



The Jury

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Avoiding Jury Duty: Psychological and Legal Perspectives

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Stanley L. Brodsky

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Values, Priorities, and Decision-Making: Intergenerational Law Offices, Intergenerational Juries

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FAVORITE THING

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Our Top Ten Most Accessed Articles for 2012!

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Forensic Mental Health Evaluations: Reliability, Validity, Quality, and Other Minor Details

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Daniel Murrie, and
Marcus T. Boccaccini

NOTE FROM THE EDITOR

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NOTE FROM THE EDITOR

Wait! We're leading with an article on how to avoid jury duty?

NO, NOT REALLY. Instead it's an article on how people search for, find, and attempt to use various excuses for why they simply cannot complete their civic duty. Part ridiculous ("I can't sit on this jury because I've been a victim of homicide myself"), part reasonable ("I can't be a juror because I'm a caregiver for my aging parents"), and for those who believe jury duty an important activity—part sad ("I can't be a juror because it wouldn't be fair since I'm psychic"), the authors give us practical strategies for knowing when to exercise strikes and knowing how to inquire further.

In addition, we have articles on how to more effectively question child witnesses, a look at the readability of pattern capital jury instruction (you know what this one says!), and a look at how to manage the intergenerational jury. And that's not all. Look further and you'll find an article on how much you can rely on the reports of forensic examiners when it comes to assessing competency to stand trial, conditional releases, and criminal responsibility. The short answer is to be cautious and ask for a second opinion!

Since it's a new year we are highlighting the top ten most accessed articles during the 2012 calendar year here at the *Jury Expert*. We also have a terrific how-to piece on the application Evernote to help you stay organized in 2013 and finally, a new Favorite Thing.

2013 has already brought us [Lance Armstrong's doping admission](#) (courtesy of Oprah), Manti Te'o and an [alleged years-long hoax](#) involving a very unlucky girlfriend who turned out not to be real, and the actor who brought us the [voice of Charlie Brown](#) arrested for stalking and criminal threats. We will likely continue to hear about these and certainly other courtroom-relevant events throughout 2013 and when we can, we'll bring you articles directly relevant to what is being talked about in the media and in popular culture.

We here at *The Jury Expert* appreciate your continued reading of our publication. Both our authors and our editorial staff work hard to bring you relevant, practical and timely articles. In 2013, our intent is to continue that standard and respond to your requests for work on topics we've not yet covered. Let me know what you'd like to read about and we'll do our best to make it happen.

Rita R. Handrich, PhD
Editor, *The Jury Expert*

READER COMMENTS

On Only the Guilty Would Confess to Crimes: Understanding the Mystery of False Confessions:

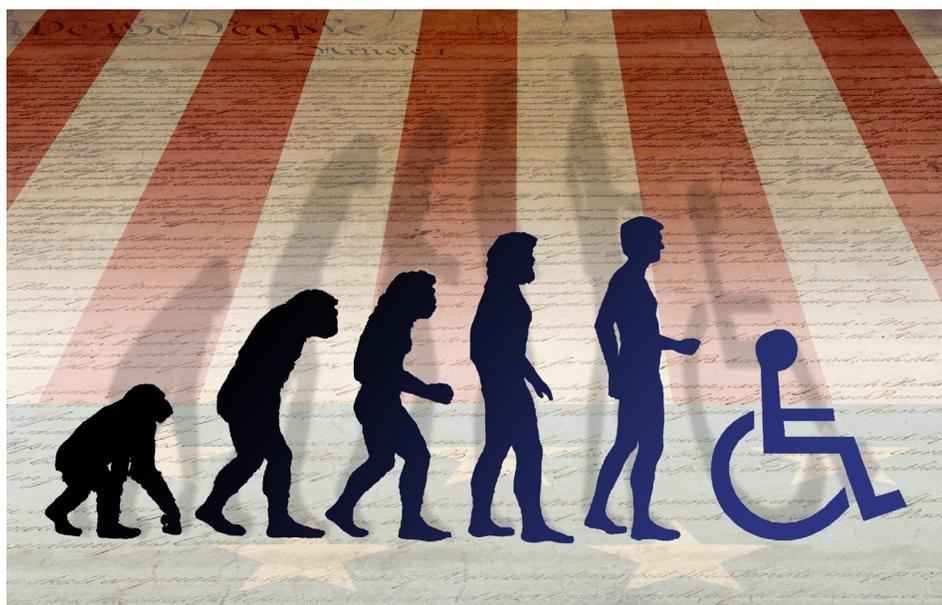
The most chilling things we learn from Barksdale are 1) When we ask why cops do what they do, “Because they can” is in fact the right answer. Since “experienced law enforcement officers know that the rules change on a regular basis” as long as they are acting within the current set of rules, they are not to blame for the result. Was is Barksdale’s intention to paint police as being devoid of their own moral compass? Unable to determine right from wrong they need the law to restrain them. A group that would rape, sodomize suspects if only it were legal. 2) Police officers really do see the Constitution as an obstacle that should not so much be obeyed, but circumvented properly. And this “willingness to test the boundaries of the rules are the mandate of contemporary law enforcement interviewers, in the quest to maximize the gathering of information.”

Frightening stuff.
-[clarkcountycriminalcops](#)

On Disability Wrongs, Disability Rights

Bravo on a clear and important essay. Identifying abelism, in parallel to racism, is apt and prescient. We can all hope that this paper accelerates progress toward acceptance of people with disabilities the same way we white people learned to accept a four-star African American general as head of the Joint Chiefs of Staff and another as Commander in Chief. That progress was long, hard and important. We can only hope things progress quickly for people with disabilities.

As the author of Truthiness Fever; I am particularly pleased with your treatment of truthiness. My personal efforts these days focus on how to make truth telling profitable, because except for the courts where truth telling is mandated, it’s mostly absent from the public sphere, where biased interests dominate messaging and communication. So if we can’t drum out truthiness from the judicial process, we are in serious trouble as a society. -[Rick Hayes-Roth](#)

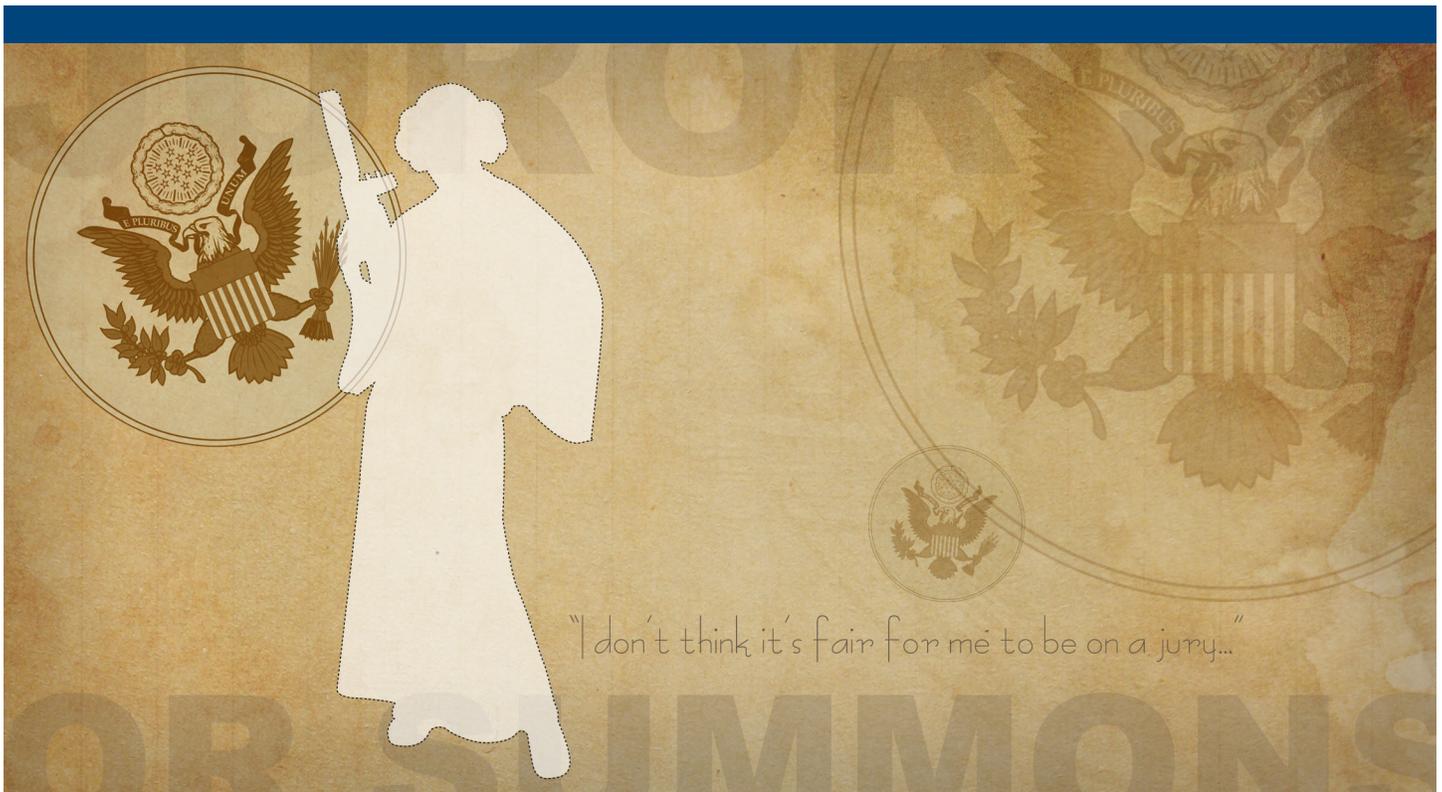


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Avoiding Jury Duty: Psychological and Legal Perspectives

by David M. Sams, Tess M.S. Neal, and Stanley L. Brodsky

IT WAS THE FIRST TIME we had ever seen an echo effect so dramatically demonstrated. The jurors had been brought in panels of 14 for voir dire in the capital murder trial scheduled to begin the following week. One woman on the jury panel explained she had been taught in her church not to sit in judgment of others, and that only God could do that. She said serving on a jury that would judge somebody of a crime would go against her religion. Both sets of attorneys and the trial consultants furiously scribbled notes. When the questioning continued, a man who was two positions behind her in the alphabetically-ordered venire piped up loudly, “Me, too!”. He continued, “What she said. I don’t judge others. It’s my religion.” In response to a series of questions, he stayed with his answer, even though it was clear to the judge, attorneys, and observers that he had leapt on her statement because it was so compelling and tried to make it his.

In one form or another, this scenario of evasion repeats itself in courtrooms all over the country. Jurors are called to serve. When and if they show up, they often have a constructed story to evade jury duty. Sometimes the stories sound rational on their surface. It would be a financial hardship to miss work. They

have caretaking obligations with ill or aging family members. They have physical handicaps that would interfere with sitting for long periods or they have difficulty hearing. Other times their stories are not compelling, like this man who echoed the religious woman. In this article, we provide observations about how and why people try to get out of jury duty and then offer suggestions for selecting jurors. As we will explain, citizens who are not at all eager to be on juries, just as those who are overly eager to be on juries, may not be the best people to have deciding your case.

Jurors and Excuses

Although the jury can be linked back to the participatory democracy that first emerged in Greece in the sixth century, it was not until the signing of the Magna Carta during the reign of King John in the 1200’s in England that the right to a jury of one’s peers surfaced. As early democracies developed, the use of the jury became the chosen method of administering justice (Sward, 2001). Participation in the legal system by free men was a method to ensure fairness and to prevent state corruption from creeping into judicial systems. This use of checks and

balances as a means to ensure justice remains at the heart of most modern democratic legal systems. Unfortunately, while the use of juries is firmly intertwined into the fabric of most modern judicial systems, jury participation by the citizenry of such democracies has fallen into disfavor.

Most states allow citizens to be excused from their civic duty under certain circumstances that address the needs of specific citizen populations or situations where jury duty would be burdensome on the citizen or their employer. Rottman and colleagues (1998) examined state laws and found that undue hardship was explicitly identified in 36 states as a reason for excusal from jury service. For example, Florida Courts readily excuse prospective jurors who are “expectant mothers” and “any parent who is not employed full time and who has custody of a child under 6 years of age” or those citizens “70 years of age or older.” Regarding employment, Alabama Courts automatically postpone or reschedule a juror’s service if one of the juror’s fellow employees was summoned in the same period and their employer has five (5) or fewer full-time employees. The public policy considerations relating to pregnancy, child care, age, and employment stand out in these instances as do the requirements for utilizing such avoidances.

Many states have broad and vague undue hardship excuse rules to relieve prospective jurors from their service. For example, Wisconsin’s reason for excusal is, “Cannot fulfill responsibilities of a juror.” Other states attempt to narrow their undue hardship guidelines. In Alabama, the legislature curtailed their undue hardship guidelines to apply to only those citizens who would “[b]e required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver”, “[i]ncur costs that would have a substantial adverse impact on the payment of the individual’s necessary daily living expenses”, or “[s]uffer physical hardship that would result in illness or disease.” Even these more descriptive statutes allow the courts wide discretion as to the meaning of undue hardship and provide avoidance-seeking citizens a wide canvas upon which to paint their woeful tales.

Why Citizens May Not Wish to Serve on Juries

Research on the reasoning behind jury duty avoidance points to four main causes: economic hardship, jury service being uncomfortable, distrust in government, and lack of punishment for non-response to summons. Other studies attribute this lack of response to jury summons to a decline in civic participation and activism in the young adult population. In a study by Boatright (2001), non-respondents were surveyed and asked why they chose to ignore the jury summons. He found no significant difference in attitude towards the court system across age groups but a large number of participants cited economic obstacles, such as lack of childcare or job compensation, as reasons they ignored the summons.

Although little research has been conducted on avoidance of

jury duty, there are indications that the incentives to avoid jury duty may be substantial. Financial burdens impeding jury duty service may be seen as substantial. Compensation for jury duty in both state and federal courts is generally between five and forty dollars per day plus payment for mileage, with Connecticut and Colorado offering no pay for the first three to five days. Although judges are most willing to excuse jurors who work on commission or for low wages, the argument can be made that the financial disincentive to serve is greater for potential jurors with well-paying jobs as they will lose relatively more income than someone who makes less money. In addition to the financial disincentive to serve, jurors consider the length of the trial burdensome. These reasons, coupled with the low return rate to jury summons and qualifying questionnaires, lead to selective representation of a community on juries and may threaten jury impartiality.

Derogation of Jury Service in Popular Culture

One further reason jurors may be reluctant to serve is the fact that our popular culture in the United States often derogates jury service. This pejorative attitude toward jury service can be seen on popular television shows, in cartoons, and online. For instance, in one episode of the sitcom *30 Rock*, Liz Lemon is called for jury duty. The episode’s humor is derived from her methods of getting excused from jury duty: wearing an old Princess Leia costume and saying during *voir dire* that she doesn’t think it is fair for her to be on a jury, because she can read minds. In an episode of *The Simpsons*, Apu receives a jury summons in the mail. He notes that he has now truly become an American citizen and proceeds to throw the summons into the trash. In the same episode, Homer advises Bart how one can avoid jury selection by saying he is prejudiced against all races. These are just a few examples; other shows in which jury service is derogated include *Curb Your Enthusiasm*, *Monk*, and *Family Guy*.

Cartoon strips in newspapers and online posts derogating jury service are plentiful (easily found by conducting a Google Image search for “jury duty”). For example, in a Dilbert strip in which a co-worker asks him what excuse he would use to get out of jury duty, Dilbert responds that he intends to serve. His coworker responds, “Insanity. That’s a good one.” Another cartoon shows a man entering hell, where a smiling devil says to him that things are only going to get worse, because he has been selected to serve on a jury. A mock Monopoly “Go to Jail” card reads “Go to Jury Duty! Go directly to Jury Duty! Do not collect \$200.”

To index informally how people talk about jury service in virtual communities online, we conducted a Twitter search for “jury duty.” Among the things people had Tweeted in the twenty minutes previous to our search included: “Yes, I don’t think I have jury duty in the morning *dancing in underwear*”, “My friend just told me he got out of jury duty today because he said he was biased to helping anyone outside of his race!”, “Deferred my jury duty thing again...i don’t have time to do

that mess lol”, and “Reasons not to check your mail: You’re already having a bad week, you open your mailbox and there it sits...Jury duty.”

These examples illustrate the popular notion held by many U.S. citizens that jury service is not something one cherishes. The derogation of jury service in the popular media may create the perception for many potential jurors that attempts to ignore jury summons or evade jury selection is the “normal” thing to do. For some potential jurors there may be also an element of obligation to attempt evasion. For instance, H.L. Mencken wrote that a jury is “a group of twelve men who, having lied to the judge about their hearing, health, and business engagements, have failed to fool him.” In the same spirit, an anonymous commentator rhetorically asked, “How would you like to have your fate decided by twelve people who weren’t smart enough to get out of jury duty?”¹¹

Strategies That Avoidance-Seeking Jurors Might Use

We have begun systematic research with regard to the strategies potential jurors might use to avoid jury duty based on what is found online. For instance, when a Google search for “avoiding jury duty” is conducted, the website Wikihow.com is close to the top of most search lists and provides a fairly comprehensive battery of suggestions on how to avoid jury service. Wikihow suggestions begin with a disclaimer pointing out that jury duty is your “civic duty” and warns against blatant disregard of a jury summons. However, once the short disclaimer ends, the avoidance education begins. We outline some of Wikihow’s suggested strategies here to illustrate the kind of deceptive information potential jurors might rely upon in trying to evade their civic duty.

Wikihow provides the prospective juror a sample “Excuse Letter” written by a fictitious employer on behalf of the summoned employee. This brief letter outlines the hardship that the employer claims will be incurred if the employee is not excused from the scheduled jury duty by outlining the specific nature of their business and the financial hardship that losing the summoned employee would cause. While this may be a legitimate argument for some small companies or those businesses that rely heavily on the presence of a single employee, the courts will probably see through this type of attempt if the person is part of a larger company or employed in an easily replicable position. Because this website is one of the first to come up in a search, the courts have probably seen their share of modified versions of this letter trying to shoehorn various types of employment into the format.

Building on the “Excuse Letter”, Wikihow adds many more specific tactics that can be applied if the summoned citizen ends up in the courtroom. The site outlines what they have labeled the “play stupid” tactic. For example, the prospective juror might overtly display confusion over the standard of evidence required for the type of case. Conversely, the site also promotes

the use of “play smart” tactic, the main goal of which seems to lie in the premise that an intelligent juror is going to be hard to persuade and will consequently be problematic. For criminal cases, Wikihow suggests expressing confusion regarding proof beyond a reasonable doubt. Does this standard mean 99%, 99.5%, or 100% certainty? This is the question Wikihow believes will label the juror as problematic and undesirable during *voir dire*.

Wikihow also suggests claiming to believe “the great majority of people arrested for crimes did them.” With a wink and a nudge, the avoiding juror would then state, “I understand I’m supposed to pretend he is innocent until the trial is over.” In addition, Wikihow suggests stating the following: “Police officers are better witnesses than the average person”; “[W]hen I am in the minority I usually cave in to the majority”; “I was a victim of a crime. They never caught the guy. I’m angry about that. The system doesn’t work”; “[m]y friend/family member is a police officer/prosecutor/defense attorney. We talk about a lot of his cases”; and, “[t]he defendant is about the same age as my son. My son has been in a little trouble himself”. The avoidant jurors may find themselves in disfavor with the court if the court or the attorneys decide to probe deeper into a falsely embellished excuse.

Palpably Deceitful Jurors

Some stories are absurd, such as a woman who explained she could not serve on a capital murder trial jury because she had been a murder victim herself (Larue, Nov 5, 2012). An ethical-emotional disconnect appears in the actions of some of these deceitful stories. Persons who see themselves as ethical and responsible citizens otherwise can metamorphize into slippery liars ready to embrace almost any phony excuse. The psychological question is why do otherwise law-abiding citizens react so strongly and deceptively in this particular context? We have four working hypotheses, based on observations of juries and jury selection.

1. Coercion elicits evasion. Because they are coerced into roles and possibly extended time commitments, they become oppositional in nature, demonstrating in a perverse form of American exceptionalism that nobody can force them to do anything.
2. Normative perceptions. This is a cultural phenomenon in which trying to get out of jury duty is perceived by many individuals as a thing that people commonly do. People do what they think other people are doing.
3. Simplistic levels of cognitive-legal concepts. Drawing on the Kohlberg dimensions of cognitive-legal development, these persons operate at the lowest levels. They think about what is in it for them and how can they avoid punishment.
4. Self versus social institutions. Beyond what is to their

benefit, there is a major cognitive distance between what they think of as their responsibilities to the self versus lesser felt responsibility to social institutions like judicial processes.

Not All Efforts to Avoid Jury Duty are Alike

Some people who show up when called for jury duty bring a sincere desire to serve if needed, but have compelling personal reasons to get out of jury duty. Some such reasons are physical and environmental, such as substantial pain, family demands, or occupational restrictions. In contrast, others who are called for jury duty show up with the explicit plan to generate an excuse sufficiently powerful that they will have to be excused. They have no hesitation about pretending they have an attitude or issue that would be enough to be excused. Between these extremes are individuals who have a general aversion to the role of jurors and who may exaggerate some existing problem, but who neither lie nor malingering.

