



# The Jury EXPERT

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<b>The Effects of Race and Gender of Attorneys on Trial Outcomes</b>	<b>1</b>
<b>Damage Awards:</b>	<b>24</b>
<i>Jurors' Sense of Entitlement as a Predictor</i>	
<b>Narrative Persuasion in Legal Settings: What's the Story?</b>	<b>27</b>
<b>C-SWOT and PLA-Squared:</b>	<b>39</b>
<i>Techniques for Avoiding and Breaking Bad News</i>	
<b>Are Your Jurors Mad or Sad?</b>	<b>46</b>
<i>How Emotional Blunting May Influence Their Judgments in the Courtroom</i>	
<b>The New ABC'S of Product Defense</b>	<b>67</b>
<b>Consulting on a Budget</b>	<b>78</b>
<b>Budget Conscious Witness Preparation</b>	<b>81</b>

## *The Effects of Race and Gender of Attorneys on Trial Outcomes*

BY ALEXIS A. ROBINSON

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*Editor's Note: The Jury Expert often brings you the most recent research findings with applicability to litigation advocacy. This time we are bringing you research in process. The relationship between attorney race and attorney gender and juror decision-making is one we don't talk aloud about – very often anyway. And we should. New research-in-process looks at the literature and questions how jurors make decisions and how they weigh the race and gender of the attorneys for either side in that decision-making process. Read through the literature summary that follows and then weigh in with your own observations and perspectives. This is research designed for practice.*

*The Issue of Attorney Race and Gender*

Regardless of color or creed, it is every citizen’s right to receive due process as proscribed by the 6th Amendment. Unfortunately, the trial process is not immune to race related biases that disparately disadvantage minority members of our society<sup>1</sup>.

In criminal cases, the effects of jurors’ biases about the defendant’s race can be diluted by making racial bias salient<sup>2</sup>. However, jurors’ racial biases about other trial participants (i.e., defense attorney) may be left unaddressed. Defendants who are represented by either a Black<sup>3</sup> or female<sup>4</sup> attorney may be at risk for being convicted more often than defendants who employ a White male attorney. This risk of conviction may be especially prominent when the attorney is a “double minority,” for example, a Black female<sup>5</sup>. Surprisingly, no previous research has compared the differences in trial outcomes between defendants who have White male attorneys to the outcomes to the defendants who have Black female attorneys. With all other factors being equal, clients of female attorneys and female attorneys of color may be at a distinct disadvantage with White and/or male jurors before any evidence is actually presented.

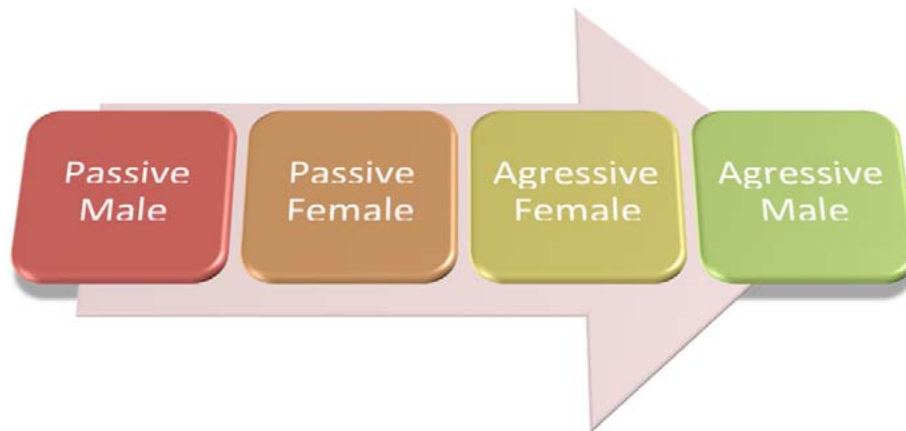
Characteristics such as race, gender, and sexual orientation of the attorney can influence the juror’s decision-making process, as well as their emotions or feelings through which they filter the message<sup>6</sup>. In the courtroom, defense attorneys are the source of defendants’ messages and the jurors are that attorney’s target. During the trial, defense attorneys typically use persuasion strategies that focus on the evidence but that also account for the defendant’s characteristics. Unfortunately, the attorney’s gender<sup>7</sup>, and race<sup>8</sup> can influence jurors’ decisions regarding the defendant’s fate but is rarely addressed.

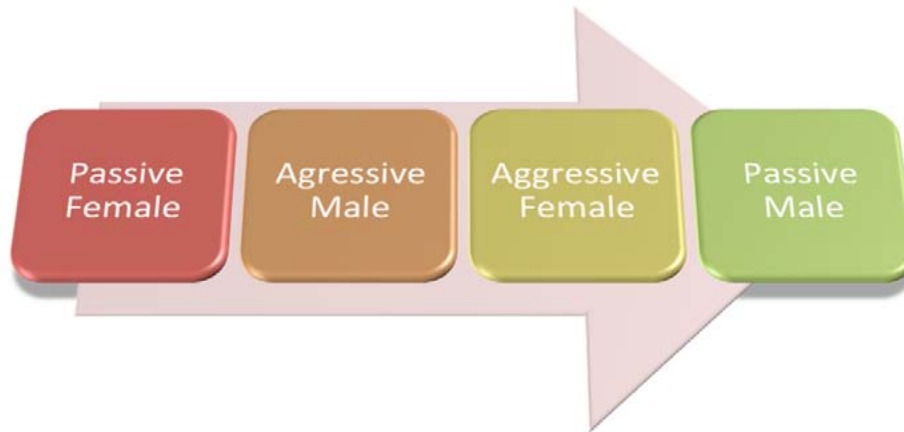
*Research on minority-group attorneys*

Mock jury research has uncovered inconsistent evidence of attorney race- and attorney gender-related disadvantages<sup>9</sup>. The evidence supporting these effects is limited<sup>10</sup> and arguably, outdated<sup>11</sup>. Thirty years ago, mock juror research using a high school sample uncovered that Black male defense attorneys’ clients receive guilty verdicts more frequently than the clients of White male defense attorneys<sup>12</sup>. The utility of this data is disputable for two reasons; first, as we all know, a sample of 11<sup>th</sup> graders is not representative of the jury pool. Second, in the thirty years since the publication of these findings, minority-group attorneys have achieved some success in reversing systematic discrimination in the workplace, and marked progress in increasing the presence of female attorneys and judges<sup>13</sup>. This data is interesting, but we still are no closer to determining what happens in the courtroom when jurors encounter a Black and/or female attorney.

*Male Jurors’ Verdicts*

*Increase in Likelihood of Acquittal as a Function of Defense Attorney Gender and Presentation Style<sup>14</sup>*



*Female Jurors' Verdicts**Increase in Likelihood of Acquittal as a Function of Defense Attorney Gender and Presentation Style<sup>15</sup>*

As mentioned above, very little research has examined verdict outcomes as a function of attorney race. However, the robust body of persuasion literature may allow us to draw inferences about how White juror biases may affect Black attorneys and their clients. Defense attorneys are their clients' advocates; and, as advocates, they attempt to persuade jurors to evaluate the evidence in a way that favors the defendant. Individuals are more critical of information from stigmatized sources than information from non-stigmatized sources<sup>16</sup>. For example, the strength of the argument was more likely to be factored into listeners' decisions when the source of the message was Black than when the source of the message was White<sup>17</sup>. Following, in a case where the evidence favors neither the defense nor the prosecution, a White male defense attorney (as a non-stigmatized source) should be more successful at persuading the jurors of his client's innocence than would a stigmatized source such as a Black male, a White female, or a Black female. More simply, when the attorneys' cases are evenly matched, the White male attorney is more likely to win than the Black and/or female attorney. Arguably, if stigmatized attorneys can devise strategies or techniques to eliminate the advantage that White male attorneys have, then the justice system may be that much closer to insuring the protection of defendants' 6th Amendment right. Given the success of racial bias salience in the reduction of White jurors' biases against Black defendants, we believe it is appropriate to extend tests of the bias salience effect to jurors' perceptions of Black attorneys and White attorneys.

The same biases that disadvantage women and Blacks, may have a unique effect on women of color<sup>18</sup>. As "double minorities," Black women experience discrimination that corresponds to both their race and their gender. The "double minority" empirical research is beginning to surface in other disciplines but there is still a need for research that investigates the factors that affect Black women or Latinas as legal professionals<sup>19</sup>. Racially relevant legal factors such as perceived credibility, perceived competence, and attractiveness influence jurors and manifest differently for female attorneys than for male attorneys<sup>20</sup>.

At this point, the lack of research suggests that law and social science researchers are unaware of the climate that Black and/or female attorneys face in the courtroom. It is difficult to offer remedies to counter biases when researchers and practitioners are unaware of the current landscape of jurors' biases against attorneys. The New York State Judicial Committee on Women in the Courts (2002) surveyed many court administrators, attorneys, and judges to evaluate progress for women in the 15 years between 1986 and 2001. Information about women in the courts indicates that female attorneys

have experienced progress but what the information fails to tell us is whether the progress for White women has improved more or less than progress for Black women<sup>21</sup>.

Fortunately, recent experimental research aimed at reducing the manifestations of White juror bias against Black defendants has met with reasonable success<sup>22</sup>. Researchers have achieved this success by manipulating the salience of jurors' potentially racist attitudes<sup>23</sup>. Sommers (2006) made racial bias salient to mock jurors by asking them open-ended questions about their ability to judge a Black defendant fairly. White mock jurors who were prompted to consider their own racial biases were less likely to convict a Black defendant than were White jurors not exposed to racially relevant questions<sup>24</sup>. Bucolo and Cohn (2010) also observed an increased likelihood for jurors to acquit Black defendants when the defense attorney referenced the inter-racial nature of the crime (i.e., Black defendant/White victim) in their opening and closing statements than when attorneys did not mention the inter-racial element of the crime. Further research in the effects of bias salience can help defense attorneys to prevent the persistent influence of defendant characteristics, such as race, on White jurors' decision-making process.

### *Research about the attorney prototype*

In addition to defendant characteristics, defense attorney characteristics and demographics may also influence jurors' verdicts<sup>25</sup>. Cohen and Peterson (1981) uncovered no effects of attorney gender on mock juror decisions. However, in other mock juror research, defendants with male attorneys had more positive trial outcomes than did defendants with female attorneys<sup>26</sup>. The most effective methods of attorney-related bias reduction require that the attorneys adapt presentation styles that conform to commonly held gender roles. For example, Hahn and Clayton, (1996) reported a three-way interaction between attorney gender, speech style, and juror gender. Male jurors acquitted defendants with aggressive male attorneys more often than they acquitted defendants with passive male or female attorneys. A more specific manifestation of gender role stereotypes surfaced with female jurors. Defendants with aggressive female attorneys were more likely to be convicted than were defendants with passive female attorneys. In contrast, male attorneys with an aggressive style were more successful than were male attorneys with a passive speech style<sup>27</sup>. This research demonstrates one example of how jurors' attitudes toward a defense attorney's characteristics have adversely affected defendants in mock trials.

Stereotypes about women's gender roles and demeanor can affect the way that jurors perceive, and ultimately, judge female attorneys and their clients<sup>28</sup>. Mock jurors indicated their disdain for the aggressive female attorneys by convicting their client more frequently than the assertive or passive female attorneys. Additionally, jurors were more receptive to the aggressive behavior when the attorney was male than when the attorney was female. Researchers believe that jurors' punishment of women attorneys and their clients is the result of the jurors' belief that aggressive behavior is counterstereotypical for women. It is also possible that jurors believe that females (regardless of presentation style) do not represent the juror's prototype of an attorney. In an experimental setting, when researchers withheld information about the attorney's gender, mock jurors were more likely to assume that the attorney was male than female<sup>29</sup>. This illustrates that jurors may not consider that women possess the qualities that are prototypical of an attorney. There are no experimental data that confirm that White is the default ethnicity for individuals' attorney prototype. However, with the White male dominated landscape illustrated by labor statistics<sup>30</sup>, it would be logical to assume that White is the default race of the prototypical attorney.

### *When the two worlds collide... Black males are the most disadvantaged*

The most prominent research on the intersection of racial and ethnic discrimination originates

from two distinct theories: Subordinate Male Target Hypothesis (SMTH)<sup>31</sup> and the Double Jeopardy Hypothesis (DJH)<sup>32</sup>. Subordinate Male Target Hypothesis suggests that Black men are more likely to be the targets of discrimination from White men than are Black women<sup>33</sup>. Sidanius and colleagues contend that statistics from the criminal justice system and statistics related to academic achievement demonstrate strong support for Subordinate Male Target Hypothesis. For example, Black men experience incarceration at a rate higher than women or White men do and they experience poorer academic outcomes than Black women<sup>34</sup>. In these situations, Black men, as members of a single subordinate group, suffer more than Black women who are members of two distinct subordinate groups. SMTH argues against the premise that Black women, as double minorities, suffer more than Black men suffer. Instead, proponents of the SMTH believe that systematic discrimination disparately disadvantages Black men.

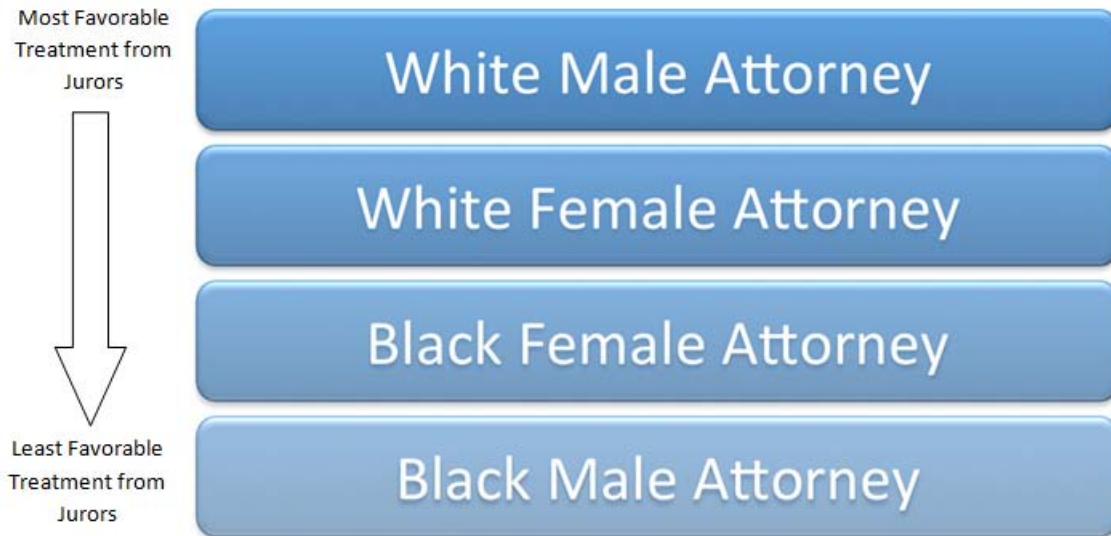
Unfortunately, much of the empirical research on SMTH has been restricted to paradigms that compare disparities in treatment or status between Black and White men to the disparities in treatment or status between Black and White women<sup>35</sup>. We can describe what happens with Blacks versus Whites and describe what happens with males versus females. However, by not analyzing the differences in privilege between the four combinations of race and gender, researchers cannot, with certainty, advise on what race and gender combination will experience the most difficulty when trying to persuade the jury. Additional research should take care to clarify the types of conditions under which SMTH can predict that Black females will have better overall outcomes than Black males.

*When the two worlds collide... Black women are the most disadvantaged*

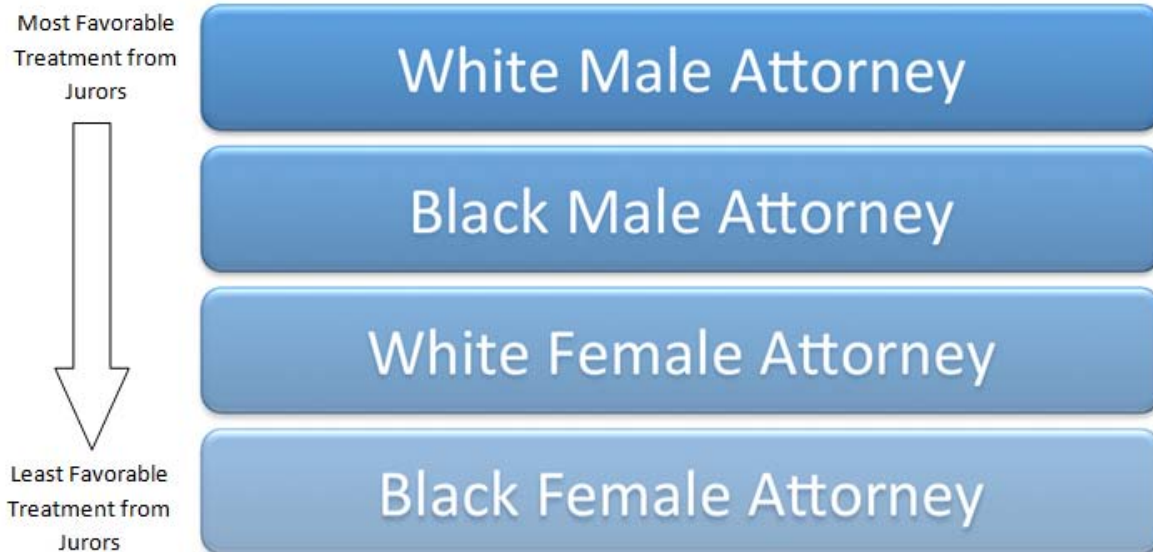
Much of the research that investigates the position of Black females in relation to Black men originated from the Double Jeopardy Hypothesis (DJH). DJH theorizes that Black women (or any person who belongs to more than one minority group) experience negative outcomes more frequently than both White women and Black men<sup>36</sup>. As a “double minority,” Black women may experience either, a unique effect of bias that is specific to their race/gender identity, or an additive effect when gender related bias mix with race related bias<sup>37</sup>. An important concept within DJH is that the bias that women of color experience may only occur under specific circumstances. Black women may not always experience negative outcomes more frequently than Black men. Each individual’s experience of privilege may be contingent upon the social influences that are relevant to the intersection of race and gender in that specific situation<sup>38</sup>.

Mock jurors’ responses to Black male attorneys and White and Black female attorneys can inform legal researchers on which strategy will be most effective in eliminating jurors’ race- and/or gender- related biases. By suggesting a compound effect, the Double Jeopardy Hypothesis is in direct opposition to the Subordinate Male Target Hypothesis. Both theories suggest that White men are more likely to experience positive outcomes than are White women, Black men, or Black women. However, the point of contention relates to the question, “Which individual is more likely to end up on the bottom rung of the social ladder?” DJH suggests that Black women are at the bottom, while SMTH suggests, it is the Black man who is on the bottom rung. Understanding which hypothesis, DJH or SMTH, is most likely to prevail in the courtroom can allow attorneys develop strategies to prevent their client from experiencing negative outcomes simply because they hired or were appointed a Black and/or female attorney. In the proposed study, we will investigate the additive effect as outlined by DJH to evaluate how membership to two stigmatized groups may influence White males’ biases against Black female attorneys.

**Subordinate-Male Target Hypothesis (SMTH)**



**Double Jeopardy Hypothesis (DJH)**



***General Plan of Work***

We have recently submitted a grant to the National Science Foundation that plans to evaluate which theoretical framework, either SMTH or DJH, is most appropriate for describing the experiences of minority-group attorneys. To accomplish this, a 4-way comparison will be made between Black males, White males, Black females, and White female attorneys. Specifically, we will assess how differences in trial outcomes (e.g., verdict, attorney persuasiveness, and ratings of competence) vary as a function of attorney race and/or gender. Bias-reduction strategies will be implemented to attempt to eliminate any disparities resulting from the racial and gender groups. Bias salience techniques that were successful in reducing White juror bias against Black defendants should reduce White juror bias

against minority-group attorneys and, subsequently, their clients. Minority-group attorneys, including “double minorities,” who represent criminal defendants, may be able to eliminate biases that are inherent to the process of persuasion by making the mock jurors aware of their potential biases. In the proposed research, we will adapt these simple bias salience techniques to eliminate yet another extralegal influence on jurors’ decisions.

Study 1 will test two competing hypotheses: SMTH and DJH. Consistent with first hypothesis, SMTH, outcomes for Black male attorneys and their clients will be significantly less favorable than outcomes for White male attorneys and their clients. Alternatively, consistent with the second hypothesis, DJH, outcomes for female attorneys and their clients should not differ as a function of the attorneys’ race such that, Black female attorneys should have significantly more negative outcomes than Black males, White females, and White males.

Study 2 will replicate the Study 1 results and evaluate methods for reducing bias against minority-group attorneys. Participants will either be asked to consider their own gender, race, or a combination of these biases so that we can evaluate if the compound effect that is suggested by DJH can be eliminated for Black women by priming participants with both, racial, and gender bias salience. SMTH suggests that the Black males are punished because they are perceived as being members of the subordinate male group that is competing for resources. According to logic, it is the Black male’s race, as well as his gender, that causes unfavorable treatment from White males. If Study 1 reveals that the SMTH is the most appropriate framework for attorney-related biases, then bias against the Black male attorney may not be eliminated unless mock jurors are primed with both racial and gender salience.

\* \* \*

As part of the preparation for this project, we would like feedback from those in the field – what do you see in your day-to-day work in the courtroom, in mock trials, in deposition or preparation for trial?

For all of the following questions, please feel free to compare and contrast the differences between civil versus criminal trials and plaintiffs’ versus defense’s attorneys.

- How do consultants advise their Black and/or female clients in terms of style, tone, approach?
- Do consultants feel that their clients are uncomfortable with using a Black and/or female attorney lead? What about their use of non-lead Black and/or female attorneys?
- Do clients adapt their use of Black and/or female attorneys to the topic of the case or to the demographics of jurors in the trial setting (i.e., Black female lead in Atlanta or Black male attorney in Title VII race employment discrimination)?
- Can you tell us about any memorable experience when the client used a Black and/or female attorney or consultant? Or, conversely, can you tell us about any memorable experiences when the client refused to use a Black and/or female attorney or consultant?
- Do you feel that clients are assuming that Black and/or female attorneys are less successful or are there certain styles that clients encourage their Black and/or female attorneys to use?

*Don't miss the four responses to this piece after the references!!*

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- <sup>2</sup> Ibid.
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- <sup>5</sup> American Bar Association, Commission on Women in the Profession. (2006b). *Visible Invisibility: Women of Color in Law Firms*. Retrieved from <http://www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf>
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- <sup>7</sup> See Rieger et al., 1995; See Hahn & Clayton, 1996
- <sup>8</sup> See Cohen & Peterson, 1981
- <sup>9</sup> Ibid.; See Hahn & Clayton, 1996; See Rieger et al., 1996
- <sup>10</sup> See Hahn & Clayton, 1996
- <sup>11</sup> See Cohen & Peterson 1981
- <sup>12</sup> Ibid.
- <sup>13</sup> American Bar Association, Commission on Women in the Profession. (2006a). *Charting Our Progress: The Status of Women in the Profession Today*. Retrieved from <http://new.abanet.org/marketresearch/PublicDocuments/ChartingOurProgress.pdf>.; See American Bar Association, Commission on Women in the Profession, 2006b
- <sup>14</sup> See Hahn & Clayton, 1996
- <sup>15</sup> Ibid.
- <sup>16</sup> See Fleming, Petty, & White, 2005; See Petty, Fleming, & White, 1999
- <sup>17</sup> White, P.H., & Harkins, S.G. (1994). Race of source effects in the elaboration likelihood model. *Journal of Personality and Social Psychology*, 67, 790-807.
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- <sup>20</sup> See Hahn & Clayton, 1996; See Rieger et al., 1995
- <sup>21</sup> New York State Judicial Committee on *Women in the Courts*. (2002). *Women in the Courts: A work in progress*. Retrieved from [http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts\\_report.pdf](http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts_report.pdf)
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- <sup>23</sup> See Sommers & Ellsworth, 2009
- <sup>24</sup> See Sommers, 2006
- <sup>25</sup> See Cohen & Peterson, 1981; See Hahn & Clayton, 1996
- <sup>26</sup> See Hahn & Clayton, 1996
- <sup>27</sup> Ibid.
- <sup>28</sup> Ibid.
- <sup>29</sup> See Hahn & Clayton, 1996
- <sup>30</sup> Bureau of Labor Statistics, 2008
- <sup>31</sup>(Sidanius & Pratto, 1999)
- <sup>32</sup> (Beale, 1969)
- <sup>33</sup> Sidanius, J., & Pratto, F. (1999). *Social dominance*. New York, NY: Cambridge University; Sidanius, J., & Venigas, R.C. (2000). *Gender and race discrimination: The interactive nature of disadvantage*. In S. Oskamp (Ed.), *Reducing Prejudice and Discrimination: The Claremont Symposium on Applied Social Psychology* (pp. 47-69). Mahwah, New Jersey: Lawrence Erlbaum Associates.
- <sup>34</sup> for a review, see Sidanius & Pratto, 1999
- <sup>35</sup> Browne, I., & Misra, J. (2003). The intersection of gender and race in the labor market. *Annual Review of Sociology*, 29, 487-513. 10.1146/annurev.soc. doi:29.010202.100016
- <sup>36</sup> See Beale 1969
- <sup>37</sup> See Browne & Misra, 2003
- <sup>38</sup> Ibid.

*We asked for responses to this article from two trial consultants, one trial lawyer and one academic specializing in research on race and racism. On the following pages, we have their responses.*

## *Attorneys in Context*

by Kathy Kellermann, Ph.D.

*Kathy Kellermann, Ph.D. is President of [ComCon Kathy Kellermann Communication Consulting](#), a trial and jury consulting firm based in Los Angeles, California. ComCon works on civil and criminal cases in both federal and state courts, and supports the free [Online Jury Research Update](#) blawg.*

I work primarily with White male attorneys, not because I choose White and male attorneys over minority and female attorneys, but because the legal profession generally, and trial attorneys specifically, are predominantly male and overwhelmingly White. The American Bar Association reports that only 31% of attorneys are female and fewer than 10% of attorneys are minorities, with African Americans at 3.9%, Hispanics at 3.3%, and Asian Americans at less than 1% (Chambliss, 2004; Commission on Women in the Profession, 2011). Further, the rate of entry into the legal profession for African Americans has slowed, and Asians are now the fastest growing minority in the legal profession (Chambliss, 2004).

Over a period of 18 years, I have worked with a number of female attorneys, although they only rarely have been the lead attorney on a case. I have worked with three African American attorneys (one female), a few Hispanic attorneys (all male), and one Asian American attorney (a female). In my experience, an attorney's gender has been a much larger part of the dynamics of the courtroom landscape than an attorney's race, and my encounters with the dynamic of female and minority attorneys has been especially rare.

