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# The Jury EXPERT

*The Art and Science of Litigation Advocacy*

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## It's Déjà Vu All Over Again: More Thoughts on Doing Effective Voir Dire

by Charlotte A. Morris

After all the articles, lectures and workshops I've read, seen, watched or personally written, delivered and conducted on the topic of jury selection I wonder if there is really room in the world for another?

Let's face it: we've covered the basics from theory to practical application and back again.

- Do reduce the social distance between you and the jury.
- Don't talk too much about yourself or ask personal questions before you have introduced a topic more generally.
- Do try to identify psychological aspects of jury decision-making.
- Don't make your questions so crafty that the average juror either can't understand them or resists your attempts to get inside his or her head in open court.

- Do rely on attitudes, opinions and beliefs more than basic demographic characteristics.
- Don't forget that simple questions – based on life experience – are the best way to begin.
  
- Do ask questions that are case-specific and relevant to jury decision-making.
- Don't draw objections by asking argumentative or loaded questions designed as thinly-veiled attempts to sell your case or secure commitments.
  
- Do rely on attitudes, opinions and beliefs more than basic demographic characteristics.
- Don't forget that simple questions – based on life experience – are the best way to begin.

Most lawyers have gotten lots of good advice and there seems to be very little disagreement about the need to prepare and practice doing more effective voir dire. But in the immortal words of Dr. Phil I am compelled to ask: “How's That Workin' For Ya?”

### **Common Jury Selection Mistakes**

In the last year I've had the opportunity to conduct a number of post-trial interviews and I ask jurors to share their thoughts about their very first memories of the trial. I've compiled here a sample of verbatim comments that reflect some common mistakes made during jury selection.

#### ***Repetitive Questions***

There's no doubt we want attorneys to do a thorough job of eliciting the information we need to work up cause challenges, make educated strikes and connect with our case facts. But that can't mean asking the same question repeatedly.

*“I thought the attorney spent a little too much time on asking questions over and over.”*

What every lawyer needs is a menu of questions worded different ways to approach the same topic. The follow-up questions absolutely depend on the answers you get, so you also have to listen closely.

Consider the following variety of ways we could ask about attitudes and opinions toward lawsuits:

- Raise your hand if you or someone close to you has any experience with lawsuits. Tell us about that.
- What have you read or heard lately about lawsuits? What do you think?
- When does it make sense to sue? Why do you think so?
- When does it *not* make sense to sue? What makes you feel that way?
- Mr. Kennedy: What's your reaction to what you've heard so far?
- What are the makings of a legitimate lawsuit?
- Which lawsuits are frivolous? Why?
- Mrs. Smith: Tell us where you stand on the issue.
- Ms. Taylor: What are your thoughts?
- Mr. Covington: What ideas do you have?

In short, unless you have some extremely compelling research that has identified a single question that determines whether you will keep or strike a juror there is no need to repeat yourself.

## Superficial Questions

Jurors are listening to the questions you ask and looking for the meaning and relevance of them. We can't afford to squander that kind of juror interest or engagement by asking an important question without giving it context.

*“One question I thought interesting was [the attorney] asking if we manage a group of people...I didn't really understand why that question was asked...[the attorney] never used that idea of managing individuals and expecting them to do their job...during the rest of the trial.”*

Finding out if people have management experience is almost always on my list of voir dire questions, but usually what follows are questions on a theme in our case. If you don't follow up on the ideas that people have *about* management (whether they have the experience or not), you haven't done justice to a worthwhile topic and the question of experience alone can be pointless for you and for them. A few ideas about themes we might pursue in the follow-up include: managers have a responsibility to enforce workplace safety rules; or managers have a duty to maintain company records; or managers are allowed to deviate from company policy under some circumstances.



Here's how you could elicit the experience and test themes during voir dire:

Raise your hand if you have ever managed or supervised others on the job.

- Tell me a little about the company and your position in it.
- How many people did you supervise?
- What are/were your responsibilities?
- What did you like least about your position? What did you like most?

Whether you've held a position in management or not, I'd like to ask about your experience with a few work-related topics. I'd like you to think about all the jobs you've had even if this doesn't directly apply to what you are doing now:

- Tell me about the rules for safety on your job. How are they enforced? Who is most responsible for seeing that the rules are followed? If someone breaks the rules for safety, what are the consequences?
- Tell me about record-keeping in your business. What kind of records are kept? Who keeps them? Are there policies – written or otherwise – for how the records should be kept? How important is it to keep accurate records? How are the records maintained? What were the rules about document destruction?
- Are there ever times when a manager has the discretion to waive a company rule or deviate from a company policy? Can you give me an example? Raise your hand if you've ever waived a company policy or rule in favor of satisfying a customer request? Are there ever times when a

manager can accommodate a special employee request even if it isn't the rule: like giving an extra personal day or allowing someone to leave early? Tell me about your experience with that. Why is it important that managers have some flexibility on the job?

You can see that beyond following up on ideas that may be critical to the evidence in our case, we are also strategically using words and phrases (e.g. “accurate records,” “document destruction” and “discretion” or “flexibility”) that we intend to argue in the case. By using them in voir dire we have an opportunity to test whether jurors buy into the argument and to what degree.

### ***Jurors Are Watching You Too***

Many attorneys have become devoted students of non-verbal communication research and the courtroom has always been a place where even reluctant litigators are inspired to perform. Nevertheless, the experience described below is less rare than we'd like to think:

*“The [plaintiff’s] lawyer had a woman at the table with him during jury selection and she stared at everybody real hard. I thought to myself, ‘I wonder what she’s looking at’ and when she stared at me I stared right back at her. All she wanted to know was our ages and I could tell they wanted women for sympathy. She kept turning to [the attorney] and saying things like, ‘we’ll keep her’ but they never asked me any questions.”*

On one hand we might fault the lawyer’s assistant for failing to appreciate that her behavior at counsel table was inappropriate. On the other hand, the juror’s comment tells us that she believed the attorney and his sidekick had a strategy to ignore and overlook everything about her but gender.