For purposes of thinking about what these three groups bring to the jury context, we have constructed a table that posits the likely emotional-personal states (and perhaps traits) of each group. These are hypotheses drawn from experience as opposed to research, but nevertheless present a preliminary schemata for thinking about these jurors.

Efforts to Avoid Jury Duty

	Apparently legitimate reasons to be excused	Exaggeration of legitimate reasons	Arguably constructed reasons
Commitment to conventional values	High	Medium	Low
Likelihood to invest effort in assessing evidence	High	Medium	Low
Likelihood of being idiosyncratic and unpredictable in deliberations	Low	Low-to-medium	Medium-to-high

To Strike or Not to Strike?

Our guidelines for thinking about people who avidly do want to be on jury duty and who equally avidly do not want to serve are seated in the principles of the strength of the case. Elsewhere (Brodsky, 2010) we have argued that highly emotional, unstable, or intense people are risky and should be struck when the evidence is strongly on your side. So it goes with persons who are intensely committed to getting on or off jury duty. They have what may be termed “over-determined motivation,” in which their personal agendas have the potential to override careful consideration of the evidence. If you have a strong case, challenge or strike them. Suppose you have a weak case? If the case is weak enough, no skilled manipulations will make a difference. However, in the normal range of a case that is somewhat lacking or faulty, then these may be high-risk high-payoff choices for not striking. Persons who have excessively sought to evade jury duty may well be inattentive. Overeager jurors may be passionate to set things right for either side, but often will ally themselves with the state in criminal cases and the plaintiffs in civil trials.

Suggestion: Seek Direct Data

Much information used in jury selection is made up of indirect data. Some attorneys use neighborhoods as defined by zip codes to make inferences about juror inclinations. The word *inferences* is used generously, because the outcome of generalizing about entire zip codes of 20,000 people is in actuality somewhere between guesswork and pure fantasy. Even more unlikely conclusions are sometimes drawn when a member of the venire has a relative who has been convicted or who is in law enforcement. We can speak personally and from observational data to how unlikely and tenuous are such links.

When citizens are called to jury duty and seek to avoid it, their behaviors are visible, they offer direct and sometimes open self-reports, and, best of all, they are usually fair targets for follow-up questions from counsel. “What is involved in caring for your

mother?” they may be asked. “What happens to you when you have to sit for a long period of time?” “What exactly about your religious beliefs relate to what goes on in a courtroom?”

Jumping from these disclosures to decisions about striking or challenging for cause is not always straightforward, but the data are of better quality than gender or occupation. In one jury selection a woman stood and waived a Bible to the assembled parties when asked about whether she could be a fair juror. All of the answers she needed, she told us, were in this book and not in any laws made by men. She did not seek to be excused (unless she was being very clever), but she might as well have done so, because the judge’s raised eyebrows alone left no doubt about what would happen. She was excused for cause.

Conclusion

It is clear that not all potential jurors are happy about being called for civil service. Representative participation in jury service by the populace has declined over the last several

decades. There are many reasons potential jurors might not want to serve, reasons that range from legitimate to palpably disingenuous or illegitimate. We argue that it may be wise to strike jurors who avidly seek to avoid jury duty. Just as a juror who appears to be overly enthusiastic about serving on a particular jury may be problematic, so too may be a juror who appears to be unusually focused on *not* serving on a particular jury. Insufficiently eager jurors may be impatient and inattentive and they may disrupt the justice process. One strategy to try before striking a juror who might be attempting to evade jury duty is to seek personal disclosures from them about the basis of their purported excuse. Doing so may serve two purposes; first, it might reveal the flimsiness of their excuse and convince them that shirking their duty is not the right thing to do. Second, seeking additional information might help reach a more informed decision about whether to strike them. Potential jurors who appear to be putting in an extraordinary amount of effort to get out of jury duty may not be the kind of people who will carefully consider evidence. If evidence is important to your case, consider striking such potential jurors.

[David M. Sams](#) is an ad hoc member of the Witness Research Lab at the University of Alabama and is currently an Associate Attorney with the civil law firm of Fabiani & Hope, P.A. in Gainesville, Florida. David primarily focuses his practice in the areas of business and corporate law, international business transactions, bankruptcy, and taxation. David’s research interests include witness credibility issues in the civil law realm, class-bias issues regarding witnesses and jurors, and the question of continued use of juries in civil courts.

[Tess M.S. Neal, Ph.D.](#) is a Forensic Psychology Post-Doctoral Fellow in the Law-Psychiatry program at University of Massachusetts Medical School. Her academic and clinical interests are in the interface between the legal and mental health professions. Dr. Neal’s scholarly focus is on improving the validity and reliability of decisions made by expert witnesses. A summary of her professional experiences can be found on her [LinkedIn profile](#).

[Stanley L. Brodsky](#) is a Professor in the Department of Psychology, The University of Alabama, Tuscaloosa. His professional interests are in jury selection, witness preparation, and court testimony. He is the author of 14 books in psychology applied to the law, including Principles and Practice of Trial Consultation and the recently released 2nd edition of Testifying In Court. You can review the activities of his witness research lab at [WitnessLab.ua.edu](#).

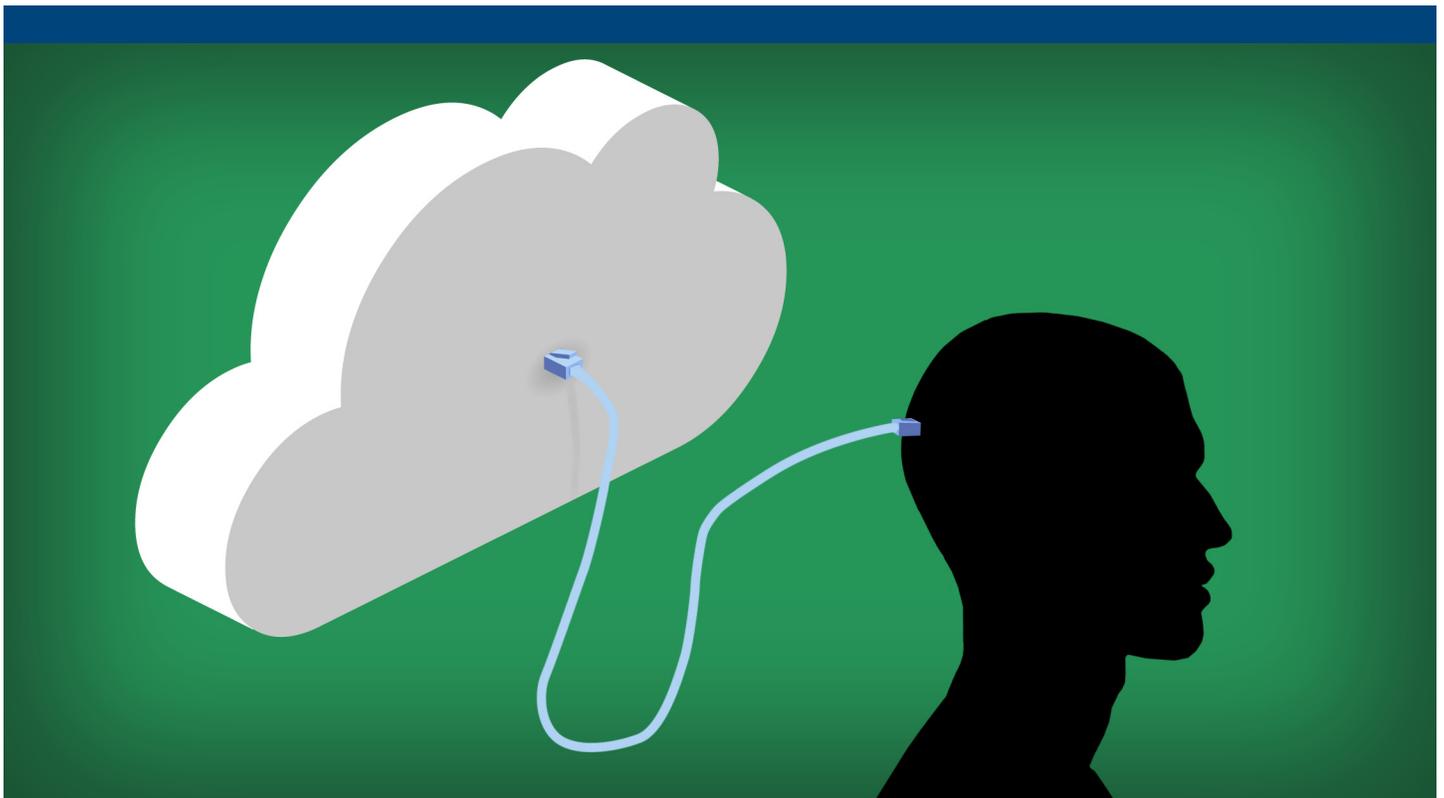
Endnotes

^[1]Cited by Daniel W. Shuman & A. Champagne, Removing the people from the legal process: The rhetorica and research on judicial selection and juries, 3 Psychology, Public Policy & Law, 242 (1997)

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Illustration by Brian Patterson of [Barnes & Roberts](#).



Out of Your Head, Into the Cloud with Evernote

by Brian Patterson

BEFORE I STARTED USING EVERNOTE, the always in-sync note taking software, I would scribble any random ideas I might have onto scraps of paper and cocktail napkins, or I'd open a text document on my computer, or I'd email myself, or voicemail myself, or save a picture on my phone. Or worse, I'd just try really hard to remember, assuring myself that *this* idea was too good, there was no way I'd forget it. And inevitably when I needed the note, it would be elsewhere: on a different computer, at home, at work, in my other brain.

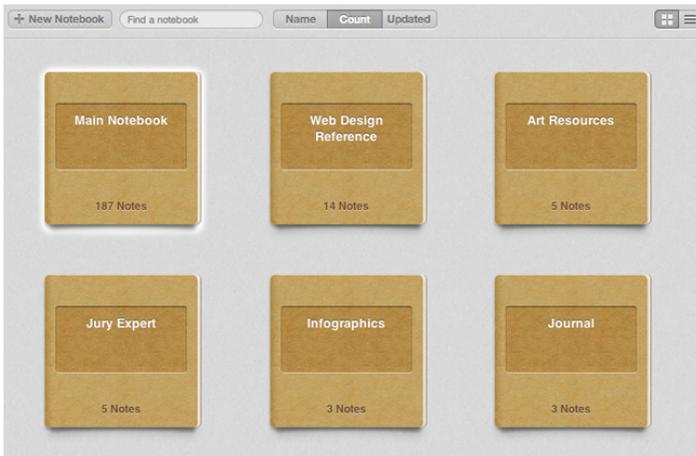
And then there are the other things I tried to keep in my mind. The phone calls to make, the supplies I needed, the tasks to perform. Without a place to put all these things, they just swirled around in my head, giving me a vague sense of dread, afraid I was forgetting to do something. In David Allen's book [Getting Things Done](#), he writes about eliminating this stress by writing things down, instead of trying to hold everything in your short term memory:

You can fool everyone else, but you can't fool your own mind. It knows whether or not you've come to the conclusions you need to, and whether you've put the resulting outcomes and

action reminders in a place that can be trusted to resurface appropriately within your conscious mind. If you haven't done those things, it won't quit working overtime. Even if you've already decided on the next step you'll take to resolve a problem, your mind can't let go until and unless you write yourself a reminder in a place it knows you will, without fail, look. It will keep pressuring you about that untaken next step, usually when you can't do anything about it, which will just add to your stress.

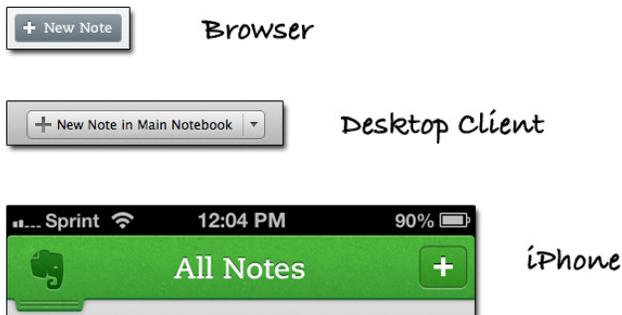
Capture Everything

Now, all my stray thoughts and ideas go into Evernote. As mentioned [previously in The Jury Expert](#), Evernote is a cloud-based tool to help you organize all your thoughts and bits of accumulated information in a single place. It uses a notebook paradigm as its base. You create a new notebook, name it, and begin adding information. But because you can have multiple notebooks, and notebooks inside notebooks, and notebooks that contain not only text notes, but also various other kinds of files, it may be more accurate to think of Evernote as a filing cabinet.



Evernote notebooks in the Mac OS desktop client

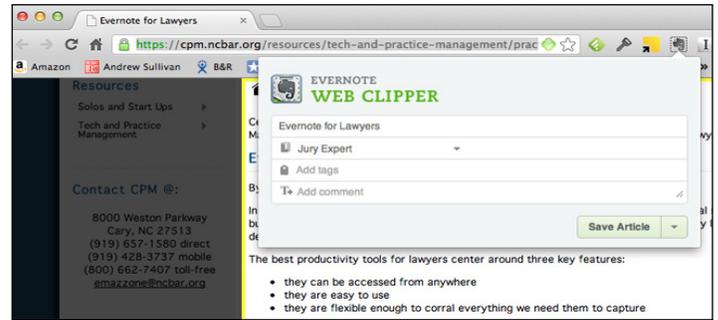
Evernote is constantly expanding the types of things you can do with it and the ways you can input data. If I am in a meeting and notes are being written on a white board, I open Evernote, snap a picture with my phone, tag it, and save it to a notebook. In addition to photos, you can record audio notes directly into Evernote. You can save web pages or portions of web pages. Or upload documents and files. And Evernote is available on just about every platform. For example, you can input data from a web browser at evernote.com, download the desktop client for Mac or Windows, or get an app for your smartphone or tablet.



Creating notes on different platforms

Plus, Evernote connects with a variety of other programs, allowing you to send data from different applications directly into your notebooks. You can find more apps that interact with Evernote [here](#).

Another way of saving information is by using [Web Clipper](#), which once installed, resides in the bookmark bar of your browser. When you see something on the web you want to capture, click the Web Clipper and it saves the info to the specified notebook in your Evernote. You can capture entire web pages, or you can select just the text you want to clip.



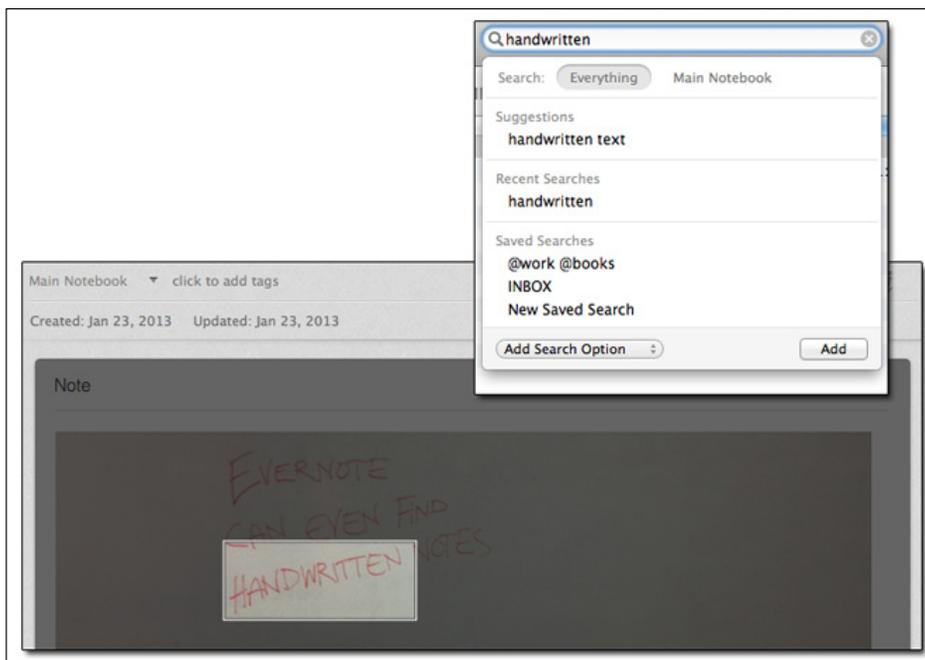
The Evernote Web Clipper

You can also add relevant emails to Evernote by forwarding them to your [Evernote account](#).

Access Everywhere

Then, from the multiple methods and devices of capture, Evernote syncs the data through the cloud, making it available on all your other devices. The white board photo I snapped with my phone in my meeting is waiting for me at my desktop when I open Evernote, and is ready for my next action. No more searching for that lost Post-it, or breaking out the USB cable or email program to transfer your photos or voice memos, or saving your files to a thumb drive to take home work over the weekend. Like other cloud-based apps, your information follows you from device to device automatically. And with Evernote, it's easily organized and searchable.

- ***Find Things Fast***
Evernote stores all your notes chronologically in a Main Notebook. From there, you have multiple options for viewing your notes.
- ***Notebooks***
If you've taken the time to arrange your notes into notebooks for different projects, cases, or ideas, you can open an individual notebook and find just the notes for that specific project.
- ***Tags***
If you've been utilizing tags in your notes, clicking on a tag or searching for a tag will bring all similarly tagged notes together for you to view, no matter which notebook they're in.
- ***Search***
You can also do a keyword search, which will bring up any instance of a word in your Evernote. Search is a key benefit of the software, and anything you input into Evernote becomes searchable, including documents and images which Evernote turns into text using Optical Character Recognition, or OCR. Even handwritten notes, if legible to Evernote, are indexed and searchable.



Evernote can OCR your handwritten notes so they are searchable

You may have saved a note long ago and forgotten about it, as I did with one of the links below. When I started writing this article I did a search in Evernote for notes on “getting things done”, and almost instantly Evernote found an article I’d forgotten I’d saved three years ago. It’s easy to remember the article you saved yesterday, but Evernote remembers the article you don’t even know you’ve forgotten.

More Tips on Using Evernote

This is a very basic summary of some of Evernote’s features. Below, I’ve included links to pages where people have explored various other methods for getting the most out of Evernote.

Getting Things Done

If you are a fan of David Allen and the Getting Things Done organizational system, Evernote is a good choice for implementing it. Here is an [article](#) which discusses this, or if you want something more in depth, this [ebook](#) might be worth checking out.

Evernote Business

In addition to free accounts, Evernote also offers [Premium](#) and [Business](#) accounts.

Evernote For Lawyers

Here are a few links from attorneys and others explaining how they use Evernote to stay organized:

[Evernote for Lawyers- North Carolina Bar](#)

[Evernote for Lawyers- jaymilbrandt.com](#)

[How an Attorney and Dad Uses Evernote for Work and Parenting](#)

[Using Evernote in Your Law Practice](#)

[My Evernote Workflow](#)

[5 Quick Tips to Speed Up Your Evernote Workflow](#)

Evernote Security

Here is an article addressing security concerns when using Evernote: [Is Your Data Safe in Evernote?](#) 

Brian Patterson is a graphic designer and trial consultant at [Barnes & Roberts](#). He has created and overseen production of multimedia presentations for well over a hundred courtroom proceedings since 1998. He is Assistant Editor of The Jury Expert, and is founder and contributor to the blog [Information Graphics & Litigation](#).

Illustration by Brian Patterson of [Barnes & Roberts](#).



Questioning Child Witnesses

by Nicholas Scurich

THOUSANDS OF CHILDREN TESTIFY each year in the United States (Ceci & de Bruyn, 1999). Children testify both as witnesses and victims in a variety of legal settings, including family court, dependency court, civil matters, and, most conspicuously, in criminal cases in which sexual abuse is alleged (Quas & Sumaroka, 2012). In many of these cases, much turns on the testimony of the child and whether jurors perceive it to be credible. Jurors often use heuristics or cues to evaluate credibility, such as facial expressions, eye contact, and the general demeanor of the child (Regan & Baker, 1998). Indeed, the United States Supreme Court held that children must testify in front of the jury, rather than behind screens or through the use of out-of-court statements, precisely because jurors need to view these cues in order to evaluate credibility (see, for e.g., *Coy vs. Iowa*, 1988).

Unfortunately, these expectations are not reflective of the actual way in which children testify. For instance, studies indicate that jurors expect sexually abused children to cry and exhibit negative emotion when testifying about alleged abuse, and jurors tend to disbelieve child witnesses who do not emote in this way (Myers et al., 1999). But research indicates that

children commonly do not cry or express negative emotions when describing sexual abuse (Sayfan et al., 2008), and there are a number of logical reasons for their unanimated testimony in general. For instance, children are often interviewed multiple times regarding the incident before testifying in court, or they may simply not have perceived the event as negative. What's more, the emotion expressed by testifying children could be an artifact of the courtroom experience—i.e., being questioned by unfamiliar and potentially hostile attorneys—and have little to do with the alleged incident itself (Hill & Hill, 1987).