Have female and/or minority attorneys been disadvantaged by jurors? At times, I suspect so by prospective jurors, although hopefully less so by jurors seated on the jury. In a murder case in which I worked, we exercised a peremptory of a juror who was an older, first generation Eastern European immigrant. The female African American attorney felt this juror was biased against her; I felt this juror disliked criminal defendants generally, and younger defendants such as ours specifically; this juror offered not very complimentary comments about defense attorneys when asked her feelings about them, and seemed offended by the charge of murder. Was it bias due to the attorney's race or gender? I do not know. Was it bias because this was a murder case? I do not know. Was it bias because the defendants could be categorized as "these young people today"? I do not know. Was it bias at all? I do not know. I do know we had agreement that this juror would be hard for us to persuade.

I believe that the effects of attorney race and gender on verdicts are difficult to pinpoint because they are attenuated, accentuated and obviated by other characteristics of the defense attorney(s), opposing attorney(s), defendant(s), witnesses, judges, seated jurors, evidence, and nature of the case. I believe the effects of attorney race and gender occur in complicated, higher-order interactions involving shifting patterns of effects for different combinations of cases, evidence strength and characteristics of jurors, opposing attorneys, defendants, witnesses and judges. It is my belief that some of the inconsistency in the research findings related to understanding the effects of attorney race and gender on verdicts is because of this complicated interplay of cases, evidence, jurors, witnesses, defendants, judges and attorneys that most often is addressed only partially in any given research project (for understandable reasons of the difficulty in addressing this interplay).

### *The Importance of the Case*

Studies of attorney gender and race are undertaken within contexts of particular cases, yet, curiously, these cases rarely receive attention when inconsistencies in research findings are encountered.

In my experience, sexual assault cases are noticeably different from, for example, robbery or white collar crime cases, and attorney gender has been reported to have different effects for at least some of these different case types. Hahn and Clayton (1996) found that male attorneys are more successful at obtaining an acquittal for their clients than female attorneys in an assault and robbery case, while other researchers report the reverse result for rape cases: When a defendant in a rape case is represented by a female attorney as compared to a male attorney, the rate of acquittal increases from 50% to 70% (Villemur & Hyde, 1983; Yanchar, 1982/1983). Does my experience accord with this research? Yes, for certain rape cases (though perhaps not at quite those rates of acquittal). In my experience, rape cases prime jurors to consider the issue of gender, and activate biases related to gender and gender-based conduct, not only of attorneys, but also of defendants, complainants, witnesses and judges.

I believe that the nature of a case affects the likelihood of the gender and/or race of an attorney to influence verdicts, and understanding the complex interactions between attorney gender and race, other attorney characteristics, opposing attorney characteristics, jurors, defendants, witnesses, judges, cases and evidence is critical to my work as a jury consultant.

I also believe that attorney race and gender are unlikely to produce consistent direct effects on jurors' verdicts within a particular type of case, even where attorney race and/or gender might often have influential effects (e.g., sexual assault cases). Cases differ in evidentiary strength, attorneys have different skill and presentation styles, defendants are differentially sympathetic, jurors differ in how punitive they are, and the interrelationships of these and other factors can easily overshadow the importance (or any effect) of attorney race and gender on jurors' verdicts. These interrelationships also have the potential to highlight the importance of attorney race and gender on verdicts.

I have more than once been asked the question "Should we have a female attorney on the trial team?" or "Should a female attorney cross-examine this witness?", and my answer initially is almost always "It depends", and I begin asking questions about the case, judge, defendant, witnesses, opposing attorney, evidence and the like. Once I have some idea of these other matters, I formulate a response which I find impossible without the larger context, and often difficult even with that context because of the complexity of the situation, the lack of solid research examining these complexities, and the need to provide one simple and direct answer to the question.

### *The Importance of Other Attorney Characteristics*

Attorneys differ in presentation style (e.g., assertiveness, passion, etc.), physical attractiveness, speech style, and a host of characteristics in addition to those of race and gender, and these other attorney characteristics can interact with and influence verdicts, augmenting or diminishing the importance of attorney race and gender on verdicts in complex ways.

For example, in one study, when a male and female prosecutor both used a dominant communication style, the male prosecutor received more guilty verdicts from male jurors than the female prosecutor, although female jurors returned the same number of guilty verdicts regardless of the prosecutor's gender (Pfeifer, 1988). Similarly, male attorneys were more successful at obtaining an acquittal for their clients than female attorneys, particularly when presenting their case to male jurors using an aggressive presentation style; by contrast, female attorneys were most successful when presenting their case to female jurors regardless of presentation style (Hahn & Clayton, 1996).

These patterns of inter-relationship between attorney gender, attorney presentation style and juror gender also are affected by other factors. For example:

The effects of attorney gender and presentation style on verdicts are not consistent across studies, cases, and attorneys of varying levels of physical attractiveness. Sigal (1985) reports that aggressive and assertive attorney presentation styles resulted in significantly more not guilty verdicts than did a passive communication style for both male and female defense attorneys. Trafalis (1985) reports that while female jurors were more open to influence by a female attorney regardless of her attractiveness, male jurors were influenced more by a female attorney's attractiveness and did not respond favorably to a high power style used by an unattractive female attorney.

The effects of attorney gender on verdicts also are affected by characteristics of the opposing attorney. Taylor (2006) looked at two types of medical malpractice cases (mastectomy, orchiectomy), the defense attorney's gender, the plaintiff attorney's gender, and the plaintiff attorney's attractiveness, reporting that attorney characteristics did relate at times to verdicts and awards, but most often in complex and higher order interactions, and not always as expected.

Jurors also do not use identical criteria to evaluate opposing attorneys, and frequently perceive identical behaviors of opposing attorneys in contrary ways. Trahan (2010) analyzed post-trial interviews of 916 capital jurors for how they perceived prosecution and defense attorneys. Eight themes emerged in jurors' comments about defense attorneys: theatrics, personal characteristics, aggressiveness, competence, defendant testimony, defense arguments, forfeiting guilt, and relationship with the defendant. Jurors' comments about prosecutors included theatrics, personal characteristics, aggressiveness and competence, but also presentation style. Importantly, in several of the common themes, prosecutors garnered praise and defense attorneys were chastised for exhibiting the exact same type of behavior.

These complexities are why I believe it is immensely difficult, and yet critically important, to study simultaneously the effect of attorney race and gender within a context permitting complicated, higher order interactions of other attorney characteristics, cases, evidence, opposing attorneys, jurors, defendants, witnesses and judges.

### *The Importance of the Defendant*

Over the years, as I have talked to attorneys about jurors they prefer and "disprefer" for cases, I have noticed a tendency for attorneys to use themselves as their point of reference in jury selection, rather than their client, preferring jurors like themselves and excusing jurors unlike themselves. In my mock trial and community attitude survey research, I have found that the ability of jurors to adopt (or not) the perspective of the criminal defendant, civil plaintiff or civil defendant has usually been more predictive of juror leaning than perceived similarity with the attorney trying the case (though not always!).

Characteristics of a defendant on trial can overwhelm and/or interact with characteristics of the defendant's attorney in juror decision-making. For example, Espinoza (2005) studied jurors' treatment of Mexican American defendants when they were represented by either a Mexican American or a European American attorney. Juror bias against the Mexican American defendant occurred only when the defendant was of a low socio-economic status and the defendant was represented by the Mexican American attorney. Similarly, juries convict African American defendants more often than White defendants for many crimes (Poulson, 1990), although the nature of the case can reverse this tendency: African American defendants are treated less harshly by juries than White defendants when pleading insanity or accused of crimes jurors typically associate with White defendants (Gordon, 1990; Gordon et al., 1988; Rickman, 1989).

As with other issues I've discussed in this commentary, I want now to "hedge" what I just wrote by stating that the characteristics of defendants are likely to matter only sometimes, depending on complex interactions of shifting patterns of effects due to the nature of the case, evidence, jurors, witnesses, attorneys and judge.

### *The Importance of the Judge*

In jury trials, jurors take their cues from the judge, and judges are not without bias. In post-trial interviews, hardly ever do I encounter a juror who dislikes the judge or thinks a judge was biased (even when both parties agree that the judge evidenced biases). Jurors tend to be attentive to a judge's nonverbal behavior (Burnett & Badzinski, 2005) and return verdicts in accord with a judge's leaning in a case, which research finds they are able to glean from something as mundane as how a judge reads standard jury instructions (Blanck et al., 1985; Hart, 1995).

In bench trials, the race of a judge can influence verdicts. In a study of federal racial harassment cases, plaintiffs lost just 54% of the time when the judge handling the case was an African American, but 81% of the time when the judge was Hispanic, 79% of the time when the judge was White, and 67% of the time when the judge was Asian (Chew & Kelley, 2009). Across 556 federal appellate cases involving allegations of sexual harassment or sex discrimination, plaintiffs were at least twice as likely to win if a female judge was on the appellate panel (Peresie, 2005).

A judge's gender and race, however, do not consistently affect case outcomes. Case type can matter. In 367 federal race discrimination cases, no differences in decisions occurred based on the gender of the judicial panels: the plaintiff win rate was similar for all male panels and for panels with at least one female judge (Peresie, 2005). My hypothesis is that gender was not primed as an issue in the racial harassment cases, and so had no influence. The ethnicity of a judge can also be irrelevant, while the ethnicity of a defendant important: Both African American and White judges in Detroit sentenced violent African American felons more harshly than violent White defendants (Spohn, 2008), although this finding is also variable across studies (see, for review, Chew & Kelley, 2009).

A judge's race and gender can have a dramatic effect on the outcomes of jury, bench and appellate cases, but again it depends on interactions of other characteristics of the trial situation. I suspect it also depends on other characteristics of the judge.

### *The Importance of Jurors*

Several research studies report that a defendant represented by a minority attorney is found guilty more often than when represented by a White attorney. For example, studies find that jurors are more likely to find a male defendant guilty of murder when represented by an African-American attorney than by a White attorney (Cohen & Peterson, 1981), and a Mexican-American defendant guilty when the defense attorney was also Mexican-American rather than White (Espinoza & Willis-Esqueda, 2008). As I read this research, my first question usually is: Which jurors are more likely to base their verdicts on attorney race and gender, and which are not? Which jurors will be biased against a minority attorney and which in favor? I cannot often change the reality of the complexity of circumstances I face in the courtroom, but I constantly seek ways to contend with that reality.

When issues of race and gender are activated, I believe studying the jurors and the attorneys simultaneously is often helpful, and sometimes critical.

Boliver (1999) examined the interrelationship between attorney race (African American or White), juror race (African American or White) and juror authoritarianism (obedience to authority versus a willingness to question authority) in a case where the "race card" was played. Participants read materials about an alleged child abuse/neglect case and then viewed a videotape of the closing arguments of the defense and prosecuting attorney. The verdicts of authoritarian White jurors were

most influenced by White attorneys. The verdicts of authoritarian African-American jurors were most influenced by African-American attorneys. Non-authoritarian jurors of both races were equally persuaded by White and African-American attorneys. Said differently, for authoritarian jurors only, an “in-group bias” existed where attorneys of the same race as individual jurors were most persuasive.

I believe that jurors, as one of two potential decision makers in a trial, need always to be considered when questions of the impact of attorney race and gender on verdicts are raised, even though this consideration may not ultimately matter. As with everything else, the courtroom situation is complex and juror characteristics may be irrelevant on certain occasions, and augmented or diminished on others in complex ways.

### *The Importance of the Evidence*

One of the most enduring takeaways for me from mock trial research and post-verdict interviews of jurors is that jurors follow the evidence. While interest is high in biases related to race and gender of attorneys, defendants, jurors, judges and witnesses, if the evidence is strong, jurors overwhelmingly follow the evidence regardless of these “extralegal” factors.

Social science research differs from what is experienced in actual trials in ways that I believe lead to extralegal factors such as race and gender being highlighted in research results, and overshadowed by evidence in trials.

In many studies, jurors read case materials, rather than see presentations of the case. The case materials are summaries of evidence that often minimize evidentiary issues. The written case materials often are presented without visual material and respondents have only a sense of “paper people” for the defendants, attorneys and witnesses. If a visual sense of key individuals is provided, it is often via photographs rather than video. If visual presentations are used, they usually are videotaped for reasons of experimental control that, unfortunately, sometimes sacrifice the generalizability of the results to the complexity of actual courtroom situations. Live presentations are extremely rare and typically restricted to mock trial research conducted by jury consultants for paying clients (because the costs are significant), and this research is more often conducted as case study research that makes examination and identification of complicated, higher order and shifting patterns of effects of attorney race and gender on verdicts difficult to do. I believe that extralegal factors, including those of attorney race and gender, increase in importance against impoverished information environments in which evidence is not accentuated and participants are asked to make verdict decisions.

Studies of actual trials, where evidence is almost always accentuated, find that jurors’ decisions are dominated by evidentiary issues rather than these extralegal factors (Visher, 1987). The results of these studies consistently show that the most powerful determinant of jurors’ verdicts is the strength of the evidence, and the side that presents the strongest case generally prevails (Feigenson, 2000; Overland, 2008). Data from actual trials show that jurors are considerably less responsive to extralegal characteristics of victims and defendants than they are to the evidence (Visher, 1987). Jurors’ personal characteristics, including their race, gender and socioeconomic status, “have relatively little, if anything, to do with their verdicts in most trials” (Overland, 2008, p. 11), typically accounting for 1% to 2% of the variance in jurors’ verdicts if they influence those verdicts at all, and the pattern of influence of these extralegal factors shifts based on the case, evidence, defendant(s), judge, opposing attorney and a host of other factors. I have reviewed a number of these studies in my blawg, the Online Jury Research Update, and I refer the interested reader to the following issues of the OJRU: [January 2011 Issue 2](#), [March 2007 Issue 2](#) [May 2008 Issue 1](#)

The point I want to make is this: Cases involving weak evidence, or closely contested cases wherein the presented evidence cannot resolve the dispute, require jurors to insert themselves into the case to find a way to resolve the dispute. Because social science research typically chooses cases where

jurors are close to equally split in their verdict leanings prior to doing the research, and the research procedures deemphasize evidentiary disputes, I wonder about the extent to which attorney race and gender will influence verdicts in actual trials as compared to these less rich information environments of the research studies. I believe it is important to assess the relative importance of attorney race and gender in the complicated interplay of informationally rich environments for cases, evidence, jurors, witnesses, defendants, judges and opposing attorneys.

### *The Importance of Attorney Characteristics*

Just as juror demographics have limited influence on verdicts in comparison to the evidence in actual trials, attorney characteristics may also ultimately be found to have limited influence in relation to the evidence.

Diamond and colleagues (1996) studied juror reactions to attorneys in simulations, and counted references jurors made to attorneys during deliberations in 60 juries hearing an antitrust price fixing case and in 34 juries hearing a penalty phase of a death penalty case. In deliberations, jurors made relatively few comments about attorneys, and instead focused overwhelmingly on the evidence. This research suggests that while attorneys are one of the messengers, they may not be the message; and that jurors focus primarily on the message.

Female and minority attorneys may also develop coping strategies that offset biases in decision-making due to their race. Phillips (2010) reports a study of 1,164 jurors who participated in 10 mock trials of real cases in which a White and a minority attorney (either African American or Asian) gave live argumentative presentations. The two attorneys in each mock trial were of the same gender and approximately the same age, skill and experience levels. Four cases involved contract disputes, in which 3 of the 4 mock trials compared jurors' reactions to an Asian and a White attorney. The remaining six cases compared an African American and a White attorney, and involved 3 toxic tort cases, an airplane-crash wrongful death case, a corporate fraud case and an employment dispute. In 8 of the 10 mock trials, jurors rated the minority attorneys higher than the White attorneys. In one mock trial no differences existed between the ratings of the Asian and White attorney. In the remaining mock trial, the White attorney was rated higher than the African American attorney. Jurors, regardless of their own race, rated the minority attorneys as more likeable and honest than the White attorneys, although African American attorneys only received higher ratings of competence than White attorneys from African American jurors. Phillips concludes that "skilled trial attorneys who are ethnic minorities can frequently overcome jurors' biases against them" (p. 11).

From these data and studies, I proceed with caution in my assessment of the effects of attorney race and gender on verdicts. Who an attorney is as a person may only be relevant to verdicts when certain conditions apply related to complex interactions of evidence, cases, and a host of characteristics of various trial participants.

From the point of view of practical application, my question is a plea to help me know which combination of factors matter when. My experience supports some of the suggestions emanating from the research: that these patterns are complicated, higher order interactions related to jurors, judges, defendants, witnesses, attorneys, evidence and case type. Said differently, I believe context is everything, and that social science research could expand my understanding greatly by undertaking the admittedly very difficult task of exploring these complex patterns of effects. The benefit to the academic enterprise is that I believe the inconsistency in the research findings noted by Alexis Robinson will increasingly become resolved. While I understand issues of experimental and statistical control of extraneous variables, the inconsistencies in the pattern of effects is such that applying these controls appropriately is difficult.

### Conclusion

The above all said, is it the case that attorney race and gender cannot directly affect juror decision-making? They can have direct effects on jurors' verdicts. A survey of 136 eligible jurors in Baton Rouge (LA), New Brunswick (NJ), Salt Lake (UT), and Los Angeles and Orange County (CA) reports that at least 10-15% of jury-eligible citizens are at least moderately biased against minority attorneys (Phillips, 2010). And I have experienced instances where jurors are noticeably affected by attorney race and gender, sometimes to our advantage, and sometimes to our disadvantage (Phillips, 2010).

Here are the questions I have, that I face in my daily work:

**When** will jurors focus on attorney race and sex, recognizing that cases, defendants, jurors, witnesses, evidence, the opposing attorney might necessitate identification of complex and higher order patterns of effects.

**Which** jurors are more likely to base decisions on attorney race and sex in the complex maze of interrelated cases, defendants, jurors, witnesses, evidence, and opposing attorneys?

**What** are multiple coping strategies attorneys can use to overcome specific biases resulting from specific patterns of effects related to attorney gender and race?

As Alexis Robinson noted, making racial differences salient in voir dire can reduce racial biases that Whites have toward African American defendants (Sommers, 2006). I am hungry for more information. I want to thank Alexis Robinson for affording me the wonderful opportunity to read about this ongoing research project, and I am eager to read more as results become available.

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## Thoughts on Robinson's "Effects of Attorney Race and Gender on Trial Outcomes"

by Sean Overland, PhD

*Sean Overland is a trial strategy and jury consultant based in Seattle. His company, the [Overland Consulting Group](#) specializes in assisting clients facing complex civil litigation.*

Alexis Robinson has proposed an ambitious research program to measure the effects of attorney race and gender on criminal trial outcomes. It's an interesting and important research question and I look forward to reading about her findings.

Before I comment on her proposal, I should offer a disclaimer. I have never worked on a criminal trial. My practice so far has focused exclusively on civil matters, and typically fairly large ones. So while I have no experience with the particular types of trials that will be the focus of this research, and my experience is with a skewed sample of legal cases, I have some thoughts on the proposal and on the questions Robinson poses at the end of her article.

The article raises questions about the effectiveness of different attorney styles, and whether it is better for attorneys to be aggressive or passive. This question seems to assume that there is one best "style" or "approach" to a trial. However, in my experience, the very best trial attorneys do not have a single style for presenting evidence or questioning witnesses. Instead, they adapt their style to fit the circumstances of the trial. For example, a defense attorney may need to aggressively cross-examine a plaintiff's expert witness. The defense may want to vigorously challenge the expert's methods, assumptions and conclusions, and try to get the expert to admit to the limitation of her testimony. On the other hand, the cross-examination of an injured and emotional plaintiff might need to be handled quite differently, with the attorney taking a more conversational and even deferential approach to the witness.

In terms of civil defendants' selection of trial attorneys, my experience has been that over the past fifteen years, there has been a concerted effort by many large corporations to make their trial teams more diverse, and most of the large law firms have reacted accordingly. In fact, I know that some businesses make diversity a requirement of any law firm hoping to represent them. And the reason for this is straight-forward: large businesses believe that it is important for their legal teams to look like the juries they hope to persuade. Accordingly, in my experience, trial teams working in the Deep South almost always have an African-American attorney. Similarly, teams with trials pending in the Southwest almost always have Latino attorneys. And regardless of race or gender, you will not be entrusted with important matters unless you are extremely good at what you do. So almost all of these minority attorneys, while often relatively young, are not only very effective, but are also willing to learn and become even better. In terms of gender, a look through my attorney contact list revealed that over half of the attorneys I know are female. So again, if anything, the civil defense segment of the legal profession may be slightly ahead of the curve in terms of recognizing capable professionals, regardless of race or gender.

But as I noted in the beginning, my experience is probably not representative. I know attorneys who have abandoned "Big Law" in favor of careers as Public Defenders and District Attorneys, and their day-to-day experiences in the trenches of the criminal justice system are radically different from what they were before. PDs and DAs often have hundreds of cases pending at the same time, requiring almost daily court appearances. And the subtle effects of racism and sexism may be more pronounced in this environment than in other areas of law. And it is on the criminal justice system that Robinson should and probably will focus her attention, and again, I look forward to seeing the results.

## *Rich Hailey, JD responds to Alexis Robinson's article*

*Rich Hailey, JD is a trial lawyer with more than three decades of experience. He is past President of AAJ and partner in the firm [Ramey & Hailey](#).*

### **INTRODUCTION**

Amazing! Amazing best describes my initial reaction to the focus-attitude research disclosed in the material forwarded to me dealing with the issue of attorney race and gender. However, upon reflection, I concluded that I should not be “amazed” or surprised. One only needs to go back to the election of 2008 and move forward to realize there is a hard core group of individuals in the United States who are willing to believe virtually anything that supports or proves their deeply held personal convictions which often border on bigotry. Approximately 15% of eligible voters still believe that Iraq contributed to or planned 9/11. Approximately 25% of eligible voters believe that the president was not born in the United States. And yes, let’s not forget the 20+ percent that still believe President Barack Obama is a Muslim. Thus, upon reflection, I have resigned myself to the fact that ideological utopia will never be realized here on earth.

In order to assist you in analyzing the modest comments that I have to contribute, I wish to make certain disclosures. Please be advised that I am an African American attorney having enjoyed an active trial practice for over 35 years. Due to my geographical location most of the trials that I have tried over my career have been to all white jurors that are located in small rural communities in Central and Northern Indiana. Approximately 75% of my civil clients have been Caucasian. With the exception of a few cases recently, all of my major trials have been tried with my partner who is a white female. Until the late 1980s our office tried both civil and criminal cases.

### **GENERAL COMMENTS ON RACE AND GENDER**

While my partner and I have always felt the data on race and gender issues and their effect upon the trial process was scant at best, we concluded early in our careers that it was not necessary to bring these issues up with the jury in voir dire. In our first medical malpractice trial in 1978 our plaintiff was a Latino who had suffered an unnecessary amputation. This Latino migrant worker did not speak much English and we knew we would have to go to trial with an interpreter. Although we had been trying cases since 1974, we felt that the Domingo Samora trial was the first in which we felt we had to voir dire the jury extensively over the fact of the plaintiff’s ethnicity and his ability to speak good English. Most jurors responded in a manner that was politically appropriate for the times. Our goal then, as our goal is now, was to not be so hopeful as to rule out or change attitudes. By raising the ethnic language issues we only hope to neutralize or desensitize and ultimately minimize these issues upon jury deliberation.

In the Domingo Samora case we only questioned jurors about their attitude about the plaintiff. We later found that we needed to explore attitudes about white female and black male attorneys. In many of the small, rural communities in Indiana, jurors have never seen female or black attorneys. We have used both direct questioning and humor to explore the race gender issue vis a vis the attorneys. Currently we cover the fact that our team has a black male and a white female in approximately one-third of the cases that we try. We tend not to deal directly with general race issues when trying cases in

Metropolitan areas like Indianapolis or in the northern part of the state (namely Lake County) which borders on the City of Chicago.

During trial preparation we do in fact spend a great deal of time with female and minority clients on style and demeanor. Essentially, we prepare our clients along the same lines that we prepare ourselves, i.e. with a goal of not playing into or reaffirming stereotypes that surround gender and race. Most important is our effort to instruct our clients their demeanor must be casual and friendly and their dress must be formal. Women and minority clients have to be guarded with showing any aggressive or hostile attitude surrounding what has happened to them. We ask them to carry their demeanor considerations into not only their time on the stand but also in hallways, the men's and ladies room and other common areas in the courthouse. We do tell all clients the jury is watching them at all times. While much of this advice is also given to Caucasian clients we candidly can say that more time is spent with women and minorities.

In recent years we have been involved in a series of employment litigation, most notably, Federal Court litigation involving major corporations. In race cases there is no doubt that major corporations hire law firms that specifically include minority attorneys on their litigation team in an effort to "add color to the case". Likewise, we have noticed that females are added to the corporate defense teams when the employment allegation is based upon sexual discrimination or Title 9 issues. As a former President of the American Association of Justice (formerly known as the American Trial Lawyers Association of America) I can assure you that I have heard the latter from other attorneys in all four corners of this nation. There are actually minority law firms that have been organized with one of their express purposes being getting Fortune 500 work promising they can deliver minority partners and associates to litigation where it is needed.

When looking back on my experience in particular with relationship to perception of race and gender as it effects perception on who is or is not successful, I now offer an interesting twist. As an African American I have experienced several situations in which African Americans sought white counsel when they had matters they considered to be extremely significant, notwithstanding they were comfortable being represented by a minority lawyer on smaller matters. On numerous occasions I have had large dollar personal injury cases taken to white attorneys by African American clients that I have represented on smaller matters. My own explanation for this phenomenon is that their perception is one of power rather than success. In other words, they feel that white attorneys would be more powerful and could best represent their interests. To be sure, this intra race phenomenon was far more prevalent in the beginning of my practice than it is today, leading me to conclude that younger African Americans, especially professionals, seem to be more confident in same race representation.

Taking a momentary departure from the "negative" aspect of race gender-attorney preference, let me concede that there have also been some huge positives. We have noticed in recent years there is a population of clients who specifically seek a female attorney. This is best illustrated in the area of family law and domestic relations litigation. It is not uncommon to find white males of substantial material means employing females to represent them in divorces. This is even more the case where there are child custody issues involved. Likewise, we have several cases of sexual assault and abuse involving children and adults where our potential client indicates to us that they came to our office because they wanted to be in an office where there was a female partner. Frankly, we are reconstructing our web page and creating landing pages featuring Mary Beth Ramey, my female partner, in a prominent way as to attract more cases where we see the female preference described herein. Given that most of our trials are in excess of several days, I have also noticed that when I, as an African American am trying a

case in a basically all white community, the jurors do not get bored and I do not have difficulty keeping their attention. The novelty seems to create a type of curiosity which I believe gives me an advantage in that they tend to focus on me and are attentive to what I am saying.

