thomas is disengaged from oral arguments, because observers interpret his silence in oral arguments as indicative of his indifference to the case. Thomas last spoke on February 22, 2006 during oral arguments for *Bowles v. South Carolina* (Lithwick 2007). As observers at oral arguments, we understand why critics misread Justice Thomas. He displays behavior suggestive of indifference: reclining in his chair, covering his eyes for a few minutes, or leaning forward with his hand on his forehead shielding his eyes. In the past, he frequently turned to Justice Breyer on his right or Justice Kennedy to his left and spoke as if he was not paying attention to oral arguments. He still speaks frequently to Justice Breyer, but now turns to Justice Scalia, since Justice Sotomayor joined the Court. While his behavior could be interpreted by observers as indifference, he also intensely rifles through counsels’ briefs, pointing out sections to nearby justices, and quietly arguing points. During our weeks of observation, Justice Thomas’ behavior has appeared more indicative of careful reflection than bored indifference, attributing his silence to the belief “that if someone is talking, somebody should be listening” (AP 2008). He understands that each justice has his or her own particular approach to oral argument, some justices “like to talk about it” other justices “enjoy the questioning and the back and forth” and other justices “think that if they listen deeply and hear the people who are presenting their arguments, they might hear something that’s not already in several hundred pages of record” (Bredard 2007).

As critics have misjudged Justice Thomas, so too can trial lawyers misjudge jurors. Thomas will occasionally look up to hear an advocate’s response to a question and advocates rarely look to make eye contact, writing Thomas off as lost cause. Trial lawyers cannot afford to ignore any juror because there is little way to know what influence a juror may hold over a jury. As the example of Justice Thomas identifies, we also strongly warn against predicting juror behavior based only on observation. Looks can be deceiving.

3. Don't take a non-credible position on a non-credible argument: Let the judge guide you

Lawyers regularly grapple with situations in which legal guidelines result in cumbersome and unreasonable consequences. Adopting a non-credible position, lawyers may dangerously ignore or fail to address the undesirable consequences, pointing to the propriety of the law as justification for their position; however, juries and justices are often less concerned with the black and white lettering of the law and more concerned with the practical consequences resulting from the application of the law. By confronting problematic issues, lawyers potentially resolve questions already present in jurors' minds, and gain credibility by both acknowledging deficiencies and offering remedies. But lawyers must have a proper understanding of the case, tested potential arguments, and identified weaknesses in their case, before properly addressing these problems. *Maryland v. Shatzer* fostered a perfect storm in which justices struggled between the letter and spirit of the law, and advocates had difficulty presenting credible arguments to non-credible positions.

In *Maryland v. Shatzer*, the Court explored whether police were prohibited from the re-interrogation of a suspect, who had previously invoked his rights to counsel and to remain silent, after a substantial amount of time had elapsed between the invocation of rights and subsequent interrogation. Because the issue in *Shatzer* revolved around the police's ability to practically conduct investigation, a prisoner's right to counsel, and the timeframe between events, advocates should have anticipated handling hypotheticals which tested the limits and extent of the controlling precedent in *Edwards*. Justice Alito posed a hypothetical to respondent's counsel, Ms. Davis, that explored the limitations of *Edwards*, and Ms. Davis was unable to provide a favorable response to a non-credible position:



Justice Alito: This is an area where it is very difficult to draw lines, at least I find it very difficult to draw lines. So let me start you out with an extreme hypothetical. . . .Someone is taken into custody in Maryland in 1999 and questioned for joyriding, released from custody, and then in 2009 is taken into custody and questioned for murder in Montana. Now at the time of the first questioning the suspect invokes the Fifth Amendment right to counsel. Now does the Edwards' rule apply to the second interrogation?

Ms. Davis: Yes it does Justice Alito. The Edwards ruling provides two ending points as it stands right now.

Justice Alito: And you don't think that's a ridiculous application of the rule? First of all, how are the authorities in Montana possibly going to know whether this person was interrogated previously on a crime for which the person was never convicted in Maryland and that invoked the right not to be questioned without an attorney? (U.S. 08-680 Maryland v. Shatzer) p. 30-1.