The worst thing about this is that it was the very first and lasting impression the trial team made on someone who actually stayed on the jury. You might get away with making a bad impression by ignoring someone you think you will eventually strike, but it is nearly impossible to recover from doing so with a person who becomes your juror.

### ***Focusing Too Narrowly On the Facts***

A little background here will make the following juror comments most impressive. The underlying claim in the legal malpractice trial described by jurors below was a product liability suit (we’ll call the product a “widget”).

*“The lawyers didn’t ask that many questions. When I was on a rape case, they asked me about where I worked, my family and lots of things. They didn’t ask me anything on this case. They never even asked us to tell a little about ourselves.”*

For this, there is no excuse. Nothing is simpler than asking everyone on the jury to “tell us a little about yourself.”

*“I thought the jury selection process was awful. I thought they did an awful job. They picked the jury in 30-45 minutes. They asked hardly any questions. Basically they wanted to know if we knew anything about widgets and, if so, you were dismissed.”*

There were no time limits or restrictions on attorney-conducted voir dire in this trial. But even if counsel was only permitted an hour, there is most certainly time to ask about more than widgets.

*“They probably should have asked what I do [for work] because I felt like the plaintiff was basing [the case] on sympathy and I don’t have that in me. I’m a social worker. I’ve learned to separate my emotions from the facts at hand.”*



Setting aside for now the idea that there are emotionless, unsympathetic social workers out there: aren’t we collectively wincing about the fact that the lawyer didn’t even ask this juror what she does for a living? Here’s still more from another juror on the case:

*“We were very surprised that none of the attorneys asked us about what we did for a living. I recall them asking about widget experience and whether or not jurors knew anyone else in the [jury] pool, but that’s about it. We commented on that later, the fact that we weren’t asked very many questions.”*

Really? **None** of the attorneys asked about the jurors’ work experience? It is hard to understand why neither side believed jurors’ occupations (past, present and future aspirations) would affect jury decision-making. In fact, an extremely influential juror in the same case also revealed to me that she was on her way to law school just weeks after the trial ended, but that too never came up during voir dire.

Unless you practice in a venue that restricts you to a half-hour or less, you should have a set of questions to use in every jury selection on at least three essential topics. These start as simple ice-breakers to get jurors talking about themselves, but they are limitless in terms of how far you can expand the topics to reach your case-specific goals for voir dire. You will learn a lot about decision-making from the way people describe their educational background, work and family life.

### **Work Life**

Tell me about your work life.

- Can you describe a typical day or typical week of your work?
- What led you to this work?
- What do you like most about your work? Why?
- What do you like least? Why?
- If this wasn’t your work, what else might you do?
- Do you have any future plans for a change in your work life? Tell us about that.
- Tell us about other jobs you’ve had in the past.
- When you were a kid, what did you want to be when you grew up?

### **Educational Background**

How far did you go in school?

- What was your major or what degree(s) do you hold?
- Describe the courses you have taken – even if they were not related to your degree(s)?
- Any technical or vocational classes?
- What do you like studying most? Least? Why?
- Are you taking any courses now or do you have any plans to take courses in the future?
- If you had the extra time or money to go back to school, what would you like to take and why?



Tell us some of the same things about your spouse or significant other.

### ***Family Life***

When you're not working, what do you do?

- Who do you spend the most time with and what do you like to do together?
- If you had more free time, how would you spend it?
- When it comes to family matters, what are the things that concern you the most?

Raise your hand if you spend at least part of your time caring for a family member (of any age)?

- Tell us about that.

None of these are case-specific but good voir dire is like good soup: if you start with good stock, the other things you add make it even better.

### ***Not Focusing on the Facts Enough***

And, finally, here is the opposite problem:

*“They probably should have asked about standard of care: I just spent the last year of grad school working on standard of care [issues] and the other jurors were so confused about it. The standard of care, as I understand it, is any competent provider who is acting in good faith. It’s not really different from one professional to the next.”*

You may be prosecuting or defending lawsuits today according to the popular “Rules of the Road” and “Reptile” models. If so, you need to develop a credible way of asking jurors about standards. You could start by asking people what they think “standards” are. It doesn’t have to be complicated or formulaic to work.

The comments shared above provide us with concrete examples for which there are readily available solutions. But we should also consider the bigger picture in our approach to jury selection.

### **Preparation, Purpose & Persuasion in Voir Dire**

Voir dire must be purposeful and it can also be persuasive. We cannot wing it and expect to win. What gets lawyers in trouble most often is a simple lack of time and effort devoted specifically to preparing for jury selection.

While most experienced lawyers and trial consultants could quickly generate a host of questions based on case type alone, we cannot conduct meaningful and persuasive voir dire without clearly identifying your case strategy and thinking about how it can be manifest in the conversation you have with jurors from the start.

You don’t have to forego the potential for persuasion at this earliest phase of trial – when jurors’ attention and interest are at their highest levels – in favor of focusing exclusively on finding your strikes. The goal is to get jurors to articulate their own experience, beliefs, attitudes and opinions that are closely aligned with your case before they even know what your case is really about.

## Start with Your Strategy

If you can clearly define your strategy for the case when you sit down to compose or compile a set of voir dire questions, your strategy for jury selection will follow. In the last few years of my practice, I've included in every set of voir dire questions a list of ideas that the attorney and I believe to be the most important to jury decision-making in the case. I also try to identify what we believe to be obvious about our strike strategy. The more pre-trial research we do on a case, the more specific these lists become.

Our over-arching goal is to find critical mass on a number of related thoughts or ideas that the majority of jurors come to trial already believing. Persuasion happens by degree, so it is essential to finish jury selection knowing where your seated jurors stand on key issues of decision-making in your case. The more they believe that your case is aligned with what they already think and feel, the easier it will be to persuade them.

Below is an example of the jury selection goals crafted for Plaintiff's counsel in a medical malpractice case. Notice that we focus on finding areas of agreement as much as on finding our unfavorable jurors. We want to empanel a jury of people who believe from the very beginning that *our case is just like their own experience*.