Improving the Quality of Child Witness Testimony

The discordance between what jurors expect and how children do testify could lead to the testimony being unfairly dismissed. As mentioned, the outcome of the case can largely turn on the credibility of the child's testimony. There are (at least) two theoretical ways to augment the perceived credibility of child witness testimony. First, one could call an expert in developmental psychology to disabuse juror expectations and explain the usual range of emotion expressed by children. Research on this prospect is not encouraging, as jurors tend to

heavily discount this type of expert testimony and revert back to their preconceived expectations (see Kovera et al., 1997). The second prospect is by improving the substance and quality of the testimony itself.

An important aspect of credibility is the extent to which the witness describes his or her reactions to the event in question. According to the *Story Model of Juror Decision Making*, jurors are more likely to be persuaded by a *coherent narrative*, which consists of logically and sequentially connected events and the internal responses of the narrator (Pennington & Hastie, 1992). Internal responses include a description of subjective feelings about the event; thus, it follows that describing subjective feelings about the event could augment credibility.

A small body of literature has examined how children respond to different types of questions. In general, open-ended questions tend to elicit longer and richer responses than close-ended questions, though close-ended questions are sometimes necessary when children are reticent (Lamb et al., 2008). A potential problem of close-ended questions is that they increase the likelihood of children acquiescing to (rather than producing) inaccurate information. One study found that a particular type of open-ended question, namely “Wh-” questions such as “what happened?” or “why did you feel that way?”, is likely to elicit more accurate information as well as greater details about the event in question compared to closed-ended questions (Lamb et al., 2008). This is exactly the type of information that is germane to a coherent narrative.

Nearly all of this research has examined forensic interviews of children who are suspected of being sexually abused. It is not clear whether the general finding—that different types of questions affect the rate at which children produce details about the event—would generalize to a trial context. There are major differences between forensic interviews, which tend to occur in private between a single interviewer and child after establishing rapport, and examining child witnesses in court, where numerous adults are congregated and ask questions. The present study examined whether different types of questions increased the production of details by children who testified in actual legal proceedings.

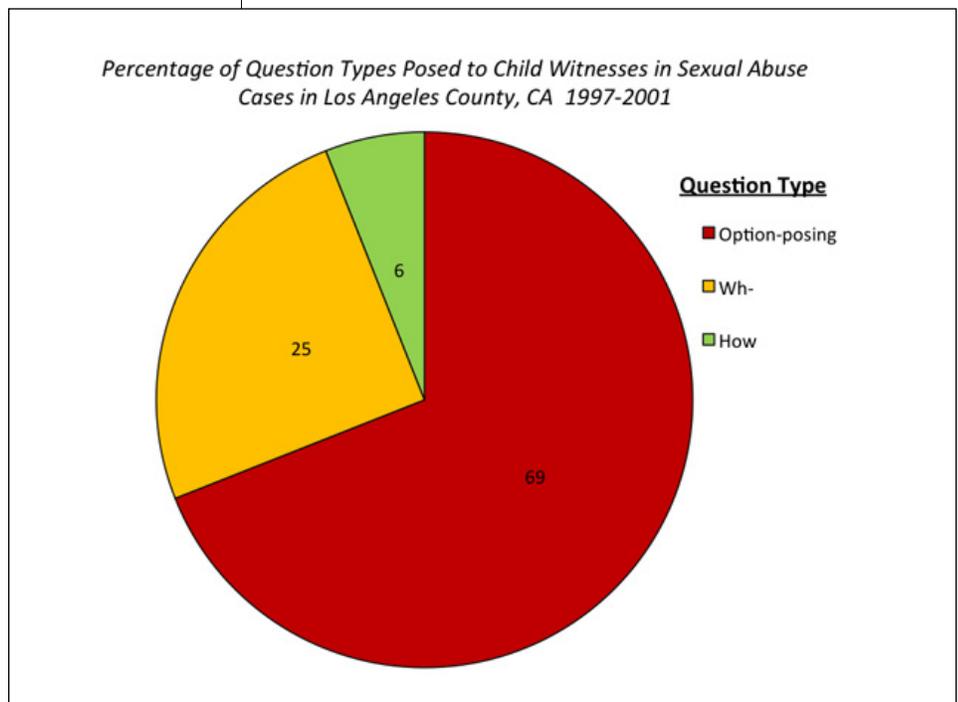
The Study

From January 1997 until November 2001 there were 3,622 felony sexual abuse charges filed in Los Angeles County. 309 of these cases went to trial, of which 82% resulted in a conviction and 17% in an acquittal (the others were ultimately plea-

bargained). 218 of these cases had at least one witness under the age of 18 who testified as the victim. From this latter set, 80 cases were randomly selected, yielding a sample of child witnesses who ranged in age from 5–18 with an average age of 12. All of the questions asked of and answers provided by the witnesses were coded. There were 16,495 question/answer turns.

The questions were classified into one of three types: “option-posing” which are questions that can be answered ‘yes’ or ‘no’ (e.g., “Did you feel good?”); “Wh-“ which are questions that contain the stem ‘Wh-‘ (i.e., Who, What, Where, When, Why); and “How” which are questions prefaced with ‘How’ (e.g., “How did you feel?”). Responses were classified according to whether they contained an evaluative response (yes/no), which is defined as any emotional (e.g., “I hated him.”), cognitive (e.g., “I was confused.”), or physical (e.g., “It hurt”) response to the event in question.

Figure 1 depicts the percentage of the various types of questions that were posed to the witnesses. By and large, option-posing questions were the most common, while the least common (asked only 6% of the time) were How questions.



The prosecution asked a majority of the overall questions (62%), and was slightly more likely to ask an option-posing question (56% of all option-posing questions were from the prosecutor). 23% of all the Wh- questions and 34% of all How questions were asked by the defense. Overall, only 3.5% of the answers contained an evaluative response. However, this low percentage depended on the type of question asked, as depicted in Figure 2. ¹¹

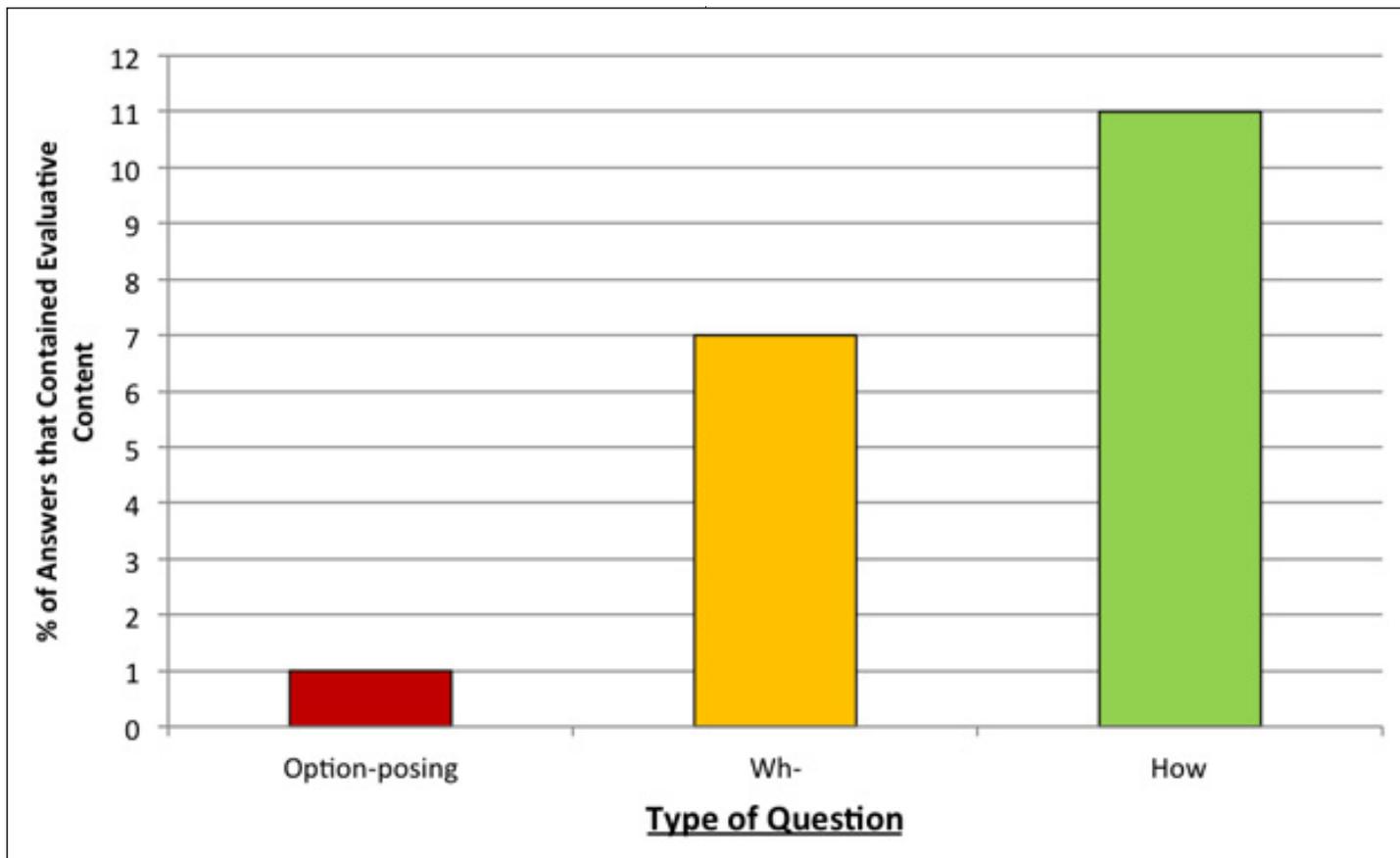


Figure 2 displays the efficiency of the various types of questions in producing evaluative content. Only 1% of option-posing question yielded an evaluative response, compared to 7% for the Wh- questions and 11% for How questions. Thus, the low overall rate of evaluative responses (i.e., 3.5%) can be partially explained by the fact that option-posing questions predominate and option-posing questions are the least productive in eliciting evaluative content. Indeed, How questions were approximately 10 times more likely to elicit evaluative content than option-posing questions.

Bear in mind that this finding exists independent of the age of the witness, which was built into the statistical model.¹²¹ In other words, it is not simply the case that older witnesses were asked more How questions since older witnesses are naturally more articulate. It is also noteworthy that this finding was replicated on a sample forensic interviews in which children were systematically asked the various types of questions, thus limiting the alternative explanation that articulate children were disproportionately asked How questions.

Implications for Practice

As a general matter, children provided few evaluative details while testifying in court. However, when asked an open-ended question, especially a How question, children were considerably more likely to provide evaluative content than when asked an option-posing question. The implication is obvious: attorneys ought to ask more open-ended questions

of child witnesses. For the most part, this prescription can be easily implemented and involves a simple reframing of the question. For example, rather than asking, “Do you feel scared when he yells?” attorneys might ask, “How do you feel when he yells?” Consider the following dialog, which was elicited from a 10-year-old child using open-ended questions:

Q: How did you feel when he touched you?

A: Kind of angry at him cause he shouldn't be doing that and sometimes I thought that he was doing that 'cause I wasn't his daughter (oh, o.k.) I felt kind of mad, disappointed. 'Cause in front of my mom he always say that he love me really. And on my mind I say that if he loves me why was he doing that to me.

Q: Okay. How did you feel after he touched you?

A: I felt like nasty. Like dirty.

Q: Really. Tell me about that, dirty and nasty.

A: 'Cause he touch, if he touches me, he touch me, right. Then he just leaves and like if like if I didn't work anymore just leave me like that (uh-huh). And I felt like mad and at the same time felt kind of dirty because he shouldn't be doing that because I'm just a little girl.

Caveats

There are several limitations of the reported study. First, the data are from sample of sexual abuse cases in Los Angeles, CA. Generalizing beyond this context (i.e., children testifying as the victim of a sexual offense) requires further study, though the replication with the forensic interview sample is highly encouraging in this regard. Second, it is assumed that providing evaluative content enhances the credibility of the child's testimony. Although this is ultimately an empirical question that requires further study, there is no reason to believe that furnishing evaluative content would attenuate the credibility of children's testimony. Finally, one might question the factual accuracy of the evaluative content. Ground truth is typically unknown and perhaps unknowable in many ecologically valid settings, as it was with this sample. But it is worth noting that the same pattern of findings emerged when the sample was restricted to cases that resulted in a conviction.

Final Remarks

Although it would be unethical to cajole child witnesses into emoting on the stand in order to satisfy jurors' expectations, there is nothing improper about phrasing questions in such a way that is likely to yield valuable and persuasive testimony. The findings clearly indicate that How questions are relatively more productive of evaluative content. ¹⁰

[Nicholas Scurich](#) is Assistant Professor, Departments of Psychology & Social Behavior and Criminology, Law & Society at the [University of California—Irvine](#). Professor Scurich earned his Ph.D. in Psychology from the University of Southern California in 2012, as well as a Ph.D. achievement award – a university-wide award for the most exceptional doctoral candidate. From 2010–11 he was a Fellow of the Saks Institute at the USC Gould School of Law. He is an expert on judgment and decision-making, especially within legal settings. He teaches undergraduate and graduate courses on Psychology & Law.

Endnotes

^[1]A nested logistic regression indicated that the effect for the type of question is significant $\chi^2(83, N = 16,495) = 1371.36, p < .001$. A complete explanation of the statistical model utilized for this analysis is available from the author upon request.

^[2]In addition to the age of the witness, a dummy code for each participant was entered into the model in order to control for the possibility the certain children were highly articulate and thus more likely to have been asked open-ended questions as opposed to close-ended questions. The statistical approach is fully described in Lyon et al. (2012) at p. 450.

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We asked two trial consultants to respond to Dr. Scurich's article on Child Witnesses. On the following pages, Katherine James and Robert Galatzer-Levy offer their comments.

Katherine James responds:

Katherine James, MFA is a trial consultant based in Culver City, CA. Her specialization is live communication skills. She specializes in making witnesses "not do that anymore and do this instead" in cases and attorneys to be the best they can be in live and virtual workshops. Read more about her company [ACT of Communication](#) at the website.

Thank you, Nicholas Scurich, for reminding us that children, nay all people, know that open-ended questions give the best information.

Of course jurors trust the answers to open-ended questions more than to closed ended questions. This is true of adults who are testifying – why should it be different for children who are testifying? Who doesn't remember being a child and being forced to answer a "yes" or "no" question about something vital and feeling the need to please the adult in question rather than tell the truth.

In my experience, however, many attorneys find themselves feeling out of control with child witnesses. This tends to make attorneys want to ask kids closed ended questions that can only be answered "yes" or "no". Just like they do with adult witnesses. This leads to the attorney knowing exactly what he or she wants as testimony from the child witness and the child not only being clueless but "out of control".

By the way, I find this true of all generations of attorneys with whom I practice – not just the ones who were raised in the

"children should be seen and not heard" era. Like I was. I shall never forget the awkwardness of the agreement I made with my mother once when she said, "Now – you aren't going to notice the giant tumor on Uncle Yalmer's forehead, are you, Kathy?" I knew I was supposed to say, "No" and of course I did. But damn, once I got to his house and got a look at that giant messy thing on his face that was so hard to do. A jury such as the one that Nicholas Scurich was talking about would have read my body language as that of one coerced young lady, I can tell you that.

Take a young child I worked with – we'll call her "Sally." Her mother had been killed by a train. While role playing the direct examination, her attorney started out with the following question, "Sally – do you know who I am?" Sally stared at him quizzically. "See, this is why I hate putting kids on the stand," he hissed at me over her head. "Sally is wondering why if you are so smart you don't know who you are," I hissed back. Solution? Sally talked about a picture she had drawn entitled "My Mommy". The attorney asked questions filled with "Why?" and "How come?" and "How did that work?" and "How so?" Sally was not only able to talk a blue streak about the picture and everything in it, but the open-ended questions led to lots more information about Sally and her mother. The questions allowed her to laugh with memories, sigh with sadness, and finally to look at the jurors and say, "Gosh, I wish you had known her" with no prompting at all.

Daring to prompt them and then get out of the way of child witnesses and allow them to tell their stories takes effort. It is a million times easier to think of a closed-ended question. It feels really "in control", especially with children, to ask that "yes or no" question. However, jurors and children alike know that the payoff of the truth as spoken by any witness is much more valuable to everyone. ●

Robert M. Galatzer-Levy responds:

Robert M. Galatzer-Levy, M.D. is a [Clinical Professor of Psychiatry and Behavioral Neuroscience at the University of Chicago](#), member of the Faculty of the Chicago Psychoanalytic Institute and the author or editor of 5 books and more than 120 research publications. His practice includes child, adolescent and adult psychiatry, providing expert testimony in criminal and civil matters, and litigation consulting.

DURING THE PAST half-century attitudes toward child witnesses, especially in sexual abuse cases, have swung wildly between extremes – from always believing the child to a belief children cannot differentiate fantasy and reality. Polemical professional studies supporting these positions have given way to efforts to develop systematic methods that differentiate credible and non-credible child testimony (Kuehnle, 2009; Lamb, 2008). But the bottom line remains. It is often devilishly hard to assess where truth lies and triers of fact have an even harder time doing so than experts. As Scurich observes, juries are likely to focus on the narrative credibility of the child's testimony, including the consonance between the child's emotions and the content of what is reported. He shows that "how questions" are more likely to elicit richer and hence more emotionally believable responses than narrower questions. He cautiously recommends such questions for this purpose.

I question the step from his empirical finding to his recommendation. Attorneys often prefer narrower questions. Such questions are less likely to lead the witness to impeachable elaborations. Notice that in Scurich's example the witness volunteers potentially impeachable statements. She reports what the defendant said in front of the child's mother. She states that the defendant leaves after the sexual act. The child says, "He shouldn't be doing that because I'm just a little girl" which could easily be followed up on cross with questions suggesting that the child had been indoctrinated. People's memories for facts are poor. Their memories for emotions, much less the causes of those emotions, are worse. While the child has perhaps provided more emotionally compelling testimony, she has also opened up several areas for forceful cross examination and impeachment.

As Scurich suggests the common finding that children's narratives lack expectable emotional force derives from several sources including testifying in court, rehearsal effects, the child not regarding the behavior in a conventional light, and the child's wish to please, or to tell the "truth," i.e., what she believes the adults think is true. If the event was traumatic, the child may exhibit the emotional flattening common in recounting such events. (See Gabourey Sidibe's brilliant performance in *Precious*.)

Some of these difficulties can be addressed if the jury sees videotapes of the initial interview with the child so jurors can assess how the child's statements came to light and the child's

testimony is less influenced by the very strange situation of being in a courtroom. Well conducted interviews carefully and neutrally assess issues like the source of the child's memories. They thus address juror's well-founded concern that the child has been indoctrinated. The dissonance between the child's emotion and jurors' expectation is often addressed. ("How do you feel when you talk about these things?" "I just kind of feel dead inside — like there is nothing in me, like I'm empty.")

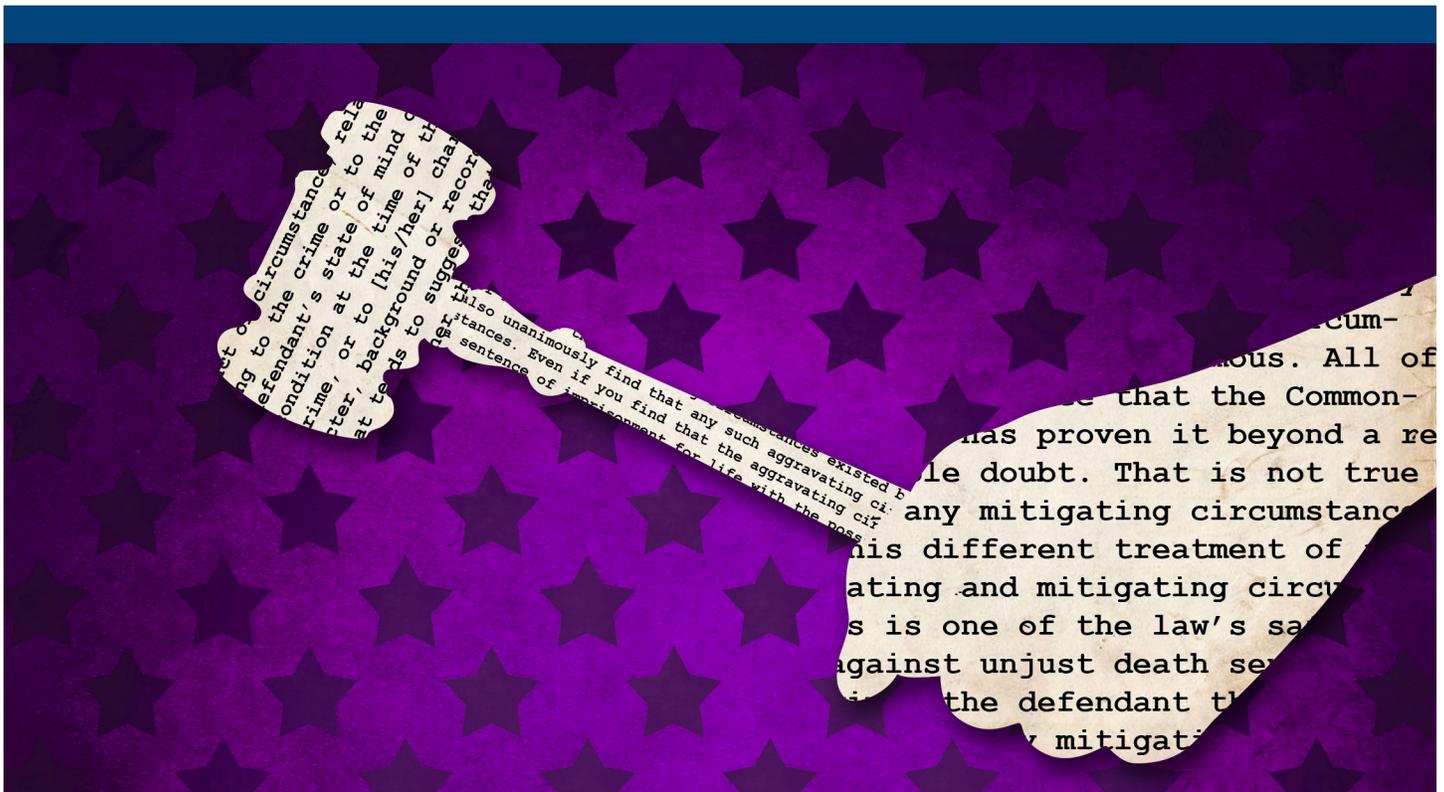
The problem of rehearsal is enormous in children's testimony. As Loftus (1997) famously demonstrated even mild questioning of a child can induce clear and vivid memories of events that never occurred. Indeed, it seems very likely that the stiffness of some children's testimony occurs because although the child recounts actual events, the source for memory is not the event itself, but the child's previous telling of the story. (In psychotherapy it is not rare for patients to realize that a memory, whether or not it is true, derives not from the event but a previous narration of it.) A video recording of the child's initial report can be very helpful in addressing these problems. However, it must be kept in mind that the strength of the video is also its weakness since it is likely to demonstrate any problems associated with the interview.