Ms. Davis clearly understands that the *Edwards* rule applies to her client and works in her client's favor, but Justice Alito's hypo exposes the rule's inherent difficulties and potential hindrance for authorities. Ms. Davis missed a crucial moment to offer the Court a compelling explanation for resolving foreseen difficulties surrounding the rule, but instead offered nothing and subsequently lost credibility before the justices. Appellate and trial lawyers alike must be prepared to address potential problems in their own cases and to resolve those issues for their audience, be it justice, judge, or juror. As Justice Breyer has mentioned "if the judge has a question and he doesn't get to say it, he's going to think about that question anyways," and so will a juror.² Resolving issues and addressing problems in the audience's mind enables lawyers to frame the issue in a positive light and potentially gain the audience's trust.

If an advocate cannot offer a reasonable suggestion to a case's problems, then occasionally a favorable justice will lend a hand and provide assistance to an advocate by offering a potential solution or redirecting the course of questioning away from hostile arguments to more familiar territory. In *Shatzer* Justice Scalia rescued Mr. Heytens, petitioner's counsel, from a difficult round of questioning by Justices Stevens and Alito, by simply asking "you started to tell us why this case was important. Would you finish that?"(25). Justice Scalia also assisted Mr. Heytens in rejecting an unfavorable position presented by Justice Alito:

Mr. Heytens: That would certainly be open to the Court to say that Justice Alito. . .

Justice Scalia: Would it be a good idea to say that?

Mr. Heytens: I don't think it would be a good idea.

Justice Scalia: I thought we liked clear lines in this. I mean, the police won't know what to do. (23).

The assistance justices lend to advocates is not always recognized by the advocates. Similarly, trial lawyers may overlook the treatment by judges, either favorable or unfavorable. The psychological battle that we see between opposing counsels and the Court comes into play in one way or another in almost every case. These issues become more pronounced if the judge lacks control or understanding in the case, often looking to counsel for guidance. In this instance (and unfortunately we see it a lot), the side that gains control of the situation has the advantage. Conversely, when the judge has control of the courtroom and counsel, it is important for trial lawyers to have a keen sense of where they stand with the judge, and how the judge's view of them is impacting their case and more importantly the jury.

Standard Bearer of Values

While the Court serves as a limited and highly specialized environment, it displays universal legal principles any lawyer would be wise to adopt, setting the standard for the conduct of law throughout the nation. Sanctity and civility imbue the justices' engagements with advocates and with each other. The amicable manner in which the justices treat each other is surprising given the ideological divides that separate them and the difficult issues with which they must wrestle. However, in many trial courtrooms, we have seen a decline in respectful behavior, such as trial counsel wandering in and out of the courtroom, Starbucks cup in hand while the judge is on the bench. Regardless of counsel's view of the judge, they should always remain respectful of the legal system. At the Highest Court in the Land, top advocates' sense of respect informs their engagements with justices as well as their understanding of the case, because the two elements are intertwined within the legal system. Advocate's respect for their case and the justices enables them to deftly respond to any question a justice may ask. We understand all too well that litigation is a fast-moving world, often with little time to prepare, but jurors sense and subsequently punish an unprepared lawyer. The Court's symbol, a turtle, reminds us of the slow and deliberate pace of Justice. Too often the courtroom is reduced to a competition resulting in winners and losers with prized legal victories in the hundreds of millions, instead of a concern for justice rendered. The Court remains an ideal, reminding both our citizenry and our legal community that Justice should always be our primary purpose.