### Plaintiff's Goals for Voir Dire

Ask questions to elicit **jurors' own answers** that closely **match plaintiff's themes**:

- **Surgery is a last resort**, and requires careful evaluation and thorough follow up.
- **Aches and pain get worse** with age, not better.
- **Exercise is a significant feature of a healthy life**; when an active person is restricted from exercise there are physical and emotional consequences.
- When a medical mistake is made, **responsible healthcare professionals admit the mistake and pay** for the harm/damage done.
- **Medical records are the best way for healthcare professionals to provide an honest account of a patient's care** and they are the only way to track the care of a patient from one provider to another.
- **Not all illness or injuries are alike**: People who have been hurt by the mistake/negligence of another deserve compensation; people who have naturally occurring conditions or who are injured in an accident (without fault) may not.
- **Even if a victim of a medical mistake is making the best of a bad situation**, she is entitled to be compensated for the harm that was done.

### Identify and remove:

- Jurors who **believe they are smarter or more skeptical patients**, who may think Kate and/or her parents should have considered more carefully the decision to have the surgery and/or sought a second opinion.
- Jurors who are **reluctant to hold healthcare professionals responsible** for "honest mistakes."
- Jurors whose life experience tends to make them **think Kate has a stable and secure job that will provide lifetime salary and benefits** in spite of her physical limitations.
- Jurors who describe their own suffering (or that of someone close) as permanent and/or **intractable** and, as a result, aren't sympathetic to Kate.
- Younger jurors who may not appreciate that **Kate's condition will worsen over time**.

This might look something like a jury profile – a way to identify best and worst jurors – or a simple list of the themes within the case. Even if you believe these to be obvious, the act of writing them down and

committing to a jury selection process that will highlight your goals for selection and strikes is the important first step to conducting purposeful and persuasive voir dire.

### Trim Your Topics

In most courtrooms there are constraints on the amount of time you have to conduct voir dire and natural limitations on the judge's and jurors' patience. Even if you have a complete database of voir dire questions to draw from, there should also be some strategic intention behind the topics you cover and in what order.

If you practice in a liberal setting for attorney-conducted voir dire you have time to start gradually and go wide. In the medical malpractice case example, you could cover all of the following topics:

- Work Experience
- Quality of Life / Family Life
- Medical Care – Experience
- Illness/Injury/Disability
- Lawsuits – Experience
- Lawsuits – Attitudes
- Medical Malpractice
- Compensatory Damages



On the other hand, if your time is extremely limited, pick two or three issues that are central to decision-making in your case and generate a discussion that will encourage jurors to talk among themselves so you can assess group dynamics while you listen for the important words and phrases in their answers.

When time is short it will be even more important to focus on themes and ideas that generate agreement with your case, because it will be a challenge to thoroughly work up cause challenges and identify your very best strikes. In this instance it is more important that you finish voir dire knowing there are critical areas of consensus among all jurors that you can link to your presentation of evidence and arguments.

In the limited format you could narrow it down to the following three topics from above (and you might find a way to sneak questions from the other topics into these wherever possible):

- Quality of Life / Family Life
- Medical Care – Experience (throw in Illness/Injury/Disability questions here)
- Medical Malpractice (include lawsuits and damages here)

A judge is much more likely to cut you some slack if you can say clearly that you intend to cover just three topics that are essential to your case.



## Craft the Questions

I've been writing and rewriting voir dire questions on topics ranging from A (Alcohol Use & Abuse) to not-quite-Z (Workplace Safety) for almost 20 years. Like many of you, I now have hundreds of questions that can be used to create the first draft of voir dire in any case. But to prepare for each case we need to craft questions that are specific and strategic.

Every jury expert will tell you that good voir dire begins with open-ended questions. In fact, for the beginning lawyer, mastering this one skill alone may be the only goal you set for yourself in the next trial.

To be more strategic in your approach you want and need to guide prospective jurors through a set of questions that go from the general to the specific. For example, the vast majority of people agree with us every time we ask if they think “there are too many lawsuits” and “people are getting too much money they don't deserve.” But attitudes like this are a mile wide and an inch deep when you start to ask jurors to tell you specifically what they think on the issues of lawsuits and damages.

In the first place many people have no first-hand experience with lawsuits and when pressed they can rarely point to a specific reason for why they agree. But people can and do find exceptions to the rule if they hear credible evidence and arguments, which is good news for plaintiffs and bad news for the defense.

Those who can clearly articulate the reasons for their position on the issues usually give you the kind of answers that make good material for cause challenges (e.g., “I think the entire court system is broken and needs overhauling”), or readily identify themselves as a strike for one side or the other (e.g., “I think people should pick themselves up and dust themselves off,” or “I think big companies hurt people all the time and lawsuits are the only way to punish them”).

So within each and every topic – on every new idea we want to test – craft the questions to go from general to specific with your strategy for the case in mind. We'll use a few from the medical malpractice example. Think about the plaintiff's goals we set out above as you consider how these questions can create consensus and identify strikes.

### ***Quality of Life / Impact of Injury***

Raise your hand if you've ever heard the phrase “quality of life?”

- What does it mean?
- What are the things that contribute to your quality of life?
- What are your top three, if you had to choose?
- Do you think most people agree with at least some of the things you mention?
- Is there anyone who has a really different idea about the things that contribute to your quality of life? If so, what are they for you?

For all of you who mentioned some form of activity or exercise – running, biking, hunting, camping, etc. – how difficult would it be for you to give those things up?

- If you had to find some alternative to your [running] habit, what would it be?
- Why do you consider those things to be a significant contribution to your quality of life?
- Has there ever been a time in your life when you couldn't do those things and you came to appreciate how important they were to you? Tell us about that.

## ***Surgery Experience / Quality of Care / Surgery as Last Resort / Second Opinions***

Raise your hand if you – or anyone close to you – has any experience with surgery.