In jurisdictions where videos cannot be admitted directly into evidence, they may often be admissible as part of the basis of an expert witness opinion. This brings us to the question of experts, who are, as Scurich indicates, often ineffective. In addition to problems common to all experts, like talking above the jury's heads and using jargon rather than vivid specific language, experts on child abuse are all too often advocates for one of the extreme positions (children always tell the truth; children are never reliable) mentioned at the beginning of this discussion. Such experts are sometimes effective because of their passionate advocacy but their advocacy also makes them less credible. Worse, well prepared cross examination can often demonstrate that the testimony does not live up to any reasonable standard. ©

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Assessing the Readability of Capital Pattern Jury Instructions

by Rachel Small, Judith Platania, and Brian Cutler

DATA OBTAINED FROM the National Assessment of Adult Literacy (2003) indicate that 29% of adults have a Basic level of prose literacy. Prose literacy refers to the knowledge and skills needed to comprehend and use information from continuous texts, such as editorials, news stories, and instructional materials. In the current study we examined each state's capital sentencing instructions for their readability using a highly reliable word-analysis tool. We found that reading levels of sentencing instructions significantly surpassed the reading comprehension abilities of American adults. All but three states' instructions were above the twelfth grade reading level. In addition, legal principles embedded within the weighing language instruction were more difficult to comprehend compared to the aggravating or mitigating factors components of the instructions. By measuring the readability of instruction language and comparing it national literacy levels of adults, we provide an important explanation for poor comprehension of legal principles.

Overview

In the *Gregg v. Georgia* (1976) decision, the Court envisioned jury instructions as both a legal safeguard and a discriminating

factor in determining the fairness of sentencing proceedings. With this in mind, instructions are intended to define the jury's role and communicate applicable laws as well as other legally relevant principles (Lieberman & Sales, 2000, 1997). Pattern instructions in particular are designed to streamline the selection of appropriate case-specific jury instructions and diminish the tenuousness of their application. The primary goals of pattern jury instructions are to increase the legal accuracy of instructions, eliminate argumentative language, and improve comprehensibility (Chilton & Henley, 1996). However, some authors have observed that instructions almost always create confusion rather than comprehension, contributing very little in terms of juror understanding of legal concepts (Strawn & Buchanan, 1976). As a result, researchers have identified remedies for misunderstanding, such as refining instructions to address linguistic and comprehensibility issues (Charrow & Charrow, 1979; Elwork, Sales, & Elfini, 1977). The current study continues the research addressing instruction comprehension by examining the readability of capital pattern jury instructions using a highly reliable word analysis tool (Flesch, 1950). Our goal was to assess the reading comprehension and level of difficulty of each state's pattern sentencing instructions and compare it to national levels of

prose literacy in American adults.

Instruction Comprehension

Given that the question of life or death is an ultimate one, juries entrusted with capital sentencing deserve clear and comprehensive guidance. If jurors do not understand legal instructions, they may not be able to apply the law. To address this issue, Strawn and Buchanan (1976) tested the effectiveness of Florida pattern instructions for comprehension and applicability. They found that participants provided with jury instructions prior to completing a true/false test based on the law, incorrectly responded to nearly one-third of the test questions. This result was only marginally better than the group given no instructions prior to taking the test. In addition, only 50% of the instructed group was able to demonstrate a correct understanding of the *presumption of innocence*, a legal concept stating that a defendant is not required to produce any evidence of innocence. As such, a critical objective in improving the jury instructions should be to preserve their legal accuracy without sacrificing comprehensibility.

Juror ability to comprehend and correctly apply the law has also been examined with a focus on the linguistic composition of jury instructions. For example in one study, Charrow and Charrow (1979) rephrased California's civil jury instructions eliminating some of the legal language and complex sentence structures. Juror comprehension was significantly improved with the revised instructions compared to the original instructions. Elwork, Sales, and Alfini (1977) conducted a similar study in which Michigan's instructions were rewritten with basic linguistic rules in mind. Comprehension was significantly improved for participants who received the rewritten instructions compared to the original Michigan pattern instructions. Additionally, Severance and Loftus (1982) provided evidence demonstrating that knowledge of linguistics could be applied to developing a comprehensible set of instructions. In a series of studies, these researchers were able to identify

and correct 'problem' areas in pattern jury instructions, leading to increased understanding of instructions. This is not always the case however, as demonstrated by Weiner, Pritchard, and Weston (1995). When testing juror comprehension of both the original and revised set of Missouri's capital jury instructions, the researchers found that revisions made little improvement on jurors' understanding. Furthermore, miscomprehension was found to be strongly related to willingness to impose the death penalty.

Finally, studies addressing the deliberation process find that juries often reach improper verdicts when a misunderstanding of the judge's instructions misguides the group's discussion of legally relevant principles. For example, in one study jurors did not exhibit increased comprehension of instruction language during the deliberation process (Ellsworth, 1989). Similarly in a subsequent study, researchers found improvements in instruction comprehension during deliberations, but only when a significant majority of jurors entered the deliberation process with a correct understanding of legal principles (Diamond & Levi, 1996). These findings highlight the notion that a jury verdict decided on the basis of a misunderstanding of legal principles greatly increases the likelihood of rendering a verdict that is incompatible with the law.

Juror Literacy

Considering the results of social science research, which consistently demonstrates low levels of instruction comprehension, it has become increasingly important for researchers in this area to understand the literacy skills of jury-eligible adults. Literacy is defined as "using printed and written information to function in society, to achieve one's goals, and to develop one's knowledge and potential" (National Assessment of Adult Literacy; NAAL, 2003, Section 1.2, p.1-2). Literacy types are identified as Prose, Document, and Quantitative Literacy. Literacy levels are rated according to the following

performance levels: *Below basic*, no more than the most simple literacy skills; *Basic*, the skills necessary to perform everyday reading tasks; *Intermediate*, the skills required to perform moderately challenging tasks; and, *Proficient*, the skills needed for complex reading tasks. Prose literacy, which measures the skills needed to understand and use information from continuous texts, is the form most applicable to jurors' abilities to comprehend and apply sentencing instructions. On average, prose literacy level of adults is identified as *Basic* – possessing the skills necessary to perform everyday reading tasks. Specifically, NAAL's (2003) survey found that 29% of adults possess a basic level of prose literacy. Additionally, adults over the age of 65 were found to be more likely to receive a below basic score on the prose literacy tasks compared to other age groups. Based on this finding, it is likely that below basic levels of prose literacy are present in a substantial portion of venire persons retained for jury service.

Similar comparisons have been drawn between NAAL's data on literacy levels and comprehension with different populations. Particularly, Rogers, Harrison, Shuman, Sewell, and Hazelwood (2007) examined NAAL's literacy data and *Miranda* warning comprehension of an incarcerated population (*Miranda v. Arizona*, 1966). After obtaining hundreds of *Miranda* warnings from jurisdictions across the United States, the researchers designed five components in order to organize content and assess comprehension levels between states and among the five organized components. This methodology provided a means for identifying particular strengths and weaknesses of the *Miranda* warning material. Similar to Rogers (2007) we have identified three components within the pattern capital instructions that appear fundamental to a complete and clear instruction. These components are *aggravating factors*, *mitigating factors*, and *deliberative* or *weighing* language. For our analysis, only material that is purely descriptive of aggravating and mitigating factors has been placed in those categories. Any language describing burdens of

proof, and any other legal principles or mechanisms of considering aggravation and mitigation have been placed in the third category, weighing language.

The current study advances the research on readability of capital jury instructions in several ways. First, we apply well-established reading comprehension tools (Flesch-Kincaid reading level scores) to establish reading levels associated with instructions. Second, rather than sampling an individual set of instructions (see Elwork, et al., 1997; Weiner, et al, 1995) we attempted to exhaustively sample capital jury instructions in the U.S. Third, we compare our results with data on literacy levels from U.S. citizens.

Method

Sources of Pattern Capital Jury Instructions

Web-based versions of each state's pattern jury instruction for the sentencing phase of a capital trial were obtained for 32 of the 33 states that currently allow the death penalty. Both general search engines and academic databases were utilized to search for these pattern instructions. In cases in which a direct listing of aggravating or mitigating factors was not contained within the instruction, state government web sites

were used to locate this information.

Instrument

We used the Flesch-Kincaid reading ease test to assess the readability of capital pattern jury instructions. Developed by Rudolph Flesch (1950), the Flesch Reading Ease Formula is considered one of the oldest and most accurate readability formulas. The Flesch-Kincaid is a highly regarded tool (Dubay, 2004) that is widely used by many U.S. Government agencies (Berndt, Schwartz, & Kaiser, 1983). The formula combines sentence length with the average number of syllables per word to produce an estimated grade level necessary to comprehend a written passage. Flesch-Kincaid scores are strongly correlated with standardized reading tests. This word analysis tool operates within Microsoft Word. Scores range from 0 to 100, higher scores indicating easier text. Flesch-Kincaid scores of 0 – 59 are considered difficult to very difficult; scores of 60 – 100 are considered standard to easy. In addition to the reading ease index, Flesch-Kincaid computes a grade level of selected text, with a cut-off of twelfth grade.

Procedure

After collecting pattern jury instructions for this analysis, we reviewed and

formatted each state's instruction to fit a general template. This ensured uniformity of the pattern instructions, making it easier to discern the precise content included or missing from each set of instructions. We deleted any irrelevant content that did not instruct the jury, such as legal notes meant to inform trial judges. We then coded instruction language in accordance with our three working components: aggravating factors, mitigating factors, and weighing language. In the process of standardizing and coding the language for the purpose of the Flesch-Kincaid reading ease analysis, it became clear that some variations in the instructions were statutory. To retain internal and ecological validity, we did not change substantive or procedural differences between each state's pattern instructions. An overall Flesch-Kincaid reading ease score and grade level were computed for each state's capital pattern instruction. Readability index scores were then drawn individually for a componential analysis of each instruction, allowing us to accurately compare the readability of three domains within each instruction.

Results

Table 1 displays the distribution of readability scores for 32 states.

Table 1. Readability Scores as a Function of Component

Flesch-Kincaid Scores	Minimum Score	Maximum Score	Mean (SD)
Overall	14.80	50.40	33.86 (8.67)
Aggravating Factors	14.50	45.80	32.61 (7.90)
Mitigating Factors	9.20	58.40	31.26 (9.13)
Weighing Language	6.00	40.00	23.37 (10.93)

As can be seen in Table 1, all instructions would be categorized as difficult to very difficult according to Flesch-Kincaid scoring guidelines. An analysis of Flesch-Kincaid grade levels of the pattern jury instructions indicated that only 3 states' capital pattern jury instructions were below the twelfth grade reading level: California, Kentucky, and Pennsylvania. Approximately 25% of the states yielded *very difficult* Flesch-Kincaid scores (0-30), the remaining 75% had scores indicating *difficult* comprehension levels (30-59). The Flesch-Kincaid readability tool also provides the frequency of passive sentences within a text as a percentage.

The percentage of passive sentences within the pattern instructions ranged from 4 to 40%, $M = 22\%$. We also conducted a series of analyses to examine whether readability differed by federal circuit. Mean scores on the instructions as a whole as well as the individual components did not differ significantly when we compared the 11 circuits or grouped these circuits into 5 by proximity. Table 2 displays this finding. We also grouped states by frequency of execution, but these analyses also did not reveal significant differences in instruction readability.

Table 2. Regional Distribution of States with the Death Penalty, $N=33$

Region	Federal Circuit(s)	States
1	1-4	NH, PA, DE, MD, VA, NC, SC
2	6, 11	OH, KY, TN, AL, GA, FL
3	7, 8	IN, SD, NE, MO, AR
4	5, 10	TX, LA, OK, KS, CO, UT, WY, MS
5	9	WA, ID, MT, OR, CA, NV, AZ

The following examples represent two of the more disparate ways in which jurors are instructed on how to consider mitigating factors.

Mitigating or extenuating facts or circumstances are those that you, the jury, find do not constitute a justification or excuse for the offense in question but that, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

A mitigating factor is any fact or circumstance, relating to the crime or to the defendant's state of mind or condition at the time of the crime, or to [his/her] character, background or record, that tends to suggest that a sentence other than death should be imposed.

Weighing language was found to be significantly more difficult to read compared to language used to describe aggravating factors. In addition, this language had the lowest readability score (*most difficult*) compared to the other types of instructional language. The following examples demonstrate differences in weighing language:

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. Even if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

The specific findings as to any particular aggravating circumstance must be unanimous. All of you must agree that the Commonwealth has proven it beyond a reasonable doubt. That is not true for any mitigating circumstance. This different treatment of aggravating and mitigating circumstances is one of the law's safeguards against unjust death sentences. It gives the defendant the full benefit of any mitigating circumstances.

Conclusion

Overall, our study offers an important explanation for poor comprehension of legal principles. Simply put, the reading levels of instructions are frequently at or above the twelfth grade, a result that is inconsistent with the average reading level of the American adult. Considering that less than fifty percent of adults possess the basic skills and knowledge necessary to read and comprehend moderately difficult reading passages, it's not likely they are able to synthesize the complex language present in jury instructions. Our findings suggest that instructions should be reworded or reconfigured to match the literacy levels of American jurors.

Our study also highlights the challenge facing committees tasked with rewriting instructions. According to a comprehensive Impact Study (Dubay, 2004), individuals with basic and below basic levels of literacy represent the most significant problem as users of technical documents. The more technical the information, the greater the need for increased readability. For those who think that a measure of readability does not capture how well one listens, our results actually provide an important framework for understanding the relation between listening and reading comprehension in explaining comprehension difficulty of jury instructions. According to research, listening

and reading comprehension involve similar syntactic and semantic processes, both of which are central to comprehension (Hausfeld, 1981). In fact, listening comprehension of longer passages surpasses reading comprehension until sixth grade, when reading becomes superior to listening (Durrell, 1969). As a result, it's likely that jurors would experience greater difficulty with listening comprehension compared to reading comprehension.

The difficulty jurors experience with the technical language

of instructions presents a formidable challenge for attorneys and consultants when preparing for trial. To address this challenge, consider utilizing instructions as a 'road map' when preparing trial strategy. Well-prepared instructions help to frame the critical case issues. With this in mind, it's important to familiarize the jury with instructional language with each advantageous chance – for example, during voir dire and opening and closing arguments. Effective and innovative uses of instructions will lead to a more focused presentation to the jury and a more thoughtful deliberation process. ❸

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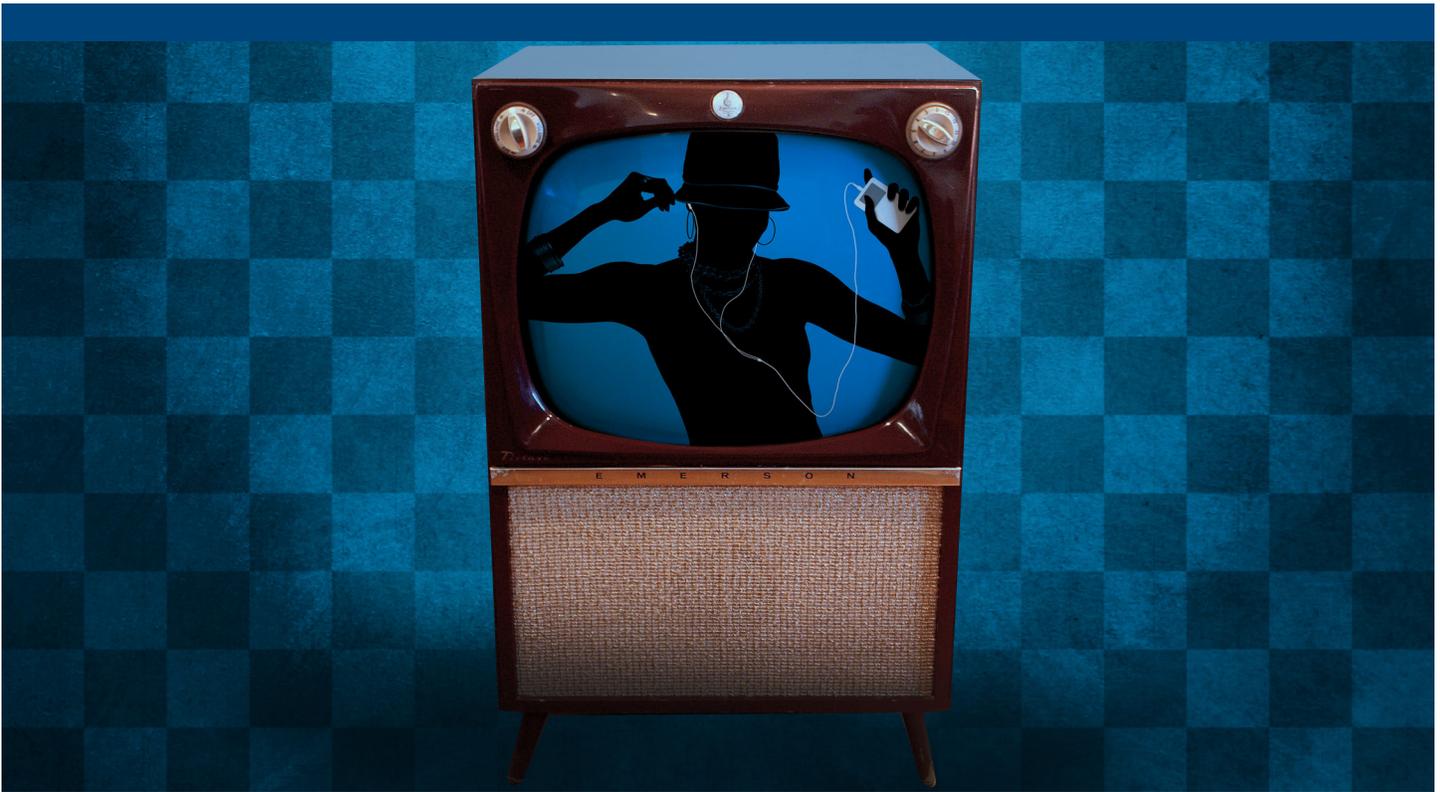
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Values, Priorities, and Decision-Making: Intergenerational Law Offices, Intergenerational Juries

by Douglas L. Keene and Rita R. Handrich

Our age and our generation shapes the lens through which we view the world. Not only because of the number and type of life experiences age presents, but also due to the key events that teach each generation what is important, and what needs to be considered in determining personal priorities and justice. Those experiences have patterns across the generations, but also differences. The marker events that shape our views can't be transferred so easily. For those who grew up looking at black and white television images of the civil rights demonstrations in the 1960's, the world is different than for those who grew up with iPods and text messaging. But how? Are we really that different? Can a workplace successfully accommodate the differences? Can juries come to a collaborative verdict with diverse age groups in the box?

The legal blawgosphere has been filled with anecdotal tales of what is termed "generational conflict" for years now. Based on conversations with our clients, contentious inter-generational interaction is not just out there "on the web". It's everywhere. We've written extensively on issues related to generations—both in the courtroom and in the office.

