



# The Jury EXPERT

*The Art and Science of Litigation Advocacy*

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## We've Moved! The Jury Expert is now published by the ASTC Foundation!

In 2005, The Jury Expert was developed by the American Society of Trial Consultants to bring the latest research, skills, and strategy to the legal profession regarding how they try cases. In May of 2008, we transitioned to an online only publication and our growth has been exponential. Now, we have a new publisher that promises an even brighter future.

We are grateful to the ASTC Foundation for offering to serve as publisher of TJE. As the ASTC Foundation is a non-profit corporation whose mission is to help educate the legal community, The Jury Expert feels right at home.

Our new home offers a lot to readers of (and writers for) The Jury Expert. The ASTC Foundation is dedicated to the study and promotion of the United States judicial system by advancing a better understanding of litigation decision-making and communication. Through research and educational activities, the Foundation seeks to improve the quality of information used by judges, juries, lawyers and litigants to resolve cases and, by doing so, improve the efficiency and effectiveness of the justice system.

*The ASTC Foundation is currently engaged in research on how to improve fact-finder comprehension, the jury selection process, and overall litigation and trial efficacy. The goal is to assist courts and various legal organizations that have been looking at reforms to cope with decreased state court budgets and resources coupled with increased case filings, litigation costs and case complexity.*

One of the goals of the ASTC Foundation is to improve the justice system's productivity and performance by studying these issues and making recommendations to the Courts and the legal community. To that end, the Foundation is doing a survey of trial lawyers, judges, paralegals and others involved in the litigation process. The survey results will help us to understand their attitudes and practices in order to better advise the legal community about these issues.

We hope you will take the following survey and send this survey link to your friends, associates and even opposing counsel in the legal profession so that we can collect a wide range of data for this initiative.

<http://www.surveymonkey.com/s/3TN9WQZ>

In addition to completing the above survey, the ASTC Foundation is funding a national study led by The Jury Expert and staffed by trial consultant members of the ASTC that will look at various biases we all face in our day-to-day work in litigation advocacy. Nothing like this study has ever been done before and we hope it will educate and inform us about biases in order for attorneys and judges to make better decisions in jury selection, case planning and preparation.

We are excited about our new publisher-home and the opportunities it affords The Jury

Expert. Do us a favor and click that link to take the ASTC Foundation survey:  
<http://www.surveymonkey.com/s/3TN9WQZ>.

It will help us all and the results will be published here in The Jury Expert. Make sure your voice is reflected in the final report.

## Popular Culture and Diversity In the Courtroom

By *Anthony P. Ashton, DLA Piper*

People who have known me for any length of time can tell you at least two things about me: (1) I am a trial attorney at a large firm; and (2) I know a great deal about popular culture, i.e., movies, television, and music. In fact, two other attorneys and I competed in the World Series of Pop Culture. This article will focus on the ways in which we, as trial attorneys, can learn from popular culture with regard to diversity of the trial teams that we put before juries. Although the tone of, and some of the references in, this article may seem whimsical, the message is not. Failure to utilize a diverse trial team may have the effect of creating a negative image of your client or alienating the jury. In the real world, this failure may translate into dollars and cents for your client.

### *A Woman Is Not Just a Man with Longer Hair*

The U.S. Supreme Court recognized the potential impact of diversity in juries more than sixty years ago when it wrote: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." In short, a woman is not just a man with longer hair. A male attorney's prediction of how female jurors will perceive the arguments to be made, the demeanors of the witnesses, or the evidence to be presented may be little more than a guess.

Similarly, an African-American is not just a Caucasian with darker skin. Forty years ago, the Court expanded its sentiments on the impact of jury diversity, explaining: "[W]e are unwilling to make the assumption that the exclusion of [African-Americans] has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. . . . [I]ts exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." In short, the Supreme Court acknowledged that being black is not something that you put on and take off only in relation to legal issues concerning race.

As attorneys, it is important that we recognize that diversity in the jury pool is a modern reality that will affect not only who makes the decision but how those decisions are made. Empirical data from a relatively recent study shows that jurors on heterogeneous juries deliberate longer than those on homogeneous juries, discuss a wider range of facts, and make fewer factual errors. There is a classic motion picture entitled *12 Angry Men*. In this 1957 film, twelve white, male jurors determine the fate of a defendant. In today's world, the idea of an all-

white, all-male jury seems farfetched. Indeed, in the made-for-cable television remake in 1997, African-American actors played four of the twelve jurors, and a Latino played one juror. The producers of the remake realized how unrealistic it was to have a racially homogeneous jury. Today, the fate of your client in a lawsuit likely will be determined by a multi-racial, multi-ethnic group of men and women.

*“There’s a Reason George Strait Isn’t Booked at The Apollo”*

Recently, I was speaking to an in-house counsel about the staffing of attorneys for trials. She told me of a lawsuit in which her company was the defendant, the plaintiff was African-American, the jury pool was predominantly African-American, and even the judge was African-American, yet outside counsel presented her with an all-white proposed trial team. She vetoed the proposal and informed the outside attorneys that they needed to use a diverse team. A few weeks later, I heard her sentiments echoed by another in-house attorney during an unrelated conversation. My response during the second conversation was: “There’s a reason George Strait isn’t booked at The Apollo.” The second in-house attorney instantly knew what I meant and, referring to Strait, said: “No one is questioning his talent, but . . .” What both in-house attorneys recognized, and their outside counterparts failed to appreciate, is the need to know and connect with your audience.