- Tell us about that experience and how things turned out?
- Would you characterize the surgery as “minor” or “major?” Why?
- How did you know you/he/she needed the surgery?
- How long did the doctor spend treating you/him/her before recommending surgery? How many visits? What type of tests?
- What kind of information did the doctor give you/him/her before the surgery?
- What about after the surgery: did the doctor give you/him/her the details of what happened during surgery or how it went?
- Tell me about the follow-up care and treatment after surgery? Did you/he/she see the doctor again after surgery? Why or why not?
- Were you/he/she satisfied with the outcome of the surgery? Why or why not?
- Was surgery the first or only option for you/him/her, or was it more like a last resort?
- How many of you would agree that – in general – surgery is probably a last resort for most medical conditions or problems? What are the exceptions? Who doesn’t agree?
- Did you – or the person close to you – seek a second opinion before having the surgery? Why or why not?
- Raise your hand if you think a patient must always get a second opinion before having surgery of any kind? If “it depends,” what factors would you consider?
- Raise your hand if you – or anyone you know – has ignored or refused to have surgery even though a doctor recommended it. Tell us about that.
- Raise your hand if you – or anyone you know – has had a bad experience with surgery? Tell us about that. Was that a case of the doctor botching the surgery or was it some other natural complication?

There are so many good ways to ask open-ended and follow up questions so be sure to incorporate all the possibilities in your voir dire. Here are a few templates:

### ***Open-Ended***

- Raise your hand if you or someone close to you has ever...
- On a scale of 1 to 10 how [insert adjective here] is...
- Tell me about your experience with...
- What have you read or heard about...

### ***Follow-Up***

- Tell us about that.
- What happened?
- How did things turn out?
- Were you satisfied with the outcome?
- Why do you think/feel/believe so?
- If you had it to do over, what would you do differently?
- What did your experience teach you?



## Create Connections with Every Juror

For so many years – when we focused exclusively on exercising strikes instead of finding areas of agreement – it felt like we never had enough strikes to go around. And at the end of the jury selection process – when both sides had effectively eliminated their least favorable jurors – we would sometimes look up at the panel only to realize that we knew very little about all those people who landed in the “middle.” We’d congratulate ourselves on getting rid of our “worst,” talk about how much we missed those awesome people that the

other side struck, and hope that we could make the best with who we had left.

Now – when we marry our strategy for the case with our best evidence and arguments to jurors’ pre-existing experience, attitudes and beliefs – we more often end up with strikes to spare. We incorporate the words and phrases jurors used during voir dire into our opening statement, so that what we tell them about our case sounds more than vaguely familiar. Throughout the trial we are mindful that our conversation at the start has set the stage for everything that follows. And in closing argument we are permitted to argue directly to jurors by reminding them of their own pre-existing ideas and beliefs that they shared with us during jury selection.

That said, it is essential that you are also comfortable opening the door to the attitudes and opinions that are harmful to your case and there are separate strategies and skills for doing this effectively. We could devote an entire article to the art of generating effective cause challenges and there are great resources – such as [Jurywork: Systematic Techniques](#) – to help you make the case for getting additional peremptory strikes and creating the optimal conditions for voir dire.

When you purposely create a connection with every juror on the panel during jury selection – on one or more important issues in your case – you are quickly on your way to being more persuasive as a result. You are also much less likely to be on the receiving end of a bad review in my next post-verdict project. And if any of the jurors’ comments could have been made about your last jury selection, you can learn more about crafting meaningful and persuasive voir dire [here](#).

***Charli Morris is a trial consultant living in Raleigh, North Carolina and working in venues across the country. She has taught extensively on jury decision-making and all aspects of trial preparation. The second printing of her book, *The Persuasive Edge*, will soon be available in paperback. You can reach her at [cmorris35@nc.rr.com](mailto:cmorris35@nc.rr.com) and find out more by visiting [www.trial-prep.com](http://www.trial-prep.com).***

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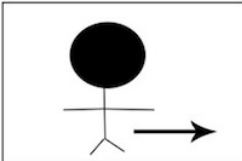
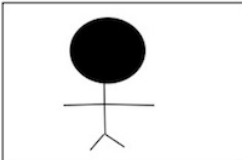
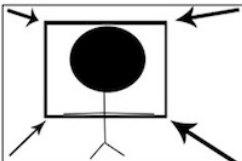
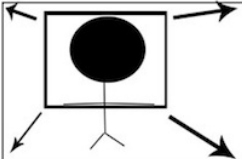
# Trial Graphics on the Cheap – 8 Useful Tips

By Laura Stanford Rochelois

When I first started in this business, I used to hear, “I really can’t have any graphics for my presentation because I’m afraid I’ll look too glitzy.” I don’t hear that anymore, thankfully. Now we hear that most of the people in the jury box expect visuals since they have been raised in the post-democratization of production tools era. That is, many things that once required investment and training (like publishing, film production, and graphic design, to name a few) can now be done by pretty much anyone who has a little time and energy to give it a try. Want to self-publish? Blog. Movies? Capture on your phone, edit on your Mac and broadcast yourself. We’ve all seen what David Byrne can do with PowerPoint, and so can we. Mostly, this gets summed up as ‘social media.’ The majority of jurors are writing, producing, starring in and distributing their own media-rich content all day every day. The ubiquity of visual messages in their lives (both as recipients and creators) means they score high on the visual intelligence-o-meter.

Fact finders with these kinds of life experiences expect you to keep them interested. None of this is news to you. What you want to know is – how am I going to cost-effectively make media-rich presentations for these fact finders? This article provides you with some DIY tips based on research and experience.

## STORYBOARD

Title		Date	
Producer(s)		Page of	
Video	Time	Audio	
	_____	When story Boarding Arrows in the frame denote movement of a person or object.	_____
	_____	An arrow outside the frame shows Movement of the Camera	_____
	_____	A frame inside of a frame Can show a push or zoom in	_____
	_____	Like wise it can show a push or zoom out.	_____

## DIY Tip #1 – Plan!

Truth is, visuals are time-consuming to make, so start the process by planning. Map out what you are going to say and list out where you’d like to have a visual to accompany your narrative. On your visuals list, separate the ‘would like to have visuals’ from the ‘must have visuals.’ Begin brainstorming possible solutions for the ‘must haves.’ Decide which solutions you want to develop and then put these into production. Once production is underway for those you can’t live without, brainstorm and produce the rest.