There is a wealth of research available today that indicates that jurors do in fact base most of their decision on the evidence as they interpret it and place far less weight on the gender or race of the advocates. At the end of the day it is good evidence, exceptional and effective presentation that neutralizes race gender outcomes provided the advocate 1) confronts the race gender issue in voir dire, and 2) adopts a "style" and demeanor that does not reinforce stereotypes.

### *CONCLUSION*

While our experience would indicate that race in general plays a small role in how juries decide cases, we believe that a much bigger outcome determinative attitude is the attitude that a juror has of the U.S. legal system. Over the last 25 years the corporate-insurance information jargon has literally saturated the American public with negative views about trial lawyers, judges and jury verdicts. By their overuse and misuse employing an erroneous rendition of a "McDonald's story," our fellow corporate citizen has convinced a significant portion of our population that our Court system is flawed, that juries are awarding unreasonably high verdicts and that trial lawyers are packing civil litigation like one buying "pooled lottery tickets." Any lawyer who has adequately voir dired a jury in the last 15 years over runaway verdicts and greedy trial lawyers will support our anecdotal observations. In the civil system this has been far more outcome determinative in our view. Juries are reluctant to find for the plaintiff, especially in medical malpractices cases, and when they do they make low jury awards, oftentimes well below what they feel would be adequate for them if they were the injured party. My criminal advocate colleagues likewise complain that in jurisdictions where juries assign sentences, juries are more apt today than ever to sentence at the top end of the sentencing scale. This latter development they feel is premised on the perception that the prosecutors are not fully prosecuting criminals and that judges are just releasing prisoners to return to society and harm them. Termed the revolving door, this perception oftentimes results in excessive sentences that do not match the crime that results in a guilty verdict. The revolving door perception, while invalid, has also led to negative attitudes about judges and has fueled the movement to remove sentencing discretion from both appointed and elected judges. At our office we have concluded that we need to be aware of race gender issues in both civil and criminal cases but realize these issues are only as prominent in our courtrooms as they are in the communities in which we try our cases. In all of our trials we stress not the elimination of bias, because we feel that is impossible, but a promise from each juror that they will leave that bias at the courthouse door and make their decision making evidence-based.

## Sam Sommers responds to Alexis Robinson's article on Attorney Race and Gender

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As a research psychologist, I am well versed in the ways in which expectation and presumption bias daily perceptions. These are basic aspects of human nature. And as a research psychologist who frequently interacts with legal professionals, I find it fascinating when someone suggests that this part of human nature doesn't extend to the courtroom—that somehow these basic tendencies magically disappear when we enter a courtroom.

So the idea to study empirically the effects of attorney race and gender on trial outcomes has appeal to me in its potential to demonstrate yet another way in which assumption and stereotype guide legal judgment. Because at the end of the day, intuition (and my reading of the behavioral science literature) tells me that it is expectation and stereotype that probably underlie many of these proposed effects, as opposed to simple prejudice or outright animus towards attorneys of certain demographics. Sure, there must exist out there jurors who harbor strong enough bigotry to discount what a particular attorney says just because of gender or the color of her skin. But my guess is that attorney race and gender effects are often more nuanced and far more context-dependent.

Despite generalized declines in overtly sexist and racist attitudes, contemporary society is still one in which male and White are more easily and automatically associated with characteristics like competence and intelligence. But I would also predict that juror expectations lead to more positive assessments of female attorneys under some circumstances. Perhaps in cases involving parenting/family issues? Or those involving crimes with female victims? I imagine this is an intuition shared by others as well, from the trial consultant who recommends that the firm's female counsel take the lead for examining a particular witness to the firm itself that seeks to hire attorneys of particular backgrounds to improve surface appeal to a certain demographic of client/case type.

Such case-dependent patterns would be consistent with what we see in the literature on demographics and jury selection. I've often argued that, for example, race-based peremptory challenges are not necessarily evidence of racial bias—at least, not of the intentionally discriminatory type we usually associate with the phrase "racial bias." No, prosecutors disproportionately use their peremptories on Black prospective jurors largely because of expectation: they assume these jurors will be less conviction-prone (and vice versa for defense attorneys and White prospective jurors). Analyses of racially disparate peremptory use that focus primarily on racial prejudice—be it of the modern, implicit, unconscious type or otherwise—miss the boat, I think.

And so I'd predict that similar case- and context-dependence will emerge as an important aspect of the investigation of attorney race and gender effects. While it may be possible to draw some

empirical conclusions along the lines of most male jurors dislike passive male attorneys, my guess is that many conclusions will be less generalized.

Do African-American attorneys face professional obstacles that their White colleagues do not? Absolutely, inside and outside the courtroom. But there may be types of cases (or defendants) for which a Black attorney is viewed by jurors as more competent or credible. Perhaps in defending a White client charged with discrimination? Or in prosecuting a case relying heavily on police testimony? For that matter, to the extent that some jurors have low expectations regarding the proficiency of minority attorneys, the proverbial bar may be low enough such that an above-average performance is viewed as superlative.

In short, the story of how attorney race and gender shape trial outcome is bound to be a complex one. After all, we're not talking about the target of persuasive messages here (that would be the defendant). We're talking about the source of these messages. And we now live in a society where when it comes to, say, certain consumer products or political arguments, it's no longer the White male who is viewed as the most persuasive, credible messenger by default. The biggest challenge facing the study of attorney race and gender effects may very well be the nuanced, context-dependent nature of jurors' assumptions. But that's all the more reason to run the studies.

*Editor's Note: After reading the thoughtful comments from these four respondents, Alexis Robinson has offered to write an article on the ways this research can inform day-to-day practice for trial lawyers and trial consultants.*

## *Damage Awards: Jurors' Sense of Entitlement as a Predictor*

BY GARY GIEWAT

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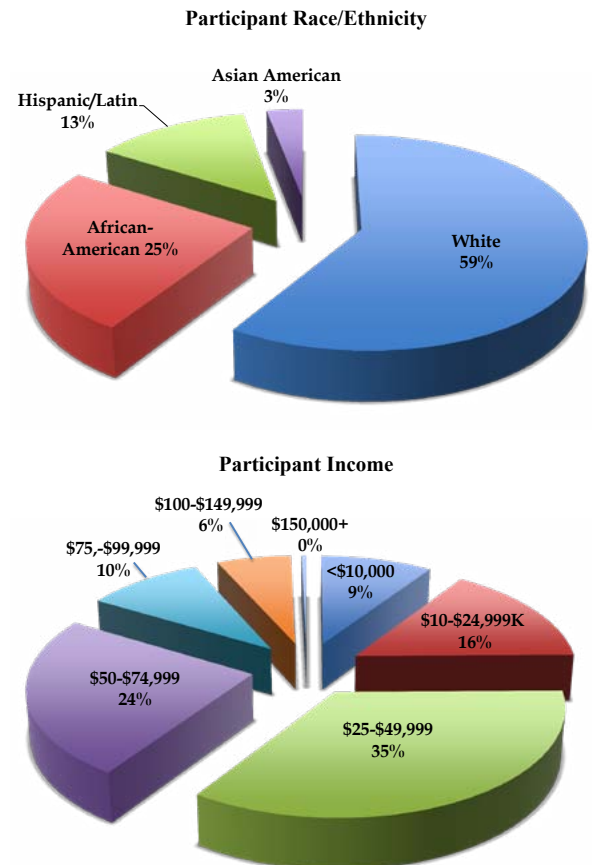
As Campbell and his colleagues<sup>1</sup> discussed, psychological entitlement is a personality trait that is instrumental to a wide variety of issues in society, ranging from the mundane, such as access to good seats at a sporting event, to more important issues such as the distribution of resources including tax breaks and social welfare. People's sense of entitlement has long been thought by research staff at American Jury Centers to be a component of how jurors make decisions, namely the propensity to provide larger damage awards. The purpose of this investigation is to examine the possible relationship between degree of entitlement and the tendency of prospective jurors to provide damage awards. That is, do those who maintain a higher sense of entitlement provide larger or smaller damage awards? Are there demographic distinctions with respect to entitlement?

### **METHOD**

Beginning in mid-2009, American Jury Centers inserted a subset of items from the Psychological Entitlement Scale<sup>2</sup> in its pre-stimulus questionnaires used in mock trial research with jury eligible participants. Three questions, ranked on a six-point Likert scale ranging from strongly agree to strongly disagree, were embedded into our standard set of questionnaire items that examine research participants' opinions regarding corporations, lawsuits, damage awards, etc. The entitlement items included:

**I honestly feel I'm more deserving than others.**  
**I deserve more things in my life.**  
**People like me deserve an extra break now and then.**

Several different projects across the United States constituted our sample of 228 participants. Fifty-seven percent of participants were female and 43% were male with an average age of 46, ranging from 20 to 77 years of age.





**RESULTS**

A K-means cluster analysis was conducted on the entitlement scale items in order to classify participants into distinct groups. Cluster analysis is a statistical technique that creates a desired number of homogeneous groups, in this case three, that are as distinct as possible<sup>3</sup>. Three groups were created and defined best as having high, moderate and low entitlement scores across the three entitlement scale items. Overall, 42% of participants were classified as low in entitlement, 42% were moderate in entitlement, and 16% were high in entitlement. Five participants were excluded as a result of missing data. The table below provides a breakdown of entitlement grouping by varied demographic factors.

<b>Demographics by Entitlement Category</b>			
	<b>Low Entitlement (overall = 42%)</b>	<b>Moderate Entitlement (overall = 42%)</b>	<b>High Entitlement (overall = 16%)</b>
<b><i>Gender</i></b>			
Male	42%	37%	21%
Female	42%	45%	13%
<b><i>Age</i></b>			
18-29	42%	36%	23%
30-39	40%	34%	26%
40-49	43%	43%	14%
50-59	36%	51%	8%
60+	53%	40%	8%
<b><i>Race/Ethnicity</i></b>			
African-American	17%	43%	41%
Hispanic/Latin	28%	52%	21%
White	54%	41%	5%
<b><i>Income</i></b>			
<\$25,000	26%	55%	19%
\$25,000-\$74,999	43%	41%	17%
\$75,000 +	65%	30%	5%

***Entitlement & Damage Awards***

In order to make comparisons between entitlement grouping and damage awards, the data from participants' individual damage awards from the varied projects was aggregated into a single, total value. For example, we summed the economic and non-economic damages to a single value. Raw damage amounts ranged from \$0 to \$50,000,000. Because the projects varied in type and range of damage awards the aggregate damage amounts were standardized in order to compare "apples and oranges." That is, the dollar awards were all transformed into a standardized score in order to

make comparisons from different normal distributions. As a result, actual dollar amounts are not used in these analyses. Instead, the values used are the corresponding z-scores that reflect the degree to which an award deviates from the average aggregate score.

Examination of these data revealed a clear relationship between entitlement grouping and damage awards. Participants classified as low in entitlement provided the lowest average damage awards, followed by those in the moderate group. **Participants who were classified as high in entitlement provided the largest average damage awards.** In addition, participants in this group were also highly variable in their awards as revealed by the high degree of variation in their awards and the fact that the median average award was not necessarily extreme. Among participants classified as high in entitlement were those who provided the largest damage awards in the varied American Jury Centers mock trials.

<b>Entitlement Grouping &amp; Damage Awards</b>			
<b>Entitlement Grouping</b>	<b>Damage Awards Average Z-Value</b>	<b>N</b>	<b>Standard Deviation</b>
High	.30009	36	1.32097
Moderate	.01008	93	.96326
Low	-.13186	94	.86033

*So What?*

**These data suggest a relationship between psychological entitlement and jurors’ damage awards, specifically that those who have a higher sense of entitlement also tend to provide larger damage awards.** What does that mean? At trial, having a better understanding for jurors’ attitudes and varied personality factors (e.g., authoritarianism, attribution style, and psychological entitlement) is useful in identifying prospective jurors less favorable to your client. Knowing the implications of psychological entitlement and the degree to which it is associated with a varied demographic may aid in developing better profiles for jury selection and potentially better managing exposure at trial. If you are a plaintiff, high psychological entitlement favors your client and can help to develop profiles to identify jurors most likely to award high damages. Conversely, for plaintiff counsel identifying prospective jurors with a lower degree of psychological entitlement for potential strike might enhance damage awards.

*References*

<sup>1</sup> Campbell, W.K., Bonacci, A.M., Shelton, J., Exline, J.J., & Bushman, B.J. (2004). Psychological Entitlement: Interpersonal Consequences and Validation of a Self-Report Measure, *Journal of Personality Assessment*, 83(1), 29-45.

<sup>2</sup> Id at 2

<sup>3</sup> SPSS Inc. (2005). SPSS Base 14.0 for Windows Users Guide. SPSS, Inc. Chicago, IL.

## *Narrative Persuasion in Legal Settings: What's the Story?*

BY PHILIP J. MAZZOCCO AND MELANIE C. GREEN

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*Melanie C. Green, Ph.D. is assistant professor of psychology at the University of North Carolina at Chapel Hill. <http://www.unc.edu/~mcgreen/> Her research focuses on the persuasive power of narratives, with an emphasis on the antecedents and consequences of transportation into narrative worlds.*

The idea that storytelling can enhance courtroom persuasion is as old as litigation itself. Researchers who study story-based persuasion are interested in the factors that render such influence more or less likely. The present article examines recent theory and research on narrative persuasion, and ends with corresponding recommendations for litigators.

To begin, researchers in the area of story-based persuasion draw a distinction between argument-based persuasive communications, also referred to as *rhetorical* communications, and story- or narrative-based persuasive communications. Rhetorical communications persuade by presenting a series of logical and cogent arguments in favor of a given viewpoint. In contrast, narratives describe a series of interrelated events that take place in a particular setting and typically involve one or more specific characters. Lacking straightforward arguments, narrative persuasion tends to be driven by the actions and portrayal of antagonists and protagonists, and also by the overall themes of the story.

Researchers in the field of social psychology have studied rhetorical persuasion for approximately sixty years, and during this time, rhetorical persuasion has remained a central focus of social psychological studies. As a consequence, a great deal is known about the factors that enhance or diminish the effectiveness of argument-driven persuasive communications (e.g., Brock & Green, 2005). In contrast, the focused and theory-based study of narrative persuasion has been primarily constrained to the past ten or fifteen years, and so researchers are still working toward a full understanding of the factors that influence narrative persuasion, as well as the psychological mechanisms responsible for these effects. Nevertheless, impressive strides have been made by theoreticians and researchers, many of which may be of interest to legal practitioners.

Green and Brock (2000, 2002) proposed the transportation-imagery model of narrative persuasion, which suggests that recipients of persuasive narratives (e.g., films, books, verbal communications, etc.) can become mentally transported into the world of the story (see also Gerrig, 1993). While in this story-world, participants are said to partially lose touch with their own world. In this way, narratives can function as an escape from reality. When recipients return to their own

world, the theory of transportation suggests they often return bearing the influences of the story world. Relevant to the current discussion, participants often return with beliefs and attitudes that have been influenced in a story-consistent fashion. For example, readers of Steinbeck's *The Grapes of Wrath* are likely to become more sensitive to the plight of the working man, and perhaps also more skeptical about motives of big business.

### *Mechanisms of Narrative Persuasion*

#### *We Laughed, We Cried: Emotions and Persuasion*

As avid readers are well aware, the portrayals, actions, and outcomes of story characters can create lasting impacts on our beliefs and opinions. Famously, Abraham Lincoln credited Harriet Beecher Stowe with arousing popular opposition to slavery through her vivid portrayal of slaves and slave-masters in *Uncle Tom's Cabin*. Consistent with Lincoln's supposition, previous studies have shown that narratives influence beliefs and attitudes in part by encouraging empathetic and emotional connections with story characters (Heath, Bell, & Sternberg, 2001; Oatley, 1999). The power of narratives to influence emotion relates to basic research within social psychology that shows that opinions and beliefs typically have both emotional and rational bases (Chaiken, Pomerantz, & Giner-Sorolla, 1994; Crites, Fabrigar, & Petty, 1994). Some opinions and beliefs are primarily emotional in nature (e.g., ice cream), whereas others are primarily rational (e.g., vacuum cleaners). Further research has demonstrated that it is often difficult to influence attitudes that are held emotionally using rationalistic, rhetorical arguments (e.g., Fabrigar & Petty, 1999). Narratives then, appear to be uniquely suited to changing opinions and beliefs which are held emotionally, and which may be resistant to other forms of persuasion.

It is worth noting that emotional reactions to characters can form regardless of whether the narrative in question is fictional or factual. Furthermore, stories can create emotional responses regardless of whether the involved characters are friends, strangers, or simply products of an author's imagination; indeed, one of the great benefits of literature is the way that it allows us to connect with and experience other lives that may be very different from our own. In any case, the formation of real-world emotional reactions to characters can influence the degree and manner to which narratives are persuasive.

#### *You Can't Argue With That: Stories Reduce Resistance*

Another important property of narratives is that they appear to reduce skepticism and counterarguing (Green & Brock, 2000; Slater & Rouner, 2002). Such scrutiny, typically involving a comparison of communication claims with preexisting beliefs and attitudes, is a natural response to rhetorical persuasion (Petty & Cacioppo, 1986). However, given that narrative recipients are immersed in the world of the story, their own preexisting beliefs and opinions should be relatively inaccessible. Furthermore, time spent scrutinizing the relevance and validity of the arguments presented is instead likely to be dedicated to building and maintaining the narrative world. Hence, narratives, relative to rhetoric, are more likely to produce persuasive traction in situations where recipients hold prior beliefs and attitudes that may be inconsistent with the communication stance.

### *What Makes a Story Transporting?*

In general, narrative persuasion should be optimal when the communication succeeds in immersing the recipient in the flow of the story. Under this condition, reduction of counterarguing and emotional connections with characters should be maximized. Prior research has indeed shown that individuals who are more transported do exhibit greater attitude and belief change in response to stories (e.g., Escalas, 2004; Green, 2004; Green & Brock, 2000; Wang & Calder, 2006). However, there are a number of factors that can theoretically make narrative transportation more or less likely.

#### *Good Storytellers*

Regarding the source of the narrative, transportation should be facilitated by an adept storyteller. Clearly, the same story can be told in very different ways by different storytellers. Master storytellers, such as public radio's Garrison Keillor, can make even trivial tales seem like epic masterpieces. Some storytellers are simply more capable of evoking immersive imagery, pacing a story for dramatic effect, and describing characters and events in a way that creates an emotional impact, and these storytellers are likely to achieve maximum persuasive impact.

#### *Immersive Imagery*

Narratives containing immersive imagery should elicit greater transportation. If listeners can easily picture the characters and scene of the events described, they are more likely to become fully engaged with the narrative world. Furthermore, the creation of these mental images should lead to lasting persuasion that is difficult to counter with less vivid facts.

#### *Realism*

In addition to immersive imagery, some degree of realism is necessary for optimal narrative transportation. In other words, recipients will have an easier time constructing the narrative world to the extent that the details of said world are at least somewhat familiar to them. Even in fantastical scenarios, it is still important that recipients are familiar with the basic human elements of the story (social interactive themes, basic human motives, etc.). The narrative should also be presented in terms that are understandable to recipients. For example, as immersive as Shakespeare can be, it would be lost on most young children merely due to language difficulties.

#### *Structure*

Even young children know that the hallmark of a good story is that it has a beginning, middle, and end. A story with a clear causal structure is more transporting than one that has inconsistencies in plot. Suspense can also help increase immersion into stories; when a story starts with an attention-grabbing question or situation, individuals want to find out what happened or how it happened.

*Surroundings and Context*

The context in which a story is heard is likely to play an important role as well. First, narratives should be less persuasive to the extent that other elements of the context disrupt transportation. For example, attempting to become immersed in a novel can be difficult when the TV is on, or others in the vicinity are having a loud conversation.

In addition, certain contexts highlight the persuasive nature of communication. In some situations, recipients might become aware that the purpose of a narrative communication is to influence their own attitudes. Such a realization may limit the story's effectiveness. However, this may depend on whether recipients believe that the persuasive attempt is appropriate in the given context. Recipients might resent emotional stories out of the mouths of politicians (particularly those from the opposing political party), who clearly harbor ulterior motives, while allowing persuasive stories in a courtroom scenario where persuasive attempts by litigators are more likely to be anticipated and accepted. However, even in the courtroom, negative stereotypes regarding lawyers in general, or a particular lawyer, would be expected to reduce the willingness of jurors to be persuaded by stories.

*The Audience*

Finally, characteristics of the recipients themselves can facilitate or limit persuasion. Recipients who have better imaginative abilities should be more capable of constructing detailed and compelling narrative worlds than their less imaginative counterparts. In addition, certain individuals are more willing and able to become transported into narrative worlds. For instance, some people are emotionally moved by a story as minimal as a thirty-second Hallmark commercial, whereas others remain impassive even when watching an amazing film or reading a great novel. Green (1996; see also Dal Cin, Zanna, & Fong, 2004) developed the nineteen-item transportability scale to measure these kinds of individual differences in the likelihood of becoming transported.

*Transportability and Narrative Persuasion*

Working with colleagues Jo Sasota and Norman Jones (2010), we recently examined the role of transportability in facilitating narrative persuasion. Across two studies, we examined the role of individual differences in transportability, i.e., the tendency to become transported into narratives, in predicting the degree of attitude change resulting from persuasive narratives. As discussed above, narratives should be uniquely persuasive for issues in which people have strong, preexisting, and emotional counter-beliefs and opinions. Hence, the communications used in our studies took a positive stance on homosexual relationships and race-based affirmative action, two topics for which negative and emotionally-held attitudes are common.

In Study 1, 137 college-aged participants read a story detailing a conversation between two high school age friends, one of whom had recently come out as a homosexual. Generally, the story promoted tolerance towards homosexuals. This theme was conveyed by both the positive characterization of the homosexual teen, as well as the accepting stance of the heterosexual friend. Results indicated that participants were persuaded by the story (i.e., exhibited more positive attitudes towards homosexuality) only to the extent that they self-rated as highly transportable as measured by Green's (1996) transportability scale. (Example items from the scale are provided below.) Additional

analyses confirmed that the persuasive narrative influenced transportable recipients by increasing empathy for homosexuals (an emotional response) as opposed to changing their rational perceptions (measured by asking participants what they were thinking while reading the narrative).

In Study 2, comprising 298 White participants, this general finding was replicated using the topic of race-based affirmative action. One goal of Study 2 was to demonstrate that highly transportable individuals were not more persuadable in general (as might have been the case in Study 1), but instead were specifically more likely to be persuaded by stories. To test this proposition, the study included sets of rhetorical arguments that echoed the themes of the analogous persuasive narratives. For example, in one condition, participants read a story about a particular African-American man who could trace his history back to slavery. Although this impoverished lineage limited his opportunities, he was able to take advantage of affirmative action to better his situation in life. The analogous rhetorical communication merely discussed how the residue of slavery still exists among the African-American population, and that race-based affirmative action is a justifiable remedial action. All participants were assigned to read either a story or an analogous list of arguments, and, once again, level of transportability was assessed.

In addition, we measured individual differences in the *need for cognition* (Cacioppo & Petty, 1982), a personality difference in the extent to which individuals enjoy effortful thought, such as debating issues, solving puzzles, or considering complex problems. (An example item for the low end of this scale is, "Thinking is not my idea of fun.") In persuasion contexts, this scale predicts the likelihood of effortful scrutiny of persuasive communications.

Results indicated that narratives were more persuasive than arguments, but only for individuals who were highly transportable. As in Study 1, the link between transportability and attitudes in the narrative condition was found to be mediated by emotional, empathic responses as opposed to rationalistic appraisals. Additional analyses indicated that the participants' level of need for cognition had no relation to narrative persuasion, suggesting that the process of transportation in the narrative condition may have been inhibiting more rational and logical thought processes.

### *Two Ways of Thinking*

This final finding is the basis of emerging research and theory in the domain of narrative persuasion. It is generally believed that humans respond to communications in one of two ways (e.g., Bruner, 1986). The first involves rational appraisal. Related processes include abstract generalizing; matching information with previous stores of beliefs, attitudes, and values; and effortful scrutiny. Rational processing is more likely given a higher need for cognition, or in response to rhetorical communications. The second response type is experiential in nature, and involves the construction of an imaginary world filled with quasi-experiences. The experiential response type is consistent with transportation, and is more likely given higher levels of transportability, or in response to narrative communications.

To elucidate the difference between these two modes of processing, consider two different persuasive communications. First, in response to a list of arguments in favor of buying a new cleaning product, a consumer may either rationally scrutinize the arguments being presented or they may imagine themselves actually using the product in their own home. Second, in response to a story about the effects of rain forest destruction on local tribes, recipients may either consider whether the story presents a good argument in favor of environmental protection, or they may imagine themselves in the position of the individuals being portrayed in the story.

Because human mental processing resources are fundamentally limited (e.g., Shiffrin, 1988), we propose individuals can only engage in one processing mode at a time. Hence, when deeply immersed in a story, recipients are less likely to scrutinize relating themes and claims. Similarly, when in scrutiny mode, narrative transportation should be either impossible or at least greatly limited. We are currently in the process of testing this framework, but we foresee important practical implications. For a given issue, there may be arguments that are better conveyed by rhetorical propositions, as well as arguments that are better conveyed by stories. Depending on the issue, one class of arguments may be stronger than the other. Would-be persuaders, then, can take advantage of the processing limitation described above to craft communications that shift between narrative and rhetoric as the topic requires, focusing on rhetoric to influence rationally held beliefs, and narrative when attempting to influence emotionally held attitudes that may be more resistant to change.

### *Practical Applications in the Legal Domain*

So when should litigators use narratives as opposed to arguments? Considering the theory and research summarized in this article, we can make several concrete recommendations to litigators. We focus on three key factors: jury characteristics, case characteristics, and presenter characteristics.

#### *Jury Characteristics*

The most straightforward implication of the results of Mazzocco *et al.* (2010) is that stories will be more effective given highly transportable jurors. This tendency can be measured during the *voir dire* process. Because the 19-item scale described above is likely too unwieldy for the typical *voir dire* proceeding, a shorter version of the scale may be used. Combining the data from Studies 1 and 2 from Mazzocco *et al.* (2010) allowed us to analyze the transportability data from 435 participants. It turns out that four particular items from the scale accounted for approximately 85% of the variance in the overall scale. Hence these four items can function as a reasonable substitute for the full 19-item scale. These four items are as follows:

1. "I am mentally involved in stories while reading them.";
2. "Stories affect me emotionally.";
3. "I can become so absorbed in a story that I forget the world around me."; and
4. "Characters in stories can seem real to me."

These items can be accompanied with a 1-10 scale (1 = "not at all true of me", 10 = "very true of me"). If even four questions would require too much time, it is possible that asking a single question ("do you become very absorbed into stories?") with a simple "yes" or "no" may have reasonable predictive ability, although we have not tested this possibility empirically.