As litigation consultants, we hear senior partners aiming sharp criticism toward both younger jurors and younger lawyers (especially new law school graduates), and we see the associates roll their eyes and grit their teeth at the disrespect they feel from some partners. The work ethic of the younger attorneys (judged as inadequate by older attorneys) is blamed for their trouble in finding jobs. "If they were not so lazy", the opinion seems to go, and "if they did not want instant success, they wouldn't have such a tough time finding work." It is, in short, their own fault they are unemployed. They have bad values. Or so it is said by many of their elders. Especially the subgroup of employers, supervisors, and— occasionally— parents. But is that accurate?

It turns out that it's likely untrue. A recent editorial in the [LA Times](#) points out that from 2004 to 2008, the legal field [grew less than 1%](#) on average (and the same growth rate is predicted until 2016). The number of likely attorney positions opening per year is thus 30,000. US law schools are graduating 45,000 new JDs every year. Fully one-third of US law school graduates will likely not find employment as attorneys.

What we've learned is that cross-generational communication is complicated. There isn't an easy recipe for success, but there is a path toward effectiveness. There are principles and strategies to use both in successful intergenerational work teams as well as effective jury dynamics. In other words— they don't all have to be just like you in order for things to go smoothly. The following pages are an effort to show you both “how to” and “why to” strategies that will aid you in skillfully negotiating generational differences—in the courtroom and in the office.

The Intergenerational Office

Generational names are the handiwork of popular culture. Some are drawn from a historic event; others from rapid social or demographic change; others from a big turn in the calendar.

The Millennial Generation falls into the third category. The label refers those born after 1980 – the first generation to come of age in the new millennium.

Generation X covers people born from 1965 through 1980. The label long ago overtook the first name affixed to this generation: the Baby Bust. Xers are often depicted as savvy, entrepreneurial loners.

The Baby Boomer label is drawn from the great spike in fertility that began in 1946, right after the end of World War II, and ended almost as abruptly in 1964, around the time the birth control pill went on the market. It's a classic example of a demography-driven name.

The Silent Generation describes adults born from 1928 through 1945. Children of the Great Depression and World War II, their “Silent” label refers to their conformist and civic instincts. It also makes for a nice contrast with the noisy ways of the anti-establishment Boomers.

The Greatest Generation (those born before 1928) “saved the world” when it was young, in the memorable phrase of Ronald Reagan. It's the generation that fought and won World War II.

Generational names are works in progress. The zeitgeist changes, and labels that once seemed spot-on fall out of fashion. It's not clear if the Millennial tag will endure, although a calendar change that comes along only once in a thousand years seems like a pretty secure anchor. ([Pew Research, 2010](#))

Generations in the both the workplace and jury room now include: the Silent Generation (born 1933 to 1945); Baby Boomers (born 1946 to 1964); Generation X (born 1965 to 1980); and Generation Y/Millennials (born 1981 to 2000). Were it not for the economic recession of the past decade, Boomers would now be retiring. However, for many, retirement accounts (if they had any to begin with) have been undermined by recent economic instability, and they are now planning to work for the indefinite future. This leaves members of Generation X without upward mobility (since Boomers hold many of the senior positions) and the Millennials with record levels of unemployment despite (simultaneously) having educational accomplishments unmatched by prior generations entering the workforce.

Given this “new normal”, workplaces have begun to shift their focus from an aging worker focus [as members of the Silent Generation and the Boomers age] to a multigenerational focus (Cekada, 2012) with many large workplaces now employing four distinct generations of workers. With this shift, more attention is being paid to major themes around which the various generations differ. Communications styles, attitudes toward authority, comfort with technology, boundaries between work life and non-work life, and the role of family, friends, and religion are among the ways the generations are distinct.

Cekada (2012) offers a glimpse of the differences in various life events and perspectives across the four generations now (and for the indefinite future) in the workplace. Despite the increased attention being paid to focus and perspective of the various generational groups, there continue to be common areas of friction and tension in the workplace. We are not all alike. And there are patterns of difference that need to be expected and respected for a satisfying workplace environment.

Major Generalizations of Each Generation (Cekada, 2012)

Silent Generation	Baby Boomers	Generation X	Generation Y/ Millennials
Self-sacrificing	Committed	Practical	Optimistic
		Accept diversity	Embrace diversity
Great Depression economy	Booming economy	Downturn in economy	
Kids contributed to family success	Strong home support	Latchkey kids	Coddled kids
	Develop and follow rules	Resist rules	Rewrite rules
	Fight technology or use it efficiently	Use technology	Assume technology
	Typewriter	Use the PC	Internet/portable technology
Strong work ethic	Independant workers	Solve problems on their own	Prefer work in teams
	Hard workers		Sense of entitlement
	Argumentative		Prefer getting along (community)
Long-term loyalty to company	Loyalty to company	Mistrust organizations	Irrelevance of organization
		Multitask	Multitask fast
“Do the time” before you make demands			Demand flexible work schedules
	“Live to work”		“Work to live”—want flexibility in their jobs

Common Areas of Friction/Difference

Here are some of the most frequent complaints we hear about office friction/differences which we've detailed in [earlier writing on generation and office relationships](#) :

Millennials are lazy with bad attitudes. (The research doesn't support this belief.)

Millennials believe they are entitled in the workplace. (The research says that may be true.)

Millennials are lacking in loyalty and appreciation. (The research doesn't support this belief.)

Millennials are needy and immature. (As were we all.)

Most of these issues seem to revolve around what is commonly referred to as a “failure to communicate”. Failures to communicate come in multiple forms: conflicting goals,

timing, power struggles, geography, perceived risk, technology and lack of trust. These are often attributed to intergenerational differences rather than what they likely reflect—ineffective communication. While it may be hard to believe that conflict in the workplace stems from communication failures and not from generational idiosyncrasies—it is largely true.

We need to back up a bit here and give you a little information about “defining events”. These are the moments in time experienced by all members of a generation that, in hindsight, shape their lives and perspectives. Think the Great Depression, World War II, Vietnam, the sexual revolution, birth control, dual career couples, latchkey kids, divorce rates, 9-11-2001, the Second Great Depression, and so on.

These defining events have had impact on the generations and color how all of us see the world, cement our attitudes and values, and look at those who are different than us. Papers on “generations” necessarily summarize (and therefore stereotype)

large groups of people. We do not mean to infer (nor do we believe) that all members of generations are the same and every person of this age will share the same characteristics. If that were true, voir dire would be a simple matter indeed. Instead, generational groupings (and stereotypes) allow us to consider broad categories which must be refined via pretrial research and careful examination of life phase, attitudes, values, experiences and beliefs.

The following table briefly presents generational groups, birth years, current ages, size of group, defining moments and the perspective each generational group has had historically as well as their current perspectives. [For additional data on current perspectives, see our most recent generational update paper \[here.\]](#)

Major Generalizations of Each Generation (Cekada, 2012)

Generation Name	Birth Years	Defining Moment(s)	Generational Descriptors	Current Perspectives
Silent Generation Came of age during Truman and Eisenhower presidencies. Now 66-83 years old.	1928-1945. Turned 18 from 1946 to 1963. Comprise 80% of those aged 65+ in the US. Now roughly 34M in size.	Korean Conflict	Helpmate Mediators Conservative Recently political activists	Conservative. More uncomfortable than younger generations with social changes (including racial diversity & homosexuality). Social Security as top voting issue. 79% non-Hispanic whites. Very frustrated with government and seen as important political activist voting block for upcoming elections.
Baby Boomers Came of age during LBJ, Nixon, Ford and Carter. Now 47-65 years old.	1946-1964. Turned 18 from 1964 to 1982. Roughly 79M in size.	Vietnam War	In Youth: Idealistic, Dreamers and Entitled. Now: Worried about money	Nearly half say life in US has gotten worse since the 1960s. Concerned about finances & may not retire. Express as much frustration with government as the Silent Generation—Boomers have grown more critical of government in the last decade. Jobs most important voting issue.
Generation X Came of age during Reagan, George H.W. Bush and Clinton. Now 31-46 years old.	1965-1980. Turned 18 from 1983 to 1998. Roughly 51M in size.	Social changes: Divorce Latchkey Increased violence 9/11/2011??	Multicultural Friends replace 'family' Work/life balance "Emerging adulthood" introduced for this generation	Similar to Millennials on social issues. Since 2009, financial worries. Backed Obama in 2008 but went Republican in 2010. Jobs most important voting issue.
Millennials (aka Gen Y) Came of age in G.W. Bush presidency. Now 18-30 years old.	1981-1993. Turned 18 from 1999 to 2011. Roughly 75M in size.	Candidates: Terrorist attacks in US 1st Gulf War Iraq War Columbine shootings	Civic personality "Can-do attitude" Entitled Disorganized Digital natives	Socially liberal. High rates of unemployment but still upbeat. Most diverse generation: only 59% are non-Hispanic whites. Welcome the new face of America. Jobs most important voting issue.

Stereotyping Those Younger and Older (“This is how they are”)

Older generations stereotype younger generations. It’s been true for countless centuries.

“I see no hope for the future of our people if they are dependent on frivolous youth of today, for certainly all youth are reckless beyond words...When I was young, we were taught to be discreet and respectful of elders, but the present youth are exceedingly wise [disrespectful] and impatient of restraint.” –Hesiod, 8th century BC

Those who are established see change and resent it. Our generation made the rules (and they are right and should not be questioned) and here are these young (read: undeserving) upstarts coming along and challenging our authority and the wisdom of established rules.

You will thus hear most of these stereotypes through the eyes of the Boomers (the previously largest and now one of the oldest generational groups). And it doesn’t only go one way. Younger generations are also quite prone to stereotyping older generations as controlling dinosaurs who resent having their rules questioned. If this sounds like typical family conflict—it is likely a good analogy to consider.

Generation X members are the children of the older Boomers while Millennials are a combination of the children of the older members of Generation X and the (“second chance children”) of the younger Boomers. Gen X parents are reacting to their own experiences as [latchkey kids](#) and Boomers with Millennial children are trying to get it right this time. You’ve heard of [helicopter parents](#)? That’s what happened to the Millennials. We all are a product of our times and the attention (or lack thereof) lavished upon us by our parents.

With that analogy in mind, let’s examine a few of the stereotypes we hold of each other and compare that with the actual facts:

Generation X: Remember them? Cynical, jaded, depressive punks of the 1980’s and 1990’s? Unwashed slackers? Well, it’s time for a mental reset. They grew up. Gen Xers are now 30 to 45 years old and have mortgages, families and careers. And guess what they’ve done?! They are the most educated generation ever. They are employed at a higher proportion than any other generation. They are married with children and are credited with reducing the divorce rate to the lowest we’ve seen in decades. They have retained and concretely defined their

youthful values of family, work/life balance and acting locally not globally so that their lives actually reflect their values. [And they are happy.](#)

The Millennials: This group was born with an internet connection in their mouth. They expect immediate communication regardless of the hour of the day or mode of communication chosen. Older generations can see this as indicative of the younger person’s impatience rather than as indicative of their proficiency in multitasking. They avoid responding to voice mail or even email messages. They have a bad habit of simply texting into the office when they are sick or going to be late. They don’t call in. As a Boomer partner in a client law firm once said (while grinding his teeth into dust) of a Millennial associate, “I asked him why he hadn’t responded to the voicemail and he replied

‘I don’t do voicemail.’”

Older generations may see this as disrespectful or inappropriate when to the younger person, it is simply habitual and convenient (and potentially respectful, collegial and totally appropriate). Further, these are ambitious, rapid paced individuals. They want careers and workplaces that match them now—not when they have done their time.

Boomers and Gen Xers can see this expectation as entitlement, or at best, over-ambitiousness. The Millennials constant use of social media does not sit comfortably with Boomers: “Boomers are more comfortable with handshakes and chats than with pokes and posts” (Keegan, 2011). Despite the economy and unemployment rates, Millennials are notoriously upbeat and optimistic.

Boomers: The flower children of the 1960s who espoused free love, peace and individuality have grown up to be “the man”. They waited their turn, made the new rules for the workplace (and in the world) and have paid their dues. They resent efforts to change the world they re-designed. They are also (following the economic collapse decimating their retirement accounts) anxious about the future and more downbeat (compared to other age groups). Boomers are currently glum. More glum—it should be pointed out—than their own parents (the Silent Generation). Ironically, Boomers are the new “grumpy old men and women”. They are more likely to say they have been hurt financially by the current recession and more likely to say they are cutting back. They are less religious than their parents and more religious than their children (the Gen X and Millennial groups). Boomers cling to youth with the average Boomer saying “old age begins at 72” but they [have lost optimism for the future.](#)

“Boomers were always the center of the universe, both at home and at work. Now they are blamed for the country’s economic problems and resented in the workplace by the younger generations who are trying to push them out.”

Dirty. Spoiled. Controlling. Disrespectful. Entitled. Grumpy and old. That’s how different generations see each other. It’s a recipe for conflict and incivility—not to mention assuming the worst in each others’ behavior. Boomers were always the center of the universe, both at home and at work. Now they are blamed for the country’s economic problems and resented in the workplace by the younger generations who are trying to push them out. No wonder Boomers are bummed.

A simple query posed by the [Pew Research Center](#) in 2010 shows the glumness of the (now second largest generational group) Boomers:

“I am dissatisfied with the way things are going in the country today”

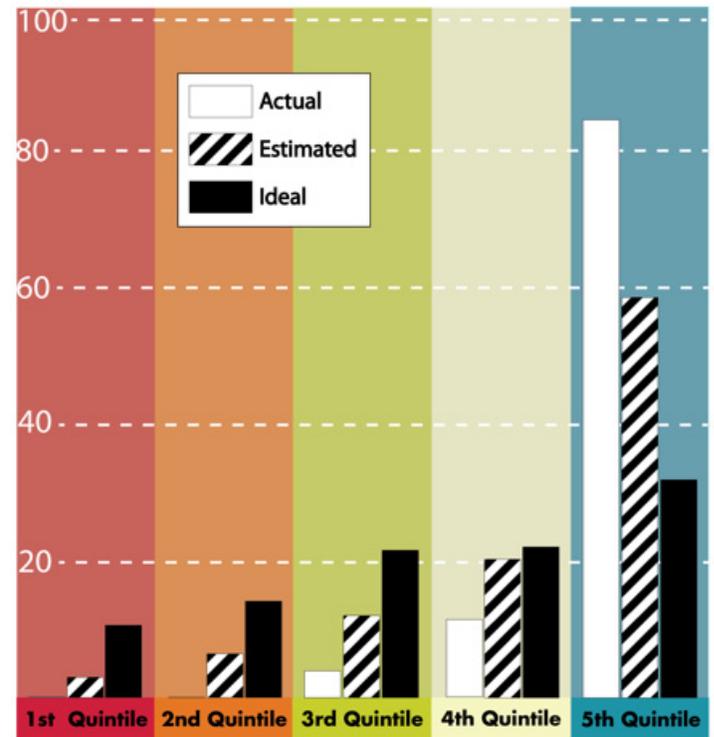
Generation	Number (and Per Cent) Agreeing
Silent and Greatest Generations (65 and older)	76%
Boomers	80%
Generation X (30-45 years)	69%
Millennials (18-29 years)	60%

What is additionally intriguing is that we Boomers raised the Millennials and Generation X. They are our children and now our colleagues and coworkers. We taught them to expect accommodation, to question authority, to challenge the status quo and to do what works for them. And now those birds have come home to roost.

To paraphrase an [old Jimmy Buffett song](#) “they are the people we never warned ourselves about”. Or to paraphrase my mother when I said I wanted a strong-willed girl child—“I hope you get exactly what you wish for and then you will understand just how much fun that is!”. Or to [paraphrase some old wife somewhere](#)—we made this bed..... (See our specific management recommendations for the intergenerational law firm [here](#).)

But there is good news. Membership in differing generations does not necessitate conflict. We are truly more alike than we are different. Despite all the nasty ads we are seeing as the election season ramps up—what we can tell you is that Americans [no matter our age, politics or income] want to live in a country that is much more financially equitable. We want wealth distributed more equally. We want a fairer nation. [That’s the good news](#). The bad news is that we have no idea that’s what we want and we have no idea just how bad things are!

Some new research illustrates this reality nicely. The graphic below shows American’s responses to three questions about the distribution of wealth in America. Researchers asked Americans to consider wealth in this country divided up into 5 buckets or pots. The bottom 20% goes in the first bucket, the second 20% goes in the second bucket, and so on.



Most of their participants guessed that the bottom 2 buckets (the poorest 40% of the population) had about 9% of the wealth while the top bucket (the wealthiest 20%) had about 59% of the wealth. You can see their estimates in the graphic above. You can also see the reality which is wildly disparate from the guesses—the bottom 40% has only 0.3% of the wealth while the top 20% has 84% of America’s wealth.

Then the researchers asked what the research participants thought would be an “ideal” wealth distribution and you can also see that in the graphic. What is most interesting in these findings is the researchers found no differences by political affiliation, income or gender. We want the same things. But we don’t realize it, and instead tend to objectify one another. This is an important lesson for us as we plan case presentation and narrative. When we emphasize universal values, we [tap into the “best” of everyone in that jury box](#) .

Before we move on to the intergenerational jury now seated in venues across the country, let’s summarize [the research data on differences](#) between generational groups. This won’t take long since the actual, data-based list is much shorter than the stereotypes we all carry.

- There is a more liberal/tolerant focus on social issues among the Millennials and Generation X.

- There is a concern about financial issues shared by Gen X and the Boomers.
- The Millennials have an unprecedented rate of unemployment.
- The Silent Generation is happiest and yet, the most angry with government.
- There is a divide between the youngest generation (the Millennials) and the oldest generation (the Silents) that appears to be a major obstacle based on the Pew Report. Some of this is due to the age gap and the increasingly liberal views of the younger generations.

That's it. So with all the press on the "slackers" and the "narcissists" and the "flower children" of yore—why do we not see more differences between the generations? They grew up differently. They had different formative experiences. Why is there not a bright line of difference? It could be that there is—in some instances.

As it turns out, the stereotype of the Boomer rebel/hippie/flower child actually applied to only a small, iconic segment of the Boomer population. But it's the image we retain of the 1960s generation. It's part of what we do. We put people in boxes. It makes things simpler. And often, it makes us completely wrong.

We all use stereotypes as shortcuts to decision-making. Readers of [our blog](#) know that we rely heavily on the newly published (not the sadly outdated) research literature to understand the evidence of emerging trends, rather than to merely parrot the anecdotal opinions found in the popular media. Here's a terrific (and pretty succinct) explanation of why stereotypes persist in spite of (data-based) evidence to the contrary:

“So, why might stereotypes persist in the face of evidence to the contrary? In fact, the stereotype and the data can both be correct simultaneously. If one considers a normal distribution of people, it would only take a small increase in numbers at either tail of the distribution to cause people to believe that one generation was different from another due to the disproportionate impact outliers have on influencing perceptions. This might occur even while the average within one generation stays the same as the other generations.” (Gentry, et al., 2011)

It's a critical lesson in both personal and work relationships. When a conflict is assumed to be “generational”—the communication failure at the root of the conflict is often lost. “Generation” is often a codeword for “kids” or “geezers” and as such, can be a pejorative means of avoiding responsibility for considering alternate explanations. It is dismissive. And it doesn't just happen in the office. It happens in the courtroom too.

Knowing general information about your jurors (in this case their generation) allows you to assess attitudes and beliefs that are relevant to your case and alerts you to the importance of not relying on stereotypes alone to make decisions you then have to live with throughout trial. Let's look at the realities of the intergenerational jury based on the evidence and not our assumptions.

The Intergenerational Jury

Of course, the jury pool evolves with the rest of society. Based on [2010 US Census Data](#), the Millennial Generation is now the largest population segment in America. If you combine their numbers with those of Generation X, adults between 18 and 46 years of age comprise over 50% of the adult population in this country (and are by far more heavily represented in jury pools than their older neighbors). [This is why when we recruit mock jurors for pre-trial research, we normally have about half between the ages of 30-50, with a quarter who are in the Millennial age group, and a quarter in the older Boomer group.]

Jury pools are shifting in numerous ways, and the proportion of various generations in the jury box isn't the only thing changing. Earlier this year, we did an exhaustive analysis of the research on differences between the generations that reflect visible or measurable distinctions.

There are changes in educational achievement; ethnicity makeup; the role of work; finances; comfort with multicultural diversity; gender roles and family structure; liberal versus conservative orientations; our willingness to trust others; preferred source of information; attitude toward the government; environmental views; acceptance of scientific findings; and attitudes toward the death penalty and religion. [You can review all of these distinctions in the \[article we wrote in January of 2012.\]](#)

Litigation advocacy, like office relationships, must take the diversity of the new jury pool into consideration with every case. The law reflects reason and our interpretation of that law, combined with our life experiences and visceral reactions to the event, often reflects a complex combination of our reason and our passions. We know some groups of jurors have more sympathy for [mitigating circumstances](#). We know some prefer a Dragnet approach to justice: “[Just the facts, ma'am](#)”.

[In any group of twelve](#), you are likely to have those swayed by sympathy and those determined to apply the evidence to the law with cool detachment. But no one decides entirely based on sympathy or entirely on evidence. Instead, all of us make decisions based on both ends of this judgment spectrum. Telling stories that speak to both ends of the continuum always serve us well, as your jury is bound to [include both types](#).