Knowing and connecting with the audience are two of the keys to being a successful storyteller. A trial is essentially competing stories told through evidence and attorney argument. Having members of the team with different world and life views increases the chances of formulating a trial strategy that communicates the client’s story in a way that has more universal appeal. Likewise, diversity in the team decreases the chances of settling on a strategy and message that will leave some jurors unaffected, or worse still, biased against your client. Inherently, a homogeneous group will tend to communicate using tone, cadence, analogies, imagery, and vernacular that are both familiar and appealing to that group, but perhaps not to others. At the conclusion of a jury trial, the attorneys for the losing party may sometimes remark: “The jury just didn’t get it.” Rather than blaming the audience for not appreciating the story, such an attorney might do well to ask: “What was there about the way in which I communicated my client’s story that proved ineffective for the jury?” The answer may be that the jury did not identify with the story, how the story was presented, or the storyteller. Thus, it may not be that the jury didn’t get it. It may be that the attorney didn’t (and still doesn’t) get it. More important, hearing that the jury “didn’t get it” is of little consolation to a client who has just lost.

*Give the Jury Someone to Root For*

Another factor often overlooked is what I’ll refer to as “The Price Is Right Phenomenon.” When I was a child and had a day off from school, I watched The Price Is Right with my mother. Inevitably, there seemed to be at least one African-American contestant on each episode. And, consistently, my mother and I rooted for that contestant to win. We never rooted against any other contestant, and we certainly did not want anyone to cheat or otherwise bend the rules so that any particular contestant would win or lose. Nevertheless, undeniably, we enjoyed watching someone with whom we felt a connection win. I am quite sure that this phenomenon was repeated over and over again in households throughout that program’s viewership. Substituting

a game show and its audience with a courtroom and a jury, necessitates the question in every trial: “Who is the jury rooting for?”

The simple and eternal truth is that people like it when they win. In a situation where we cannot personally win, we like it when our surrogate, i.e., someone whom we perceive to be like us, wins. Thus, when assembling the trial team, it is advisable to provide the jury with persons the jurors consciously or subconsciously want to see win. A homogeneous trial team would be fine for these purposes if the jury was similarly homogeneous, which, as noted above, is a farfetched notion.

If you practice at a large law firm, your firm is likely diverse in terms of gender, race, and ethnicity. Presumably, these diverse attorneys are skilled or they wouldn't be at your firm. Increasing the diversity of your trial team may be no more difficult than utilizing someone already on your firm's payroll. If you are a solo practitioner or at a small firm with no diversity, assuming the economics work, simply team up with another solo practitioner or small firm to add diversity for the specific trial at hand.

#### *The Make-Up of the Trial Team Influences the Jury's Perception of the Client*

One of the definitions of “represent” is “to serve as a sign or symbol of.” To the jury, the attorneys at trial truly do “represent” the client. For an individual plaintiff or defendant, the attorneys exemplify the choices and demeanor of the client. For example, it is not difficult for a jury to conclude that a plaintiff who hired an overly aggressive bully as his attorney is himself or herself an overly aggressive bully. With regard to the proverbial faceless corporation, the faces of the individuals on the trial team may be seen as the faces of the corporation. A large corporate defendant represented by an all-white, all-male trial team can project an image of elitism and an old boys network, whether or not that image is accurate. Indeed, a big corporation being represented by such a trial team is a tired movie cliché used to evoke sympathy for the little guy plaintiff. Witnesses will come and go throughout a trial, but, as attorneys, we will be there day in and day out. Although there likely will be a corporate designee at the trial table, he or she likely will sit and remain silent throughout most of the trial. The attorneys will move about the courtroom, converse with the judge, and question witnesses. In addition, the attorneys will start and end the trial by speaking directly to the jury.

At bottom, as trial attorneys, we stand in for, and vouch for, our clients. We implicitly tell jurors that they can trust us and they can trust the people who chose us as their lawyers. We also sometimes expressly tell jurors that they cannot trust those who testified contrary to our client's position. It is human nature that people trust those with whom they identify. Therefore, a good trial strategy is to assemble a team that reflects the makeup of the jury. Although gender, racial, and ethnic commonalities between the jurors and the attorneys do not guarantee success, these types of commonalities serve as shortcuts by which jurors may more easily relate to the attorneys. We want them to relate to us, because, at the end of the trial, we will be the persons who tell the jurors how they should decide the issues at hand.

### *We Can Learn a Great Deal from Disney Channel*

Anyone who has children and cable or satellite television has spent more time than they care to admit tuned into Disney Channel. The executives at Disney Channel have mastered the art of appealing to the broadest base while offending no one. Moreover, in general, the casts of their shows personify diversity, while rarely, if ever, mentioning race. Programs in which the lead is white tend to have African-American or Latina best friends, e.g., *Good Luck Charlie* or an older show such as *Lizzie McGuire*, while shows with African-American leads tend to have white best friends, e.g., *A.N.T. Farm* or an older show such as *That's So Raven*. The formula is brilliant in its simplicity. Equally important to the casting itself is that, to the audience, the race of any particular actor portraying any particular character has little, if any, impact on the character's screen time, the importance of the character, or the story being told. Thus, even when the title characters are white, the network's programs come across more as being ensemble shows than as productions having white stars/heroes, with ethnic sidekicks, e.g., *The Lone Ranger* and *Tonto*, or *Indiana Jones* and *Short Round*.