Of course, in some situations, jurors may need to be selected based on characteristics other than transportability. If it is clear that a given jury is low in transportability, it is possible that using stories might actually backfire. This supposition is based on emerging evidence from recent studies in our lab showing that individuals low in transportability seem to prefer to be persuaded by arguments as opposed to stories. In a jury where some jurors are highly transportable but others are not, a mixture of stories and arguments might be ideal.



*Case Characteristics*

Based on the summarized research and theory, we propose that stories may be especially effective when jurors are believed to have preexisting negative reactions that are counter to the to-be-argued stance. To the extent that such resistance is based on rational factors, stories are likely to reduce juror scrutiny. And to the extent that the resistance is based on emotional factors, stories are uniquely positioned to actually influence such emotions in a story-consistent fashion.

It is important, however, that the characters in the story can be portrayed in a way that is designed to elicit the desired emotional reactions. For example, it may be challenging to tell a persuasive story highlighting the positive aspects of an extremely unlikable defendant. However, a cleverly crafted story is often an ideal method of focusing juries on the more positive aspects of the characters in question, while distracting attention from less desirable attributes.

Finally, in situations where the evidentiary case is weak or tenuous, stories may be the only way to go. In most cases, though, portions of the evidence will be strong, and portions will be weaker. In such instances, litigators can strategically switch between rhetoric (when the evidence is strong) and narratives (when the evidence is weak). To the extent that jurors are confined to processing either rationally or experientially, the net perception given such a strategy should be of a consistently strong case.

*Presenter Characteristics*

Of course, a story tends to be only as compelling as the individual telling it. Some people are naturally good storytellers. This applies not only to litigators, but also to anyone called to the stand. If a particular witness is a very poor storyteller, questioning them in a way that encourages them to present a narrative may be counterproductive. In such cases, asking simple questions relating to the facts might be preferable. Given the importance of being able to tell gripping stories, litigators would likely benefit from taking story-telling or acting classes.

*Conclusion*

In this article, we summarize some of the relevant research on narrative persuasion, with a focus on theory and findings likely to be relevant in legal settings. In particular, we present evidence that stories are more persuasive for some people (those who have a natural tendency to become absorbed in narratives) than others. A case presentation that relies on narratives would benefit from attempting to select these individuals as jurors. We further suggest that given these individual differences, presenting a mix of stories and arguments may be an ideal strategy. Furthermore, efforts to increase narrative quality (for example, through coherence or strong storytelling skills) will likely have benefits in both transporting and persuading an audience.

We hope that in addition to suggesting a number of practical applications, this article will encourage psychological researchers and legal practitioners to work together in future studies of narratives in the legal setting. With the dual emphasis on the presentation of sound and coherent arguments as well as the weaving of compelling and gripping stories, the legal domain may provide an ideal context for future testing of propositions relating to narrative persuasion. To the extent that this testing was informed by the real world knowledge of legal practitioners, it would provide both basic and applied benefits.

*Don't miss the trial consultant responses following the references!*

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***We asked two trial consultants to respond to Mazzocco & Green's research.  
On the following pages, Benson Green and Glenn Kuper offer their thoughts.***

## Response to Narrative Persuasion in Legal Settings: What's the Story?

Authored by Philip J. Mazzocco and Melanie C. Green

BY BENSON GREEN

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*Narrative Persuasion in Legal Settings: What's the Story?* is an interesting, well-written article based on some very compelling research that provides a theoretical insight into the mechanisms behind narrative persuasion and its potential impact on trial strategy. Our firm has been investigating this issue on a more practical level for some time now. Much of our current practice involves intellectual property litigation and we regularly face cases where we believe the facts are objectively strong for our client, but the jurors just do not seem to get it. The reason, we have concluded, is lack of a narrative to go along with the facts.

The challenge we face is that attorneys are well schooled in rhetoric, but often have no practical experience in narrative. Moreover, trial lawyers spend the majority of their time on a case speaking to and arguing with others schooled in the law. So, when it comes time to try the case to a jury, many attorneys continue with what they know. Compound the problem with the rich panoply of biases today and the complicated nature of the technology we usually deal with and the situation becomes very challenging.

As the authors suggest, we find that many jurors are naturally predisposed to respond favorably to compelling narratives. More significantly, the authors argue that a strong emotional response, or a pre-existing emotionally based bias on the part of a juror, may be extremely difficult to overcome with a rhetorical argument. Thus, narrative is a potentially more successful means of persuasion. Indeed, in some cases it may be the only means to persuasion. These conclusions are consistent with our experience that jurors with strong biases are difficult to persuade with a purely rhetorical argument. When a juror believes that "All big companies are liars," there's little room for rhetoric to overcome such a strong bias. This is why narrative is a critical aspect of trial preparation. But, where does it fit in and how should it be used?

Let's start with the authors' suggestions regarding jury selection. When narrative is likely to be a significant part of the trial, measuring transportability in some way during jury selection makes good sense. The authors' transportability scale contains 19 items, but only four capture 85 percent of the variance in the measure. In other words, these four items are doing most of the work and if asked of jurors should give a good indication on individual juror's transportability and thus susceptibility to narrative persuasion. Notwithstanding the appeal of this approach, we believe it will prove impractical in application. A juror questionnaire would be necessary to gather the data. In civil litigation, we have not found juror questionnaires very common. When they are used, many courts will require the parties to agree on the questionnaire. One side or the other, in our opinion, is likely to object to these questions. If the court is then asked to consider whether to include them, it will be hard for the

proffering attorney to argue their relevance to the case. However, we plan to use these questions experimentally in our jury research over a period of time to determine how they interact with decision making. If they prove useful, a more practical approach might be to look for more factors that correlate with transportability that can more easily be used in jury selection. Without thinking about it in these terms, I have no doubt that we have been working on this issue for quite some time. The attractiveness of this article is that it provides a theoretical framework to consider the question.

Turning now to the notion of incorporating narrative into the case presentation, the authors correctly surmise that in “most cases...portions of the evidence will be strong, and portions will be weaker,” but they suggest that, “In such instances, litigators can strategically switch between rhetoric... and narratives...” Given their conclusions that individuals are likely able to process information either experientially or rationally at any given time, the authors believe that this strategy will cause jurors to view the entire case as strong. This strategic switching is problematic on a practical level. Moreover, the authors also found that “individuals low in transportability seem to prefer to be persuaded by arguments as opposed to stories,” and thus strategic switching could “backfire” both with jurors that are low in transportability and those that are high in transportability.

In our experience, the most effective way to incorporate narrative into trial preparation is to fold rhetoric into a narrative framework. This method not only takes advantage of an attorney’s existing strength in rhetoric, it also allows jurors to preferentially engage with the rhetoric or the narrative over the course of a trial. This process involves creating what we refer to as an Organizational Narrative: an overall narrative of the case that is used to inform the selection and arrangement of facts and arguments in a way that reinforces the narrative and themes of the case. For example, an organizational narrative can be used to simplify difficult technological concepts by identifying which concepts are necessary to support the narrative.

The process of creating an Organizational Narrative should ideally begin early in the process of trial preparation. It starts with performing limited research, such as focus groups, to test narrative concepts. Once an effective narrative is established, more substantial research, such as a mock trial, is used to test the rhetorical arguments of the case within this narrative framework. We’ve found that given this layered approach to mixing narrative and rhetoric, some jurors will respond well to the broad themes of the case whereas others respond well to the specific rhetorical arguments. In our experience, more biased or emotional jurors respond well to the narrative, shutting off or ignoring the rhetorical arguments, whereas less obviously biased jurors tend to ignore the more emotional aspect of the narrative and focus on the evidence and rhetoric.

Finally, the authors suggest, briefly and perhaps tongue in cheek, that attorneys consider training in story telling or acting. We quite agree. The ability to construct a narrative as part of the overall trial strategy is an essential tool for every trial lawyer.

Continued study of transportability and its impact on narrative persuasion could greatly enhance our understanding of how jurors respond to arguments and in what ways that knowledge can be practically applied to trial preparation. We look forward to updates on the authors’ work.

## Review of “Narrative Persuasion in Legal Settings: What’s the Story”

BY GLENN KUPER

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The article “Narrative Persuasion in Legal Settings: What’s the Story” provides some constructive advice to help attorneys evaluate the usefulness of narratives and incorporate this strategy into their practice. As useful as it is, I believe the authors’ analysis would benefit from widening their focus to include the rhetorical perspective on narratives and by providing a more developed and practical set of prescriptions for their use.

The authors hail from the social psychology perspective and are therefore understandably focusing on the literature from that field, but the contributions from rhetoricians should be acknowledged. For example, Walter Fisher has developed a comprehensive theory of human communication as narration. Fisher “offer[s] an approach to the interpretation and assessment of human communication [that] assume[s] that all forms of human communication can be seen fundamentally as stories, as interpretations of aspects of the world occurring in time and shaped by history, culture and character.”

In other words, rather than viewing narrative as a subset of communication, Fisher suggests that all of our interactions can be assessed in the context of stories. This broader perspective can be useful in the courtroom as attorneys think about their overall case and the perceptions of the key actors and actions being portrayed during the trial.

Fisher’s perspective also calls into question the dichotomy forwarded by the authors that rhetorical communication presents logical, cogent arguments and narratives primarily influence receivers on a more emotional level. Although stories are less likely to appeal to more formal argument schemes, they can persuade through what Fisher calls a “logic of good reasons.” These good reasons are based on values that guide an audience’s evaluation of a story. Fisher also explains that “narrative rationality” intuitively leads audience members to a conclusion about which stories make sense. Narrative rationality primarily considers whether a story is coherent (narrative *probability*) and whether it is consistent with the listeners past experiences (narrative *fidelity*).

Expanding their application of narrative theory beyond just discrete stories designed to appeal to listeners’ emotions would widen the applicability of this strategy. I am not certain how often a lawyer or witness has the opportunity to develop such a detailed story that a juror would be able to transport out of the courtroom and into the alternative reality of the narrative. The authors argue that narrative persuasion is optimal “when the communication succeeds in immersing the recipient in the flow of the story.” I would think it is easier to do this when the recipient is watching a movie in a dark theater where their critical judgment is suspended or in reading in their quiet living room than in a stressful courtroom, where they are expected to be critical consumers of communication.

The authors address this concern to some extent by presenting advice for how to increase the likelihood of constructing a narrative more likely to induce “transportation.” These characteristics of a strong narrative can help an attorney to develop more compelling stories, regardless of whether total

immersion is attainable. This section is very useful for individuals with a more limited experience in storytelling theory and practice.

The practical advice for when narratives might be useful is helpful for attorneys wishing to employ this strategy. It would be constructive to provide some additional advice about how to employ this strategy in the flow of a typical trial. Would it be possible to elicit such stories from a witness? Or is it more useful in opening and or closing? Also, it would be interesting to know if fictional stories would play as well in a legal setting (where relevance is of greater value) as they do in other contexts.

Relating to another practical suggestion made by the authors, I am not sure how practical or wise it would be to choose a jury based on their susceptibility to transportation. Voir dire allows for more of a “de-selection” process where troublesome jurors are struck rather than a “selection” process where amenable individuals are chosen. Using a precious peremptory challenge to eliminate a juror who is not highly transportable might be difficult when more troublesome characteristics are exhibited by other members of the venire. It might be more useful to use jurors’ past experiences and attitudes to determine which potential panelists might be adverse to the story you want to tell.

The use of stories to affect the emotions of a jury can be an effective strategy. The authors’ recommendation to employ a mix of logical and emotional appeals is sound, and reflects a strategic approach that dates back to Aristotle. There is great potential to view narratives in a larger context and to consider the ability to combine appeals to both logic and emotion in an overarching story that encapsulates one’s case.

### *Reference*

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## *C-SWOT and PLA-Squared: Techniques for Avoiding and Breaking Bad News*

BY STEVEN E. PERKEL AND ERIC DAKHARI

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In 1847, the American Medical Association's first code of medical ethics stated, "The life of a sick person can be shortened not only by the acts, but also by the words or the manner of a physician".<sup>4</sup> Lawyers too have an ethical responsibility to be mindful of their words and manner. This is particularly important when breaking bad news. In every lawyer's life there comes a time to deliver bad news. Sometimes you may have to deliver a difficult message to a corporate client, a family, a colleague or a senior partner in the firm. Regardless of who the recipient of the bad news is, the way you deliver the information and manage the process will either make things worse or better. Developing the skills to effectively deliver bad news is simply learning to deal with the inevitable.

There are many ways you can break bad news. You may ask yourself, "Is there a correct or best method? Should you be direct or assertive? Can you be compassionate without sounding disingenuous? Is it best to just get to the point? You need to utilize your judgment along with your knowledge of the client and/or corporate culture to determine how you will proceed, but there are some fundamentals that can be helpful. This article discusses (1) the nature of bad news, (2) what makes news bad and (3) the authors' Case-Strengths, Weaknesses, Opportunities and Threat (**C-SWOT**) model which is an effective tool for analyzing a case and then developing congruent expectations between you and your client. We also present the **P<sup>2</sup>L<sup>2</sup>A<sup>2</sup> Model (PLA-Squared)** which describes a process you can use to minimize the difficulties associated with breaking bad news. Both the **C-SWOT** and the **PLA-Squared Model** have been field tested in a variety of settings including law firms, healthcare organizations, insurance companies and small businesses.

### *Three Universal Principles*

When we consider delivering bad news, certain universal principles apply. First, the skills required to deliver bad news are teachable and therefore are learnable. Second, delivering bad news is seldom easy and is always uncomfortable. Third and finally, learning to deliver bad news thoughtfully, enhances trust in client-attorney relationships, is ethically appropriate and makes good business sense. While it is an absolute truth that everyone encounters situations that include breaking bad news, few of us have had any formal training on the subject. Intuitively, we also all know that Sophocles was correct when he said “*None love the messenger who brings bad news*” (Sophocles 496-406 BCE), therefore knowing how to break bad news is an important skill to develop.

### *Bad Is In the Eye of the Beholder*

Bad news, like beauty, as the saying goes, is in the eyes of the beholder. As a practical matter, news can be characterized as “bad” when it reflects the gap between expectations and outcomes. The gap between expectations and outcomes is likely, at a minimum to provoke disappointment and may result in anger, hostility and blame. Take for example, losing a motion for summary judgment when the case law seemed clearly favorable. Your expectations were created based on your analysis of the facts and the case law. They were also demonstrated in the brief you prepared in support of your motion for summary judgment to the court. When your motion was denied, a gap was created between your expectations and the outcome. How did you feel? What did you think about having to break the news to your client? Will the client have faith in you and the plan you must recommend as a next step in the litigation?

Imagine another scenario: you have a settlement offer on the table that your client perceives as being too little or too much. Either way, you as the bearer of bad tidings and as the client’s lawyer, must recognize your client’s negative reaction and help them manage the gap between their view of an appropriate settlement and the various alternatives that are available. Conducting a **C-SWOT** analysis can help resolve this situation.

There also are times when the information you must manage would be seen as bad news by any reasonable person. Examples include discussing the death of a client’s loved one, the failure of a business endeavor resulting in loss of money and the ensuing litigation; or having to implement staff reductions and lowering compensation at your firm. The consistent thread in each of these examples is the presence of loss and the potential for harm to the future of those affected. The PLA Squared Model can be especially useful for these types of situations.

It is easy to see that bad news can take a toll on both the recipient of the news and the messenger. It is not an accident that messengers are often blamed for the messages they deliver. Fear of being blamed makes delivering bad news especially difficult. However, being unprepared due to little or no training in basic communication skills and not having a model or tools to use increases the risk of making things worse due to the manner in which the bad news is delivered. Additionally, without tools and training it is likely that you will feel heightened anxiety when you are the messenger.

From the moment an inquiry is made about representation through to the disposition of a case, there is the potential for having to deliver bad news. For example, a woman calls inquiring about representation because her brother died in an automobile accident in which the front tire of his car failed causing him to lose control and strike a bridge abutment.



You decide to meet with her in person to assess the case. You and your paralegal review the matter carefully and then determine that the facts and the potential costs of pursuing the litigation do not support initiating representation. When you tell the prospective client during a second meeting “No, I am sorry, we cannot accept your case.”, she becomes tearful, but quickly regains her composure and angrily says “My brother is dead and you are only thinking about the money. The tire, the tire, it was less than a month old and it failed, it exploded. I think the tire manufacturer...maybe even the tire store who sold it...are responsible for Charley’s death and I want to sue them!” There is nothing surprising about the surviving sister’s response. The **C-SWOT** could help you manage this situation if you use it to explain your analysis of the case to the deceased man’s sister. **PLA-Squared** can provide guidance and structure regarding how you deliver the message that you cannot accept the case.

Another difficult conversation can occur during discovery. During a deposition your adversary is aggressively questioning your client. You and your client expected the deposition to be two hours long however it has taken the entire morning and appears that it will take another two hours after lunch. Your client is rattled and annoyed. During the lunch break he seeks direct guidance regarding a question posed by your adversary. You decline to provide the guidance, explaining that he remains under oath and that you cannot coach him regarding the content of his answers. He looks at you and says, “I thought you were my lawyer and that I could count on you to help me. I guess I was wrong.” He clearly feels let down and perhaps abandoned by you, his lawyer. In this situation the client does not understand the rules, roles and limitations you ethically must abide by, therefore he has erroneous expectations. There is a gap between expectations and outcomes that results in you having to tell the client you cannot help them in the manner they wish to be helped. Using the **PLA-Squared** Model with the client prior to the deposition to realistically frame rules, roles, responsibilities and expectations can be a pre-emptive strategy for mitigating potential bad news.

### *A Few Words on Communication Skills*

What you intend to communicate must be congruent with the style you use to deliver the message. To inform or get a task accomplished, your communication style needs to be direct, clear and convey what you expect to have done. If your intention is to establish trust, you must be honest and understanding; excellent listening skills are essential to establishing trust. When you want to learn more about a particular fact, opinion or perception, your communication style should be inquisitive. That is, do not deliver a declarative message when you really want to ask a question.

Sitting down and repeating what you heard to demonstrate understanding are powerful ways to enhance communication. Lowering the tone of your voice and confirming that your client was heard and understood helps establish mutual understanding. Nodding affirmatively to encourage further disclosure is also a powerful non-verbal way to establish and maintain congruence between intentions, communication and actions. Congruence between your words, emotions and actions is especially important when breaking bad news lest your behavior be perceived as untrustworthy or ineffective.

### *The C-SWOT: Case Strengths, Weaknesses, Opportunities and Threat Analysis*

The **C-SWOT** is an effective way to examine each case by reviewing the strengths and weaknesses and comparing these to opportunities and threats. The Strength-Weakness assessment should focus on internal case issues, whereas the assessment of Opportunities-Threats addresses external issues. Identifying and writing these observations in one place enables you and your client to

see the bigger picture at a glance, thereby identifying the known major factors affecting expectations and the case itself. The C-SWOT analysis also can serve as a strategic planning and decision-making aid within the trial team.

*How to Conduct a C-SWOT Analysis*

First, focus on the strengths of the case. Identify the facts, the supporting statutes, case law, expert witnesses and your client’s strengths. Using the four-quadrant model, fill in as many strengths as you can in the top left box. Spell them out clearly and honestly – and don’t be modest. Typical questions you might ask are:



- What do statutes say or require? How do they strengthen the case?
- What case law applies and how does it add strength to the case?
- Identify your witnesses’ (expert and lay) substantive and communication strengths.
- Discuss and identify the skills/knowledge each member of the trial team brings to the table.
- What strengths does the client bring in terms of credibility, likeability and communication skills?

Then move to the top right quadrant, filling in as many weaknesses or areas that represent internal factors that may threaten achieving the goals of the litigation. Ask these types of questions:

- What do statutes say or require? How do they weaken the case?
- What case law applies and how does it weaken the case?
- Do the experts and client communicate clearly, understandably and credibly?
- Does the client have reasonable expectations regarding the case?
- Does the client have the mettle to pursue the case through to a trial if necessary?
- Do I have adequate time, money and talent to take on this case?

Now it is time to look outside of yourself and your trial team. This inquiry is essentially focused on environmental issues that may have an effect on the case. In the bottom left quadrant, identify areas such as:

- What opportunities exist to maximize resources you intend to use?
- Who can add value to the trial team from within the firm?
- Are there opportunities for a trial consultant to assist in the case? If so how?
- What technologies are available to help present the case?
- Does the case offer any practice development opportunities?
- Does the case offer an opportunity to maximize the synergy between you and your client?

Next in the bottom right quadrant, list those factors that may threaten the success of the litigation. These might include:

- Lack of time and resources
- Stress, travel and being away from home for extended period of time
- Client is not likeable and is inconsistent relative to the facts
- Difficulty finding appropriate experts
- Pre-trial publicity
- Conflict among members of the trial team

### *C-SWOT Analysis Results*

The **C-SWOT** will provide you with a profile of the case and enable you to weigh the pros and cons. More importantly however, the **C-SWOT** provides a basis to identify and develop consensus around each element of the case between you, members of the legal team and the client. Additionally, a **C-SWOT** enables you to minimize the gap between client expectations and outcomes over the course of the litigation, thereby reducing the likelihood of having to deliver bad news. The **C-SWOT** also provides a method to strategically plan litigation resources and manage identified risks.

### *The PLA-Squared Model (P<sup>2</sup>L<sup>2</sup>A<sup>2</sup>)*

**PLA-Squared Model** is an acronym based upon the following words: plan/prepare, listen/learn, and alternatives/actions. The model suggests specific behaviors and ideas for your consideration when you are confronted with having to deliver or break bad news to a client or colleague. The model is a generic framework for structuring difficult conversations. The model was originally developed for use in a business setting and bears many similarities to models used by healthcare professionals. The model includes specific guidance regarding preparation, learning, posing alternatives, as well as supporting and empathizing with clients. The fundamental premise of the model is that preparation, excellent communication and shared understandings will make the task of delivering bad news more effective and less stressful for all parties.

### *Plan and Prepare:P<sup>2</sup>*

When you run into a situation that requires you to break bad news, assuming you have done a **C-SWOT** as part of your case preparation, you will have already identified potential weaknesses and threats. The **C-SWOT** thus reduces some of the destructive impact that comes from surprising your client with bad news about their case. In fact, in our experience we have seldom seen a situation in which bad news was delivered that did not relate to a known weakness in the case or an anticipated threat from an adversary. The exception to this occurs when unanticipated changes in the law framing the litigation or the transaction change the fundamental nature of the goals, structure, plans and outcomes.

Being prepared therefore, means anticipating the foreseeable problems that may arise during litigation and having mapped out a plan to manage them. Being prepared also means having tools and methodologies to manage unforeseen changes in the law. In either case, however, the most effective plans for delivering bad news will address timing (when); the setting you choose to use to break the bad news (where); knowing what the facts, issues and findings related to the bad news are (what); and having identified the key stakeholders (who). Being honest and realistically empathizing with the client's dismay over the bad news provides guidance regarding your behavior and the tone of your speech.

An additional element in planning and preparing is rehearsing. Just as you would plan, prepare and rehearse an opening or closing argument before a trial, you will want to rehearse delivering bad news. This does not mean developing a presentation and memorizing it. It does mean knowing what you want to communicate and having practiced your delivery to the point that you are comfortable with what you intend to say and how you intend to say it. In every instance, there must be congruence between your delivery, your concerns and the impact of the bad news on your client.

### *Listen and Learn: L<sup>2</sup>*

No matter what the circumstance are when you are breaking bad news, it is essential that you listen to your client and members of the trial team. Effectively listening will enable you to learn what their expectations are. You no doubt recall we operationally defined "bad news" as the gap between expectations and outcomes, therefore knowing a client's or colleague's expectations positions you to manage the bad news or gap between their expectations and the emerging status of the case.

Listening to your client and learning about prior experiences and knowledge provides an opportunity to identify and reframe pre-existing events, ideas and emotions that may be creating erroneous expectations. Like jurors, clients have biases that have been influenced by prior events and ideas. Unlike your interactions with jurors, you have the opportunity learn as much as possible about your client's prior experiences, beliefs, ideas and the way they impact expectations regarding the litigation. Inquiring about a client's history, experience and knowledge followed by thoughtful listening positions you to work with their biases to better represent them.

Employing a learning style that includes attentive, active listening will result in getting more and better information; combining listening and learning (L<sup>2</sup>) is congruent with your interest in the client's wellbeing and will enhance trust between attorney and client.

### *Alternatives and Actions: A<sup>2</sup>*

A previously completed **C-SWOT** analysis will have identified strengths and opportunities that often can be used to generate alternatives and action steps in response to bad news regarding the case. After discussing the bad news among members of the legal team, we recommend that you generate a list of potential alternatives and actions that address the issues that are creating the gap between expectations and outcomes. Each alternative that you identify as a possible response should have a suggested action step attached to it. The list of alternatives and action steps can then be presented to the client for explanation and further discussion.

In certain instances the choices that are available may be limited due to court rules, judicial findings or changes in law or regulations. These situations need to be carefully and thoroughly analyzed and explained along with any alternatives that may be available. When alternatives and actions appear to be limited, it is important not to rush the client to a decision if that can be avoided. Remember, in many instances the client has little or no experience with legal matters and certainly has less than you, so they are likely to need more time to process the information and manage their disappointment, anger or outrage. Additionally, you also must not lose sight of the fact when you are breaking bad news that the client may be hearing something for the first time whereas you have had more time to consider the issues. In situations that are particularly complex or emotional it may be a good idea to bifurcate breaking the bad news from exploring alternatives and actions by several hours or days, as time allows.

### *Conclusion*

Using the **C-SWOT Analysis** process and the **PLA-Squared Model** adds structure, reduces ambiguity and consequently reduces anxiety when you encounter a situation in which you have to break bad news. Lawyers and trial consultants who use it can reduce fear and enhance effectiveness for themselves and their clients. By helping your client and your colleagues manage the gap between expectations and outcomes you help them reduce ambiguity, reframe erroneous expectations and become more effective members of the litigation team. The benefits for you are significant too. If you are not preoccupied about how to deliver bad news, you can devote your energies to what needs to be said and the best way to say it while representing your client's best interests.

### *End Notes for Further Reading*

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2. Grant, M., Letts, EM. Yikes! How to deliver bad news and disclose mistakes. Solo Magazine, American Bar Association, 2008 [http://www.americanbar.org/content/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/yikes.html](http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/yikes.html)
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C-SWOT Analysis Checklist	My Case	Adversary's Case
Strengths	<input type="checkbox"/>	<input type="checkbox"/>
Weaknesses	<input type="checkbox"/>	<input type="checkbox"/>
Opportunities	<input type="checkbox"/>	<input type="checkbox"/>
Threats	<input type="checkbox"/>	<input type="checkbox"/>
Use the C-SWOT as an assessment tool and to establish realistic expectations between legal team and clients.		