Resist the urge to produce in order of the presentation. The goal is to allocate resources wisely, so that the important items get the time and effort they deserve. Some visuals are filler, and should have fewer resources devoted to them.

**DIY Tip #2 – If your trial is going to last more than two days, use a trial presentation system.**

The main reason to use a digital evidence retrieval system is that you must create the impression that you would never, ever waste even a second of the jury's time. Jurors expect you to be prepared and to respect their service. Plus, once you have everything loaded, it's a super cheap way to pop something up on screen any time you see the need.

Please note that even though they are social media hogs, Gen Y is still subject to bandwidth issues for learning. If you want them to learn something (so they can be persuaded by it and persuade others with it), you can't overload their cognitive capacities. Distinguish between what you show to meet their expectations for a media-rich presentation ("fillers") and what you show to win your case.

**DIY Tip #3 – Use Visuals Produced in Discovery**

These rate high on the likely to be admitted scale, and they don't cost more than the price of a scan. Police report diagrams, photographs, org charts, flow charts, graphs, magazine covers, anything in color, etc. If production documents are few, assign someone to quickly flip through every page (without reading a single word) and flag items with visual interest. If production documents are many, maybe have someone quickly scan the documents on the trial exhibit list for visuals contenders. The goal is to mine the evidence you've already got for ready-made visuals. Once you've found it, crop it, put a title on it, colorize it, annotate it, or simply use it as is. Voila, you've made a visual.

Note that there doesn't have to be 100% overlap between the voiceover and the visual. It can just be on-screen while you're talking; you don't necessarily need to explain/describe/'talk to' everything that shows up on the screen.

**DIY Tip #4 – Don't Forget Title and Bumper Pages**

I *love* User Interface. Out there on the world-wide-web, you have to figure out where you are all by yourself (and with the help of the much under-appreciated UI designers). But in your presentation, you can tell them you're going somewhere else by signposting. If you don't have to exchange visuals in advance, you can type in your section headings to slides. If you do have to exchange, you can just write the section header on the whiteboard or butcher paper.

Note that I'm not suggesting you make bullet point slides. While I never say never, I will say that you should avoid bullet lists. I am suggesting that you make a one word slide (okay, maybe a couple of words) as a cheap way to get something on-screen. Sort of a visual pause, that can also help transition into a new section of your presentation. Or if you want to draw emphasis to something in closing, a few well-chosen words on-screen are a fast and inexpensive 'visual.'

Use theme phrases, or even more instructional phrases to set up the role of the jury. For example: INSPECT THE EVIDENCE, or depending on your message, CONSIDER ALL THE EVIDENCE. Or one word, CREDIBLE?, up on screen while you skewer (gently, of course) their witnesses in closing. Eyes are still on you, but the screen is something other than black or document scans the whole time.



## DIY Tip #5 – Troll the Web

I feel kind of silly for having this as a “Tip,” but I need a place to share a couple of URLs and ideas.

5.1. Logos: Companies spend a fortune on branding so that their logo has lots of associative meaning. Leverage this at [brandsoftheworld.com](http://brandsoftheworld.com), where you can download native versions of logo files for free.

5.2. Aerial photographs: Before there was Google earth/maps, there were aerial photography outfits, that would take pictures from low-flying planes every couple of years and then sell you prints or jpegs for a nominal fee. If you are looking for something that [your favorite online map site goes here] doesn't have, you can probably find the old school aerial outfits online.

5.3. Stock photography/clip art: My favorite stock photo sites are [corbisimages.com](http://corbisimages.com) and [gettyimages.com](http://gettyimages.com). Stock photo sites are useful both when you already know you're looking for a photo, and when you're hunting around for visual ideas. Bing and Google images can also be helpful in the brainstorming phase (both offer a blend of clip art and photography). Beware that image research can be very time consuming (I'd say worse than Facebook, but I have no idea how much time you spend on Facebook every day). Note: If you do wind up getting stock images from the web (from Getty for example), please pay for the image so that it doesn't have the watermark. It is very bad form to display an unlicensed copy of stock imagery in court.

5.4. Figures, etc: I do a fair amount of work on technology cases, and am often asked to ramp up quickly (albeit superficially) on the technology-in-suit, and help explain the technology to juries. Like everyone else tasked with learning something they know little to nothing about, I turn to the Internet. [Wikipedia](http://Wikipedia), of course, and [howstuffworks](http://howstuffworks) are trusted resources for explanations that are accompanied by figures and illustrations. If I use the figure/illustration to help me ramp up quickly on the technology, I am likely to flag it as something that will help a layperson. I might redraw it, or use it as is (as time and budgets are often tight). In some situations, existing figures and illustrations serve as inspiration for original artwork. Industry-specific websites can also be a good place to find helpful figures, or the sites of the parties in suit. I worked on an options trading case recently, and found wonderful explanations in the 'investing basics' section at [schwab.com](http://schwab.com). Given that Schwab is a discount/DIY brokerage, it makes sense that their site has helpful figures and explanations. Keep an eye out for sites like this during your case/visuals research.



## DIY Tip #6 – Repeat, With a Twist

Messages need reinforcing, but jurors who move at the speed of Twitter may not like to see the exact same thing on-screen more than once or twice. And so my suggestion is to duplicate and slightly revise (make 'derivatives,' if you're into jargon), as a cheap way to get something 'newer' on screen. We're all familiar with zooming in on documents, but why not zoom-out on a photograph, to show more context? Toggling between arms-length and detail view can be visually interesting, and not at all costly. Annotations are another good trick, especially once the underlying item has been moved into evidence. Overlay color blocks on a map to show wetland areas. Overlay icons on a graphic the other side created to show that their theories are full of holes. Put arrows on diagrams; you get the idea.

Modifying motion can also be a good derivative trick. The second time you show the animation, you might not need as much set-up, so you can condense that part. Or you might just show the end-frame. Or you might decide to expand the version you use with the expert, where you used the shortest possible summary version in your opening. Variations on a theme can make your material go farther and with better effect.