Likewise, a trial team should be perceived by the jury, as an ensemble cast. Each member should play an important and necessary role in the production. It is critical that the jury see all of the trial team members as stars, actively presenting the client's case, rather than as bit players or extras. Simply placing a woman or a person of color on a trial team is not enough. In fact, it is counterproductive if jurors perceive that certain attorneys are on the team solely for the purpose of filling the female or ethnic slots while the "real" attorneys handle the important aspects of the trial. One of the goals of having a diverse team is to have jurors identify with and connect with one or more of the team members. No one likes it when someone with whom he or she identifies or feels a connection appears to be relegated to handling seemingly menial tasks or seems superfluous. People want to drive the Batmobile, not just sit in the passenger seat. In divvying up assignments for trial, an easy analogy to remember is that the average person would rather be Batman than Robin, and nobody wants to be Alfred.

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- i. [http://en.wikipedia.org/wiki/The\\_World\\_Series\\_of\\_Pop\\_Culture\\_\(season\\_1\)](http://en.wikipedia.org/wiki/The_World_Series_of_Pop_Culture_(season_1)).
  - ii. *Ballard v. U.S.*, 329 U.S. 187, 193-94 (1946).
  - iii. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).
  - iv. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY*, 2006, Vol. 90, No. 4, 597, 608.
  - v. The Apollo Theater is a landmark located in Harlem, New York, and is known as the preeminent African-American theater, having inter alia helped launch the careers of Ella Fitzgerald and Pearl Bailey, and served as the venue for performances by, among others, Lionel Hampton, James Brown, Aretha Franklin, and "Motown Salutes the Apollo." George Strait has recorded dozens of country music hits, has won numerous awards for his songs, and is considered a country music superstar.

- vi. While writing this article, I checked the Internet for George Strait's current tour schedule to verify my assumption that he is not booked at The Apollo. He's not.
- vii. Priscilla M. Elsass & Laura M. Graves, Demographic Diversity in Decision-Making Groups: The Experiences of Women and People of Color, 22 ACAD. MGMT. REV. 946 (1997) ("In diverse decision-making groups, members have different experiences, values, attitudes, and cognitive approaches; consequently, they bring divergent perspectives to the group's problem. Ideally, the availability of these varied perspectives will lead to the identification and critical examination of diverse alternatives and, in turn will create performance gains.").
- viii. Steve M. Wood, Lorie L. Sicafuse, Monica K. Miller & Julianna C. Chomos, The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict, THE JURY EXPERT, Jan. 2011, Vol. 23. Num. 1, at 23, 24 ("According to social influence theory, it is not only the message, but also the presentation of the message and the messenger that affects the decision-making process.").
- ix. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 993 (10th ed. 1997).
- x. John DiMotto, *Lawyer Credibility in a Jury Trial*, BENCH AND BAR EXPERIENCES (Apr. 20, 2010, 4:50 AM), <http://johndimotto.blogspot.com/2010/04/lawyer-credibility-in-jury-trial.html> ("If the lawyer has no credibility, the client will have no credibility.").
- xi. If Disney Channel shows simply do not serve as points of reference for you, use the original Lethal Weapon. Both racially diverse lead characters have their own familial issues; both have their own personal theme music – for Riggs it's guitar solos by Eric Clapton, for Murtaugh it's saxophone riffs by David Sanborn; and both shoot the bad guy at the end.
- xii. Short Round, portrayed by former child actor Ke Huy Quan, was the young Asian sidekick in Indiana Jones and the Temple of Doom. He may be remembered for saying lines such as "Okey dokey, Dr. Jones," and driving a car with boxes strapped to the bottoms of his feet because his legs weren't long enough for his feet to reach the pedals.
- xiii. Karen L. Hirschman & Ann T. Greeley, Trial Teams and the Power of Diversity, LITIGATION, Spring 2009 Vol. 35, Num. 3, at 23, 25 ("Jurors view women or minority attorneys who sit at counsel table without a substantial role as 'tokens.' If the lawyer never examines a witness and does not open or close for his or her client, there is a risk that the jury will perceive the lawyer's presence as manipulative or pandering-an attempt to suggest that the client is sensitive about diversity issues.").

*We asked two trial consultants to respond to Anthony Ashton's article. On the following pages, Susie Macpherson and Kacy Miller share their thoughts and then Anthony Ashton replies to their reflections.*

***Susie Macpherson responds:***

*Susan Macpherson is a senior consultant with NJP Litigation Consulting. She conducts communication research to help attorneys prepare presentations for juries, judges and ADR proceedings.*

"How will the jurors react to an all white all male trial team?" "Do we need a woman at counsel table?" Trial consultants frequently hear questions regarding diversification of a trial team, and all too often they only arise when the case is fairly close to trial. As Anthony Ashton explains, there is a better question that senior litigation partners and their clients should be asking: "what benefits are we missing out on when our trial team lacks diversity?" I can confirm and endorse many of his points on the benefits of trial team diversity from my own observations

in the courtroom and conducting hundreds of post-trial interviews. What I would emphasize is that the time to be thinking about the composition of the team is well before trial.