<b>Breaking Bad News</b> <b>The PLA-Squared Model Summary</b>
<b>Plan-Prepare-P<sup>2</sup></b>
When-timing
Where-setting
What-content
Who-messenger & recipient
How-method
Practice-script & rehearse
Identify-expectations
<b>Listen-Learn -L<sup>2</sup></b>
Listen Actively
Learn what your client knows/doesn't know
Listen to establish shared goals
Learn to establish trust
Listen for emotional content
Learn to establish congruence
Listen for gaps between expectations & outcomes
<b>Alternatives &amp; Actions-A<sup>2</sup></b>
Explain Limits
Identify Alternatives
Respect Disappointment
Pace Reasonably
Review Intentions
Propose Actions
Evaluate Outcome
Using the PLA-Squared approach to break bad news reduces ambiguity and provide a basis for attorneys and trial consultants to enhance relationships with clients and members of the legal team.

## *Are Your Jurors Mad or Sad? How Emotional Blunting May Influence Their Judgments in the Courtroom*

BY KAREN PAGE WINTERICH

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Contrary to Dr. Spock's steady stoicism throughout the classic Star Trek series, human beings typically experience different, and sometimes strong, feelings throughout the course of a day. We may feel angry when we get cut off in traffic, experience sadness when we hear the news of a friend suffering from illness, or have a sense of pride when someone compliments us on a job well done. These everyday emotion experiences are common occurrences, but only recently have the effects of these emotions on individuals judgments and decisions been investigated; though even Aristotle (350, B.C.E./1991) suggested that emotions may influence human judgment.

Researchers generally agree that emotions can and do have a substantial impact on our decision-making, even in the context of legal judgments in which emotions may be expected to be sidelined for more rational, cognitive judgments (Blumenthal, 2005; Feigenson, 2009). Though research has provided much insight into the role of emotions in judgments, this research has tended to focus on the effect of one particular emotion experienced at a given point in time on a specific judgment or decision.<sup>1</sup> However, emotions may be experienced in a sequence. For instance, I may be angry upon my arrival at work because I got cut off in traffic, but subsequently may experience sadness upon finding out at work that my grant proposal will not be funded due to budget cuts. Acknowledging that the anger we experience on our way to work may subsequently influence our judgments, isn't it possible that this anger may also influence any subsequent emotion experiences? In the context of juror judgments, imagine that the prosecution, in its opening statement, elicits anger in several jurors. Then, as the defense makes its opening statement, this subset of jurors are already experiencing anger. Will any potential sadness-eliciting stimuli presented by the defense result in the same experience of sadness among the subset of jurors already experiencing anger compared with those jurors in whom the prosecution has failed to elicit anger?

This article discusses how emotion experiences may not only influence legal judgments, but may also influence subsequent emotion experiences, specifically through emotional blunting, as well as subsequent judgments. In doing so, we draw upon the appraisal-tendency framework (Lerner &

<sup>1</sup> We note exceptions to this which include research examining mixed emotions, or the experience of several different emotions at a given point in time. For example, Ramanathan and Williams (2007) considered how experiencing both happiness and stress result in over indulgence on subsequent choices.

Keltner, 2001) which has previously been used to understand the effect of one emotion at a given period of time on a judgment. Presenting the occurrence of emotional blunting, legal scholars, judges, and attorneys may want to consider the extent to which the emotion experiences elicited in jurors that may affect decision-making may be altered by juror's current emotional state.

### *What is the Appraisal-Tendency Framework?*

First, the appraisal-tendency framework (ATF; Lerner & Keltner, 2000; 2001) assumes that emotions are characterized by cognitive appraisals. That is, each emotion arises from a specific set of thoughts about a situation (Ellsworth & Scherer, 2003; Lazarus, 1991). For instance, if an individual appraises a negative event (e.g., a car accident) to be controlled by other individuals (e.g., bad drivers), she will experience anger. If, however, she appraises the event to be controlled by the situation (e.g., bad weather), she will experience sadness (Smith & Ellsworth, 1985). Second, the ATF assumes these cognitive appraisals of a situation not only determine the emotion experience (i.e., anger or sadness), but they also shape perceptions of subsequent unrelated situations, which are referred to as "appraisal tendencies". In other words, emotions influence judgments and decisions through our tendencies to view a specific situation or decision in line with the set of thoughts we have from an emotion we are experiencing at that moment. For instance, an individual may experience anger after being cut off in traffic. Consequently, the appraisal tendencies activated by anger – that is, appraisals of certainty and of human control – carry over and shape subsequent perceptions. The resulting effect may be that the angry (vs. neutral) individual makes riskier judgments in subsequent settings (e.g., risk estimates for life events, Lerner & Keltner, 2001; Litvak & Lerner, 2009). However, these same appraisal tendencies – say certainty and human control if angry – may also influence subsequent emotion experiences.

### *How does the ATF affect Emotion Experiences?*

Imagine that a parent experiences anger after hearing about a student that got into a fight with their child. Will that parent be less likely to experience sadness when they learn that a different student in their child's class is ill? Drawing from the ATF, we reason that the subsequent emotion experience of sadness will be influenced by the appraisals of the current emotion experience, anger. Specifically in the case of sadness and anger the appraisals, or characterizations of situations leading to these emotions, are contrasting. That is, anger is characterized by certainty and human control whereas sadness is characterized by situational agency, or situational circumstances beyond human control.

When the parent is experiencing anger and thinking in terms of individual, human control such that the child's behavior was caused by his argumentative nature rather than the specific situation that provoked the child, this parent is likely to have a difficult time subsequently experiencing sadness because it will be more difficult for the parent to switch from thoughts of individual, human control to that of situational control wherein any child would have reacted in the same manner given the specific situation. In such circumstances, the subsequent experience of sadness is blunted by the current experience of anger. This blocking or minimization of sadness when experiencing anger or vice versa is referred to as *emotional blunting*. Therefore, just as psychologists may understand that experiencing anger may cause individuals to perceive events more optimistically and be more punitive, anger may cause individuals to be unable to experience sadness to the same degree as those not currently experiencing anger, or otherwise in a neutral state.

### ***1. Emotional Blunting in the Courtroom: Your emotional evidence or testimony won't elicit the juror emotion or the juror judgment you anticipated.***

Given that one emotion experience can thwart a subsequent emotion experience through emotional blunting, what should legal scholars, jury consultants, and trial attorneys consider in forming legal policies, instructing jurors, and presenting their case? In considering how emotional blunting may have a role in the courtroom, it is important to recognize that there is a multi-step process that moves beyond the existing emotion-to-judgment two-step process addressed in past research. Instead, there is a three-step process: 1) existing emotion – 2) subsequent emotion – 3) judgment. Therefore, we first consider the extent to which juror emotions may be influenced and then consider how this may affect juror judgments.

#### ***A. Unanticipated Juror Emotions***

Jurors may experience sadness or anger, two negative emotions that may result for a variety of reasons including viewing graphic photographs, videos, or other evidence (Adams, Neal, Titcomb, & Griffin, 2010). If a trial lawyer anticipates jurors will experience sadness or anger from the information presented at trial, they should recognize this emotion elicitation is only likely occur to the extent that jurors are not already experiencing an emotion with contrasting appraisals.

A prosecutor may attempt to elicit anger in the jury when detailing the defendant's alleged crimes. In so doing, jurors' appraisal tendencies are likely to be focused on individual control. Then, when the defense attorney attempts to elicit sadness in the jury, they will likely be less successful in this attempt than they would if the jury was currently in an emotionally neutral state. The information that the defense attorney presents to elicit sadness may be interpreted as being controlled by the individual, only heightening or maintaining the current experience of anger rather than eliciting sadness. Alternatively, jurors experiencing sadness, perhaps intentionally elicited by the defense lawyer or even from situations unrelated to the trial, may subsequently experience less anger when the prosecution presents information suggesting that the defendant not only committed the behavior but is also personally responsible for the behavior. When jurors experience sadness, their appraisals of situational control may color the interpretation of the information presented by the prosecution minimizing the experience of anger the prosecution is trying to elicit.

#### ***B. Unanticipated Juror Judgments***

Perhaps more important than jurors' unanticipated emotion experiences is the effect that emotional blunting may have on juror judgments. Research concludes that if individuals are experiencing anger, they are likely to attribute more responsibility to an individual and make more punitive attributions than those who are not experiencing anger, even when the anger is not related to the judgment (Lerner, Goldberg, & Tetlock, 1998). Thus, if jurors are not experiencing the sadness that a lawyer anticipates due to emotional blunting (i.e., jurors are experiencing anger from the prior witness' statements or otherwise), they will also be unlikely to have the same judgments that the lawyer might expect if they were experiencing sadness as intended. That is, if the prosecutor successfully elicited juror anger, this anger could subsequently prevent jurors from feeling sadness and acknowledging



the situational factors associated with the case. This blunted sadness could thereby cause the jury to hold an innocent person wrongfully accountable for a crime because of greater perceptions of the defendant's responsibility for the crime. Moreover, this blunted sadness could result in more severe sentencing decisions by jurors.

At the same time, if the defense successfully elicits sadness in the jury in closing argument, the prosecution's subsequent attempt to elicit anger may be unsuccessful, as addressed earlier. However, this blunted anger experience also means that the jury will be less likely to hold the defendant as responsible for his/her actions and thus more likely to recommend a lesser penalty than it otherwise would (i.e., if they were not experiencing sadness but rather were in a neutral state at the time of the prosecution's closing argument). Considering the effects of emotional blunting not only on subsequent emotions but also on juror judgments, the order in which the prosecutor and defendant present evidence, question witnesses, and make opening and closing statements could have far-reaching implications.

## *2. Emotions Elicited Outside the Courtroom Matter Too*

In addition to lawyers considering the emotional state of the jury based on information presented in the trial to determine how to best present their case based on expected juror judgments, it is also important for lawyers to consider emotional states that jurors may be experiencing from situations outside of trial. If jurors experience sadness from being sequestered or anger from how they are being treated by other jurors, these emotion experiences will also blunt the experience of subsequent emotions that are characterized by contrasting appraisals. That is, emotional blunting does not arise only in the case of subsequent emotions that are related to the situation eliciting the current emotion. Emotional blunting also occurs when the situation that presents the subsequent emotion-eliciting event is unrelated to the situation that prompted the current emotion experience.

## *3. Emotional Blunting Extends Beyond Anger and Sadness*

Though the present research on emotional blunting examined anger blunting sadness and vice versa, lawyers, judges, and consultants should not limit their consideration of emotional blunting to these emotions. Based on the theory of emotional blunting, any emotion experience (e.g., fear, hope) may blunt the subsequent experience of any emotion (i.e., anger, pride) as long as the characteristics or appraisals of the subsequent emotion *contrast* with that of the current emotion experience. When considering emotions that may be elicited in the courtroom from trial information as well as those that may arise from situations experienced outside of the courtroom, there is an array of situations in which emotional blunting may occur.

## *4. Subsequent Emotion Experiences May be Augmented Too*

Though the present work focused on when an emotional experience may be inhibited based on a current emotion experience, it is important to note that when the appraisals of a subsequent emotion experience are *consistent* with the current emotion experience, that emotional experience may be heightened. That is, if an individual is experiencing anger and experiences a subsequent anger-eliciting event, the anger that is experienced may be greater than if the second anger-eliciting experience occurred when one was in a neutral state. Further, if an individual is angry and subsequently is shown

very graphic images that elicit feelings of disgust, the disgust experience may be more extreme than if the individual had not been experiencing anger when exposed to the disgusting images. This effect of emotional augmentation is likely to occur because the human, individual control appraisal associated with the anger experience is consistent with the appraisal typical of experiencing disgust.

Jurors' emotional experiences, both in and out of the courtroom, may have substantial implications on the extent to which jurors may subsequently experience emotions sought by the prosecution and defense in their case presentations. More importantly, this emotional blunting will subsequently affect jurors' judgments. Additional research is necessary to investigate the extent to which emotional experiences can also augment subsequent emotion experiences and juror judgments. The need for legal scholars, trial lawyers, and jury consultants to understand emotional blunting processes is even more pressing because most people are unaware of the effect of their current emotional state on their subsequent emotion experiences and judgments. In a test of lay intuition for emotional blunting (Winterich, Han, & Lerner, 2010), people not only lacked awareness of these effects, but they also denied the possibility. Knowing the juror's base emotional state may be just as important, if not more important than the emotions that one hopes to elicit.

Based on the extension of appraisal-tendency framework to emotion experience and our research findings, we make the following recommendations for litigation advocacy:

1. *Neutralize jurors.* Do not assume jurors' emotions won't affect their judgments. If you can see that jurors are angry or sad, attempt to bring jurors to a neutral emotional state before presenting your arguments. This may be done by reporting factual, unemotional information or reminding them of everyday, unemotional events (e.g., "Most of us get up in the morning, brush our teeth, have coffee or tea and breakfast, and go to work.") before presenting critical evidence or questioning a witness.
2. *Elicit cognitions, not emotions.* When making your case, do not try to make jurors feel a specific emotion such as anger, injustice, sadness, or fear. Instead, emphasize why the defendant was or was not responsible for their behavior, *how* the situation could or could not have been controlled. If you can have the jurors hold these key beliefs in their thoughts, then these thoughts rather than emotions should guide their judgment.
3. *Raise awareness.* Tell jurors that they might be feeling lots of different emotions and these emotions may lead them to make a certain judgment. Make them aware of why they are feeling these emotions (e.g., "You just heard testimony from the victim's mother who is clearly very angry about the murder of her daughter.") and that they should refrain from using how they feel as *information* to reach their verdict (e.g., "Her anger does not make the defendant guilty"). If jurors can attribute their emotions to the heart-wrenching testimony of a witness, victim, or defendant, then they are less likely to use this emotion in making their decision.

***Don't miss the trial consultant responses after the Reference list!***

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*We asked three trial consultants to respond to Karen Winterich's article on Emotional Blunting. On the following pages, Katherine James, Susie Macpherson and Tammy Metzger offer their thoughts.*

## *Katherine James responds:*

*Katherine James is a trial consultant who specializes in witness preparation and attorney training. She partners with Alan Blumenthal at [ACT of Communication](#).*

This interesting and insightful article puts science behind a concept many of us have been working with for a long time. Thank heavens for Winterich! We now have a reference when explaining to attorneys why they must:

- Choose the right emotional state that they want for the jurors and don't try to switch it up too quickly if they are going first.
- Either embrace or neutralize the emotion in the courtroom if they go second.

For example, many plaintiff's lawyers want to make jurors angry for liability and sad for damages. Common wisdom says that an angry jury is better than a sad jury for the plaintiffs...and now we have a study to back up that theory. Winterich has also given us a good basis for keeping jurors angry rather than trying to switch them to sadness when discussing damages.

In the same light, many civil defense lawyers want to stand up and solemnly say, in essence, "Don't feel what you are feeling - there is another side to this story." Winterich's work shows us that this, too, is not possible. Finding a neutral segue with which to start, say, a defense opening, is not easy. Especially at a time when emotions are riding high.

The term "emotional blunting" is very descriptive. As soon as I read this article, I was able to use the term and the research to help an attorney as we were crafting an opening. Thank you, Karen Winterich.

“Knowing the emotional base states of the jurors may be just as, if not more, important as the emotions one hopes to elicit.”

A COMMENT ON WINTERICH BY SUSIE MACPHERSON

*Susan Macpherson is a founding member and Vice President of National Jury Project's Midwest regional office located in Minneapolis. She has been conducting jury research since 1976, and has advised attorneys across the country on complex commercial, antitrust, intellectual property, class action, and criminal cases.*

The best advice in this article might be overlooked because it is not included in their formal recommendations: “Knowing the emotional base states of the jurors may be just as, if not more, important as the emotions one hopes to elicit.” Jurors do not come into the courtroom as emotional blank slates, or with slates that can be wiped clean when the judge explains that they must be impartial. Each juror’s view of the arguments and evidence is determined in part by the emotional response it triggers, and as the authors suggest that response can be blunted by the individual juror’s emotional base state. That is why it is essential to identify in voir dire the jurors who are already angry or hostile.

Many people are unhappy when they report for jury duty, and in jury selections for longer trials, it is not unusual to see people who appear to be downright angry. The challenge is to sort out those who display what the authors refer to as augmented anger from those merely irritated at the significant disruption of serving on a longer trial. As discussed in the article, jurors in the former category are predisposed to make punitive judgments. In a criminal trial, a juror’s anger is obviously more likely to have a negative influence on judgments about the defendant and defense arguments. However, in a civil trial, a base state of anger may influence judgments about either plaintiff or the defendant depending who the juror sees as being (more) unreasonable.

Given the inherent limitations of voir dire, it is often difficult to assess emotional base states. But as a growing number of jurors experience unemployment, foreclosure, and bankruptcy, it becomes more important to do so. In my experience, the best clues are going to come from tone and content of jurors’ narrative responses to open-ended questions and carefully observing patterns of nonverbal behavior. Asking a juror to talk about his/her home life and occupation will often provide a better indication of emotional base than questions probing attitudes and opinions on issues relevant to the case. Jurors let their guard down when talking about themselves because they don’t have to sort out the socially desirable answer, and because biographical responses usually elicit longer narrative responses. We look for evidence of underlying anger that leaks through, such as clipped or terse speech and vocal tension, as a juror describes what she likes and dislikes about her job and explains in more detail what is involved in doing her job. When using a written questionnaire, this is one reason to consider leaving off some of the basic background questions and asking those questions during voir dire.

The authors’ recommendations to “neutralize jurors” and “elicit cognitions, not emotions”

seem curiously at odds with their earlier discussion of how emotion influences juror judgments. No support is provided for the concept of a “neutral” state or for being able to separate cognition from emotion. That aside, these two recommendations seem to stem from the assumption that jurors’ judgments at trial are the product of a serial decision making process (the “three step process”), rather than the process of constructing a story as a framework for decision making. The story model of juror decision making explains why blunted emotional responses, which undoubtedly occur, do not necessarily determine how jurors ultimately decide the case.

The authors’ third recommendation, to raise awareness, is an effective and underutilized approach for attorneys, as well as judges, who are anticipating arguments, testimony, and other evidence that will trigger strong emotional responses. The traditional approach is to tell jurors to “set aside” and essentially ignore their emotional responses. That instruction may fit the requirement of impartiality, but does not fit the reality of how jurors process what they see, hear, and feel during trial. If the goal is to reduce the impact of emotional responses on decision making, it is more effective to encourage jurors to do the opposite; that is, pay close attention and actively monitor how their emotional reactions are influencing their judgments during trial. Forewarning has been shown to reduce the impact of subsequent emotional appeals because it encourages the listener to be looking for more subtle appeals or triggers that might otherwise escape their notice. That said, the greatest benefit of such a forewarning in the context of a jury trial may be that it encourages jurors to discuss this issue during their deliberations and call each other on decisions that appear to be driven by emotions rather than evidence.

## ***Tammy R. Metzger Responds to Winterich:***

*Tammy Metzger, J.D., M.A. is based in Orange County, California and offers litigation support and MCLE trial advocacy workshops nationwide. She worked in-house at a plaintiff products liability firm for five years, with prosecutors at the local, state and federal levels and at UC Santa Barbara as a researcher and instructor.*

The appraisal-tendency framework (ATF) sheds light on tried and true trial practices, including two newer, effective trial approaches: *Rules of the Road*, by Rick Friedman & Patrick Malone and *Reptile*, by David Ball & Don Keenan. This mechanism helps explain juror decision-making in surprising verdicts, which I describe in two case studies. Utilizing the ATF can help attorneys optimally sequence evidence and make their strongest points when jurors are most open to reconsider their assessments. It also clarifies how jurors perceive risk, causation, blame, and guilt. I believe the ATF offers enormous potential for advancing communication strategies.

Dr. Winterich and her colleagues have taken an important step towards understanding how emotions affect subsequent emotions and verdicts. They provide us with a better understanding of how jurors become angry or empathetic, i.e., want to punish or help. (Empathy is often related to sadness, which is discussed below.) I was impressed with the authors' robust statistical analyses in the original journal publication (Winterich, Han & Lerner, "Now That I'm Sad, It's Hard to Be Mad: The Role of Cognitive Appraisals in Emotional Blunting," *Personality and Social Psychology Bulletin*, 2010, 36, 1467-1483). By integrating these findings with knowledge from other fields and utilizing additional methods to measure emotion and decision-making, mock trial research provides unique insight into the human mind and practical, powerful applications for attorneys.

### ***EMOTIONS AND THEIR COGNITIVE APPRAISALS***

Research from the neurosciences tells us that all judgments are a blend of emotion and reason and that without input from our unconscious, emotional "primitive brain," people are unable to make the most mundane decisions. (See *How We Decide*, by Jonah Lehrer (2009), for a good overview of recent neuroscience research.) Emotional reasoning provides seasoned attorneys with their courtroom instincts. But in novel situations, such as jury service, emotions can lead to befuddling verdicts.

Even the most experienced experts can be led astray by snap judgments. Conversely, thinking too much causes us to focus on variables that don't really matter. (See *id.* at 142). A critical function of our rational mind is to make sure that our emotional judgments are properly applied to a given situation. By understanding how emotions interact and affect decisions, attorneys can help jurors make better decisions and mitigate reasoning errors.

### ***Anger Motivates People to Punish, Seek Revenge and Exert Control***

Trial consultants have known that angry jurors are more punitive towards criminal defendants, and they return larger verdicts in civil cases. Our observations have provided a richer basis for explaining how anger motivates people to punish, seek revenge, and exert control. With Dr. Winterich's research, we can further clarify that anger interferes with jurors' ability to feel sadness and to empathize with criminal and civil defendants, which can result in harsher verdicts.

Anger tells us that something needs to change. Anger is energy directed outward when there is interference with a goal, an unfair loss, mistreatment, a threat, social norms are violated, a lack of justice, a sense that something shouldn't happen, etc. Anger drives us to overcome obstacles and control our environment so we can reach our goals, instead of fearfully anticipating pain or sadly accepting a loss.

There is a strong physiological response associated with anger, as we instinctively prepare to fight, which may be why it takes so long for anger to dissipate. Long ago, anger protected us from threats of physical harm, but today it usually protects threats to our ego, i.e., our sense of self and our values.

### *Anger, a “Secondary Emotion,” Masks Other Emotions*

The function of anger is often to mask our first emotion so that we appear strong, instead of wounded, scared, or otherwise weak. Psychologists call anger a “secondary emotion” because it almost always follows an initial emotion. Thus anger is not one distinct emotion and there will be somewhat different cognitive appraisals. The main features of anger are similar and it often suppresses sadness. Thus, a well-designed experiment should be able to highlight the mechanisms by which anger blunts sadness. And I agree with the Dr. Winterich’s findings, that the converse is also true. Sadness, characterized by losses that are out of individual human control, can diminish anger, where there is blame or a way to remedy the situation.

All of us have experienced the fatigue of sadness and know firsthand that we are less likely to then feel or sustain a high-energy emotion, such as anger. This is because we generally conserve energy when we do not know what to do, by not getting angry about things out of our control or not worrying (*Reptile* elaborates on this). Consequently, we do not prepare to act, and we try to ignore the issue.

Emotions can combine and coexist together or alternate in rapid succession, whereas certain combinations, such as sadness and anger, can interfere with each other. Our emotions are usually unconscious, where they direct our attention, which drives learning, memory and problem-solving.

### **APPLICATIONS TO TRIAL ADVOCACY**

The ATF mechanism is constantly at work, during trials and in our daily lives. Case Study 2 discusses this blunting of anger in a benzene case, after defense attorneys pointed out to jurors that they, like the plaintiffs, are unavoidably exposed to the same chemicals that gave rise to the plaintiffs’ lawsuit. Jurors are less inclined to want to punish a defendant when no action is required, i.e., when expending energy will not return a benefit.

The emotional risk calculation occurs in the unconscious mind, where thinking is done in black and white, and risks are not distinguished by severity. Therefore, jurors assume that if the benzene off-gassing from the courtroom walls (out of their control) is nothing to worry about, then the benzene that the plaintiff was exposed to is similarly nothing to get angry about because nothing could have been done to protect the plaintiff’s (or the jurors’) safety. (See *Gut Feelings: the Intelligence of the Unconscious*, by Gerd Gigerenzer (2007), which explains decision-making heuristics; i.e., “rules of thumb,” often unconscious.)

Pointing out other exposures also reduces jurors’ certainty that the defendant’s product actually caused the harm, which also reduces anger and the desire to punish (although jurors in Case Study 2 assumed causation, as described below). Conversely, Case Study 1 discusses a trial where jurors’ extreme anger towards the defendant actually resulted in a defense verdict, probably because their anger blunted jurors’ ability to empathize with the plaintiff.

### *Rules and Reptile Approaches Activate Cognitive Appraisals for Anger*

The *Rules of the Road* and *Reptile* are two, well-known, effective trial advocacy approaches that activate cognitive appraisals for anger: certainty, external human control, and a bad outcome. I believe this anger is mostly unconscious, where it drives verdicts by motivating jurors to punish and exert control over their environment, to stay safe, achieve goals, help others, etc.

*Reptile* approaches focus on community safety and emphasize how the defendant’s unnecessary



actions (and similar actions by others) endanger members of an entire community. This activates cognitive appraisals of certainty (with so many people at risk) and outside control, which both increase anger. As described below, anger and fear are closely related emotions and fear causes people to impose higher standards of care on parties that control bad outcomes.

The *Rules of the Road* approach helps attorneys define relevant, clear rule violations, thereby increasing jurors' certainty of fault. Rules can come from industry standards, product labeling, statutes, contracts, jury instructions, expert testimony, procedures manuals, professional literature, ethical codes, common sense, etc. (*Rules* at p32.) The Rules approach gives jurors a sense of certainty, whereas many legal standards are fuzzy.

I wholeheartedly agree with the premise stated on page 1 of *Rules of the Road*: "The defense wields three weapons to defeat plaintiffs' cases that should be won: Complexity, Confusion and Ambiguity." The ATF and other research summarized above help explain why this is true. Certainty and outside control activate anger, which subsequently increases jurors' certainty of their judgments and results in larger verdicts.

This certainty leads to more plaintiff verdicts and higher damages awards, in part, because it is activating an anger appraisal. The methods explained in *Rules of the Road* also activate outside control appraisals in a way that elicits anger, without appearing overtly emotional or manipulative. Jurors are probably not consciously aware of the emotions activated by the *Rules* and *Reptile* approaches; nonetheless, these emotions motivate jurors to control and punish behaviors that wouldn't otherwise cause them concern.

#### *The Rules within a Reptile Framework Prompts Motivating Anger*

One of the reasons *Reptile* and *Rules* approaches work well together is because they both activate the same cognitive appraisals for anger, certainty and outside control. I believe this sense of certainty transfers (via an appraisal tendency) into greater juror conviction of their own judgment, which results in larger verdicts.