### DIY Tip #7 – Display Wisely

Now that you've made your visuals, what kind of display will you use? Print or projection? If you are displaying video or any kind of motion graphic, you'll need to project. The most important thing if you're going to project is to make sure you're using a very bright projector (4,000+ lumens). Projection is also much more forgiving when it comes to lower image resolution, and it's more flexible if you need to make real-time changes to your visuals. Print, on the other hand, is less immediate and less forgiving resolution-wise. BUT, if you have just a few display images, and your image resolution is high enough (300 dpi), then printing at your local Kinko's the day before is a good way to go (many offer low-cost oversize inkjet printing + foam core mounting). I usually don't think visuals are board-worthy unless (1) they are in color, (2) they function as a mood piece and/or (3) they are fill-ins (where you print some of the information, and write on the board to fill in remaining information). In general, documents should not be printed as boards. I saw yesterday that my local Costco photo will do a 20x30" un-mounted color print for \$8.99 while I wait (promising 1 hour turnaround)! They aren't open 24 hours a day, so you'd need to factor that into your planning, but my god it's cheap to print these days.

### DIY Tip #8 – Pause Before You Make a Timeline

My kids watch a very entertaining TV show called 'Mythbusters,' where some science-geek hosts put together experiments to test various myths. Are bananas really slippery (yes!); does drinking alcohol really keep you warm? (sadly, it does not). In my next life, when I come back as a Mythbuster science-geek TV host, I will test the validity of a trial myth that I hear a lot in this life – "Every case needs a timeline." I guess I don't disagree entirely. Yes, every case needs a timeline, but I'm far from convinced that every trier of fact needs to *see* a timeline. Every case needs to have a chronology developed for planning purposes, but consider pausing before you proceed to producing the timeline. Ask whether the timeline is primarily being produced as presenter-notes, or primarily as a visual communication tool. Proceed with production if it's the latter. For bonus points, articulate what you want your timeline to communicate visually, and brainstorm whether another graphic could meet the visual communication objective.



I'm not suggesting you shouldn't make timelines, but I am advocating for some ROI analysis up front. They are expensive to produce and frequently not very visually compelling. Before you make a timeline, be sure it's the best solution.

## Parting Thought

The goal of courtroom presentation is as it always has been – to persuade the jury. The catch is that we seem to have less and less time to prepare for presentations that need to be increasingly media-rich. Not an easy task fellow Iron Chefs! But, use some of the above tips and you will be on your way.

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# Does Bifurcation Eliminate the Problem? A Closer Look at Hindsight Bias in the Courtroom

By Matt Groebe

Hindsight bias is a widespread and often unavoidable human fallacy. Relative to foresight observers, those with knowledge of the outcome of an action (e.g. in hindsight) believe that the given outcome has a much higher likelihood of happening. Hindsight bias plays a crucial role in civil trials, in which the defendant is often disadvantaged because jurors know the negative outcome of the defendant's behavior and are thus more likely to think he should have known about the risks associated with his behavior. Bifurcation (separate liability and damages phases) is proposed as a way to reduce or eliminate hindsight bias in the courtroom. The question though, is does bifurcation eliminate or reduce hindsight bias? This article presents a quick overview on hindsight bias and some detail on how hindsight bias applies to jurors in the courtroom. Finally, I discuss two empirical studies that tested the effectiveness of bifurcation as a tool in reducing hindsight bias in jurors.

## *Hindsight Bias*

Fischhoff (1975) identified a phenomenon in which individuals who were asked to make a judgment in hindsight differed markedly in their judgments than other individuals asked to make the same judgment in foresight. Specifically, he observed that individuals with outcome knowledge tended to exaggerate their ability to predict the inevitability of an event's outcome, such that they overestimated both the likelihood of the known outcome occurring and the ability to foresee the outcome (Stallard & Worthington, 1998). Fischhoff coined the term "hindsight bias" to explain this human fallacy. He concluded that despite continually falling into the trap of hindsight bias, individuals are largely unaware of the effect that the outcome knowledge has on their perceptions. And even when they are told that they have this outcome knowledge and that they should try to ignore it, individuals are unable to avoid hindsight bias. Perhaps even more disheartening, both novices and experts alike (e.g. judges in court cases, surgeons in medical malpractice hearings) fall prey to hindsight bias (Harley, 2007). In addition, Fischhoff (1975) found that we are more likely to remember event information that is consistent with the outcome and minimize, distort, or even forget information that is inconsistent with the outcome. Therefore, people pay much more attention to information that fits with the reported outcome, and marginalize information that is inconsistent with the reported outcome.

## *Hindsight Bias in the Courtroom*


Jurors typically face the classic hindsight task. Jurors are put in a situation in which they know the outcome of some event, but are asked to judge whether the defendant's behavior at the time leading up to the accident was negligent. Jurors' duty is to assess whether the damage or injury caused by the defendant was foreseeable, and whether the defendant was aware or should have been aware of the risk (Harley, 2007). Put another way, when judging negligence the law asks jurors to attempt to recover a naïve, ex ante view of once future events and to judge the defendant's conduct in light of what he should have known in the past (Hastie, Schkade, & Payne, 1999). Given what has been documented about hindsight bias, this should prove to be a much more difficult task than intended. Jurors are aware of the outcome when they make their determinations of negligence for the defendant. Jurors know how bad the injuries to the plaintiff are. Even in a bifurcated trial the jurors know that some sort of negative outcome occurred or there would be no trial.

So the fact that jurors know the plaintiff has suffered an injury and that the plaintiff believes the defendant caused that injury makes it difficult for jurors to set aside that damaging information when judging whether the defendant's actions were negligent.