Getting all the benefits of using diverse perspectives to develop the story that will be told at trial requires bringing those voices into the conference room at an early stage of litigation. Because there is typically greater diversity among the firm's younger lawyers, the trial team leadership often needs to consciously develop a group culture where every member has "speaking rights" to maximize participation and reinforce the value of ideas coming from a variety of perspectives. When that is the group norm, pretrial brainstorming sessions can provide the first test of the client's story, and the opposing story, against a broad array of life experiences, assumptions, and beliefs. It pays to identify early the points that may cause credibility problems with the jurors, and the unanticipated assumptions jurors could make about the evidence.

That is not to suggest that a non-white and/or female attorney on the trial team should be expected to be the expert on all jurors of his or her race, ethnic background, or gender, or to encourage the assumption that a single demographic characteristic is a reliable predictor of verdict preference. We know that the former proposition doesn't make sense and the latter is not true. The notion being endorsed here is that a story with broader appeal will emerge by looking at the evidence and the arguments through the lens of different life experiences.

In post-trial interviews, jurors often comment on the lack of diversity when the case was tried by an all-white male team from a large or mid-size law firm. The typical comment goes something like this: "They must have stopped hiring only white males a long time ago, so I can't believe they couldn't find even one person of color or one woman in their firm to help them try this case." But in my experience, jurors' harsher judgments are directed at the teams that treat diversity as an afterthought.

As Ashton points out, the expectation established by popular culture is an ensemble cast, not a team where the only person of color or the only female plays the role of the silent or subservient sidekick. Bringing a lawyer onto the team who has not had the time to learn the case well enough to play any role in the trial for no reason other than filling the quota for diversity is more likely to harm than improve jurors' perceptions of the team. Jurors are also acutely aware of any disparity between the ways in which lawyers behave 'on stage' and 'off stage' during trial. A lawyer who is introduced as a member of the team and not treated as such during breaks or out in the hallway will be readily identified by many jurors as 'the token.' This is particularly true in longer trials where jurors often give the lawyers nicknames and spend some time speculating about the dynamics of the trial team. Jurors' post trial comments such as, "he was never part of the huddle in the courtroom" or "she was usually left behind to pick up the papers during lunch" reveal what may be a surprising degree of sensitivity to this issue. This likely results from jurors' awareness of the same problem in their own workplaces where they may have seen a disconnect between the stated policy on diversity and the reality of disparate treatment. When jurors spot this problem on a trial team, it is often the unintended consequence of introducing a new member to add diversity to the team too close to trial. Selecting someone who has the skills to play a role in the courtroom does not automatically mean that he or she will be fully integrated into the team. Team building takes time.

In the era of “vanishing trials,” litigation team diversity will still be a valuable asset despite the fact that the majority of arbitrators and mediators are white males. (In recent years, we are seeing more women on arbitration panels, but there is still very little racial or ethnic diversity.) Regardless of the characteristics of the decision maker, incorporating diverse presentation styles helps to keep the listeners more engaged. Tying distinct topics to distinctive presenters can also increase the decision maker’s retention by reinforcing the process of “chunking” evidence and arguments, which is essential in complex cases. Jurors have often demonstrated this in post trial interviews where they associate a specific message or argument with the attorney who presented and/or challenged the related evidence.

Mr. Ashton’s article was not intended to be a detailed discussion of juror decision making so I’m not certain whether he meant to imply that juror identification with a lawyer of the same race, ethnicity and/or gender can be assumed, or that when identification between attorney and one or more jurors does occur it always plays a significant role in the outcome.

In my experience, jurors do not necessarily “root for” or rely on the evidence and arguments presented by a lawyer with whom they share demographic characteristics. I have heard many jurors say that they liked or could relate to one lawyer much more than the others in the courtroom, but that they also had to reject that lawyer’s argument(s) when deciding the case. Consciously or subconsciously they may indeed have been “rooting for” the lawyer they liked better, but they were also very conscious of their duty to weigh the evidence. As one juror put it, “We all liked (the losing lawyer) more than the other guy, but we just had to call it as we saw it.”

Mr. Ashton recognizes that juror identification with the lawyer is “no guarantee of success,” so perhaps he would not disagree that the strength of the evidence can easily override that factor. The composition of the jury may override it as well. And, unfortunately, the jury that is selected often does not reflect the level of racial and ethnic diversity that exists in the venire or in the venue. There are examples in many state and federal courts across the country where underrepresentation of non-white jurors is a continuing, if not growing, problem.

Studies on the impact of attorney race, ethnicity, and gender on jury verdicts and juror decision making are fairly limited and do not provide a consistent picture. For a thorough discussion of the social science literature and an indication of research in progress, take a look at Alexis Robinson’s article [The Effects of Race and Gender of Attorneys on Trial Outcomes](#) and the related commentary pieces in the May 2011 issue of *The Jury Expert*. You will find an excellent summary of the factors that make this a very challenging and complex issue to study, and get a good understanding of how little we really know about this issue.

The studies that have been done suggest that the attorney’s demographic characteristics do not have a uniform impact. For example, a study that looked exclusively at civil cases produced very different results than the studies that looked at criminal cases.<sup>1</sup> At this point, we can only safely say that the impact of attorney race, ethnicity, and gender depends on a large number of variables in addition to the strength of the evidence such as: the composition of the jury, the attorney’s style of communication, case type, the venue, the venire, and the characteristics of other actors in the courtroom. It is simply not possible to make any definitive general statements about how jurors’ decision making or jury verdicts are influenced when attorneys share demographic characteristics with some or all of the jurors.