David Ball suggested that I distinguish motivating anger (certainty and outside control appraisals) from impotent anger (probably avoidance appraisal). In *Emotional Awareness* (2008), the Dalai Lama and Dr. Paul Ekman define anger as avoidance, i.e., pushing away an obstacle. They also briefly distinguish an aspect of motivating anger, speculating it is a product of individual intelligence, resilience and vitality. David's advice is more practical:

#### **IMPOTENT (Static) VERSUS MOTIVATING (Dynamic) ANGER:**

There are (at least) two kinds of anger: impotent anger, which is anger in the face of a situation you can do nothing about; and motivating anger, which is anger in the face of a situation you can do something about. Use of the Rules in a Reptilian advocacy framework quickly turns the former into the latter by showing that the danger was not an inadvertent "mistake" or "error" -- but was, rather, a knowing and volitional act. As a result, a verdict against the defendant is seen to decrease the chances that other people or companies will violate the same rules. This is an unlikely result when the bad act is seen as inadvertent, which creates impotent not motivating anger, because you "you can't fix inadvertent" so there's nothing to be motivated to do. Many plaintiff's attorneys make the error of thinking that anger is enough; it's far better when the anger moves from impotent to motivational, and the most fool-proof way to accomplish that is by means of the Rules with a Reptile framework. There are other ways to do it but none as reliable.

The "Rules within a Reptilian" approach does not scare jurors; instead it enables them to make themselves safer -- with motivating anger usually (not always) as the catalyst. The result is the emotional change from anger to such emotions as pleasure, satisfaction, revenge

fulfilled, pride and a sense of importance, etc. Hard stuff for a defense to fight.

All this is well beyond the theory stage; the neuroscience folks have seen it, and the string of verdicts (along with what jurors say afterwards) over the past 30 months shows that properly done, the defense is usually powerless to derail it.

I think all these views on anger are correct and that the Rules and Reptile approaches are the products of intelligence, resilience and vitality. They are also blueprints to further direct intelligent, vital energy. Like appraisal tendencies, I think the converse is also true, that when attorneys utilize these approaches, it augments their own motivating anger, which helps focus and energize their efforts. The attorneys, in turn, transfer this motivating anger to the jury as certainty (in their judgment) and a strong desire to control the defendant's behavior, which empowers juries to return larger verdicts.

### ***Lead Characters are Blamed for Controlling Bad Outcomes***

Another common trial strategy, framing the case around the other party, may be more fully understood through the ATF lens. People tend to blame the lead character in the story for causing the bad outcome because that person is perceived as having control over the situation. Accordingly, both sides focus on the other party, opening their story and keeping attention directed there until jurors have attributed blame. Now there is evidence that this framing alone augments angry emotions because it activates cognitive appraisals of external human control and certainty (the jurors already know what happened to the plaintiff).

### ***Anger Limits Our Ability to Consider Opposing Information***

Once jurors are angry, it is difficult to get them to reconsider who is to blame. Emotions limit our ability to consider contradictory evidence that challenges that emotion. The limbic system overrides the rational, conscious mind, thereby sustaining the emotion and its bias. It is unclear how long this information filtering effect persists, probably through the refractory period of emotions, when we discount or ignore knowledge (new and known) that challenges the activated emotion.

The duration of the refractory period varies from seconds to hours, possibly days for very strong emotions, and begins again each time the emotion is reactivated. (See *Emotions Revealed*, by Dr. Paul Ekman (2003), an excellent introduction to emotions and facial expressions.) This may go on until the issue that's creating the emotion is resolved, e.g., when there's a verdict. Strong emotions reduce the windows of opportunity to persuade.

### ***Anger Causes People to Accept Higher Risks***

The role of cause and effect of emotions and cognitive appraisals can be reversed, where emotions actually cause the cognitive appraisals. Winterich et al. discuss "appraisal tendencies," giving the example of the woman, who was angry at the driver who cut her off, later making riskier judgments regarding unrelated matters because the cognitive appraisals of human control and certainty were activated. This would lead an angry person to view risk in a more optimistic way, i.e., accepting higher risks because she assumes that she controls her health.

### ***Cumulative Effects of Emotions Arising from Events Outside the Courtroom***

Dr. Winterich also pointed out that emotions can accumulate, where the feelings jurors bring into the courtroom can augment their reactions to testimony. Since jurors' lives are often impacted by trial, they may be angry or anxious. People expect that jury duty will be frustrating, but if jurors start to blame an attorney for taking far too long to present the client's case, this may trigger additional anger towards that attorney, whose client may be unfairly punished.

Practice Tip: the attorney can mitigate displaced anger by humbly and sincerely apologizing to

the jury for possibly frustrating them, and asking them to direct that frustration towards the attorney herself and not the innocent client. Whenever possible, attorneys should also emphasize to jurors that they are trying to save time.

***Fear Increases Jurors' Perceptions of Situational Causation, Outside Their Control***

Fearful people are more risk-averse and more likely to attribute causation to things outside of their control, whereas angry and happy people are more risk-seeking and more likely to assume they control their health. (Like anger, happiness is also associated with certainty and individual control, but with a positive outcome.) Research also shows that fearful people think things through more systematically whereas happy and angry people rely more on heuristics.

Since this process is outside of our conscious awareness, it may be hard to believe that our emotions can influence judgments about our safety in such an illogical way; however, other research has confirmed this effect. (See Han, Lerner & Keltner, "Feelings and Consumer Decision-making: The Appraisal-Tendency Framework," *Journal of Consumer Psychology*, 17(3), 2007, 158-168.) Study participants were asked to hold their faces into prototypic expressions of sadness and anger, which created the target emotions.

Simply holding sad or angry facial expressions affected people's perceptions of the cause of a negative event. People making sad faces were more likely to attribute the cause of negative events to situational causes, while people making angry faces were more likely to perceive human causes and attribute blame to others. The same effect on risk-assessment was observed by showing participants subliminal images of sad and happy faces. (See Yang & Tong, "The effects of subliminal anger and sadness primes on agency appraisals," *Emotion*, 10(6), 2010, 915-922.)

***Case Study 1 - Medical Malpractice  
Anger Reduces Jurors' Ability to Empathize***

Strong emotions can produce surprising results. A recent wrongful death case provides more evidence of juror anger blunting their ability to feel sadness, which is closely related to sympathy and is sometimes a component of compassion. In this case, an 88-year-old woman died a painful, prolonged death due to an improper medical procedure, resulting in the doctor surrendering his medical license.

The jury was so angry with the defendant that several jurors ran up to the plaintiff's attorney afterwards and asked him to look into filing criminal charges against the doctor. These same jurors had just returned a defense verdict! There was a disconnect; they did not feel an attachment to this woman's family, probably because they were so angry. They explained that the decedent was old and the negligence probably didn't kill her. (See Don Keenan's Reptile Superstar blog on Tommy Hastings at <http://www.keenantrialblog.com>. Click on "Older Entries.")

As seen in this instance, anger is a double-edged sword that is dangerous to both sides because anger limits jurors' ability to analyze problems, is contagious and motivates strong action, not just to punish but also to control. When we add the findings of Dr. Winterich's research, that anger can blunt sadness, we can also infer that it can blunt empathy for an injured person or innocent defendant. If jurors are angry for an extended period of time, be it from testimony or frustrations from their own impacted lives, they may fall into an angry mood that interferes with their ability to empathize and remain open to testimony. This state may last for days or perhaps the length of the trial.

***Case Study 2 - Products Liability  
Jurors Follow Their Innate, Emotional Sense of Morality and Fault***

In every trial, jurors decide cases with their own emotional sense of morality and fault, rather than following legal standards to arrive at their verdicts. Moreover, strong emotions often lead jurors to parse factual dichotomies and impose burdens of proof to unreasonably favor one side over the other.

During a benzene litigation conference in New York City, I noticed that every time warning

labels were shown to mock jurors, they reacted negatively to the plaintiff even though plaintiff's attorneys were making clear, strong points regarding the warning defect legal issue. (This was measured via perception analyzer dials that record jurors' self-reported moment-to-moment positive or negative affect throughout the trial.)

The fact pattern was set up to demonstrate effective direct and cross-examination of live experts, so causation was a disputed issue. This strict liability case did not legally depend on negligence or fault; however, the jurors assumed causation without discussion and focused on fault instead.

The jurors agreed that the labels should have included more information, that the defendants knew that their solvents caused cancer and that the solvents caused Plaintiff's cancer--well beyond the factual findings required to find liability. However, the jurors returned a defense verdict and said they would not award any damages to the plaintiff, even though they strongly favored the plaintiff and blamed the defendants after closing arguments. During deliberations, jurors blamed the employer for being mostly at fault.

### *The Structure of the Verdict Form and Deliberations Will Affect Jurors' Judgments*

During deliberations, the jurors changed their feeling judgments, which are often difficult to explain because they are formed in the unconscious. To explain our feeling judgments, we invent rationalizations that can sometimes be easily challenged. Jurors can arrive at different verdicts depending on whether they begin deliberations by simply voting for which side they favor or explaining what evidence was most important to them. Trial research has also shown that general verdict forms can increase findings of liability because these feeling judgments tend to favor the plaintiffs more than the defense. Special verdict forms, which require that jurors answer specific fact questions, result in more defense verdicts.

Practice Tip: to protect favorable jurors' feeling judgments, attorneys should arm them with concisely worded arguments and rebuttals. (See Practice Tips section below for more information.)

Soon after deliberations commenced in Case Study 2 and before a vote on which side jurors generally favored, a juror brought up the fact that the plaintiff did not wear gloves. This elicited much discussion and eventually strong agreement from other jurors that the plaintiff should have worn gloves. Since the discussions centered on what the plaintiff and his employer did wrong, they were blamed instead of the defendants. Jurors did not know how to argue against this point or reframe the discussions to another issue.

If the discussion had begun with a vote as to which side jurors generally favored, they would have seen that about 12 of the 16 jurors favored the plaintiff (some votes will change due to group dynamics). This would probably have resulted in jurors changing the focus to facts that supported the plaintiff, such as the inadequate label-facts under the defendants' *control*.

Anger and blame (control) are closely dependent upon each other, with intensity of anger correlated with intensity of agency appraisal (See Harmon-Jones, "Anger and the Behavioral Approach System," *Personality and Individual Differences*, 35, 995-1005.) Hence, the more jurors believe a party controlled the bad outcome, the angrier they become and want to punish that behavior. The angrier they are, the more they assign blame and the less open jurors are to opposing information. It's a positive feedback that can lead to extreme verdicts.

### *Uncertainty Regarding Rule Violations Led to Defense Verdict*

Jurors want clear boundaries that delineate right from wrong, and they will rely on bright-line rules, even when they are irrelevant. Jurors will gravitate towards familiar, objective standards, such as Occupational Safety and Health Administration (OSHA) regulations, to determine if any parties are at fault.

It's very likely there would have been a different outcome had the plaintiff's attorneys

coordinated a *Rules of the Road* strategy and presented alternative standards, i.e., evidence of unambiguous, certain examples. For example, a labeling expert could explain to jurors what information is required on product labels, compare defendants' labels with warnings on similar solvents and reconstruct defendants' label-making process, including information that was intentionally omitted.

### *Fear Caused Jurors to Assume Causation*

I believe that fear of the warning labels caused jurors to assume causation in this example. Although the labels lacked required cancer and benzene warnings, two displayed a fire symbol and read "DANGER! HARMFUL OR FATAL IF SWALLOWED. EXTREMELY FLAMMABLE." I noticed that these simple labels scared several mock jurors and probably affected others on an unconscious level. As explained earlier, fear drives people to assume there are greater risks outside of their control. When in a state of fear, people assume a dangerous product must have caused the known injury. Only one of these 16 jurors questioned whether the solvents caused Plaintiff's cancer during deliberations, and this one juror dialed in neutral reactions throughout most of the trial and then strongly sided with the plaintiff after the medical causation experts testified.

### *Fear Can Also Raise the De Facto Standard of Care for the Party in Control*

I also think the dangerous-looking labels, which warned consumers to avoid skin contact, caused jurors to attribute more fault to the plaintiff and his employer for causing Plaintiff's cancer. In deliberations, jurors blamed the plaintiff for not wearing gloves, presumably because jurors believed they (as reasonable people) would have protected themselves from cancer by wearing gloves to avoid skin contact with the products that warned it was *flammable* and possibly lethal if *ingested*.

This doesn't rationally make sense, especially since this was a strict liability case, not negligence. But the untrained, unconscious, feeling mind does not distinguish varying levels and types of risk, nor complicated legal standards. It uses simple rules of thumb and recognizes that "FATAL" is something to be avoided. While fearful, jurors are more likely to apply their risk-averse standard of care onto the party they deem most in control of the bad outcome: in this case, the plaintiff who used the solvents without gloves.

Practice Tip: sequence evidence that might scare jurors after evidence of what the other party did to control the bad outcome. Also, avoid showing evidence of your client's control while jurors are still in the refractory period of fear, when they are more likely to impose a higher standard of care.

### *Lack of Anger Reduces Punishment*

After assuming causation, where fault was not at issue, jurors had to go through mental gymnastics to get through the verdict form and find for the defense. In the post-deliberation debriefing, jurors said they would award nothing to Plaintiff, a likeable actor. At first, I thought this was due to unclear rule violations and a lack of empathy from the fear of the labels, but it probably was not. The \$0 damages reaction was too extreme for too many jurors, and the fear would have dissipated by the time jurors were asked to decide a hypothetical award, had they decided for the plaintiff. I think jurors refused to punish an "invisible" chemical company because they *liked* it, or perhaps I should say *him*.

After I wrote a post-trial analysis of this surprising verdict, *Dissection of a Defense Verdict in a Benzene Lymphoma Trial*, one of the defense attorneys, Ted Ray of ExxonMobil, contacted me (and permitted me to quote him). He explained the defense had coordinated their efforts and actually planned and executed the mechanisms I described, as an experiment. Their "experiment" seems to have been partly based on their trial instincts, i.e., their intuition, not a reasoned, deductive application. Therefore, Ted was interested in my analysis of how their framing worked, and we both learned quite a bit from the mock trial and our communications. (I also inferred that Richard Gabriel, a talented trial consultant, contributed new ideas for their experiment, which Ted wanted to understand more completely.)

Practice Tip: plaintiffs' attorneys should clearly and repeatedly define the civil burden of proof throughout the trial or jurors will impose a much higher burden of proof, approaching the criminal standard. Also, other legal standards, such as "substantial factor," must be clearly defined or jurors will impose civil standards (or higher) for that element.

### *Emotional Framing Can Drive Decision-Making*

Ted wrote that they intended to create an "emotional frame" of the chemical companies as innocent criminal defendants--who should be exonerated. And that this is "a very noble function!" He added that their factual framing was to distinguish benzene from the "real product," defendants' solvents (the benzene content was minimal). I had written about the various effects of this framing, but now I understand another aspect of the "Not-Our-Benzene" defense (because it clearly was). As previously mentioned, jurors were told that they are unavoidably exposed to benzene throughout their lives. They did not feel that they had the ability to protect themselves from this threat, so they did not get angry with the defendants.

Interestingly, jurors *lowered* the defendants' de facto standard of care regarding the warning labels. Not one of these educated jurors challenged the foreperson when he unjustifiably said, "We would love to know if your product is going to kill us. But if you don't have to tell us, I don't expect you to tell us." Two other jurors actively argued for this assertion, and others seemed to also support it. I think this was because the jurors didn't think about how labels are created and that the defendants *control* that process. Jurors also said they thought OSHA regulated the labels and product formulation, which is incorrect. Thus jurors did not get angry with the defendants for their failure to warn because jurors didn't understand what defendants did wrong, according to their individual moral standards.

### *Anger and Fear Inhibit Compassion*

I think the \$0 damages in Case Study 2 makes it pretty clear that jurors lacked compassion for the plaintiff. Compassion is on the opposite spectrum of the control appraisal as fear, where fear is characterized by situational, outside influences and compassion is within the individual's human control. But I think another cognitive appraisal may be at work, and perhaps another mechanism entirely, since compassion is not technically an emotion, but a state of readiness for action, based on emotional or cognitive empathy.

We can identify additional cognitive appraisals by reading Buddhist teachings on emotions. Mindfulness techniques permit greater awareness of our emotions, and Buddhist philosophy explains how emotions combine and inhibit subsequent emotions. For example, Buddhists believe that anger and fear are very similar, largely defined as an aversion or a repulsion to an object or person. Attachment is its opposite, an attraction. Therefore, fear and anger block our ability to empathize with others. This is important because anger, fear and compassion are the strongest emotional factors that drive jury verdicts.

## **PRACTICE TIPS**

### *Focus on Other Party's Control and What "Should" Have Been*

Just as you fight bias by presenting evidence that contradicts the elements behind that bias (e.g., irresponsible teenage driver assumption refuted by evidence of good grades), you have to present additional facts that challenge the cognitive appraisals that are activated by emotion. In Case Study 2, jurors responded most favorably to plaintiff's closing when the defendants' knowledge and *control* of their products was emphasized.

This point was not legally or rationally as important as many others, such as the fact that the labels didn't inform consumers how to protect themselves from cancer. But it shifted jurors' attention back to defendants' control, which made them (momentarily) blame defendants. Focusing on defendants' control probably also angered jurors and motivated them to punish the defendants. If

defendants' knowledge and control had been emphasized throughout the trial, I think there would have been a verdict for the plaintiff. Similarly, having a label expert talk about how the labels *should* have been written would focus the story on who had control. Thinking in terms of how things *should* be also makes us angry and motivates action to affect change, such as arguing for your side.

### ***Greater Certainty Leads to Larger Verdicts***

The more certain jurors are of causation and fault, the greater the verdict. Jurors are absolutely confused by legal definitions and the verdict form. They do not understand *substantial factor, defective, significant, knowingly, negligence, reasonable, malice, etc.* Any ambiguity and confusion diminishes the certainty appraisal required for anger. You must simplify your case so that everything is easy to understand.

Attorneys already know that simplicity is best, but they still slip back into using unnecessary jargon and otherwise complicating their cases. Trials invariably confuse jurors, but it is critically important that your Rules are clear. For example, in Case Study 2, a labeling expert should specify what must be on a label, with concrete examples.

Sequence your *Rules* testimony after clear evidence, rather than anything that is confusing, preferably regarding something that is certain and controlled by outside, human influences. (The *Rules of the Road* explains how to do this well.) This sense of certainty (and control) is cumulative and will cause jurors to form a greater appraisal of certainty. This sense of certainty and anger can transfer, as an appraisal tendency, into larger verdicts.

### ***Fortify Favorable Jurors' Feeling Judgments***

Feeling personality types have difficulty defending their emotional judgments, so attorneys should arm them with concisely worded arguments and rebuttals to expected counter-arguments. In closing, walk jurors through the verdict form, show them how to apply the law to the facts and clearly explain all legal terms. List your favorable facts and give jurors time to also write them down. Specify the verdict form question numbers to which these facts pertain. Also give your jurors short answers, talking points with just 5 or 6 words, to rebut expected arguments. Say it slowly, so they write it down. (If no one is writing, try to settle the case.) You should conduct focus groups before trial so you know which facts and arguments jurors will find most compelling.

### ***Repeatedly Distinguish the Civil v. Criminal Burdens of Proof***

It is worth repeating that plaintiffs' attorneys should clearly and repeatedly define the civil burden of proof throughout the trial or jurors will impose a much higher burden of proof, approaching the criminal standard. Since many jurors will use their emotional reasoning and do this unconsciously, you will have to repeat this many times to overcome their internal sense of fairness. (See *David Ball on Damages 3*, by David Ball (2011), for a good preponderance technique, as well as a thorough list of motivations and excellent trial advice.)

## **LIMITATIONS AND AREAS OF IMPROVEMENT**

There are some limitations to keep in mind when applying these emotional blunting research findings. For example, Dr. Winterich's original journal publication noted that there is a strong dispositional tendency to their findings. In their second study, these emotional blunting effects were only seen in people who scored low on tests that measure motivation. People who are more likely to move towards their goals did not report measurably diminished anger after first experiencing sadness. Since leaders tend to be more driven, happy people, they might simply prefer an emotional state other than sadness.

Another limitation is the type of data used. Most cognitive appraisal research is based on college students' subjective, self-reports of their emotions. This is problematic for several reasons. We often do not realize we are emotional until others point it out to us, and we tend to forget the details

that triggered the primary emotion that anger masks. We usually only recall one emotion, even though multiple emotion centers can be firing away in the unconscious simultaneously, as seen in functional neuroimaging scans. In fact, emotions can alternate rapidly and blend into one facial expression.

### *Additional Cognitive Appraisals for Anger*

There are varieties of anger with differing sets of cognitive appraisals, so our understanding of what generates anger is still developing. A better understanding of anger and how it relates to other emotions, as well as additional research methods, is necessary to develop a more complete knowledge of what causes anger.

### *Facial Expressions May Add More Insight Than Self-Reports*

Most of us are unaware of what we are feeling until after we have communicated it via facial expressions, voice and other body language; we might then notice others reacting to our emotional displays. Dr. Paul Ekman's work on facial expressions provides objective means to code displayed emotions. Also, many trial consultants are trained to read facial expressions, even momentary "micro-expressions" that are often not consciously experienced. These characterizations of emotion probably offer more insight than self-reports.

### *Dials Measure Overall Positive or Negative Affect (Valence)*

Another way to improve the measurement of emotions is via perception analyzer dials, which record overall positive or negative affect moment-by-moment, i.e., visceral reactions to a trial or focus group discussion. When used properly, these numeric dials can capture the context of unexpected emotional responses that are a window into our unconscious selves.

## **TRAIN YOUR COURTROOM INSTINCTS**

Trial attorneys continually adapt to unexpected facts, court rulings, jurors' moods, and all the other surprises that necessitate changing the best-laid plans. Seasoned trial lawyers have developed solid courtroom instincts by training their emotional brain, the "supercomputer" of the mind. This is achieved through extensive preparation, thoughtful analyses, and receiving quality feedback soon enough for your unconscious to associate it with the appropriate technique.

Most of us are resistant to change our opinions, but watch what happens when you prime people in various ways, such as subtly affirming their importance, focusing the story on the other party or redirecting their attention to another topic with contrasting cognitive appraisers. Suddenly, jurors are willing to change their mind because they are not trying to defend their sense of self or their current emotional state. You can see this immediately in real-time, during trial advocacy workshops.

Observing graphical displays of jurors' moment-to-moment reactions in a mock trial is also a great way for attorneys to practice *Rules of the Road*, *Reptile*, *Damages*, and *Polarizing the Case* techniques. It's fascinating, fun and useful. The benefits you reap will be shared by your client.

### *How to Participate in Workshops and Learn More*

I enjoy collaborating with attorneys, trial consultants, and academic scholars, so if you are interested in my workshops and research, please contact me and I will share information with you, including the paper mentioned in Case Study 2, *Dissection of a Defense Verdict in a Benzene Lymphoma Trial*.

You can also visit [www.JuriSense.com](http://www.JuriSense.com) for more information, including free, online MCLE webinars and mock trial workshop opportunities. The mock trial fact patterns and workbooks can also be customized for groups, such as consumer attorneys, bar associations and law schools. The State Bar of California has pre-approved MCLE credit for these workshops (MCLE Multiple Activity Provider 14856) and I will apply for MCLE credit in any state.



## *Karen Winterich replies to the trial consultant perspectives:*

I read the responses by James, Metzger, and Macpherson with great interest. I am very appreciative of these informative and supportive comments, particularly as they provide important practical and legal perspectives for the consideration of emotional blunting among jurors. I am delighted that this work may provide controlled empirical support for existing phenomenon that attorneys have been observing. At the same time, I am intrigued by the additional questions raised regarding the role of emotion in jury decisions and the extent to which such emotional impacts can and should be controlled, corrected, or accounted for.

For example, Macpherson raises an important point regarding the role that the emotional baseline of jurors may play. Though not mentioned in my original article published herein, the research (Winterich, Han, & Lerner 2010) did control for participants' baseline emotions. The study accounted for the fact that participants may enter the research with a strong emotional state, similar to the way jurors may enter a trial. Indeed, though most effects of baseline emotion were nonsignificant, accounting for baseline emotion strengthened the effect of emotional blunting. Given these findings with student participants who may tend to enter a research study with reasonably neutral emotions, it is very important to consider the effect of baseline emotions of jurors who may be far more likely to enter the jury process in an angry rather than neutral state, as Macpherson notes. In doing so, it is unlikely that self-report would be the most effective method of determining juror's baselines for a variety of reasons such as misidentification as well as socially desirable responding (Deiner, 2009; Frijda, 1991). As such, it is important for lawyers to be trained to use facial expressions (Ekman, 1993) and other behavioral cues during jury selection.

Macpherson also raises an issue that is in need of additional research in jury decision-making and emotional psychology more broadly: what is a neutral state? To date, there is limited understanding of what determines and characterizes a neutral state relative to a positive or negative affective state (Brendl & Higgins, 1996). Given the uncertainty of a clear neutral state, raising jurors' awareness of the effect of emotions on their decision-making is an even more important process.

Additionally, I am pleased to hear that James and Metzger believe this work may be useful in explaining juror decision-making. I found the applications to trial advocacy by Metzger to be very interesting and informative and hope they will aid in the application of this research in the courtroom. Though I believe the emotional blunting effects tested to date would hold for other emotions with contrasting appraisal tendencies, empirical research should provide further support, perhaps focusing on the effects for fear or emotions related to compassion given the critical role of fear and compassion in jury verdicts noted by Metzger. In considering these effects, it is important to recognize that fear differs from anger in cognitive appraisals of situational control and certainty as well as differing from sadness in levels of uncertainty (Smith & Ellsworth 1985).

From these insightful commentaries, I am optimistic that this research will be beneficial to lawyers attempting to better understand the role of emotions in juror decision-making. At the same time, additional research should continue to explore the effects of emotional blunting, incorporating a larger range of emotions, on juror decision-making as well as investigate effective methods for determining jurors' emotional baselines and employing a neutral state. Many thanks to Dr. Handrich and The Jury Expert for providing the opportunity for this exchange which, hopefully, will ultimately benefit juror decision-making.

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## ***THE NEW ABC'S OF PRODUCT DEFENSE: A LARGE-SCALE ONLINE MOCK TRIAL EXPERIMENT SHEDS LIGHT ON THE PRACTICAL NEEDS OF MANUFACTURERS IN LITIGATION***

**BY KEN BRODA-BAHM**

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The public's attitudes toward products liability is one critical juncture where the world of litigation intersects with the public's daily relationship to products. For many reasons, it is a good time to take a look at the persuasive demands of product liability litigation. Public attitudes toward companies and lawsuits continue to evolve. High profile cases involving Toyota, Chinese dry wall, tobacco, pharmaceuticals and a host of others continue to move forward. More importantly, the Consumer Products Safety Commission has recently unveiled SaferProducts.gov, a new publicly searchable database that is widely expected to increase companies' exposure to products liability lawsuits. In that context, conducted research focusing not only on what people say about products issues (a survey) but, also on what they do in response to a realistic products defense case (an experiment).