The following pages summarize the varying expectations and predilections of the different generational groups when it comes to specific aspects of trial and case presentation. (If you want

to understand more about [Gen X jurors](#) or the [Millennials](#) , follow the links to see our earlier work.)

Differences in Learning Style and Information Application

One of the most well-known differences between jurors (and employees!) of varying ages has to do with work styles. Boomers and Gen X members tend to prefer to work alone. On the other hand, the Millennials grew up doing team projects and group exploration at school. They learn by doing, and respond positively to team tasks. Working in a cubicle farm or sitting in silence during endless video excerpts is experienced as “soul crushing”. Boomers are not as positively disposed to team tasks and often are not productive or effective team members (Cekada, 2012). But they are better at solitary work tasks. For Boomers, especially men, true collaboration and idea interchanges can be very difficult, as it isn’t a work style that they have been trained to embrace. It is more often about the dominance of ideas, and whose perspective ‘wins’.

When it comes to deliberation, it makes sense to teach all of the jurors about the team nature of the task and how they should approach deliberations. This education both levels the playing field (with all group members having access to basic information on deliberative processes) and gives all group members an equal chance to participate and be heard. We’ve seen mock juror deliberations where Millennials play an active role and are respected for their contributions. We’ve seen other deliberations where they are quite silent, and appear to be oppressed until someone directs a question to them, at which point they disclose valuable views. While the views might not otherwise have been added to the discussion, that doesn’t mean that their voting was passive. They aren’t any more interested in submitting to domination than anyone else, but they might not offer a viewpoint that isn’t welcome. Education and information allows everyone to participate in the process.

Graphics and Visual Evidence

Many of us are also aware that the Millennials are often more visually attuned. They are able to grasp a wealth of information through graphics and visual representations but are often resistant to reading lots of text. Computer-based learning is second nature to them and they expect you to use technology. Gen Xers are also visually skilled but not to the same degree as most Millennials, who never knew a world without the internet.

On the other hand, delivering solely computer-based visuals to the older Boomer or Silent Generation member can be an exercise in futility if they are resistant to computer use or feel that your presentation is going to be incomprehensible simply due to the delivery method. There was a transitional period 10-15 years ago when computer graphics in court were not consistently embraced; using foam boards offered a physical presence in the room, while projected images are ephemeral.

Now, more people have embraced computer images, and they also like the smoothness of the presentation flow when the imagery is cleanly choreographed in a presentation. Again, you need to attend to the diversity of preferences in your audience and have something for everyone.

New research studies offer important information for the design of visual evidence. Our [attention is often drawn to the center](#) of a graphic, picture or page. And we pay more attention to what the researchers call “[biological cues](#)”—a pointing finger and directionally focused eyes—as we make decisions about what to examine in our environment. While a pointing finger or eyes may seem more casual than a professionally designed graphic using arrows and directional symbols—it may also be more effective with the viewer. We tend to say that whatever the conflict that has initiated the litigation—ultimately it’s always about people. This research would say that’s true with visual evidence as well. Make it more human (or more ‘biological’ as the researchers would say). Jurors will notice.

But graphics isn’t a solution by itself. A recent study reported by [Research Digest blog](#) provides an example of when we do better with text than graphics— in a hospital. Some of the many graphs and charts filling patient records are subject to misinterpretation by [harried and distracted staff](#). Researchers conclude that if those graphs were replaced or supplemented with short passages of text conveying the same information—fewer mistakes would be made.

Birth trauma cases often involve questions about proper interpretation of fetal monitor strips. In a recent case we consulted on, one challenge was that there were no physical strips. The entire system was digital—you read it on a monitor. The complication was that in order to see the pattern that had evolved throughout the labor, or through the last hour, you have to page back and back and back... and you can’t flip back and forth as easily. [The image becomes less clear](#). Jurors saw it as an easy way to get confused, or a reason to do less checking of the records than might be prudent.

Another recent study related to visual evidence tells us when to give prototypes to jurors for closer examination and when to keep them at a distance! Apparently, our ability to learn and to remember information depends on what we do with our hands while we are learning! In other words, there are differences in what you process and ‘see’ depending on whether something is in your hands!

If you hold something in your hand, you notice differences among objects more effectively.

If you look at something from a distance (not near your hands), you are more likely to note similarities and consistencies between those things.

The implications for patent and IP litigation are pretty straightforward, but they are equally relevant for other types

of cases. If you need jurors to understand subtle features or attributes, you want to give jurors the opportunity to hold prototypes or exhibits in their hands, so they can appreciate subtle but important differences. If the point you are trying to make involves how things are the same, or how confusion is reasonable, or to raise confusion about an identification, you want jurors looking at the prototypes from a distance, when differences are seen as superficial or invisible.

It's an interesting idea. We were in [North Carolina](#) on an infringement case and the prototype invention was a very heavy industrial device. Not huge, just heavy. And we saw this exact phenomenon in real life. Because of how heavy the prototype was, it was on the table in front of me as the focus group facilitator. I described the similarities and the differences in appearance and function. Jurors focused on appearance and how the two items 'looked' the same. As the group prepared for a break, jurors were told they could approach and examine the objects. They did. And as we listened in to their reactions from behind the mirrored glass we saw them poking and hefting and examining the prototypes and exclaiming they could now 'see' differences between the two prototypes.

The researchers say that humans developed this skill to survive—when we had to tell poisonous berries from non-poisonous berries. We cannot say with certainty that they are wrong. But for us as consultants and our clients as litigators, the knowledge that there are different processes involved in close-up examination and observation from a moderate distance is a game-changer. And for those who are more tacitly-oriented (overall, Boomers and older Gen Xers), the images are especially inadequate to tell the story. For those who are more imagery-oriented (Millennials and younger GenXers), they may feel satisfied reaching conclusions based on images, but the impact of touching the object in question can still be transforming.

Most IP litigation involves claims of infringement (“these two things are the same”) and validity (“this invention is different than what has come before”). The more physical the contact they can have with the exhibits, the stronger their belief in the correctness of their decisions. If the patent dispute is over highly abstract inventions (biotech compounds or organisms, software, or high-tech generally), that same value attaches to analogous objects that they might have encountered in their lives.

In short, you do best with all generations when you communicate visually:

Use charts and graphs to simplify complex transactions or concepts.

Use timelines to illustrate relationships between events and documents or transactions.

Use short bursts of text to clarify relationships.

Use “hard copy” (think of the missing birth monitor strip) strategically.

Make it familiar through touch, and the point can become more persuasive.

“Get to the point” and all your jurors will appreciate it.

Before we leave the subject of trial graphics, a comment begs to be made about PowerPoint. It is a tool, a great way of achieving some kinds of goals. But every tool has a purpose, and in trial, PowerPoint is often used for more than it can deliver. Just as you shouldn't use a wrench to pound a nail, don't try to deliver case narratives through PowerPoint. PowerPoint is most effective to present images, not text. Research has clearly established that text-heavy slides often end up getting in the way. Specifically, the research demonstrated that if a presentation is presented in 3 formats (the lecture is largely printed on the slides, or the presentation is lightly outlined on the slides, or no slides are used at all), the audience learns to different degrees. And the best learning comes from the use of slides lightly outline the material, or show images that represent the material. Verbatim slides are the least effective presentation style, and in fact are worse than no presentation at all. If you are going to use verbatim slides, research tells us that you'd do better to show the slides, and say nothing. Just let them read the text and you can simply click them through the deck. Evidently, people will read what you show them, and reading while trying to listen actually interferes with learning. The goal is to convey a story, so don't get in the way!

Case Narrative

The use of the story model is now second nature to many trial lawyers. But perhaps, the story model is not always the first choice.

A paper published to the Social Sciences Research Network ([SSRN](#)) in 2010, examined the impact of the story model among court personnel. Participants were appellate judges, appellate law clerks, appellate court staff attorneys, appellate practitioners, and law professors—95 participants in total. The researcher (Kenneth Chestek) described the study rationale as follows:

“In early 2009, I conducted a study in an attempt to fill that gap. I wrote a series of test briefs in a hypothetical case and asked appellate judges, their law clerks, and appellate court staff attorneys, appellate lawyers, and law professors to rate the briefs as to how persuasive they were. My purpose (which I did not disclose to the test participants) was to measure whether a brief with a strong strand of story reasoning, woven in with the logos-based argument, would be more persuasive than a “pure logos” brief.”

Chestek found that of all the court personnel surveyed, law clerks were the only group that did not express an overall preference for the story brief. Chestek hypothesized that these 'new' professionals (with less than five years experience) prefer a focus on "the facts" to aid them in their task— helping their supervisors (the judges) identify laws at issue. In other words, new professionals see the informational brief as one that more closely represents "thinking like a lawyer".

"Perhaps it is because "the law" becomes familiar and the stories become the "new" information that is interesting and engages the attention of the reader. Or perhaps it is related to the fact that emotional reasoning (the "story strand" of our DNA molecule) evolved in the human brain long before logical reasoning. Perhaps as we mature, we learn to trust our emotional reasoning processes more."

What isn't considered in his hypothesis is the generational difference that is well documented between Millennials (the law clerks) and the Gen X/Baby Boomer lawyers and judges. [We have written exhaustively on the subject](#), and believe that the distinctions between generations can explain the difference just as well.

As a member of one of these older groups who reads hundreds of pleadings, motions for summary judgment, and appellate briefs every year, I know how much more I look forward to reading those written in story form. My kids would probably tell me that they wish the author would cut that stuff out and just explain what needs to be shared.

This gives credence to the old advice to "know your audience". If you are speaking (or writing) to a professionally "newer" group or jury, you may want to use a more stream-lined and factual approach. If your audience (or jury) is more experienced, a story narrative may be both more interesting to them and more persuasive.

Finally, another study assessed [need for cognition](#) (that is, the enjoyment of thinking) as well as 'transportability' (the capacity to allow a story to 'transport' you into the narrative's alternate reality):

Research participants read two different stories:

"One story focused on the ability of affirmative action to increase social diversity. The second was based on the role affirmative action plays in redressing generations of discrimination and disenfranchisement. Another portion of participants read one of two analogous rhetorical communications that focused either on social diversity or historical oppression and were composed of simple listings of related arguments."

In other words, one focused on the story, and the importance of the issue, while the other focused on pure facts. The story transports, while the fact presentation has a less transporting effect. The researchers hypothesized that higher transportability would again be related to increased persuasion but only in the story conditions. And they were right.

Highly transportable folks were more responsive to the narrative and their attitude change corresponded to changes in emotional responding (empathy) as opposed to rational appraisals (objective thoughts).

This can be an important area to consider for voir dire: "How many of you are regularly 'transported' by reading a good story?" "Who can remember being brought to tears watching a movie or television show?" The research doesn't address whether a love for narrative dramas on television is as effective a screen as reading (a past-time not embraced by all).

If your story is one that relies on emotional appeal—you want jurors who are "high in transportability".

If your story is one with a more rational or objective appeal—you want those jurors who look at you with confusion when you ask that voir dire question.

And we might suggest that if you are really looking for jurors who are low in transportability, the challenge will be to [observe the jurors who sit disinterested](#) as the "transported" jurors tell their stories.

Metaphors and Analogies

As we've begun to do extensive work in patent and high-tech litigation over the past ten years, the relevance of metaphors and analogies has become ever more apparent. When your case is full of abstract and conceptual ideas (like in many intellectual property disputes), jurors need ways to have it make sense in their own lives. Sometimes those metaphors arise of their own volition like this one that simply emerged in East Texas:

We were telling a story of a company (the plaintiff) suing another company (the defendant) because a third party (let's call him Joe) had given an idea to the defendant and the defendant (not knowing 'Joe' perhaps did not have clear title to the idea) taught some people how to use it, improved on it, and provided consultation on how to use the improvements. So the plaintiff sued the defendant for infringement because we all know 'Joe' doesn't have the money to recover significant damages. Finally, a construction worker mock juror raised his hand:

"Let me get this straight. So some guy steals a drill and brings it to my worksite. I teach him how to use it. And now I get sued for teaching him to use the drill?"

A simple and straightforward metaphor for an abstract concept

with no relevance to the lives of East Texas residents. And just like that, the relevance was given to us. There was a stunned silence in the observation room filled with attorneys and then the sound of pens scratching and keyboards clacking as the example was recorded. What's interesting is that [the more huge the potential damages](#) are in a case, the more relevant the use of metaphors and analogies that relate the case facts to everyday life of the triers of fact.

Old and young alike can understand concepts, metaphors and analogies when presented in a familiar format. We've seen the esoteric technology underlying complex patents simplified using [for example] comparisons to drive through orders, vending machines, and pizza delivery. Use examples that are universal and jurors will 'get' enough of the concept to talk about it in their own words.

Along those same lines, I was recently reminded of a blog post from Dave Munger back in the glory days of [Cognitive Daily blog](#). In the post, Dave's spouse Greta (co-author of the blog) discovered that the fable of the [Fox and the Grapes](#) was unfamiliar to many of her college students. Cognitive Daily then did a survey of their readers to see how many were familiar with the origin and meaning of the phrase "[sour grapes](#)". As it turned out, it was relatively few. Aesop didn't make the Millennial reading list.

It's a good lesson in generational communication for the courtroom. As they saw in the [Cognitive Daily survey](#), those survey respondents who were avid readers were more familiar with the meaning and origin of the term "sour grapes". We need to remember the [phase of life](#) of our jurors, as well as how actual 'reading' has decreased for many. Movie references, TV show references, book references, Bible quotes and religious references, and even pop culture references become [quickly dated and meaningless](#) to your audience.

We saw this recently in a mock trial where the (Boomer generation) defense attorney was attempting to demonstrate the difference between the disputed technologies as the difference between a record album (which he held up for the mock jurors) and a CD. Both delivered music, but with much different technology. Jurors liked the comparison and it made sense for them. But an unanticipated message came through. The attorney displayed a record album by Barry Manilow. Younger jurors saw that choice as reflecting both the attorney's age and a questionable taste in music. They were unafraid to verbalize this perception directly. It made for some amusing razzing in the observation room, and an important lesson for trial.

Argument and Persuasion

The stereotype tends to be that Millennials are suspicious and cynical. They are dyed in the wool skeptics, and hard to please. But more realistically, society is generally trending in that direction. We do not like to be deceived and we are always

on the lookout for liars. We prefer to learn by discovery rather than by being told what to think. This is a big change from the Greatest Generation, which is more deferential to authority and respectful of the pulpit (in church or in court). For those who were raised watching Watergate and Viet Nam on television, and for their progeny, skepticism has always been greater. And now in the age of internet fact-checking, the reluctance to trust opinions of strangers is even greater. What they will say is "give me the facts, don't tell me what to conclude."

Recently, researchers studied participants with fMRI machines while they watched a series of print advertisements. They were not asked to assess the merits (i.e., evaluate) the ads, just to passively observe. The researchers exposed the participants to three (pre-tested) advertisements deemed "highly believable", "moderately deceptive" or "highly deceptive". What they found is intriguing in terms of how our brains deal with threats of deception.

When the print ads were either "moderately deceptive" or "highly deceptive", the fMRI results showed increased attention was paid to the ad. Specifically, the precuneus area of the brain (associated with focusing conscious attention) was activated. In short, the more deceptive the ad, the greater the threat and the more the participant focused their attention on the ad itself.

Intriguingly, ads that were "moderately deceptive" caused more overall brain activity than the "highly deceptive" ads. The researchers suspect it is because participants had to work harder with the "moderately deceptive" ads to ascertain the truth while they were able to quickly evaluate and toss away the "highly deceptive" ads.

So how is this connected to litigation advocacy? In several ways.

Most deception in cases that make it to trial is going to be of the "moderately deceptive" type. The good news is that jurors will automatically focus more on those issues to attempt to intuit the truth behind the evidence presented to them. What we see (over and over again) is that jurors do not want to be [told what to think](#). They want to figure it out for themselves. Most effective is a tight case narrative that answers the questions that naturally emerge in the minds of jurors as they hear your story—and you want to let them draw their own conclusions.

Secondly, it isn't just our youngest jurors (the Millennials) who are suspicious and look for deception everywhere. They may simply be more consciously aware of that process. For the rest of us though, our brains are lighting up. Make us [consciously aware of our suspicions](#) by questioning witnesses, subtly displaying doubt via facial expressions or tone of voice, and giving jurors alternatives to opposing counsel's explanations. What is paramount is that the jury sees you as the antidote for deception, not the source of it. Play it straight, and resist argument.

Technology

Technology comfort and use is thought of as another bright-line generational divider. According to a recent Pew Research survey, while 75% of those aged 18-30 report they use the internet daily, only 40% of those aged 65 to 74 have the same internet use on a daily basis.

“The older Gen X goes online to accomplish a task and then walks away from the computer. Gen Y goes online and offline seamlessly and does not make a distinction between one and the other” (Behrstock-Sherrate & Cogshall, 2010).

Technology use difference across generational groups can be seen even more strongly with cellphone use. For those 65 or older, only 5% get all or most of your calls on a cell phone and only 11% use phones to text. Conversely, 72% of those under age 30 use their cell phones for most or all of their calls while 87% text (Elmore, 2010). This is likely why it only makes sense for the Millennials to send texts to report that they are sick or will be late to the office. It’s not disrespectful—it’s simply habitual and normative for their generational group.

On the other hand, do not assume only your younger jurors are technology-wise. Ask! What may surprise you is that Boomers and even the Silent Generation are also [remarkably ‘connected’](#). Certainly not to the same degree as the Millennials, but [Grandma is also wired \(mostly\)](#).

Millennials: 91% use the internet (up from 89% in 2008) and 86% use social networks. Despite their constant connectivity, texting is more popular among this group than either email or social networks.

Generation X: 88% of Gen Xers were internet users in 2011 (up from 80% in 2008) and of those online, 73% used social media. Gen Xers are “fully comfortable using both traditional and digital media channels”.

Boomers: 75% use the internet (up from 70% in 2010) and 93% use email. Of those online, 47% used social networks in 2010 with 20% doing so daily. Intriguingly, Boomers spend more money on technology (monthly telecom fees, gadget/device purchases) than any other demographic!

Silents: 47% used the internet in 2011 (up from 36% in 2008) and of those online, 94% use email and 26% use social networks!

When you are in a tech-heavy case, make sure to use simple [even anthropomorphized] explanations for the complex layers of technology as exemplified in [Barnes \(2009\)](#). But for the sake of retaining your credibility and trustworthiness, be cautious about claims of ignorance regarding technology (or any aspect of your case). While you can get away with saying “When I first heard about this case, I didn’t appreciate much about this technology...”, jurors are not going to respect you if you don’t

display comfortable mastery of it at trial. Learn it and act like you know it, or sit down. Anything less means that you are not a reliable source of the information that they demand. You are the expedition leader, and you’d better know the route.

Younger jurors are going to expect that you will use technology at trial. Further, they are going to expect you to use that technology smoothly and effortlessly. A good trial technician can be worth their weight in gold when it comes to juror’s sense of your technological credibility. The days of getting juror commiseration and empathy with your self-deprecating comments about “not being good with technology” are long-past. You get no pass.

Pretrial Publicity (PTP)

When you have an upcoming trial with much publicity, there is always the concern about the impact of pretrial publicity on your potential jury. Recent examples for which this has been a concern are the Enron trials, Casey Anthony trial, the Conrad Murray (Michael Jackson’s doctor) trial, and the George Zimmerman/Trayvon Martin shooting (see our paper on this one [here](#)).

Despite our beliefs about the impact of pretrial publicity on the defendant’s right to a fair trial, the Supreme Court has differed from that common wisdom. There was much discussion when the [Supreme Court decided Jeffrey Skilling had gotten a fair trial](#) in Enron’s home town of Houston, despite extremely negative pre-trial publicity. Recently, researchers examined transcripts of 30 mock jury deliberations to assess whether pre-trial publicity affects jury deliberations.

Not only did pre-trial publicity have a powerful effect—that effect was consistent across all thirty juries. Every single one of the juries exposed to PTP discussed what they had read/heard about the trial. Rarely did a juror in any of the thirty groups halt the PTP discussion despite pre-deliberation admonitions to not discuss PTP and to halt any discussion that should arise during deliberations. Rather, they acknowledged the information came from PTP and then agreed to discuss it anyway! The researchers opine courts cannot rely on the jury to correct fellow jurors who raise PTP information.

Jurors who were exposed to negative PTP (anti-defendant) were significantly more likely than their non-exposed counterparts to discuss ambiguous trial facts in a manner that supported the prosecution’s case, but rarely discussed them in a manner that supported the defense’s case.

Negative PTP seems to be lumped in with the prosecution’s ambiguous evidence as though it is more evidence for the prosecution’s case. So ambiguous evidence is strengthened by negative PTP. As in, “That’s just like what I heard...”.

This study also found that PTP-exposed jurors were either unwilling or unable to adhere to instructions admonishing

them not to discuss PTP and rarely corrected jury members who mentioned PTP.

In essence, this study says that jurors' ability to hear and interpret ambiguous evidence is damaged by negative pretrial publicity. They are simply unable to process the evidence in a balanced fashion and instead they skew their interpretation to support the prosecution. Supreme Court ruling notwithstanding, pre-trial publicity does affect juror behavior. And [negative PTP stacks the deck](#) for the prosecution.