Although there is no one-size-fits-all prescription for the composition of a trial team when viewed from the perspective of an individual attorney's ability to influence jurors, we do know that the benefits of assembling a diverse trial team are not limited to that dimension. There is also an inherent value in incorporating a wide variety of perspectives and styles of communication in preparing for and conducting a trial or arbitration.

## ENDNOTE

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- i. Phillips, M.R. (2010). Jurors' perceptions of ethnic minority attorneys: Are we in a post-racial era? *Minority Trial Lawyer*, 8(3), pp. 1, 8-11.

***Kacy Miller responds:***

*Kacy Miller, M.Ed is the president of CourtroomLogic Consulting, a full-service trial sciences firm located in Dallas, Texas (www.CourtroomLogic.com). Areas of expertise include pretrial research, theme development, witness preparation, graphic development and all aspects related to jury selection.*

As I read Anthony Ashton's article, I found myself feeling in total agreement with some of his statements and shaking my head in disagreement with an equal number of other statements.

In the spirit of full disclosure, I am a female Caucasian. I did not grow up in a multiracial home, my high school was predominantly Caucasian and Hispanic, and I can probably count the number of minorities I knew during college (a private institution) on my fingers and toes. But I know juries. It's what I do.

In his first paragraph Mr. Ashton states, "Failure to utilize a diverse trial team may have the effect of creating a negative image of your client or alienating the jury. In the real world, this failure may translate into dollars and cents for your client."

I agree with his assertion that jurors need to feel a connection with the trial team and that an inability to form such a connection could translate into an adverse or non-ideal outcome. However, the idea that merely adding a man, woman or person of color to the trial team is the ticket to increased success or persuasion is faulty logic.

Years of pretrial research, shadow juries and post-trial interviews have taught me that good communicators and storytellers persuade jurors. I cannot think of one instance where a juror has told me that he or she rendered a specific verdict in a case because of the gender, race, ethnicity or age of the attorney.

What jurors do tell me is that they are influenced by the perceived skills, competency and professionalism of counsel, regardless of demographics. Did counsel treat the court, jury, witnesses and judicial process with the utmost respect? Did counsel have a command of the facts and arguments? Did counsel make points that were strong, clear and understandable? Did counsel present a story and themes that jurors could personally identify with? Was counsel organized? Did counsel utilize multimedia effectively and skillfully? Was counsel honest,

trustworthy, believable and likable?

If jurors perceive counsel as possessing these characteristics, the diversity of the trial team becomes secondary. Diversity is certainly important, but it should not be the driving force when assembling a trial team.

Mr. Ashton hit the nail on the head when he stated, "... in short, a woman is not just a man with longer hair . . . [and] an African American is not just a Caucasian with darker skin." While I agree, I think the client would be better served if counsel focused on the diversity of the jury rather than the diversity of the trial team.

Back in 1999, research was conducted to investigate whether jurors were more influenced by arguments from attorneys of their own race.<sup>1</sup> While the research focused on criminal verdicts involving allegations of sexual abuse/neglect, the findings are relevant in other causes of action. Why? Because data revealed that juror characteristics and personality traits determined whether the race of counsel mattered. Authoritarian jurors were more influenced by attorneys of the same race. The issue was the degree of authoritarian characteristics and beliefs held by the juror, not the skin color of counsel.

Steven R. Covey once famously stated: "Seek first to understand, then to be understood." This quote describes the foundation of trial advocacy. Understand your audience. Identify what matters to them. Learn how they think. Discover what makes them tick. Understand how specific values, belief systems, life experiences and attitudes shape their views. And the best way to learn what jurors think is to ask them. Test your case strategy, themes, message and delivery by conducting pretrial research in the form of a focus group, mock trial or other small group format. If you're on the right track, the jurors will tell you. If you're not, they will tell you that, too.

Rather than selecting a trial team that paints a picture of diversity, why not deliver the message in a way that appeals to the diverse jury? At the end of the day, clients need to be represented by a dynamic storyteller who is professional, honest, believable, trustworthy, and one whom advocates strenuously on their behalf. Every client hopes jurors will connect with counsel, but to do that, counsel has to connect with jurors.

Sure, having a diverse trial team is something to strive for. But at the end of the day, trial teams should be comprised of the best communicators, not just "a man with longer hair" or a "Caucasian with darker skin."

#### ENDNOTE

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- i. Boliver, S.E. (1999). The effects of attorney race and use of racially relevant arguments on juror decision-making. Dissertation Abstracts International: Section B: The Sciences and Engineering, 60, p. 1911.

#### *Anthony P. Ashton Response to Kacy Miller Commentary:*

With regard to the review by Ms. Miller, she seems to disagree with me and says: "... the idea that merely adding a man, woman or person of color to the trial team is the ticket to increased

success or persuasion is faulty logic” However, I think we’re actually in agreement on this point based on the following statement from my article:

“Simply placing a woman or a person of color on a trial team is not enough. In fact, it is counterproductive if jurors perceive that certain attorneys are on the team solely for the purpose of filling the female or ethnic slots, while the ‘real’ attorneys handle the important aspects of the trial” and “gender, racial, and ethnic commonalities between the jurors and the attorneys do not guarantee success . . . .”

Consequently, I do not believe Ms. Miller’s statements reflect disagreements with the article.