As part of a program of annual national research projects extending over the past eight years, Persuasion Strategies has relied on data collected from a national random sample of 4,291 juror-eligible Americans, as well as the results of an online experiment involving 1,375 mock jurors. In late 2010 and early 2011, jury-qualified and demographically diverse participants completed a short attitudinal questionnaire, then viewed forty minutes of video-recorded summary arguments from a plaintiff and a defendant in a products liability suit, and finally rendered a decision. We were able to capture their demographics, experiences and attitudes going in, as well as their verdicts and comments coming out.

The case involved a fictionalized but realistic case of a 16-year-old boy who was brain injured after a baseball that he pitched was hit back toward him by an aluminum alloy bat at an unexpectedly high rate of speed. The plaintiffs' claim that the bat was unreasonably dangerous because its design

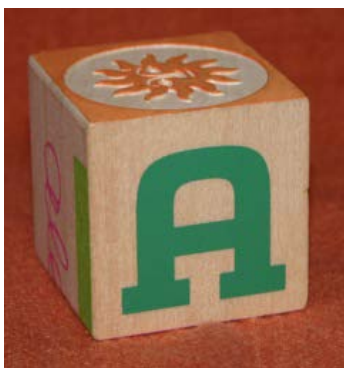
and manufacture made it possible for the bat to meet testing standards while still hitting the ball at greater speeds than those associated with wood bats or other aluminum bats. This danger, the plaintiffs claimed, caused batted ball speeds that exceeded a player's ability to either catch or get out of the way of the batted ball. In its defense, the manufacturer claims that scientific testing shows the bat to be comparable to other wood and metal bats, and contends that the same injury could have been produced by a ball coming off any bat. The company also claims that there were other causal factors (including a vulnerable pitching position, and a banner behind home plate that reduced the visibility of the ball), as well as exaggerated damages. After hearing from the attorneys, the mock jurors split 55 percent in favor of the plaintiffs and 45 percent in favor of the defendant.

While every case has its own nuances, there are several elements to the plaintiffs' claims that tend to cut across product cases: a tragic injury, preventability in hindsight, attempts to work around regulations, dishonest communication, self-serving product testing, and multiple causation. What we learned from this study, as well as from our other research and experience, tells us a great deal about the juror characteristics, evidence traits, and argument strategies that determine success or failure in products litigation.

Taken together, the survey and experimental data helps to shed some new light on some common concerns. Here is my own alphabetic take on the product liability lessons that stand out the most:

- Anticipate the Limits of Personal Responsibility
- Bolster Your Credibility with Open and Transparent Product Testing
- Create and Highlight Product Warnings and Other Claims That Inform
- Defend Your Honesty As Much As Your Product
- Evaluate Potential Jurors to Discover Unalterable Bias

*"A" is for "Anticipate the Limits of Personal Responsibility"*



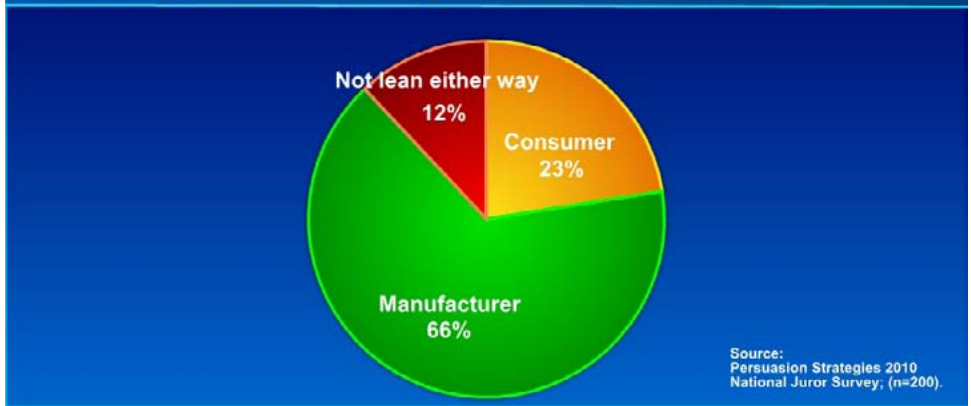
To take one example, the phenomena of 'unintended vehicle acceleration' was for many years treated as a simple problem of driver error. Step on the gas instead of the brake, and you have no one to blame but yourself. But that view changed with the number of lawsuits filed against Toyota and other auto manufacturers. While it remains to be seen whether that view will shift back based on the results of a Department of Transportation study finding no electronics-based cause for the accidents, the discussion does show how swiftly a frame of individual responsibility can be replaced by a narrative of corporate irresponsibility when personal choices come to matter less than company decisions.

In many cases, however, jurors have stuck with a personal responsibility focus, and have viewed the case through the coffee-stained lens of the *Liebeck v. McDonald's Restaurants* spill case. Over the years, juries have sent the message that it is the individual's responsibility to protect themselves from possible poisoning from Botox injections, collapsing stepladders, and tire tread detachment. There are

strong reasons to believe that this is a self-protective tendency: Jurors can avoid the discomfort of feeling personally at risk by believing that the injured party brought it on themselves somehow.

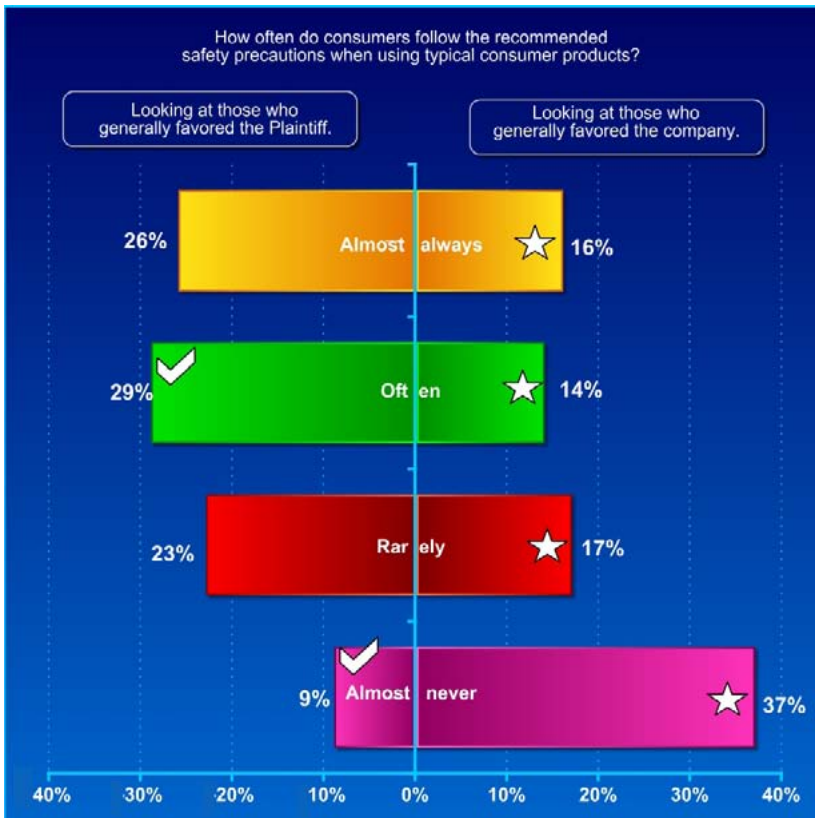
Our own survey supports this tendency to gravitate toward personal responsibility. When asked to assign responsibility in a situation where a product user followed some but not all of the listed safety precautions, two-thirds of respondents would favor the manufacturer.

A consumer bought a product from a company and experienced a severe injury when using the product, and is now suing the company. The consumer followed some but not all of the safety precautions on the product label. Knowing nothing else, would you be more likely to:



When responding to a particular case, jurors' expectations about personal responsibility will also play a very strong role. It helps to ask in voir dire, for example, for potential jurors' opinions on whether consumers "often" or "rarely" tend to follow recommended safety precautions. In our research project, the answers were statistically significant predictors of which side they would favor.

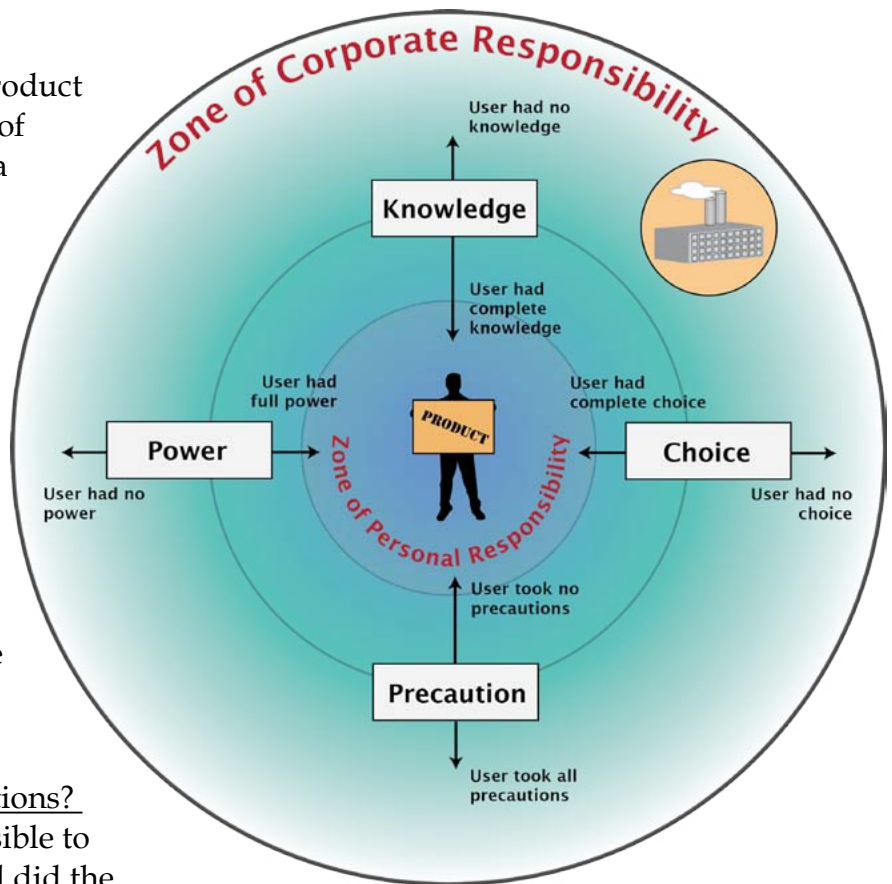
As the chart indicates, those who believe consumers "often" follow recommended safety precautions are more likely to generally favor the plaintiff than those who think consumers "almost never" follow recommended safety precautions. This is in spite of the fact that in our batted ball case, there was no issue of a failure to follow a warning. Instead, it is a simpler dynamic. Those who focus strongly on the burden to exercise personal responsibility, and feel that the burden is often unmet, are



also likely to start with the presumption that consumers are responsible for their own misfortunes.

Still, it is worth noting that many - including a majority in our experiment - will ultimately favor the consumer. In the earlier chart, one in five would still favor the consumer even where the consumer failed to take all precautions. That is because precaution is not the only factor at play. While the pull of personal responsibility is strong, it isn't automatic, and defense attorneys should not exaggerate the power of jurors' tendency to emphasize personal responsibility at an individual level. Our research has shown that there are four factors that tend to determine whether it is the responsibility of the individual or the corporation that will hold greater salience.

1. Who has the most power? Is the product user able to control the conditions of use, or are these conditions set by a manufacturer?
2. Who has the greater knowledge? Is the product user fully informed, or is some information known only by the manufacturer?
3. Who exercises the most choice? When looking at the sum total of choices leading up to the adverse event, were those choices made by the ultimate user, or were those choices made earlier by a manufacturer?
4. Who takes the appropriate precautions? Did consumers do everything possible to protect themselves from harm, and did the manufacturer do everything possible to protect themselves from lawsuits?



Naturally, this is a general list and it will apply differently in every products liability case scenario. What remains constant is plaintiffs will use these four levers to push responsibility toward the outside of the circle, toward greater corporate responsibility, while defendants will want to make use of the same basic tools to try to draw the responsibility in toward the center, into the zone of personal responsibility.

*“B” is for “Bolster Your Credibility with Open and Transparent Product Testing”*

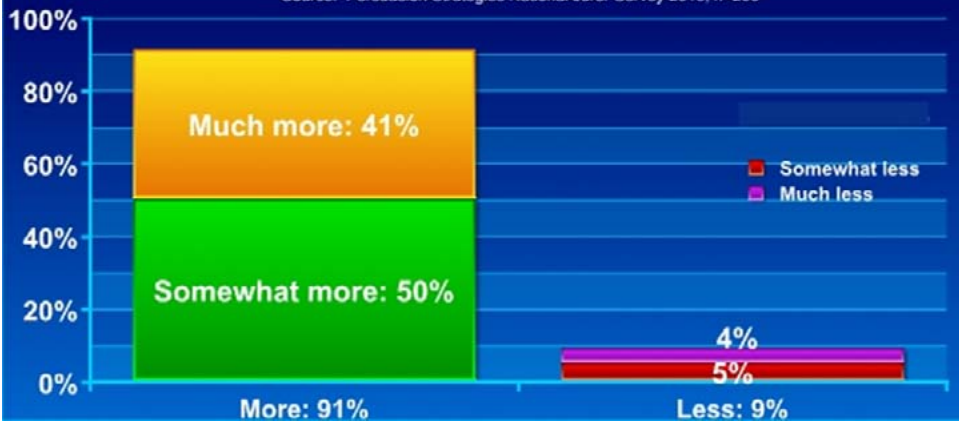


From exploding automobile gas tanks to faulty cribs, the history of jury verdicts is littered with cautionary tales of what can happen when a company fails the perceptual test of protecting its customers, investigating dangers known and unknown, and ultimately standing behind its product. The company that manufactures or sells a product is either a good steward or a poor steward of the goods it brings to market, and jurors’ assessment of that will determine the company’s credibility and fault.

At a default level, the public supports rigorous testing. When asked in our most recent national survey, nine in ten supported “more” testing than is

How much testing should large corporations do before placing their products on the market?

Source: Persuasion Strategies National Juror Survey 2010; n=200



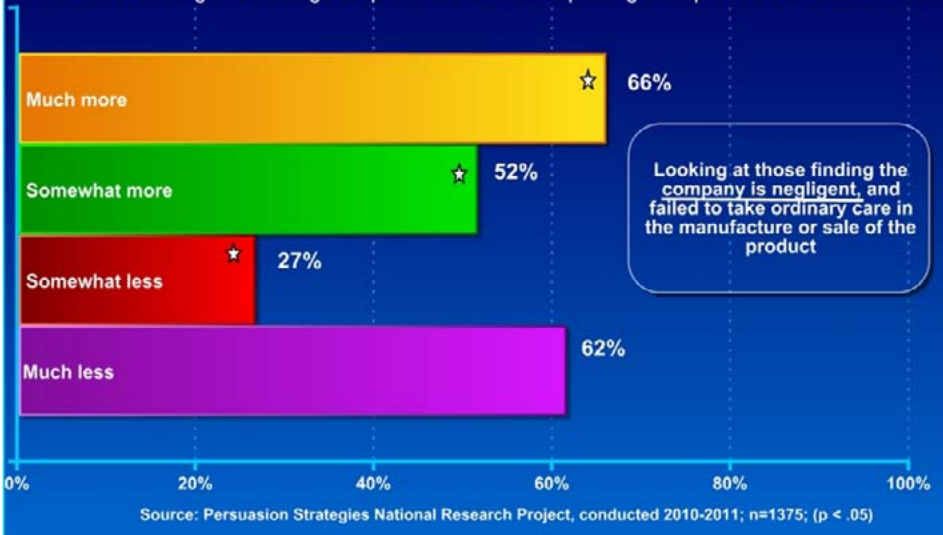
currently done, with four in ten calling for “much more.”

That attitude is easy to understand. If testing can discover and correct product dangers, then why not test? The more, the better! Despite the widespread nature of this belief, however, it remains a good idea to pay attention to those who are on the extremes of this call for greater testing. One thing we know about those who are

most likely to support more testing is that they are also more likely to support the Plaintiff. In our study, we found that those who indicated at the start of the project a support for “much more” or even “somewhat more” product testing, were significantly more likely to find negligence on the part of our company after hearing the attorneys’ presentations.

Those who think corporations should test their products much more are more likely to find the company negligent.

How much testing should large corporations do before placing their products on the market?



In our experimental research project involving the boy injured by the batted ball, testing played a particular role. Because the company was accused of running product tests, not to improve product safety, but to design around the applicable regulations, the issue of honesty played an important role, and was the biggest driver of comments by pro-plaintiff jurors (see “D” below). The important takeaway from this research is that *motive matters as much as method*. In other words, expect jurors to ask *why* you tested, and to look for signs

in the documents and the study protocols that give clues to that motive. If the test appears to be an open and transparent attempt to discover and address product dangers before the fact, then jurors may be more apt to forgive the one weakness that manages to slip through. However, if the reason for testing boils down to “CYA” or worse, then expect jurors to blame the company even for inevitable dangers that could not have been solved through greater testing.

Beyond the experiment, I recently interviewed some actual jurors who had completed their trial service, and they reminded me of four rules or themes that companies should use in order to, ideally, avoid litigation, but also to defend themselves should they find themselves the target of a lawsuit. The rules may boil down to common sense, but after all, that is exactly what makes them appealing to a jury. These are the four takeaways that stood out the most, along with some quotations from my notes:

**1. Know Your Product**

The company should have researched all possible dangers posed by a product. Armed with hindsight, jurors can be harsh: *“I think they were lazy... they did not do the research they should have done... they didn’t steward their product.”*

**2. Communicate Clearly**

Both internally, and externally, the company should clearly share what they know about the product. When they don’t, the responsibility is lifted from the users’ shoulders: *“They didn’t talk to customers... nobody knew anything.”*

**3. Take Proactive Measures**

The company should do more than simply react when it hears of problems. Instead, the company should take proactive steps to avoid dangers. In one case, jurors faulted a company for not specifically investigating use conditions after a large volume sale: *“I didn’t see any desire to do follow-up.”*

**4. The Measures You Take Should be Proportionate to the Danger Posed**

In the same case, jurors clearly appreciated the product: *“I think it is an amazing product,”* one said, and another called it a *“brilliant product.”* But they also felt the product carried some obvious dangers when used incorrectly. As a result, *“their stewardship has to be stepped up a bit when you are dealing with something that is potentially dangerous.”*

Jurors voicing these themes or similar could be found in virtually any case that involves an attack against a product or a service, and a successful litigant will take them to heart.

***“C” is for “Create and Highlight Product Warnings and Other Claims That Inform”***



A warning that calls attention to a product’s potential danger is obviously an important part of a company’s litigation prevention and defense. But according to one recent statistic, a substantial portion of the public, and potential jury pool, may be a bit cynical on the question of whether warnings are designed to educate or just provide cover. In a 2010 Decision Analysis survey<sup>1</sup> on attitudes toward products liability litigation, fully 70 percent shared the belief that product warnings exist to protect companies in the event of lawsuits rather than to protect the public from product risks. On the bright side, that means that if “CYA” truly is your motivation for consumer warnings, you won’t be violating jurors’ already low expectations by admitting it. On the even brighter side, it means that if you can convincingly reframe your own company’s warning in the broader terms of public education, you may end up surprising jurors and gaining an important measure of credibility in the process.

While jurors outside the context of a particular case tend to scoff at coffee cup warnings, once they become more knowledgeable about the dangers of a specific product, they are more apt to appreciate a need to warn clearly. As one juror in a recent post-trial interview said to me, you *“need to make it idiot proof,”* and as another said, *“there should be no question”* of how a product can be appropriately used.

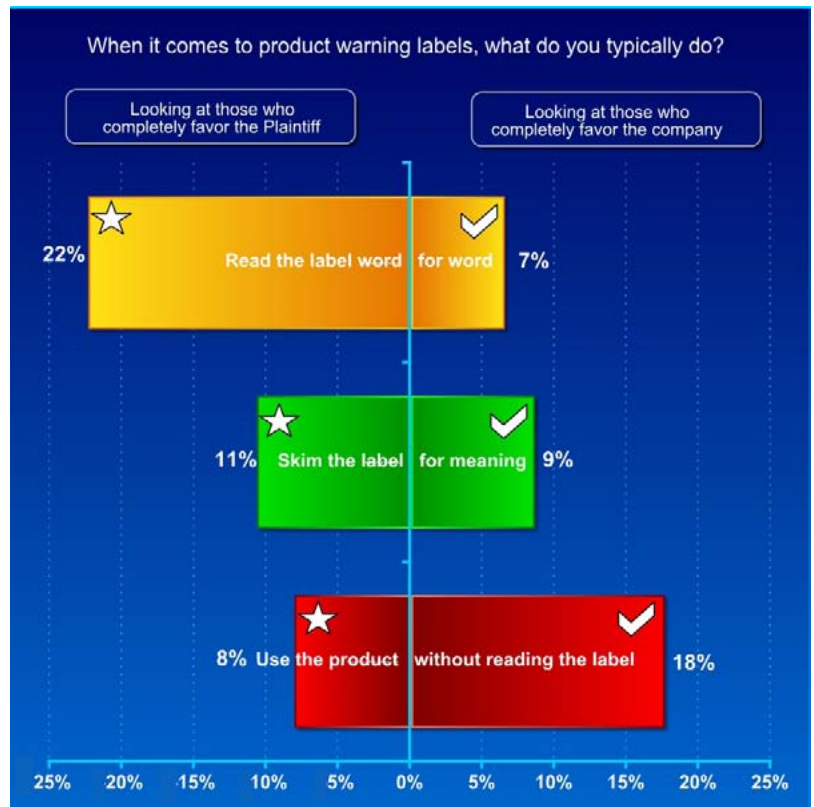


In our mock trial experiment involving the batted ball, warning labels did not play a role (after all, it is hard to put a warning label on a baseball bat that is big enough for a pitcher to see it). However, attitudes toward product labels still played an important role.

As the chart indicates, even in response to a fact pattern that doesn't explicitly include label issues, those who say that they read product warnings word for word are more likely to favor the plaintiff, while those who merely skim the label for meaning or use the product without reading the label, are more likely to favor the company defendant. Why would we see that result? Again, it is probably due to the role of expectations surrounding consumer responsibility. Those who have idealized views of their own behavior, are likely to extend that view to other consumers, and to believe that consumers tend to take responsibility.

Thus, when a tragedy occurs, it is easier to blame the company. Those who, more realistically, acknowledge that they and other consumers often skip labels, are more likely to see a clear way that the consumer could have avoided the tragedy. They could have reviewed the labels.

But when it comes to product labels and related messages, they're not all created equally. The best consumer warnings should be oriented toward "FYI" -- information, and not just defense. So how do you develop and communicate a product warning that does that? A few ways:



**1. Include warnings within the broader picture of necessary information.** Try to steer your warning strategy away from the frightening list of dire consequences that seem to come during the next-to-last moments of televised drug commercials. Instead, provide a full spectrum of information, including product uses and answers to broader questions of how and when consumers should use the product. A warning in that context is more likely to be seen as effort toward education rather than making excuses.

**2. Don't leave the printed warning as the lone voice.** If a single printed product warning is the only time that you are talking about risks, then jurors can feel like you are just checking a box instead of trying to make sure that users genuinely understand potential problems. In a recent products mock trial, for example, we found that the number of defense-oriented jurors who said, "they warned - case closed," was exceeded by the number who said, "due to the danger involved, the company needed to take special efforts to make sure that the warning is read." In that case, it meant an expectation that the company would actually hold classes to make sure those who installed the products were aware of the revised precautions. In other words, when the risks are serious, jurors can expect a broad-spectrum effort, and not just a single warning.

**3. Ensure that everyone, including your marketing and sales force, is consistent with the warning.** Nothing can undermine the effectiveness of a clear no-nonsense warning as well as testimony showing that the sales force didn't know, didn't care, or consciously counseled buyers to ignore the warning. In the eyes of many jurors, even a single rogue salesperson can end up defeating the best product warning plans.

**4. Make an educated public not only possible, but likely.** When the end user has to work in order to locate and carefully unfold a list of product dangers, and then find a magnifying glass to access the unbroken field of 3-point font, it is easier for jurors to believe that the company didn't really expect that every user would inform them. Instead, ask yourself, "what if our mission wasn't just to sell the product, but to also try at the level of a true public information campaign, to make sure that the product was only used by the right people and in the right ways?" Some industries like tobacco and alcohol, have learned the hard way and embraced public information campaigns only after damage has been done. You will certainly have a better story to tell jurors if you can show that emphasis right out of the gate.

*"D" is for "Defend Your Honesty As Much As Your Product"*



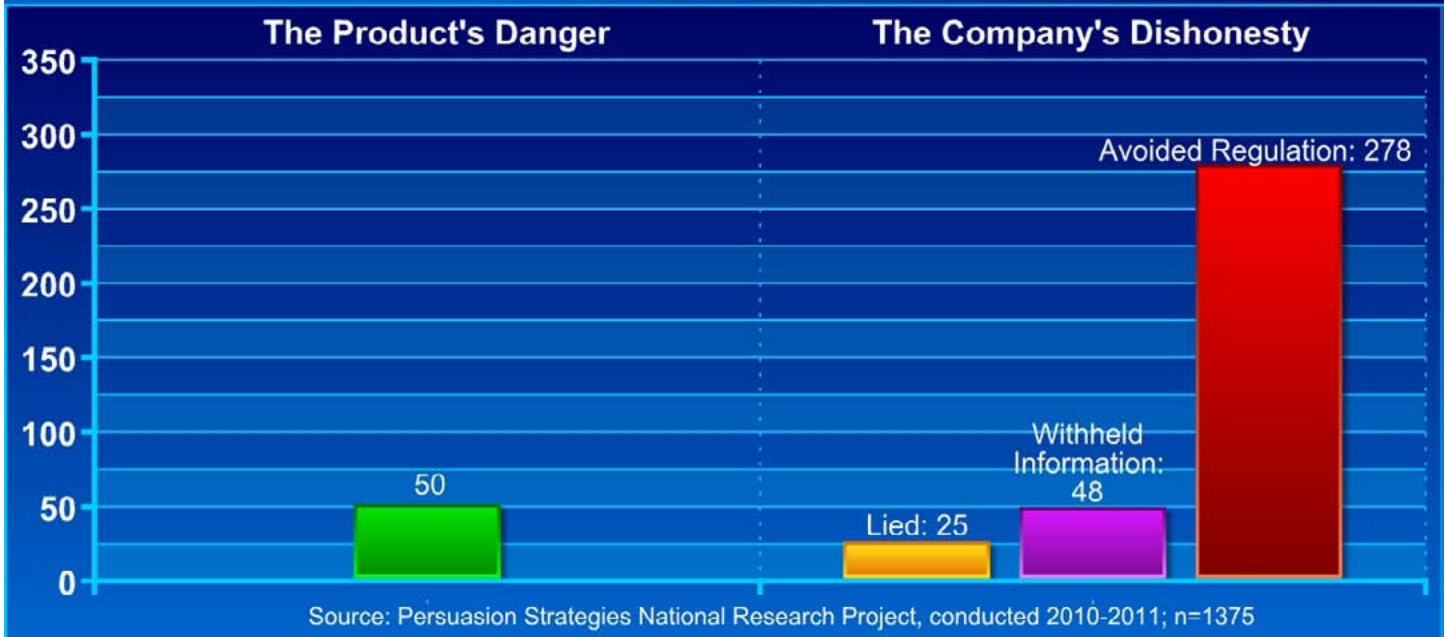
One stereotype of the litigious American society suggests that jurors are willing to hold manufacturers and sellers responsible for even the most obvious product dangers: a ladder that allows its user to fall, or a cup of coffee that turns out to be hot. While anecdotes abound -- some true, and some false -- our experience is that product danger alone rarely drives a verdict. Instead, jurors need to see something else in order to generate sufficient anger to deliver any sizeable verdict against the company. That 'something else' can be boiled down to one word: dishonesty. Jurors know that products are dangerous. They have no trouble placing personal responsibility on adults who knowingly use dangerous products. What they are less able to abide is incomplete information. Whether the company is failing to investigate, providing inadequate or false warnings, working around regulations, or simply withholding information, the jury is less willing to say "buyer and user beware" and more willing to put responsibility on manufacturers and sellers.