Hastie and colleagues (1999) examined the effect of hindsight bias in the courtroom. They put some participants in a foresight condition in which a railroad company was given a ban and told to stop operations, and it was up to the participants to decide whether the company should proceed anyway despite the ban. The rest of the participants were put in a hindsight condition in which the railroad company decided to continue operations despite the ban. A train crashed and spilled toxins into the surrounding ecosystem, causing extensive damage. Sixty-seven percent of hindsight participants said that the railroad company's actions were negligent, whereas only 33% of foresight participants said the railroad should not be allowed to operate. Thus, most foresight participants thought the company should continue operations, even though most hindsight participants thought that those actions were negligent. Hindsight participants were exposed to a negative outcome which made the defendant's behavior seem more negligent than it appears in foresight. In addition, foresight participants on average predicted a .34 probability of an accident, whereas hindsight participants on average predicted a .59 probability of an accident. Thus, the negative outcome information given to hindsight participants made it seem likely that an accident would happen, whereas those foresight participants who had not read about an accident were not prone to think that an accident was imminent. In this study, the authors found hindsight effects, even though hindsight participants were not exposed to any new ex post information regarding the defendant's negligence that foresight participants were not given.

This finding by Hastie and his colleagues is not an uncommon finding. The authors found that the hindsight participants, who are akin to jurors, were not good at setting aside their outcome information when asked to make negligence decisions and estimates of probabilities, even when they were instructed to do so. This is a prime example of a phenomenon known as “fusion”, which is when jurors use legally inappropriate information (e.g. outcome information such as the extent of the damage) when making an unrelated legal decision (e.g. negligence) (Ellis, 2002). Thus the courtroom is perhaps a flawed venue for making determinations of negligence because jurors are put in the privileged spot of knowing outcome information that the defendant could not possibly take into account at the time of the accident. But there is no feasible or practical way to eliminate this problem. Bifurcation has been one of the primary methods proposed to attempt to lessen, if not entirely eliminate, hindsight bias in the courtroom.

### *Bifurcation*



The typical civil trial is presented to the jury in a unitary format, in which the jury hears liability-related evidence (e.g. the defendant's conduct) and damages-related evidence (e.g. the outcome of the accident including the plaintiff's injuries) all at once. The jury then makes its decision regarding liability. If the jury finds the defendant liable, jury members then discuss appropriate damages amounts. The criticism often raised with unitary trials is that they bias the liability verdict towards the plaintiff and away from the defendant. This is because the damages-related evidence in a unitary trial is likely to be strongly pro-plaintiff. It is the presence of this evidence that often helps the plaintiff win on liability (Horowitz & Bordens, 1990).

In contrast to the unitary format, in a bifurcated format the jury first hears only liability-related evidence (e.g. the defendant's conduct) and then makes its decision on liability. Only if they find the defendant liable do they then hear damages-related evidence (e.g. the extent of the negative outcome). Advocates of bifurcation claim that it reduces the probability that jurors will utilize damages-related evidence



when deciding liability (Horowitz & Bordens, 1990). In addition, bifurcation helps by separating the two components of the case to facilitate independent liability and damages decisions by reducing confusion about which evidence is to be used for which decision and by minimizing the biasing effect of evidence regarding one component on the decision regarding the other (Wissler, Rector, & Saks, 2001). Hence, it reduces fusion, which may be due to hindsight bias. So the empirical question is then, do bifurcated trials reduce hindsight bias and help defendants prevail on liability?

Both Horowitz and Bordens (1990) as well as Smith and Greene (2005) found that defendants were more likely to prevail in bifurcated than in unitary trials. So it certainly seems possible then that bifurcation is an effective tool to reduce hindsight bias. While it is a worthy goal to reduce hindsight bias, it would be a much better goal to eliminate it entirely. In explaining how bifurcation helps the defendant win on liability, Smith and Greene (2005) conclude that bifurcation eliminates the possibility of hindsight bias because it removes from jurors' consideration the very information that biases their decisions in the first place (e.g. outcome-related information).

But is the above assertion premature? In a bifurcated trial, jurors are aware that some negative outcome has occurred, even if they do not know the full extent of it. Why else would they be called to serve on a jury? They know that the defendant's actions allegedly led to some sort of negative outcome. Since they know that a negative outcome occurred, hindsight bias might not be eliminated but instead merely reduced in a bifurcated trial. In order to test whether bifurcation actually eliminates hindsight bias, a bifurcated trial condition must actually be compared to a foresight condition, which would be a true baseline condition because foresight individuals do not have any outcome knowledge and hence no propensity to be affected by hindsight bias.

### *Does Bifurcation Actually Work?*

Two studies were conducted to test whether bifurcation *reduces* or *eliminates* hindsight bias. The study materials were adapted from Kamin and Rachlinski (1995). In the first study, college students read one of three versions of a civil trial transcript. In the foresight condition, participants acted as a town council member and read about a town council administrative hearing in which the town was deciding whether or not to enact a law to require the employment of a bridge operator during the winter months. Specifically, the participants were asked about the probability of a preventable flood in any given year as well as whether they would vote to enact the law. In the hindsight bifurcated condition, participants acted as mock jurors in a civil trial and read a transcript in which the town was sued by a bakery owner for not hiring the bridge operator, and as a result the river overflowed and destroyed his bakery. Jurors in the bifurcated condition only read about liability-related information and were not exposed to any information about how severe the outcome of the flood was. In the hindsight unitary condition, participants again acted as mock jurors in the same civil trial. The only difference was that these jurors were exposed to outcome-related information, and thus learned about the full extent of the outcome. Jurors in the two hindsight conditions were asked about the probability of a preventable flood in any given year as well as whether they found the city liable.

Although there were no significant differences for the probability of a preventable flood between the three different conditions, there were interesting differences in the dichotomous liability question – the question that would determine liability in a civil trial. Mock jurors in the hindsight unitary condition almost uniformly (95%) found the city to be liable. Mock town council members in the foresight condition were much more lenient on the city. Only 41% thought that the city should enact the law to require the employment of a bridge operator. Thus, the majority of foresight participants did not agree to hire the bridge operator, something that most hindsight unitary participants found negligent. The critical question is, what did the hindsight bifurcated participants think?