She also says: “Sure, having a diverse trial team is something to strive for. But, at the end of the day, trial teams should be comprised of the best communicators, not just ‘a man with longer hair’ or a ‘Caucasian with darker skin.’” My article does focus on being a better storyteller, i.e., communicator, as a key part of “knowing and connecting with the audience.” Thus, I think we’re again in agreement on the importance of having a trial team comprised of the best communicators. Any possible disagreement lies in the fact that Ms. Miller’s comment could be read to say that having the “best communicators” and having a diverse trial team are mutually exclusive. However, this is clearly incorrect. As discussed in the article, “If you practice at a large law firm, your firm is likely diverse in terms of gender, race and ethnicity. Presumably, these diverse attorneys are skilled or they wouldn’t be at your firm.”

## Closing Argument: Prospective, Not Retrospective -or- The Closing Argument: Telling the Future, Not the Past

By *Bob Gerchen*

Tell 'em what you're going to tell 'em;  
Tell 'em;  
Tell 'em what you told 'em;  
Sit down.

*--an old trial truism that isn't very true.*

Let me tell you a story: One fine day, The Three Bears sat down to eat breakfast. But their porridge was too hot, so they decided to go for a walk while their breakfast cooled down. Not long after The Three Bears sidled down the path, a lost, hungry girl named Goldilocks came upon the Bear cabin. When no one answered her knock, she entered...

You know the rest of the story: girl eats porridge, breaks chair, passes out in Baby Bear's bed.

What happened next? If the rest of the story was told in closing argument it would probably go like this:

Well, when Goldilocks came upon that cabin – locked or not – she had an obligation to remain outside unless she had permission to enter. But she was too hungry to abide by the accepted rules of our society. She simply burst right in. And she fouled not one, not two, but all three bowls of Bear porridge, not one, not two, but all three Bear chairs and messed up not one, not two, but all three Bear beds...

But, what happened next?

And so you can now see that the evidence has indeed shown that Goldilocks is a miscreant, a threat to civilized society and a young lady who just doesn't learn from her mistakes. Tell her it is time to own up to her behavior. Punish her accordingly.

Wait, how does the story end?

Traditional narrative has a beginning, a middle and an end. The end of the story is so very important; we all want to know how the story ends. Does our hero get the girl? Does our heroine survive the killer storm? Do they live happily ever after?

So why, after telling most of the case story at trial, and the opportunity to help jurors end the story in a fitting manner arrives, do so many lawyers go back to the beginning?

### Where Does the Story End?

The story ends in the jury room. And several things happen in that jury room:

- 1) Jurors look at the instructions, and the verdict form, and as we've seen countless times in mock deliberations, exclaim, "This [instructions/verdict form] has nothing to do with what they were talking about out there [in the courtroom]."
- 2) The true work of persuasion takes place.

### Let's Talk About Persuasion

There are several internal issues at play for jurors by the time you get up to deliver your closing arguments:

- Most of them believe they know how they feel about the case;
- Most of them are eager to talk about the case;
- Many of them are experiencing some level of anxiety and/or confusion over what they are being asked to do by the parties.

But it is not during closing arguments that those internal issues get resolved. It is during deliberations.

A meta-analysis of 1,631 jurors who participated in mock trials between January 1, 2011 and June 22, 2012 showed that 53.6% of jurors changed their leaning toward plaintiff or defense during deliberations. A full 85% of undecided jurors waited until deliberations – not closings – to finally make up their minds.

The true work of persuasion takes place in the jury room. If the first vote in the room is 7-5, and a couple of hours later, the final vote is 10-2 (in a civil case), who persuaded the three converts? It wasn't you; you weren't there.

So, if the persuasion is happening in the jury room, and not during closing, what is the purpose of closing argument?

### The True Purpose of Closing

It's simple: Help them put the fitting end to the story. More specifically:

- 1) Help them understand the job that is before them;
- 2) Arm jurors who are sympathetic to your case with the words and ideas they need to counter the objections of jurors who are sympathetic to your opponent's case.

So in preparing your closing:

- Think prospective, not retrospective;
- Give them a reason to listen;
- Use the instructions/verdict form as a framework, not an afterthought;
- Make it about them.

### Think Prospective

When you begin to put your closing together, think in terms of “What is going to happen next?” Well, what is going to happen is, twelve relative strangers are going to go into a small room and discuss, argue, barter and compromise. And they need help.

### Give Them a Reason to Listen

By the time you get up to close, they’ve heard enough. They’ve listened to attorney rhetoric and to witness upon witness. And they’ve made some judgments along the way. They want to talk about the case, already. And your oratory is an obstacle to their getting to do that. So before you can accomplish anything in closing, you first have to give them a reason to listen to you. One way to do that is to predict the future: “When you go back into that jury room, you are going to have two jobs,” you can begin. Wait a minute, they’re thinking, I thought I only had one job – answer the questions. “Your first job is going to be to answer the questions that the Court wants you to answer. Yup, knew that one. “Your second job will be to explain to your fellow jurors why you feel the way you do about each of the issues these questions raise.” So, how do I do that?

Now they have a reason to listen.

### Use the Instructions/Verdict Form As a Framework, Not an Afterthought

All too often, attorneys are so wrapped up in trotting out their best imitation of Cicero, the true job of the jurors – answering the verdict form – gets relegated to a few minutes at the end of closing (“Now let me tell you how what I’ve just expounded upon for 30 minutes relates to the verdict form”).