With ten of the top fifty verdicts<sup>2</sup> of last year coming from defective product suits, we do know that jurors are willing to hold manufacturers responsible. At the same time, the important ingredients that drive those damages are often found in the company's behavior rather than in the product itself. A good example can be found in attitudes and behaviors surrounding tobacco use. Based on the results of a pair of studies, the public is more likely to reject a 'deceptive' product than it is to reject a merely 'dangerous' product.

The first study, (Mazanov & Byrne, 2007),<sup>3</sup> looking at the knowledge and beliefs of young Australians, found that smokers were actually significantly *more* aware of the risks of smoking than non-smokers. In that study, a greater awareness of danger didn't result in less use of the product. The second study, (Klesjes et al., 2009),<sup>4</sup> found that what did in fact differentiate smokers from non-smokers was a belief that the company was misleading consumers. If study participants felt that tobacco companies had lied about the risks, that was a strong predictor that the individual was a non-smoker. In other words, while smokers may feel that they have an honest appreciation of the dangers of smoking, non-smokers believe that manufacturers are distorting or concealing information about those risks.

There is a parallel in tobacco litigation as well. The product has been known to be deadly for decades, yet tobacco litigation only became viable in the courtroom when attorneys were able to show that the companies had lied about the dangers and manipulated the addictiveness of the products.

## Reasons for Pro-Plaintiff Products Liability Verdict



We have also found in our own experimental mock trial focusing on the batted ball case that deception matters more than danger. Among other things, we asked our mock jurors for a verdict as well as an open-ended reason for their decision. After analyzing the content of the responses, we found that comments relating to the danger of the product itself were not nearly as prevalent as comments relating to various forms of the company's deception.

In this particular fact pattern, the company was accused of knowingly making a sports product more dangerous, but what resonated with the mock jurors was the "knowingly" part. A smoking gun memorandum appeared to show the company's intent to design in a way that would enhance performance (and hence, possible risk) while still skirting the regulation. Jurors were also disturbed at the stated intent in this memorandum to keep the company's testing data to itself and not share it with the regulatory body. As noted in this chart of the reasons given by those favoring the Plaintiff, product dishonesty was mentioned seven times more often than product danger.

There is a clear takeaway for those who defend their products in litigation. Your goal is to fully steward your product, and that means not only making it as safe as possible, but also making sure that your communication about the product -- with sellers, with consumers, and with the government -- is as direct, complete, and honest as possible.

### *"E" is for "Evaluate Potential Jurors to Discover Unalterable Bias"*



You can't reach everyone. Even if a company is dutifully following "A" through "D" above through appeals to its responsibility, thorough testing, clear warnings, and complete candor, there will still be jurors who are prone to find against a company. For that reason, an important part of your strategy at trial will still involve evaluating your venire in order to discover the attitudes and experiences that predict a more anti-company juror.

There are a number of factors that I've already discussed that would indicate a higher risk for company defendants in products liability suits:

- Those who believe that customers “often” follow product safety precautions;
- Those who believe that products should undergo “much more” testing;
- Those who say they read product warnings word for word.

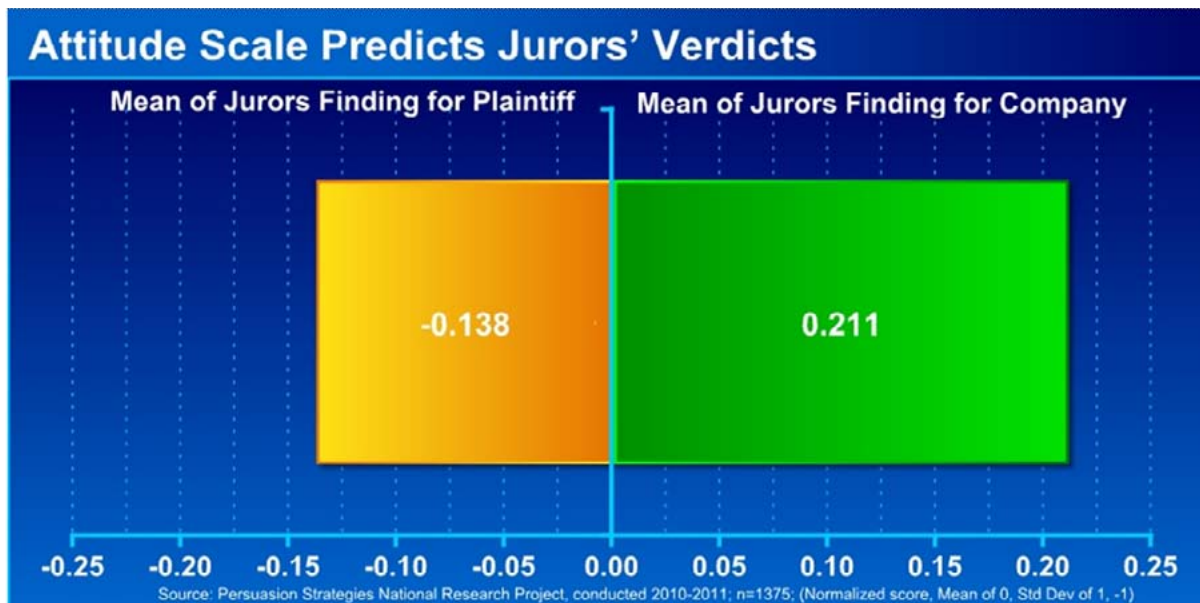
In addition, we found in our online experiment that some additional attitudinal factors were significant in predicting which mock jurors would decide in favor of the plaintiff at the end of the case. Individuals with the following attitudes would also be higher risk for product defendants:

- Those who would “definitely” pursue a lawsuit if they were injured by a product; and
- Those who believe that when an individual is injured while using a product, it is “generally,” or “almost always” the product’s fault.

Many of these attitudes stand to reason, of course, yet it can be surprising how often questions like these are not asked of potential jurors. Instead of relying on gut feelings or juror demographics, it helps to go straight to the source in asking potential jurors how they feel about the general issues that may bear on your case. While no judge will allow you to ask for potential jurors to prejudge the case, judges *should* allow questions that bear upon the consumer, product, or litigation attitudes which are likely to cut across all manufacturer liability cases.

Through our online experiment, we also discovered that one other factor was critical in identifying the most dangerous jurors for the product defendant: anti-corporate bias. While we gathered information on demographics and occupation and related facts about jurors, none of that was significant in predicting who would favor the plaintiff at the end of the case. Instead, the best predictor turned out to be anti-corporate bias, as measured by a custom scale that we’ve recently developed.

Relying on eight years of data collected from a national random sample of 4,291 juror-eligible Americans, as well as the results of our online experiment involving an additional 1,375 mock jurors, we have developed a scale consisting of a specific weighted combination of seven attitudes concerning corporations, government regulation, ethics, and lawsuits. When juror responses to this series of questions are collected, via a supplemental juror questionnaire or oral voir dire, and combined into



a single score, that score serves as a statistically significant and reliable predictor of juror leanings and verdicts on a wide variety of cases that pit an individual against a corporation, in the context of products liability cases, as well as in employment, intellectual property, contract, investor claims, and other 'individual versus company' litigation.

For example, in our mock trial experiment, we found that those with scores on the more anti-corporate end of the scale were significantly more likely to favor the plaintiff, find that party credible, and reach a plaintiffs' verdict on both liability and cause in the specific case.

In high stakes litigation in today's economic climate, those who defend product manufacturers need every tool to assess and persuade potential fact-finders. It makes sense to discover how your potential jurors stack up on both products related questions as well as this dimension of anti-corporate bias. These attitudes should form an important part of the overall picture you use to assess your venue and inform your strikes.

### *Closing Thoughts*

In addition to the lessons for litigators mentioned above, the other takeaway we gained from this research project is a reminder of the benefits of testing a specific case with a larger sample size than you can typically get in mock trial research. Working with twenty-five to thirty jurors, you can definitely see some important factors that bear on your case preparation, but it is the exception rather than the rule that you actually see statistically significant findings on the specific factors that separate those who buy your arguments from those who don't. Working with a large data set, however, provides many more opportunities for analysis, and we are continuing to mine the results of our online mock trial experiment, along with our national survey data.

In the end, products liability cases are complicated because they implicate not only jurors' attitudes about companies and litigation, but also their more personal experiences with the products in their lives, along with their basic outlook toward personal responsibility. In that context, those who are working to defend product manufacturers and sellers in litigation need to make sure that they are relying not only on the strategies I've included in this article, but also on the full alphabet of legal persuasion.

Portions of this article have appeared in the author's blog, [Litigation Postscript](#).

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## Consulting on a Budget

BY JESSICA HOFFMAN BRYLO

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The economy is hitting everyone hard and while attorneys still want to do what is best for their clients, budgets for working up cases have decreased. Plaintiff's attorneys are hesitant to front as many costs and defense attorneys want to keep costs down for clients who themselves may be feeling financial strain. Simply because budgets have been cut, however, does not mean that attorneys need to try their cases blind without the help of a skilled consultant. Many consultants are sensitive to the economic times and will work with clients to find a way to help attorneys better their cases without breaking the bank.

Consultants offer a variety of services and in order to understand how you can consult on a budget, you need to be knowledgeable about what options you have:

- **Case Analysis.** Case analysis can be anything from a one-hour phone conference to multiple meetings with a consultant. Using their experience interviewing jurors, preparing similar cases for trial, and running numerous focus groups, consultants can often provide valuable insights into how jurors are likely to view the case simply by knowing the case facts. Attorneys are often too entrenched in a case to be able to step into the role of an outsider lay person to understand where jurors are likely to get confused, what issues are likely to be detrimental, and how to best work around or address those issues. Case analyses can be used to identify and address those issues, including tips on what questions need to be asked in voir dire, how to structure the opening to deal with potential problems, or if done early enough, what other experts or witnesses you may need to hire.
- **Opening Statement & Closing Argument.** These are pivotal points in your case. The opening is your chance to frame the issues in a manner that allows jurors to see the rest of the case through the lens you create. Once jurors begin to believe something, they tend to continue to believe it. During opening statements, jurors are beginning to form opinions about the case, about who is right or wrong, and about what happened or how much it is worth. Once a juror begins to believe your side of the case, they will tend to filter the rest of the evidence through that lens. They will dismiss (or forget) evidence which contradicts that belief, hold tightly to evidence that supports that belief, and alter evidence in their minds to make it consistent with that belief. Consultants

can edit opening statements in a manner that is known to be most convincing to jurors, thus subtly and unconsciously beginning to alter how jurors will view the rest of the evidence in the case.

By closing arguments, most jurors have made up their minds, but this is the perfect opportunity to explain to jurors how your evidence fits into the jury instructions. Further, if done correctly, you can teach jurors how to argue for you in deliberations when you are no longer there to point them in the right direction. A good consultant can edit your closing argument and frame it in a way that sends jurors into the deliberation room ready to counter arguments from opposing jurors.

- **Jury Selection.** It has often been said that cases are won or lost at jury selection. While this may not be entirely true, there is a lot to be said for the importance of the jury selection process. Contrary to popular belief, jury selection is not about picking jurors. It IS about careful DE-selection of jurors, but it is also about establishing good rapport with jurors, neither of which can be done without some practice at asking the right types of questions which elicit truthful responses. Consultants can help with anything from drafting of jury selection questions, to putting on a mock jury selection where they can critique your skills, to accompanying you to jury selection to watch for jurors' body language and other cues which indicate which jurors are likely to be harmful to your case.
- **Focus Groups & Mock Trials.** The only true way to know what jurors are likely to think of you or your case is run a focus group or mock trial in the trial venue. The purpose of a focus group/mock trial is not to win; the purpose is to set up the exercise in a scientific manner which controls for all variables except the ones you want tested so that you can find the problems in your case. Although many attorneys run focus groups themselves, they are often doing themselves a disservice by doing them in an unscientific manner. The adage "junk in, junk out" applies and although attorneys can avoid expenses by doing focus groups themselves, they often are throwing away any money they are spending. The results of a focus group should always be worth the cost; you should recoup the expenses either at mediation or trial with insights learned from the focus group.

With those consulting services in mind, let's talk about how to use them on a budget. One possibility is a restructuring of fees. Many consultants are willing to do some services at a flat fee rather than hourly, which will give you a more concrete figure of what costs to expect. You can also ask for a combination of flat fees and hourly rates for various services.

If you are interested in doing a focus group or mock trial, there are additional ways to save on costs aside from fee structuring. One large cost in doing these projects is recruiting. Random recruiting is important in creating a reliable focus group with results you can trust, but recruiters charge high dollar for their services. You can bypass the recruiter by having a paralegal or legal assistant do the random recruiting for you. It takes patience and many hours of hard work making cold calls or typing up hundreds of letters and fielding follow-up calls and you will need a consultant to teach the assistant how to screen jurors properly, but it can save you thousands. Some consultants may offer to do the random recruiting for you at a lower cost than recruiters. Either of these options is preferable

to using Craigslist or unemployment or temp agencies to find mock jurors. Such methods give you a very biased group of people which will be significantly different from your real jurors. People who are unemployed, looking for temp work, or who regularly search Craigslist for small side jobs think differently from the rest of the population. If you watch a focus group with unreliable participants and compare it to one with reliable participants from random recruiting, they may look the same; in either case, you will see a group of people deliberating about a case. What you are not seeing is the unreliability of the one group when trying to test how a real jury will respond to your case. If you're going to cut out the recruiter, do not cut out random recruiting.

Another cost that can be cut for focus groups and mock trials is the venue. Most are conducted in hotels where there is a food and beverage minimum and you are paying for multiple rooms. Ask your consultant how you can cut this cost out of the equation. I have conducted focus groups in churches and court reporters offices before to save on costs. As long as the rooms can be set up such that your videographer can run cables from the cameras to the viewing room and participants in different deliberating groups cannot hear one another, it does not matter where you host the project. The caveat to that statement is that it should not be hosted in an attorney's office. Jurors will inevitably Google the attorney's name on their cell phones during breaks and find out if they do defense or plaintiff's work. As soon as the jurors know which side you work for, your results are compromised. Other than that, any neutral ground is fine.

A third cost-cutting measure is to run two half-day focus groups instead of day-long mock trials. This will save you money in the amount you pay jurors (you don't have to pay for as much of their time) as well as what you need to feed them. I will often do morning and afternoon groups. I feed the morning groups bagels and coffee and put out some snacks for the afternoon group. This cuts out costs of feeding breakfast and a full lunch. You can also fit more groups into a day without renting out additional rooms. For example, if you do one group in the morning and one in the afternoon, you only need a total of two rooms (one viewing room and one for the jurors) as opposed to three rooms if you did two groups at once for a full day and then split them up to deliberate (two juror rooms and one deliberation room). To do this, you will need to cut down on the amount of exhibits to show, the length of any deposition videos, and the length of statements, but if you can get the core of your case and the main arguments conveyed to the jurors, in most cases, this will be enough.

If you are comfortable doing your own video and have the equipment to do so, you can ask your consultant to eliminate the audio-video charges. I suggest this with great hesitation, however, as I have had attorneys elect to do the video themselves only to find out that their equipment did not pick up the audio well enough to decipher what jurors were saying. If you want to do your own video, I highly suggest that you have table microphones and sound-mixing equipment that you have tested. Otherwise, you may waste the rest of your money in having a useless focus group video.

If the budget is too low to conduct a focus group or mock trial, even with the cost-cutting suggestions above, you can still benefit from using a consultant for other services, such as help with your opening statement, closing argument, and/or jury selection. Simply by utilizing knowledge of juror psychology, consultants can point out probable weaknesses in your case that you may not have seen. They can help revamp your opening statement and voir dire questions to deal with these issues head-on. Buying a couple of hours of a consultant's time for a simple case analysis can leverage your case multiple times over. Some consultants may offer package deals that can be customized to include a case analysis, opening statement, and closing argument. Bottom line, do not assume that because you do not have thousands of dollars to spend on a focus group that you have to try your case without the aid of a consultant. Be up front with the consultant, tell them your budget, ask for ways they can be creative with fees, and most will suggest ways to make the most of your money, whether that's tens of thousands of dollars or a couple hundred.



## *Budget Conscious Witness Preparation*

BY KATHERINE JAMES

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### *Introduction*

These days everyone, it seems, is looking to cut down on costs. Large corporations who used to hire big firms are now looking for “boutique” firms who can try their cases for less. Plaintiff’s firms, who used to live and die by the model “wait until the last minute and then spend, spend, spend” are allocating time and resources on a per case basis from the time they get involved in a lawsuit. Criminal Defense lawyers are finding that they have to put their Clients on the witness stand more than before... and how many criminal cases have unlimited funds? And the insurance companies who are involved at the heart of so many of our cases are cutting litigation corners right and left.

This article is intended to give attorneys some good advice on how to prepare as efficiently as possible. This doesn’t mean that you won’t ever have to pull out the checkbook and get a witness preparation specialist involved in your case. Just because times are hard doesn’t mean that some witnesses will simply be beyond your skills as an attorney to prepare. But with proper planning, preparation and taking advantage of cyber space you can keep your costs at a minimum.

### *1. Inexpensive Investments = Big Rewards*

First – educate yourself. Instead of skipping the session on witness preparation taught by a trial consultant at the next conference you attend (because you already “know everything”) go in and learn from whoever is teaching the course. Those of us who specialize in witness preparation have the latest scoop on how to prepare witnesses from many different approaches since consultants come from many different training backgrounds – from psychology to education.

Also, read whatever you can get your eyes on. I would suggest starting with the articles archived right here at *The Jury Expert*. Obviously, attorneys also write about witness preparation. The reason that I steer you to trial consultants is that attorneys only spend a fraction of their time preparing witnesses. Many of us spend the majority of our time preparing all kinds of witnesses in all kinds of settings. Frankly, why not learn from the folks who do this for a living?

The first equipment that you need to invest in is a digital camera and a system for video playback. Do you have an “okay” camera you use to take videos of your kids playing soccer? Get another one for your office. Do you already have a flat screen in your office? Then you have a system

for reviewing the video. A few wires to hook them together and you are good to go. I definitely suggest having a separate camera for your office rather than counting on “remembering” to bring in your camera from home or wresting it from the backpack of the young filmmaker to whom you find you have given birth. I learned this the hard way. “No one is allowed to touch Mom’s camera!” was a rallying cry in my house when my kids were growing up. It came from showing up thousands of miles away from home on more than one occasion minus a power cord, a tripod...or, of course, a camera.

Most witness preparation specialists use cameras and playback to help witnesses in role-playing mock examination sessions. You, too, will find that working with someone using video feedback makes your job so much easier. Witnesses look at themselves in playback and say, “My GAWD, I look like a gargoyle when a scrunch my eyebrows together while I am thinking!” You get to say, “In that answer you used way too much business jargon. How would you say that in English?”

I suggest that you record your witness the first time you meet that witness. Do it in a mock examination session. Hang onto it – it will be in a digital format – somewhere you feel is safe and privileged. You are building a small library on this witness. You can use this first file in future prep sessions to say, “Look how much you’ve improved from the day I met you!” You can send it to whoever is ultimately responsible for settling the case and say, “Seriously? You think we can let this person take a video taped deposition without hiring someone to help make her act like a human being?” There are multiple ways you can use these files – including sending them to a witness preparation specialist. More on this later...

Another inexpensive tool in which to invest is a hat. If you are used to having two attorneys prepare one witness at the same time, it is much less expensive to use one attorney. Most people, I find, use one lawyer to do direct exam and/or act as the defending lawyer in the deposition. They use the other as the lawyer who is taking the deposition or the lawyer who is cross-examining. Many attorneys say to me, “I don’t want my client thinking I am a bad guy!” I find that most people understand that you are playing another character – the character of the “bad lawyer” -- if you wear a costume. I’m not talking about dressing up like the other lawyer – just put a hat on your head when you are playing the other lawyer. I actually created the Good Lawyer/Bad Lawyer™ clothing line through making witness preparation hats. You don’t have to buy my hats – but if you are going to play both lawyers, you do need to distinguish yourself with a simple physical distinction – and a hat is as simple a solution as any.

## *2. Smaller Budget = More Time... Or Does It?*

Many attorneys allocate the same amount of time to each witness they prepare. For example, they always allow three hours preparation time for a deposition of a “minor” witness and six hours of preparation time for a “major” witness. Still others allocate time based on the amount of time that witness will be on the stand or in the deposition. I’ve heard one hour prep time per hour on the stand.

Sounds like good budgetary planning, doesn’t it? The only problem is that witnesses are not like cupcakes. If you bake them all for 12-15 minutes in a 350° oven you will not get a perfect batch of testifiers, ready for frosting.

One way to figure out from your first meeting how much time this witness will need is to do a role-playing mock examination. Something short, sweet, and that gives you the answers to the questions that tend to haunt you from the ghosts of past preparation experiences. Make a list of criteria that you want from this witness – this will depend on the witness and case. A short list example might be, “I need her to appear credible. I need people to know she is emotionally affected by what happened

to her. I need her to answer the question she is asked – neither to ‘volunteer’ nor to say too little.” In your mock examination can she do all these things? Then you might be able to budget less time with her or fewer sessions. Can she do none of these things? Then you must budget more time with her or more sessions than you are going to with another witness in the case who can fulfill his or her list of criteria.

If you have a large group of witnesses from the same company, you might be used to preparing them one at a time and allocating a day for each one. For example, 20 witnesses means 20 first days of preparation. Another model, depending on privilege issues, might start with all twenty in a general preparation session that includes role-playing exercises for all of them. That session might include some content that is case specific or no content that is case specific depending on privilege. Out of that half-day session, you will learn who is going to need almost no time for preparation, who is going to need several hours, and who is going to need more than one session. You then can plan in a much more time-efficient and therefore cost-efficient manner. Out of those further sessions you will be pleasantly surprised and get to cut the time short with some and be unpleasantly surprised with others and allocate that “saved” time to them. I recently used this model in a lawsuit and helped prepare 44 witnesses in less than 15 days time.

### *3. In Over Your Head? Look to Cyber Thrift!*

Suppose you realize you are in over your head – you need help from a witness preparation specialist with a witness. Before you arrange for travel and daily fees try the following two interim steps.

First, send the witness video you recorded from your first meeting, as well as any subsequent role-playing exercises you recorded from further meetings (if any) to a witness preparation specialist. You might also need to let your consultant review some content in the case. The consultant will charge you an hourly fee for this. Next, ask the consultant to send a written report with observations and recommendations. Talk with the consultant over the phone and discuss his or her tips on how to make the witness better. Or, if the consultant knows you are not able to affect the change that is needed, the consultant might recommend the next step.

The next step is having the consultant work with you via Skype or videoconference. Again, for an hourly charge by the consultant and perhaps some videoconference fees, you can have the witness preparation specialist work with you and the client long distance.

Anywhere during this process or at its end you might still decide it is best to bring the consultant to your witness, or for you and your witness to travel to see the consultant. You now have a consultant who is totally up to speed on your witness and you should have a very good sense of what the problems and issues are that still need to be addressed in person.

### *Conclusion*

Witness Preparation does not have to bust your trial budget. With careful planning, assessment, and use of modern technology you can end up spending no more or less than exactly what is needed.

# S

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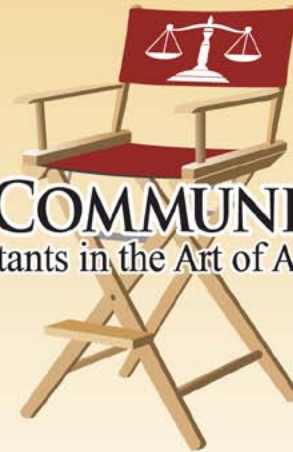


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## A Note From the Editor

*Race, gender, tears, rage, damages, communication, economy and emotion!*

*You cannot run the gamut of topics anymore than that! And that's what we have for you in the May 2011 issue of The Jury Expert! As trial consultants, we see the good, the bad, and the ugly. We are privy to the secrets, the dysfunction, the illicit wishes and wants of the parties and the anger and frustration of both litigants and lawyers. And that results in work that is sometimes exhausting but always invigorating and interesting.*

*You may have expected a piece in this issue about the way our heroes fall and how jurors [and the general public] respond. We think that topic is way too predictable for The Jury Expert. So instead, what you will see is emerging work on how the race and gender of the trial lawyer is related to the ultimate verdict for criminal defendants. (It isn't pretty.) And then you'll find lots more including some original research on damages and entitlement, product liability, juror emotions, and finally, narrative persuasion.*

*We are, naturally, attuned to the economy and your desires to save some money. So we have two pieces on how to save money on pre-trial research and on witness preparation. Why? Why, because we care about you and want to help.*

*You could help us too! Our authors work hard on their articles for The Jury Expert! You like reading them. So read. Enjoy. Gather nuggets. AND then become real—by writing a comment on our website or on your own blog so our authors know you are out there appreciating their hard work.*

*Next time you see us it will be in the dog days of summer. So enjoy this breath of spring and know that, before too long at all, "we'll be back".*

Rita R. Handrich, Ph.D.  
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A M E R I C A N S O C I E T Y O F T R I A L C O N S U L T A N T S



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