While there was a significant difference between the hindsight unitary and hindsight bifurcated conditions, there was not a significant difference between the hindsight bifurcated and foresight conditions. Only 54% of hindsight bifurcated participants found the city to be liable for not hiring a bridge operator. Since there was a statistically significant difference between the hindsight unitary and the hindsight bifurcated conditions but not between the hindsight bifurcated and the foresight conditions, these results suggest that bifurcation actually *eliminated* hindsight bias. Mock jurors in the hindsight bifurcated condition were not as influenced by the outcome information (since they did not learn the full extent of it as hindsight unitary mock jurors did), and consequently they were less inclined to find the defendant liable.

	Foresight Condition	Hindsight Bifurcated Condition	Hindsight Unitary Condition
Decisions Finding the City Liable (%)	41% <sup>a</sup>	54% <sup>a</sup>	95% <sup>b</sup>

Table 1. Percentage of participants across conditions finding the defendant liable. Note that the difference between the first two conditions is not statistically significant, whereas the third condition is statistically significantly different from the first two conditions.

After finding that bifurcation effectively eliminated hindsight bias, the next question is what is the mechanism or process through which bifurcation reduces the bias? Several researchers have found that more severe injuries to the plaintiff (e.g. more severe outcomes) lead to a higher likelihood of liability verdicts against the defendant (Bornstein, 1998; Greene, Johns, & Bowman, 1999). In order for a case to actually go to trial, the injury to the plaintiff or the damage to a property is likely to be pretty severe. So in a unitary trial the outcome that jurors hear about has the potential to be bad. And since severe injuries exacerbate hindsight bias compared to milder injuries, a unitary trial is likely to lead to greater hindsight effects and hence a higher percentage of verdicts against the defendant. In a bifurcated trial, on the other hand, jurors know nothing about the severity of the outcome. If jurors are imagining a less severe outcome in a bifurcated trial, then it follows that outcome knowledge would have less of a detrimental effect on liability verdicts, leading to smaller hindsight effects and hence fewer liability verdicts against the defendant.

A second study was conducted to test this assumption. The goal was to manipulate the severity of a flood in the minds of the mock jurors. Mock jurors were placed in one of two conditions. In the “typical” condition, mock jurors first read a short cover story about a flood that resulted in minimal damage. They then read the bifurcated trial transcript from the first study. Before making their liability verdicts, they were asked to write about the “most likely” outcome that would have happened to the plaintiff's store as a result of the flood. In the “severe” condition, mock jurors first read a short cover story about the recent Nashville floods and the detrimental impact they have had on that city. They then read the bifurcated trial transcript from the first study. Before making their liability verdicts, they were asked to write about the “most severe” outcome that would have happened to the plaintiff's store as a result of the flood in the transcript.

Significant differences were found between the “typical” and the “severe” conditions. Whereas only 52% of mock jurors in the “typical” condition found the city liable, 76% of mock jurors in the “severe” condition found the city to be liable for failing to hire the bridge operator. Therefore, it appears that when jurors are imagining a milder outcome, they are less inclined to find for the plaintiff on liability than when they are imagining a more severe outcome. This implies that bifurcation may be effective in reducing hindsight bias and hence leveling the field between the plaintiff and the defendant because jurors may not be imagining as grave of an outcome as the one they may hear about in a unitary trial. But when jurors are

induced to imagine a severe outcome in a bifurcated trial, verdict rates rise to more closely resemble those from a unitary trial.

### *Closing Remarks and Recommendations*

Despite its potential for reducing the amount of liability verdicts against the defendant, not much empirical research has focused on the effectiveness of bifurcation at meeting its intended goal. The aim of bifurcation is to reduce hindsight bias, which is what often hurts defendants. The research reviewed above demonstrates that bifurcation essentially eliminates hindsight bias so that liability verdicts were not statistically significantly different from a foresight baseline. Also, the mechanism through which bifurcation works is potentially through the less severe outcomes that jurors are imagining in a bifurcated trial.

The advice for attorneys is quite simple. A civil defense attorney should advocate for a bifurcated trial, unless of course if liability evidence is very strong against the defendant in which case the defendant will likely lose on liability no matter which trial format is used. Bifurcation will reduce, or even eliminate, jurors' hindsight bias and thus lead to less liability verdicts. Furthermore, during the bifurcated trial the defense attorney should carefully attempt to create expectations of mild outcomes that could have happened as a result of the accident. On the flip side, the plaintiff's attorney should advocate for a unitary trial. It will exacerbate hindsight bias and thus lead to more liability verdicts against the defendant. During the bifurcated trial the plaintiff's attorney should carefully attempt to create expectations of severe or extreme outcomes that could have happened as a result of the accident.



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## Editor's Note

2011. That happened fast! But we're ready (more or less). We're doing new things here at *The Jury Expert* in 2011. And we are excited about them. In our next issue, we'll have professional layout so you won't have to put up with my amateurish efforts any longer. (You are no more relieved than I!) And. Also in our next issue, we expect to have a new web design that will just amaze you. It will be beautiful. Trust me.

Also in 2011--we are introducing a new sort of respondent to the articles we publish from academics. So far, we have always had trial consultants respond to those pieces with thoughts on how they would (or would not) use the research findings in court. Now--we are adding in trial lawyers. Have you wished you could have your [tactful] say? Now you can. Just send me an email ([rhandrich@keenetrial.com](mailto:rhandrich@keenetrial.com)) and let me know you would like to respond to a *Jury Expert* article. You can see a how-to from Mark Bennett (a Houston criminal defense lawyer) in this issue. We thought it would be interesting to see how the thoughts of trial lawyers diverged and/or converged with the thoughts of trial consultants. So line up, oh gentle readers. Show us what you've got.

So in this issue of *The Jury Expert* you will find ways to do what you do better, smarter, and more efficiently. You will find ways to keep up with what's new, pack your bag (lightly), craft a SJQ for white collar crime cases, do better voir dire, consider how bifurcation interacts with hindsight bias, and get practical and useful tips for cheap DIY trial graphics. Just our effort to help you maintain your resolutions to do what you do better, smarter, and more efficiently.

Welcome to 2011. Welcome to another year of terrific content and thought-provoking commentary from *TJE*.

[Rita R. Handrich, Ph.D., Editor](#)

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