It is so very critical to help the jurors understand how to deliberate. If you practice in a venue that allows you to do so, start with the instructions. Pedestrian? Perhaps. More useful to the jurors than a retelling of what they’ve just heard for the last two weeks? Certainly. If there are terms in there that routinely confuse laypeople, e.g., “recover,” “injury,” explain them in laymen’s terms. What does an instruction on “Agency,” or “Scope of Employment” mean?

Walk through the verdict form; if one question is predicated on another, make sure jurors are clear on that. If you are the defendant, you don’t particularly want a “No” answer on Negligence, but a “Yes” answer on Gross Negligence, do you? Take the time now to refer back to the evidence in the case and apply it not rhetorically, but concretely – to the very questions they are being called upon to answer. And make sure they understand which instructions apply to which questions on the verdict form. Attorneys make the mistake of assuming that legal constructs that seem logical to someone who spent three years in law school will seem equally logical to laypeople. Assume nothing.

Arm your jurors for argument by predicting the future: “When you are talking about this question, someone may very well say [opponent’s theme or argument]. If they say that, you remind them, [your theme or argument, in one succinct line].” Ultimately, what you are doing is walking them through the strange process that they are about to embark upon, and easing their anxiety about it.

### Make It About Them

If, in closing, you take on the role of facilitator – the one who understands the difficulty and the emotion of the job that jurors are about to be called upon to do – you increase your credibility as you provide clarity for your triers of fact. And clarity is what they need more than anything as the story draws to a close. Not rhetoric. Not convention. Not self-indulgence. Clarity. It is no longer about you, or about your client. It is now about the jurors and the job they are about to do. Ask yourself, “How can I make this upcoming process as clear as possible for them?” Clear thoughts produce clear results.

By the way, for those who have forgotten: the ending to the story is Goldilocks, upon being discovered by The Three Bears in Baby Bear’s Bed, jumps up and runs out of the cabin, never to be seen again (and The Bear family installs an alarm the next day).

*Acknowledgements: To the folks I stole from: David Ball and Ken Broda-Bahm. Thanks, guys.*

***Bob Gerchen** is the Director of the St. Louis office of Litigation Insights has nationwide experience consulting on a broad range of litigation in civil defense and plaintiff cases, as well as criminal prosecution cases. He has worked most extensively in the areas of mass tort defense, intellectual property, employment, medical malpractice, insurance litigation and even lottery law. In addition to his active training practice with various legal associations, he spends a great deal of time working one-on-one with attorneys, honing their oratorical skills for openings, closings and argument before the bench. You can read more about Bob at: [www.litigationinsights.com](http://www.litigationinsights.com).*

## Road Warrior Tips: July 2012

Like many of you, we travel all the time. And we have secrets that help us get around faster, more comfortably and tips on what to make sure and carry with you in the air, on the ground or even, underground! Thanks to the generosity of these frequent flyers—these trial consultant secrets can be yours as well. As we collect additional secrets, we'll add them here (check the Road Warrior category before you head out).

### National Travel: [alphabetized by state]

#### Florida, Orlando

Orlando security is very slow. They have one of those “Clear” lanes, which I thought didn't exist anymore, but other than that, no frequent flyer or First Class lines. Prepare for a 20 or 30 minute wait at the Orlando security lines. [Submitted by Tara Trask of Tara Trask and Associates]

#### Nevada, Las Vegas:

Very often the cab lines in Las Vegas are HORRIBLE. If there is a convention in town you can literally wait an hour for a cab and the lines can stretch around the building. There is a trick. Get one of the luggage porters that are employed by the airport to haul your bags out for you (even a briefcase). They take you to the FRONT of the cab line. Worst case, you will wait behind one or two people. This can save a lot of time for a tip of \$5 or \$10 bucks. [submitted by Tara Trask of Tara Trask and Associates]

#### New York, NYC:

I really like hopstop.com. Great for big city metro info. You can use it on your handheld and it tells you how to get where you are going via metro lines. For NYC, it even says “go south toward Houston” or whatever to direct you when you come out on the street from the subway. I use it in NYC on the subways all the time. LOVE subways. [submitted by Tara Trask of Tara Trask and Associates]

## Traveling faster, easier and with less frustration

### Be a 'Trusted Traveler'

The "Trusted Traveler" [known as PreCheck for domestic travel] program of the TSA has reopened (for a while, at least) for new registrants. It is a program that allows people who are deemed to be 'low security risk' to register. It provides access to special lanes at airport security checkpoints, and you don't have to deal with having shoes, belts, liquids, computers, etc. hauled out and placed back in your luggage. It is more like it was before 9/11. There are also options that facilitate driving through border checkpoints into Canada and Mexico, as well as returning international travelers. I just registered, and was conditionally admitted. Now I have to go through a fingerprinting and photographing process at one of their airport centers, and I am good to the standard security lanes. I anticipate that will give me back dozens of hours each year.

Note: Not all airports make use of this program. Generally, the bigger the airport the more likely it is to be in the system. By the end of 2012, it will have expanded to 35 airports. Austin is not in it, but most of the airports I fly to are, so I will benefit on the return flights. For program information and included airports, go to this website. [Submitted by Doug Keene of Keene Trial Consulting.]

### Carry a spare passport, driver's license and eyeglass prescription

Another thing that I do when flying, especially overseas, is to make a color copy of my U.S. Passport, driver's license and flight information including the paper documentation for electronic tickets. I tuck all of these together in the lining of my suitcase and in my backpack/briefcase. I also bring a copy of my most recent eyeglass prescription with me as I have been in the unenviable position of having lost my glasses when canoeing on a combination business and vacation trip. [Submitted by Steve Perkel of Archer & Greiner, PC.]