Standing in line for the Court at midnight is an experience. Depending upon the case, you may be one of the first in line, though some cases require observers to arrive days in advance. The Court always reserves seats for the public and this open policy attracts a wide swath of America. Among those in line are law students, tourists, special interest groups, lawyers, the homeless, housewives, and high school students. As a group we stand waiting to be ushered through the golden doors of the marble temple, and into the courtroom where images of angels and great lawgivers surround us. We gaze at depictions of the innocent and wicked judged by ethereal figures. Within this sacred legal temple, it is difficult to imagine that this court receives petitions from prisoners scrawled on toilet paper, as well as amicus curiae from the President, or that the Court's words may grant both freedom and death to America's citizens. The Supreme Court stands as a place where, emblazoned above the entry, "Equal Justice Under Law," promises Justice to Americans and offers guidance to the legal community, because "Justice," as the Court's West entrance declares, is the "Guardian of Liberty." And, while we should not forget, we often lose sight that it is for liberty that our legal community serves.



"Now if there are no further questions, I would like to reserve the remainder of my time . . ."

EndNotes

¹A variety of bloggers covered this piece but the major media outlets failed to mention it. See Whitlock (2006).

²Some have suggested that Justice Thomas is discussing the results of the latest baseball game with Justice Kennedy or Breyer, but I spoke with one of the clerks who regularly sits behind the three justices and she explained that they only talk legal issues regarding the case and she's never heard a conversation revolving around any other topic.

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November 2009's Favorite Thing

This month we have two favorite things (again). Susan Macpherson and Ted Brooks offer their favorites for your exploration!

Susan Macpherson:

I like a blog called Presentation Zen that sends out regular examples of powerful ways to communicate visually and to motivate audiences WITHOUT bullet points. Many cases don't have the budget for professional graphics and this site gives a huge boost to those producing the visuals on the "do it in house" cases. The plus is that there are a host of links to other provocative resources on information processing and retention. For anyone looking to improve and innovate in the realm of visual communication this site and its regular updates is a fantastic free find! See Presentation Zen here: <http://www.presentationzen.com/>



Susan Macpherson is a jury consultant with [National Jury Project's](#) Midwest Regional Office in Minneapolis.

Ted Brooks:

YouSendIt (<http://www.yousendit.com>) is an excellent tool for sending large files electronically, without clogging your email system. The basic versions are free, and are limited at 100MB with a 7 day, 100 downloads limit per file. It can be used directly via their website, a small application (YouSendIt Express) or from a plug-in on your computer. There are also upgraded (paid) versions available for larger files, more downloads per file and other options.

Ted Brooks is a Trial Presentation Consultant and President of Litigation-Tech LLC, and publishes the *Court and Trial Technology Blog* (<http://trial-technology.blogspot.com/>).

Editor's Note

This is a very cool issue of *The Jury Expert*. We have an array of articles we think you'll find interesting, thought-provoking and fun to read. First, we have a look at gender and race in the courtroom over time and recommendations for how litigators might use this information with reactions from two trial consultants. Then a look at how the internet has been intruding into the courtroom (it isn't just with jurors) and recommendations on how litigators and judges can minimize the impact through clear and specific education and instruction. Third, we have an article on how research into damage assessments can inform settlement negotiations. Following that, we have a introductory bibliography on the GBMI/NGRI verdicts with thoughts from three trial consultants on learning about this specialty niche, educating jurors, and voir dire. We all pay attention when jurors nod. But what does it mean and when should you really pay attention? Read our fifth article and find out. Our sixth article takes lessons an experienced trial consultant has learned over three decades about communication in the courtroom (and more decades on the stage). Learn about common mistakes and best practices as well as the identity of Konstantin Stanislavski. Most of us already know who Antonin Scalia is but did you know it's not a good idea to 'poke Scalia'? What can litigators learn from observing our Supreme Court in action?

November's issue of *The Jury Expert* also features advertising for the very first time. Publishing this journal has been a very exciting undertaking for the American Society of Trial Consultants (ASTC) but not one that has been without cost. We are grateful to our growing readership base and we are especially grateful to those advertisers who believe in us and show their support by advertising on our website and in the downloadable pdf version of [The Jury Expert](#).

Please join us in thanking [ByDesign Legal Graphics, Inc.](#), [Consumer Centers of New York and New Jersey](#), and [Savitz Research Solutions](#) (and visit them on the web via these links or their ads in TJE)! And thanks for reading and commenting on our website.

Rita R. Handrich, Ph.D., Editor
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