Why is this topic being included in a paper about generational differences? Because there is an important generational distinction surrounding PTP (Ruva & Hudak, 2011). Their study examined how pretrial publicity affects older jurors [range = 60-80 years old, average age = 69.5] and younger jurors [range = 18-21 years old, average age = 19]. In this instance, researchers looked at the impact of both positive and negative publicity on mock juror decision-making.

Mock jurors read either positive or negative pretrial publicity accounts of the case (via mock news articles) and then, one week later, they watched an edited 30 minute video of the trial. (This video was used in previous research and found to be realistic, believable and ambiguous as to guilt. Pretrial publicity is believed to be most important when guilt is ambiguous.) Following viewing of the trial video, they were told to disregard any relevant information from their readings the week before and then they wrote down their individual verdicts.

Older jurors were only affected by positive pretrial publicity.

Younger jurors were only moved by negative pretrial publicity.

In other words, even though the mock jurors were given identical information "pretrial" and then viewed the same video summarizing the trial, they came to very different conclusions. Older jurors were only biased by the positive PTP while younger jurors were more conviction prone than the older jurors only when exposed to negative PTP.

What this research would suggest is that when you have negative pretrial publicity, older adults (older Boomers and Silents) are going to be less affected by it than when they have been exposed to positive pretrial publicity.

If the case involves a well-known and positively regarded person, older adults are going to be more affected by the 'halo' surrounding them than will younger adults.

If there is a high level of negative publicity and the litigant is relatively unknown, younger jurors are going to be more swayed (negatively) while older jurors are largely unmoved.

It's an intriguing finding for two different reasons. First, this is a demographic finding—attitudes and values are almost always

more powerful in affecting decision making. The second point is the question of why the older jurors were only moved by the positive PTP. They are, for the most part, more conservative. If they were looking for reasons to be punitive, the negative PTP would be powerful. Instead, another finding in our analysis of generational research seems to fit: older jurors are happier. They prefer to pay attention to news and information that says 'the world isn't so bad after all'. Generally speaking, [expect older jurors to prefer positive stories](#), good character, and good manners.

Paths to the Attention of Younger Jurors

To Engage Both Millennial and Gen X Jurors

Like them, treat them as having something to contribute. This is especially true for the Millennials who are tired of being treated disrespectfully, like "kids".

Don't write them off as insensitive. Use universal values to engage jurors of all ages with your specific case.

Understand the impact of growing up digital but don't assume competence with all things technological. For both Gen X and Millennial jurors, some will be mavens and others will not. Age is not a totally reliable indicator of technological prowess.

Betrayal of trust is an important (and potentially powerful) theme. This is especially true for the Millennials who grew up in very protected and supervised environments. They are especially sensitive to betrayal of trust. Focus on issues of what is right and what is wrong.

Connection, tolerance and making a difference are case themes that resonate. Build connections: Make witnesses and parties "like" the jurors. Consider case narratives focused on relationships, family and friends. Consider how to use "balance". Demonstrate the meaning in your case and how it personally affects them, cut especially for the Gen X juror.

Religious affiliation is lowest among the Millennials and lower among Gen X jurors than Boomers or Silents.

Help them trust the sources of information by giving information on source validity that extends beyond educational credentials.

Use effective and crisp multimedia strategies in presentation. Make the trial visual. Highlight digitized material or sound bytes that outline key points.

Stay concrete and practical. Be "cool" but not "slick". Move around and vary your position and speech style.

Teach the jury charge so they understand what is expected of them.

Conclusions

In the courtroom, much as in the office, you are best served by maintaining your curiosity and minimizing your reliance upon stereotypes about the various generations. The ones ‘not like me’ (older or younger) are not the enemy, they are merely strangers. And strangers prefer people who appear to like and

respect them. Don't assume that disagreement or differences are a sign of disrespect or disdain— frequently, they are just a matter of habit and personal style. There has been intergenerational tension forever. We hope this overview of generational issues helps your navigation in the “new normal” of both the office and the courtroom. 🎧

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FAVORITE THING



Sometimes I come across an article or video I want to view, but don't have time at that moment. I don't want to add it to my overgrown, untended pile of bookmarks which have accumulated over the years, I just want to come back to it later, watch it or read it, and be done with it. [Pocket](#) is a free cloud based app/service that makes it easy to do just that. If you see something you want to read later, send it to Pocket in one of the ways shown [here](#), then pull it up later on any web-enabled device.

This may sound similar to [Evernote](#), and there can be some overlap depending on how you use them, but I tend to use Pocket for things I wouldn't use Evernote for, things that I'm interested in reading or viewing later, but that aren't related to any projects I'm working on. Or if I find that it actually is something I might want to use later, it's easy to send it from Pocket to Evernote. In either case, whenever I'm done with it in Pocket, I click a button and it goes to the archive, locatable but out of the way.

I find Pocket indispensable for minimizing distractions while browsing the web by allowing me to shelve interesting things for later, knowing they'll be there when I have a free moment to get back to them. Pocket plays well with all my devices (Chrome, Mac OS, iPhone, Kindle), but it may not work for everyone. If this app doesn't suit you, there are a couple of other services I can recommend that might work better for your own personal tech menagerie.

[Instapaper](#) was the first of these read it later services, and I used it until I decided to switch completely to Pocket. [Readability](#) functions much the same as the other two with slightly different options and functions. They all have the same basic functionality, it just depends on which one works for you. And they are all free (with the exception of the iPhone/iPad Instapaper app, which is \$3.99). ☺

Brian Patterson is a graphic designer and trial consultant at [Barnes & Roberts](#). He has created and overseen production of multimedia presentations for well over a hundred courtroom proceedings since 1998. He is Assistant Editor of The Jury Expert, and is founder and contributor to the blog [Information Graphics & Litigation](#).

TOP TEN OF 2012

Our Top Ten Most Accessed Articles for 2012!

What was most popular among Jury Expert readers in 2012? Take a look. One of the beauties of publishing on the web is that readers can find articles that may not have just been published and enjoy them (and share them) in perpetuity. The most accessed articles in the entire on-line repository of Jury Expert articles during the calendar year 2012 are listed below in order of their popularity. Our 2012 articles are not far behind our Top 10 list (we thought about doing a Top 20 list!) but they just haven't had time to build an audience yet. So take a look. While you might choose a different Top Ten—this one is composed by visitors to the Jury Expert website. It's what your friends, colleagues and opponents are reading.

1) [Ethical Issues in Racial Profiling](#) by Annabelle Lever

This article by a British ethicist examines the differences in the British and American practices related to racial profiling and poses provocative questions about practices related to jury selection and voir dire in this country. First published in 2009, this article has consistently been a popular one with our readers.

2) [Online and Wired for Justice: Why Jurors Turn to the Internet \(the "Google mistrial"\)](#) by Doug Keene and Rita Handrich

The first article we published in The Jury Expert that comprehensively examined the issue of jurors and the internet. Also written in 2009, this article has been a consistent favorite among our readers.

3) [Eyeglasses and Mock Juror Decisions](#) by Mike Brown

Popularly known as the "nerd defense", this 2011 article explains the original research that found only a small effect of putting glasses on your criminal defendant. The popular media picked up this small finding and ran with it. Here's the real story of what the researcher actually found.

4) [Guilty but Mentally Ill \(GBMI\) vs. Not Guilty by Reason of Insanity \(NGRI\): An Annotated Bibliography](#) by Jennifer Kutys and Jennifer Esterman

Another 2009 article by two doctoral students at Wright

State that has been consistently popular with TJE readers. This is a very specialized area of practice but that means solid information on the issues are very hard to find.

5) [Will It Hurt Me In Court? Weapons Issues and the Fears of the Legally Armed Citizen](#) by Glenn Meyer

We thought this would be another niche article as well that would only be of interest to a small number of readers. This one has staying power though and is often passed around on gun-interest/use forums. While there has not been an uptick in traffic to this article since the debate over gun control has peaked—traffic has been steady throughout the year.

6) [Police Deception During Interrogation and Its Surprising Influence on Jurors' Perceptions of Confession Evidence](#) by Krista Forrest and William Woody

Published in 2010, this article focuses on the impact of police deception during interrogation on jurors thoughts about accepting or rejecting confession evidence. Not surprisingly, this one picked up traffic toward the end of 2012 as the issue of false confession hit the media and theaters.

7) [Generation X Members Are “Active, Balanced and Happy”. Seriously?](#) by Doug Keene and Rita Handrich

Published in 2011, this article has been consistently popular throughout the year. And we thought people were mainly interested in the Millennial Generation! Apparently not. This one is a Myth Buster on the grunge generation that grew up to live (seemingly) happier lives than their parents.

8) [A Necessary Evil: Edward Tufte and Making the Best of PowerPoint](#) by Jason Barnes and Brian Patterson

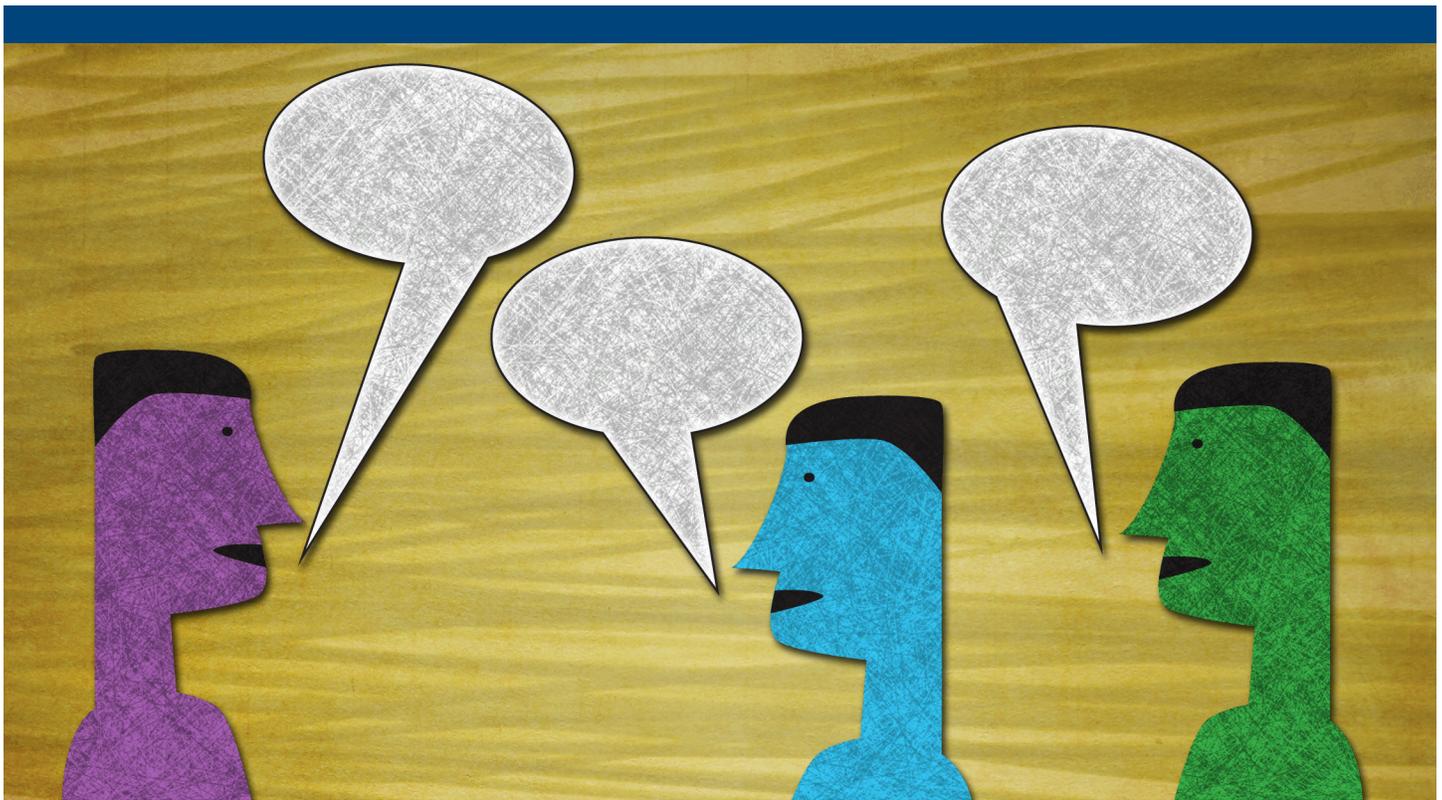
Also published in 2011, this article has been consistently popular throughout the year. This user-friendly piece shows you how to use PowerPoint effectively and is written by visual evidence specialists.

9) [Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea](#) by Stephanie West Allen, Jeffrey Schwartz and Diane Wyzga

Published in 2010, this article picked up steam at the end of the year to make it to our Top Ten list. A rejoinder to the popular Reptile Technique with responses from trial lawyers who are opposed to and/or support the reptile strategy in the courtroom.

10) [Powerpoint® Presentation Compatibility: Be Prepared for Surprises](#) by Robert Featherly, Adam Wirtzfeld, and Adam Bloomberg

Published in 2011, this one has also been consistently popular. We are all interested in help with our PowerPoint presentations and many of us have opened a slide presentation that is “just all wrong” when we arrive to share our knowledge. Written by visual evidence specialists to help you avoid that horrifying experience. ☹



Forensic Mental Health Evaluations: Reliability, Validity, Quality, and Other Minor Details

by W. Neil Gowensmith, Daniel Murrie, and Marcus T. Boccaccini

Reliability is crucial to expert evidence. In cases involving mental health, the court usually relies on the opinions and testimony of forensic mental health expert witnesses (those experts who specialize in the intersection of mental health and the law). Even in adversarial proceedings, independent forensic experts appointed by the court are presumed objective and generally reliable. In other words, an opinion from one neutral expert should be similar to the opinion from another neutral expert when the two are considering the same case details.

But how reliable are these forensic experts? That is, how often do independent, court-appointed forensic experts agree with each other? Further, what factors might influence that reliability? Do some types of cases lead to more disagreement than others? Is agreement better for some questions (e.g., competence to stand trial) than others (e.g., insanity)?

To answer some of these questions, we reviewed nearly 350 real cases in which multiple forensic evaluators, in routine practice, evaluated the same defendants to answer questions of competency to stand trial, legal sanity (criminal responsibility),

and readiness for release from a psychiatric hospital. Our goal was to examine how often we might expect forensic evaluators to agree on the most common psycho-legal questions the court asks of them. We calculated evaluator agreement across these cases, researched the eventual court dispositions, and explored factors that increased or decreased evaluator agreement. We present these findings later in this paper. First, we review how the evaluations in our study were ordered and conducted.

The Forensic Evaluation

We studied evaluations from Hawaii, where state statutes dictate a unique process that provides an excellent setting for examining reliability. In felony cases, the courts order three concurrent and independent evaluations of the defendant. One of these evaluations must be conducted by an employee of the state Department of Health. The other two evaluations are conducted by independent certified evaluators in the community. One of these independent evaluators must be a licensed psychiatrist, while the other may either be a licensed psychiatrist or a licensed psychologist. All evaluators are appointed by the court, not by the defense or prosecution.

In this way, evaluators in Hawaii are *independent*, so any disagreement we find is *not* likely to be attributable to “adversarial allegiance,” the tendency for experts to form opinions that support the party who retained them (see Murrie et al, 2008). All of the evaluators in this study had been certified by the state Department of Health through a series of trainings on forensic evaluation. These conditions allowed for a unique, naturalistic study of the field reliability of forensic evaluations; because each case requires three independent and concurrent evaluations, we could easily compute agreement rates across each case and identify factors related to that reliability.

We reviewed opinions from the most common forensic evaluations: competency to stand trial, legal sanity, and readiness for “Conditional Release” (release from the state hospital subsequent to placement after a verdict of insanity).

Competency to Stand Trial

In lay terms, competency to stand trial (CST) refers to a defendant’s ability to understand his or her court proceedings and work productively with his or her defense counsel. Like all states, Hawaii uses the *Dukys* criteria for competency (Dusky v United States, 1960). That is, the defendant must demonstrate a factual and rational understanding of the charges against him, and must be able to assist defense counsel (see Drope v Missouri, 1975).

How reliable are evaluations of a defendant’s competency to stand trial? Previous results were mixed, with some showing reasonable agreement among clinicians and others showing poor agreement. Most previous research utilized artificial experimental conditions (such as hypothetical vignettes, or studies in which evaluators use the same instruments in the same hospital), which tended to reveal strong reliability but may not translate adequately to real-world forensic practice. Thus routine reliability “in the field,” has been largely unknown.

We coded data from a total of 716 CST reports, taken from 241 cases (full details available in Gowensmith, Murrie & Boccaccini, 2012). Seven Department of Health psychologists, 15 independent psychologists, and 16 certified independent psychiatrists submitted the reports. In most cases, three different evaluators saw each defendant. Thus, evaluators could show unanimous agreement in one of two ways: all could agree that the defendant was competent to stand trial, or all could agree that the defendant was incompetent.

How often did all three evaluators agree with each other? In 71% of cases involving initial evaluations of competency to stand trial, all three evaluators unanimously agreed in their opinion about the defendant’s competency. Most of those cases (59%) involved unanimous agreement that the defendant was competent, and fewer (12%) involved unanimous agreement that the defendant was *incompetent*. For cases involving repeated evaluations of competency (i.e., re-evaluation after incompetent defendants received treatment to restore

competence), agreement rates fell to 61.0%.

When it came to the actual court decisions about a defendant’s competence, judges typically followed the “majority opinion” from evaluators. When judges ruled in the opposite direction of the majority of evaluators, they usually did so to find a defendant *incompetent* to stand trial. This reflects the court’s conservative stance towards competency; that is, they were apparently reluctant to find a defendant competent if there was any doubt among evaluators. Judges were also far more likely to rule against the majority recommendation of evaluators when evaluators presented a split decision on competency (i.e., two say competent, one says incompetent).

We explored several factors that we believed might influence evaluator agreement: the age, gender, and ethnicity of the defendant, the seriousness of the offense, the location of the evaluation, the referral court, the judge presiding over the case, the professional discipline or employer of the evaluators, and the defendant’s proficiency with the English language. None of these factors significantly influenced agreement among evaluators. However, when evaluators agreed that a defendant was psychotic (that is, demonstrated severe symptoms such as hallucinations, delusions, or grossly disorganized behavior), they showed better agreement about competence. Fortunately, further analysis revealed that evaluators did not simply conflate a psychotic diagnosis with the finding of incompetence, a problem that has historically been common in competence evaluations (Skeem & Golding, 1998).

Legal Sanity / Criminal Responsibility

We also investigated rates of agreement regarding legal sanity (also known as criminal responsibility). Unlike competency to stand trial, which is a dynamic condition focused on a defendant’s current functioning—which may change from moment to moment—legal sanity is a static, historical condition that requires retrospectively determining a defendant’s functioning at the moment of his crime. The state of Hawaii uses a version of the two-pronged American Legal Institute standard for legal sanity, which considers both the M’Naughten standard (whether the defendant understood the criminal behavior was wrong) and the volitional capacity standard (whether the defendant could resist the impulse to commit the crime).

Very little previous research has been conducted on the field reliability of legal sanity evaluations. Indeed, *no* recent literature examines evaluator agreement in real cases involving legal sanity.

We coded 468 sanity evaluation reports across 161 cases (for details, see Gowensmith, Murrie & Boccaccini, in press). The proportion of psychologists (24) versus psychiatrists (12) was similar to the pattern we found in CST evaluations.

How often did evaluators agree with each other regarding a

defendant's legal sanity? We found unanimous agreement among evaluators in 55% of legal sanity cases. Evaluators unanimously agreed that the defendant was sane in 38% of cases, and they unanimously agreed the defendant was insane in 17% of cases. When evaluators disagreed, two of the three evaluators more often opined that the defendant was sane rather than insane.

When these sanity cases went to trial, judges were more likely to "overrule" the majority opinion of the evaluators in cases of legal sanity than in cases involving competency to stand trial. They typically did so to find defendants legally sane even when two or three evaluators opined them as *insane*. In fact, in only one out of 91 cases did a judge find a defendant insane when the majority of evaluators believed the defendant to be sane.

Unlike competency to stand trial evaluations, several factors influenced rates of evaluator agreement in cases involving legal sanity. Evaluators were more likely to agree about sanity when they agreed the defendant warranted diagnosis of a psychotic disorder or when the defendant had been hospitalized in a psychiatric facility sometime in the six months prior to the evaluation. Evaluators were more likely to *disagree* with each other when the defendant had been abusing substances (making it difficult to disentangle the effects of mental illness versus substance abuse) or when the defendant had committed a violent felony.

Readiness for Conditional Release

Finally, we investigated agreement rates for evaluators assessing readiness for conditional release (CR). "Conditional release" in Hawaii refers to the community placement of a person previously acquitted by the insanity defense. Conditional release procedures are typically required in every jurisdiction that has an insanity defense. CR readiness evaluations typically involve some form of violence risk assessment, a broader category of evaluation that requires evaluators to measure and comment on an individual's likelihood to act violently.

Unlike competency to stand trial and legal sanity, there is little statutory guidance for the CR evaluation. The statute requires that evaluators form an opinion as to whether or not the insanity acquttee can "be safely managed in the community" once released from commitment status. However, the statutes give no additional guidance on this issue, making the legal question far less clear than competence or sanity.

We reviewed 175 real evaluation reports across 62 cases (McNichols, Gowensmith, Murrie & Boccaccini, 2011). Unanimous agreement rates were the lowest of all three evaluation types we studied. Evaluators agreed unanimously on a person's readiness for CR in only 53.2% of cases. Nearly 90% of these cases involved all three evaluators agreeing that the person was indeed ready for CR. When evaluators disagreed, the two evaluators in most of the split decisions were just about as likely to recommend against CR as they were to support

the motion for CR. None of the additional factors that we examined in this study significantly influenced the agreement rates of evaluators on CR readiness evaluations.

Of all the psycho-legal questions that we studied, judges were most likely to "overrule" the majority recommendation of evaluators in cases involving readiness for CR. That is, judges appeared to err on the side of caution, by retaining a patient in the hospital, even when the majority of evaluators opined the patient was ready for release.

Did evaluator agreement relate to case outcome? Of the 62 patients who petitioned for conditional release, the court ultimately granted conditional release to 43 of them. We followed all 43 of these cases for up to three years post-hospital discharge and documented rates of rehospitalization. In cases in which evaluators unanimously agreed that the person was ready for CR, 34.5% were rehospitalized within three years. This approximates a base rate for rehospitalization within the Hawaii CR population, and is similar to other rates of rehospitalization in similar populations across the United States. In cases in which evaluators *disagreed*, however, 71.4% of individuals granted CR were rehospitalized within three years. In other words, the patients about whom evaluators tended to disagree were indeed those patients who were more likely to "fail" on conditional release (or at least to require rehospitalization).

Decision-making in Forensic Evaluations

We also explored the rationale behind the conditional release decision-making in the evaluators themselves. Previous work along these lines has been done for competency to stand trial evaluations; Skeem and Golding (1998) found substantial differences among competency reports, with many evaluators documenting little to no rationale for their decision on competency in their reports. Given the low rates of agreement in CR evaluations, and the lack of statutory guidance for CR readiness, we explored how evaluators make decisions on hospital discharge.

We gave 46 certified forensic evaluators a list of 21 potentially relevant factors to be considered in a CR evaluation. We asked them to rank these factors, and we then asked them to identify their understanding of the psycholegal question for CR readiness. Evaluators showed substantial agreement on the importance of "past violence" in determining readiness for conditional release. However, evaluators disagreed on the importance of all the other factors; no other factor was endorsed by more than half of the evaluators, but two-thirds were listed in individual evaluators' "top three" lists. Also, evaluators were nearly evenly split on how to interpret the statute ordering the evaluation. Forensic evaluators seem to have no clear agreement on what factors are important to consider in conditional release readiness applications, or even what the question means in the first place – likely causing the low reliability found across these evaluations. In other words, Hawaii's ambiguous legal

criterion for this particular type of evaluation apparently leaves evaluators interpreting and measuring the relevant issues in different ways.

What Do These Reliability Studies Mean for Attorneys and Trial Consultants?

First, we should expect to see some disagreement among forensic mental health experts, particularly in complex cases. Attorneys and consultants who routinely handle cases that require mental health testimony will inevitably encounter some in which reasonable experts seem to disagree.

Does this mean that expert mental health testimony is worthless? Not at all. The levels of agreement among evaluators in our studies were significantly better than chance. For example, using the base rates for sanity opinions found in our sample, the likelihood that three evaluators will agree on a dichotomous opinion of legal sanity *by chance alone* is 31%; our research showed that evaluators agreed at a rate of approximately 55%, which is well above chance. Agreement rates for competency to stand trial were substantially higher (71%), far exceeding chance levels. Thus, experts agreed in most cases, particularly when the legal question was more straightforward and well-defined (e.g., competence to stand trial).

Arriving at a unanimous decision on “straightforward” forensic evaluations—those that have clearly defined statutory criteria and sound psychometric assessments easily available to evaluators—is itself a tall order. Expecting unanimous agreement on evaluations that require retrospective decision-making (legal sanity) or interpreting fuzzy statutory criteria (conditional release) is simply unrealistic. In addition, the clinical data that evaluators must consider are rarely unambiguous. Complicating factors abound: defendants may misrepresent or mangle their symptoms, important records may be unavailable, and it is inevitably difficult to infer mental

state in the past or present. Challenging and confusing cases will always exist; this is the rationale behind requesting a “second opinion” from a medical doctor – or behind checking that second weather report before holding your daughter’s outdoor wedding in the backyard. Our findings of less-than-perfect agreement (even in non-adversarial contexts) suggest that it may be worthwhile and reasonable to seek a second opinion in complex cases.

Second, because disagreements among experts are not common, it is important to consider an expert’s *procedure* not just the expert’s final opinion. Although judges do tend to follow the evaluator’s ultimate opinion, we suggest that the opinion itself is less important than the procedures and data that underlie that opinion. When litigation features disagreeing experts, consultants and attorneys should be ready to scrutinize—and help the court scrutinize—the procedures that an expert followed, and the data an expert considered, to reach a particular conclusion. Often, the reasons for disagreements become clear when evaluators are asked to detail the information they considered (or failed to consider) or the inferences they used to connect data and form an opinion. Because many forensic evaluations are genuinely complex and difficult, there are often decision points (e.g., Are additional collateral records necessary?) and inferences (e.g., how does this new data fit with the existing records?) in evaluations during which reasonable professionals might disagree. It is important to identify these decision points and ambiguous data for careful scrutiny. Ask forensic experts to “show their work,” not just state their opinion.

Input from forensic mental health experts can be helpful—even essential—to answer certain legal questions. But, like any expert opinion on complex matters, opinions from mental health experts may vary, particularly on complex cases, and this requires educated consumers to carefully consider the data and procedure underlying forensic evaluations. 

[W. Neil Gowensmith, PhD](#) is an Assistant Professor in the Master’s of Forensic Psychology Program at the University of Denver’s Graduate School of Professional Psychology. As a clinician, Dr. Gowensmith performs criminal forensic psychological evaluations and was previously the chief of statewide forensic services for the state of Hawaii. His research program focuses on issues related to forensic assessment (particularly field reliability, validity and quality) and the public forensic mental health system.

[Marcus T. Boccaccini](#) is an Associate Professor in the Psychology and Philosophy Department at Sam Houston State University. His recent consulting work has focused on strategies for explaining psychological test results to judges and jurors. His research program focuses broadly on the area of forensic assessment, with emphases in field reliability and validity.

[Daniel Murrie, PhD](#) serves as Director of Psychology at the University of Virginia’s Institute of Law, Psychiatry and Public Policy (ILPPP), an Associate Professor in the School of Medicine, and an instructor in the School of Law. As a clinician, Dr. Murrie performs criminal and civil forensic psychological evaluations. As a researcher, Dr. Murrie studies topics related to forensic assessment, particularly bias and quality control. For details, see [here](#) or [here](#).

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We asked two trial consultants to respond to this paper. On the following pages, Doug Green and Roy Aranda respond.

Doug Green responds:

Doug Green is the principal consultant with Douglas Green Associates, Inc. which is based in greater New Orleans, but has a national scope, working mostly in civil litigation. Doug has a Ph.D. in Psychology from Tulane University is once again serving on the board and is the President-Elect of the American Society of Trial Consultants.

Because my practice is focused almost exclusively on civil litigation, the principal implications of this research do not necessarily apply directly to my clients. But, underlying these findings is a core concept that I believe applies to expert testimony in any kind of case. While it is generally accepted that experts are indispensable in most kinds of civil litigation, in my experience jurors view experts in a much different way today than they did 20 years ago. This experience comes from conducting hundreds of mock jury studies and interviewing actual jurors after verdicts. The changing perception of experts has important implications for trial lawyers.

When I started working as a trial consultant in the 1980s, most of the work I did involved automotive, product liability cases. At issue in these cases was typically an allegation of design defect. Both sides hired experts in automobile design who would opine on the ultimate question in the case: does the design in question represent a defect. Along the way, the experts would discuss design standards and practices. One side or the other might conduct testing related to the case. And, the presentation of the expert witness at trial always began with an impressive presentation of his or her credentials. Ultimately, there was the opinion that the design was or was not defective. The same was true for injury causation and damages.

Back then, we counted a great deal on the credentials of the expert and his or her ability to persuade the jury that he or she was more experienced, more credentialed, and more of a “real expert” in the field. These factors were very important at the time and we focused mostly on getting the jury to trust

the expert for his or her expertise and therefore accept the proffered opinion.

Things slowly started to change towards the end of the 1990s. At the time, I attributed the change to the collapse of Enron, and still do to some extent. Perhaps my bias was that I did a lot of work in Texas. But the Enron scandal exposed an ugly side of American business. At the core of the scandal was unbridled greed and arrogance, and the big losers were the average workers who went to the office every day and did their jobs for nothing more than their middle class wages. They stood to gain nothing by the risks that their employers took, but they paid a very heavy price.

At the same time, I saw a concerning escalation in the fees charged by expert witnesses. When I first started, expert fees were in the range of \$150 to \$250 per hour. In that range, jurors were impressed, but not shocked. But by the mid–1990s, some experts were charging as much as \$500 to \$650 per hour. At those rates, jurors started to take serious note of the money changing hands. Then, Enron came to light.

What the scandal stood for in the eyes of many people was that when there was enough money to be gained, some people would do, or say, almost anything. It also created tremendous skepticism about corporations and corporate governance. The role of government regulation in the scandal, or lack thereof, did not become apparent for some time. But, the perception of these events on the part of the average person, the average juror, became a dominant theme in how they perceived cases where individuals were pitted against corporations. Now, the \$650 an hour expert was viewed with great skepticism. For that much money, many people believed, a person might say just about anything. The perception of the hired gun became very real. The idea of building trust in an expert became very difficult.

Nothing much has happened to change these attitudes in the intervening years. Around the same time, we saw the dot-com bubble bust and more recently we have seen the sub-prime mortgage crisis. There has also been a massive tort reform movement set in motion largely by the insurance industry, designed to question the motivation of anyone who files a lawsuit. Plaintiffs, after all, have a lot to gain and everyone knows about contingent fee lawyers.

So, what does all of this mean for the use of expert witnesses today? What strategies do we incorporate in my practice to deal with the increasing skepticism of anyone getting paid a lot of money to give opinions? Well, I turn back to the authors' recommendations, which is how I got started on this line of thought: "it is important to consider an expert's procedure not just the expert's final opinion. Ask forensic experts to 'show their work,' not just state their opinion."

As an initial proposition, the philosophy I use when working with experts is that their job is to educate the jury on the relevant field of study to the point where the jurors can examine the evidence and reach their own conclusions. The expert is, therefore, not someone who says, "trust me, I'm an expert," but rather, "let me teach you so you can become an expert."

If you start from this point of view, the qualifications of the expert you choose become clear. I get a lot of calls on this question and the client usually starts by telling me about the potential expert's qualifications. My response is usually, "but can he teach this to the jury?" The precise qualifications of experts, in my opinion, are less important than the individual's ability to communicate and to present difficult concepts to the jury in plain, simple terms. It is also tremendously helpful if the expert is likable and friendly. I find that lawyers tend to parse the qualifications of experts much more finely than do jurors. The gap between the knowledge and experiences of two potential experts will always be far less than the gap between either one and the jurors. When it comes to experts, one should worry more about the ability of a potential expert to communicate and relate to jurors and worry less about expert's specific credentials.

Finally, I believe that the impact of experts on jury decision making today has tremendously diminished compared to 20 years ago. I can't debate the conventional wisdom that experts are essential to most cases. They are often required as a matter of law. But what impact is the expert going to have on the jury verdict? My experience is that in most cases the impact is not much. Jurors today want to hear from fact witnesses. They want to know the story of what happened. If there is a design question in the case, they want to hear from someone actually involved in the design *at the time*. If the issue is patent infringement, they want to hear from the inventor of the patent and the designer of the accused product. The weakness of experts is that they were not involved at the time and are only involved now because they are getting paid – and usually a lot of money. From this point of view, jurors look at experts with great skepticism.

So, my advice to trial lawyers today is to choose experts carefully and use them wisely. Build your case around people who were there at the time – whether they are your witnesses or the other side's – and rely on experts as little as possible. Build the record you need to make your case and hold on to a verdict, but do not expect the jury to care much about the opinions of your experts.

Roy Aranda responds:

[Roy Aranda, Psy.D., J.D.](#) is a forensic psychologist with offices in N.Y. and Long Island. He has been involved in several high profile cases including traveling to Cuba and Puerto Rico and testifies frequently in criminal and civil cases throughout New York State.

Gowensmith, Murrie, and Boccaccini have taken their research about how often forensic experts agree with one another in the field up another notch. Drawing upon earlier research (Gowensmith, Murrie, & Boccaccini, 2012) that examined field reliability of competence to stand trial (CST), *Forensic Mental Health Evaluations: Reliability, Validity, Quality, and Other Minor Details* examines forensic evaluations in three contexts: CST; criminal responsibility; and conditional release from a state hospital.

Gowensmith, Murrie, and Boccaccini sought to answer several questions: 1) How often do forensic evaluators agree with another? 2) What factors might influence their reliability? 3) Do some types of cases lead to more disagreement than others? 4) Is agreement better in some contexts than others?

Gowensmith, Murrie, and Boccaccini reviewed nearly 350 cases in Hawaii of multiple forensic evaluators who evaluated the same defendants. Hawaii's unique process provided an excellent setting for several reasons. First, three evaluators are used. This adds a measure of validity that is lacking in settings that rely on a single examiner and when it is assumed that evaluators are interchangeable. Second, because precious little is known about reliability in the field, it provides a natural, real-world setting as opposed to a research setting that employs artificial experimental conditions. Third, the impact of adversarial or partisan allegiance is controlled because all evaluators are independent in as much as they are appointed by the court, not by the defense or prosecution.

Outcome:

CST: In 71% of cases there was unanimous agreement; 59% found that the defendant was competent, and 12% found that the defendant was not competent. Judges typically followed the majority opinion. When they did not they usually took a conservative stand finding that the defendant was not competent to stand trial. Judges also were more likely to rule against the majority when there was a split decision among the evaluators.

Gowensmith, Murrie, and Boccaccini examined the following factors:

- Age of the defendant
- Gender of the defendant
- Ethnicity of the defendant
- Seriousness of the offense
- Location of the evaluation

- Referral court
- Presiding judge
- Professional discipline
- Employer
- Defendant's English-speaking proficiency

Surprisingly, none of these factors significantly influenced agreement among the evaluators.

Analysis revealed that a psychotic diagnosis per se did not result in a finding of incompetence suggesting that functional abilities were looked at more closely.

Criminal responsibility: In 55% of cases there was unanimous agreement; 38% found that the defendant was sane, and 17% found that the defendant was insane. Judges were more likely to overrule the majority opinion of evaluators than in CST, and when they did, they found the defendant to be legally sane and thus subject to criminal prosecution.

Factors that led to increased agreement among the evaluators were 1) diagnosis of psychotic disorder, and 2) hospitalization in a psychiatric facility within six months prior to the evaluation. Factors that led to increased disagreement among the evaluators were 1) when the defendant had been abusing substances, and 2) when the defendant had committed a violent felony.

Conditional release: Unanimous agreement rates among evaluators were lowest of all three types of evaluations. In 53.2% of cases there was unanimous agreement; nearly 90% found that the defendant was ready for conditional release. Judges were most likely to overrule the majority opinion of evaluators in these cases keeping the patient hospitalized, apparently choosing to err on the side of caution.

Little statutory guidance in Hawaii makes the issue of conditional release – that involves whether or not the respondent can “be safely managed in the community” – much less clear than CST or criminal responsibility.

Significantly, of the 21 potentially relevant factors that Gowensmith, Murrie, and Boccaccini considered to be important in a conditional release evaluation, substantial agreement was found in only one: past violence. None of the other factors were endorsed by more than half of the evaluators. Moreover, evaluators were split on how to interpret the statute.

The study raises the following questions and implications:

Evaluators are not interchangeable. Expect to find disagreement among evaluators albeit levels of agreement were significantly better than chance. Agreement was greatest in CST.

Agreement is greater when the legal question is more straightforward and well defined.

Gowensmith, Murrie, and Boccaccini recommend that a

second opinion be sought in cases that are complex.

How applicable are the findings to other jurisdictions? Evaluators comply with jurisdiction-specific requirements. What might reliability look like elsewhere?

How are judges' rulings influenced by the reports of evaluators? What other factors are weighed?

How do evaluators go about performing an evaluation? What factors do they consider to be important? What does their assessment consist of? What are the “best practices” or guidelines established by the profession?

Judges tend to follow the evaluators' opinions. The procedures employed by evaluators may shed more light. Thus, when there is disagreement, it is advisable to scrutinize the procedures, data employed, and to examine the evaluators' work product.

How can the procedure(s) in conditional release evaluations, the most problematic of three forensic contexts examined by Gowensmith, Murrie, and Boccaccini, be improved?

In their earlier study, Gowensmith, Murrie, and Boccaccini noted that a small percentage of evaluators (14.3%) used formal competency assessment measures. Why do they or don't they use measures? And when employed, which ones are used?

What weight can be attributed in different contexts to static factors (more applicable in criminal responsibility cases and providing a window into the past in conditional release) and dynamic factors (more applicable in CST and current functioning in conditional release)?

Do evaluators use risk assessment tools in conditional release evaluations? Why or why not? Which ones when used?

Would reliability be improved by use of context-specific instruments?

Do evaluator characteristics and factors identified by Gowensmith, Murrie, and Boccaccini need to be examined further? Would the conclusions extend to other jurisdictions and settings?

What can be done to improve the evaluation on the part of examiners in different forensic contexts?

Would mandated training and oversight improve reliability?

What policy implications can be drawn from this study in different jurisdictions and forensic contexts?

When evaluators are not court appointed, what is the likely impact of adversarial allegiance? How can this be controlled?

When mistakes are made, what are the consequences to the

defendant and to society in different jurisdictions and forensic contexts?

For attorneys who rely on the work of forensic experts, it behooves them to know their background, training, evaluation methodology, and experience and knowledge of the applicable law and statutes.

Forensic examiners need to remain up to date with the literature, evidence-based practice, and know the applicable law and statutes of the jurisdiction they work in. It also behooves them to routinely self-assess potential biases.

It may be that describing evaluation procedures and methodology more fully in forensic reports will add greater clarity to the judge to assist in making a ruling.

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After reading the reactions to their paper, the authors decided to issue a final comment.

Dr. Aranda raises several insightful questions about our research and the context for its findings. Although space precludes us from answering each of his questions, please allow us a brief moment to discuss some additional research that addresses his major themes.

First, Dr. Aranda wonders about how well this data generalizes to other jurisdictions and settings. The reliability values we found appear comparable to one of only a few other “real world” reliability studies (Skeem & Golding, 1998), though far more studies of this sort are needed. We are also researching additional settings and states to consider how our results generalize. Specifically, we are conducting additional research in multiple states on the decision-making of both the judges *and* the evaluators in forensic psychological assessments. What factors do mental health professionals prioritize in these types of cases? Do those comport with the factors that judges and attorneys view as most important? Does the state or setting matter? Some early trends are emerging, and we look forward to having more answers soon.

Second, Dr. Aranda poses questions about how to improve reliability and validity in forensic mental health evaluations. Of course there is no one easy answer. We have some evidence that the overall quality of forensic evaluations themselves has room for improvement (see Nguyen, Acklin, Fuger, Gowensmith, & Ignacio, 2011 for more information). We suspect that the largest improvements in reliability, validity and quality of

forensic evaluations are likely to come from simply following the already-established standards in the field. We are working with several states to improve their evaluator certification processes and to ensure that best practices are infused into training and education for forensic evaluators. We must also work with the legal system as well to ensure that both legal and mental health audiences are well-informed about the most powerful factors to consider in various forensic cases, and the best ways to scrutinize forensic evaluations.

Finally, Dr. Aranda mentions the subject of adversarial allegiance. In contrast to our studies in Hawaii, where evaluators are appointed by the judge and presumed to be neutral experts, many jurisdictions let the defense and prosecution retain their own experts. Of course this raises questions about whether those experts can ever be impartial. This concept of “adversarial allegiance” continues to be a focus of our research, and we have found that opinions of mental health experts can differ depending on the side from which they were retained (please see Murrie et al, 2008; 2009 for more information).

We appreciate all of the reviewers’ commentary and questions. As they suggest, a comprehensive understanding of forensic evaluations requires examining the evaluations, the evaluators, and the justice system in which they work. We have begun this process, and we have found some provocative results, but there is much work left to do.

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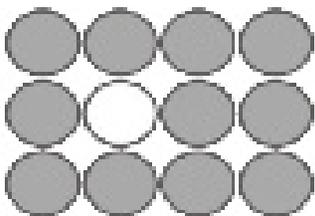
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