## International Travel: [alphabetized by country]

### Japan, Tokyo

If traveling to Tokyo – you'll be flying into Narita, which is well outside of Tokyo. Like Dulles and DC here, only worse. Best way into Central Tokyo is to use the "Airport Limousine Bus" – and not a taxi. It's a much cheaper, and nicer ride. [submitted by Bruce A. Beal of Beal Research]

## Eating Well on the Road

### Everywhere you want good coffee

I love coffee, but don't want to spill it on me while sitting in that airplane or have it go cold. Holding it while someone tries to crawl over to his or her seat is no fun either. I bought a great little thermos from Nissan Thermos (JmL350P) and take it pretty much everywhere with me. It's vacuum insulated and comes with a tea infuser for people who are discriminating tea drinkers. I like it because the top screws on and prevents spillage. I've had it for five years and have dropped it, kicked it, and bounced it down a set of steps and it's still going strong. More importantly, it really keeps my coffee hot for hours. I fill it up at the airport and have good coffee, or at least better coffee, than is typically served on the plane. It easily slides in the pocket in front of my seat. And, I've never had a problem getting it through security. [Submitted by Debra Worthington, Auburn University]

### In the airport

Longing for a layover? Not generally. But when you have one, CNN has a link to 14 airport amenities that will make you long for a layover! Austin, TX (my hometown) is first among them (and rightly so). Also included are Miami International Airport, Schiphol in Amsterdam, Hong Kong International, Boston's Logan International, San Francisco International Airport, and airports in Portland, Milwaukee, Minneapolis/St. Paul and more. [Submitted by Rita Handrich of Keene Trial Consulting]

Enter the "Secret Garden." For anyone with flights or layovers at Norfolk International Airport in VA and needing to refresh and relax, there is a "secret passage," a walkway into Norfolk Botanical Gardens that borders the airport. The Gardens are truly lovely—all 12 acres of them and there is a free tram with narration that makes a 25 minute tour of the main areas on the half hour. There is a good Café with real fresh made food, and beer with terrace seating adjacent to the Japanese Garden section, complete with small waterfall, koi, statuary. Not that many travel by air through Norfolk, but I thought I would recommend it. The Gardens also have Bald Eagles, Eagle Cam and on Easter when I was there with a friend, many folk with big camera set ups were focused on the nest. There are numerous secluded, shaded places with benches where one can sit, review work, meditate or just love being outside. (Apparently the passage way isn't really so "secret" because I discovered the WSJ ran an article on it stating that there are monitors in the Gardens main building where you can keep up with flight schedules, but I didn't try to find them when I was there.) [Submitted by Margie Fargo of Jury Services, Inc.]

When traveling I am always on the lookout for electrical outlets as I wait for the next connecting flight. These are two terrific resources for identifying which gate to stop at for a quick recharge of phone, laptop or tablet devices. AirPower Wiki and the easily remembered AirportPlugs.com. [Submitted by Doug Keene of Keene Trial Consulting]

The GoHow app for Android, iPhone and Blackberry is pretty awesome. It provides flight tracking information, including departure and arrival gates, what's around the gate (restaurants, services, etc.), and transportation and directions to and from each airport. You can find, ahead of time, the best place to grab a salad during your 20-minute layover or while you're running to your gate. It's come in very handy. [Submitted by Leslie Ellis of [TrialGraphix](#).]

### While at your destination

I try to control my diet pretty strictly, but the road makes it very hard. On the road my hours tend to be long, time zones change eating times, long flights with no in-flight food makes me tend to eat what I can, when I can. Also, client invitations to go out with them for meals or drinks create more pressures on the whole eating-thing.

I have started to Google map some health food stores for places near my hotel in advance of my trip. I then try to go a little early (like catch a flight that gets in an hour earlier than one I would have chosen) and go to that store and stock up on some items that are part of my regimen. Then, if I know I am working long hours, I can take some good food with me. If a client wants to go out, it is fine because I can order a salad or something light while I am with them knowing I have some reserves back at the hotel. When I do not think about meals in advance like that, I find myself at the mercy of the "we'll bring in sandwiches" offer, which, as kind and as thoughtful as that might be, usually does not fit my vegetarian and cycling-racing life. By being more mindful of meal challenges and being more proactive, I have been much more successful keeping up my energy levels on the road and not having to compromise how I want to live. [Submitted by Dan Dugan, [Trial Science Inc.](#)]

A good night's sleep is absolutely critical for me, especially when I'm keyed up the night before a project. I have three things I won't travel without: first, a set of Macks Pillow Soft Earplugs. I buy them at my local grocery store, but I think they're also available on Amazon. These are made of moldable silicone. I found that the cheap foam earplugs are nearly worthless for me, but the silicone ones work wonderfully if they're inserted correctly. They block nearly any sound (like unsupervised kids running through the halls). Note: an airtight seal is important – just follow the instructions.

Secondly, I use an eye mask to block all light. Yes, they look dorky, but I'm either alone or with my husband so it doesn't matter. Bed Bath and Beyond has a good selection. Get one (or two) with very soft edges so you don't wake up with raccoon lines on your cheeks.

Finally, I suck on Historical Remedies' Stress Mints just before bedtime. They are homeopathic mints with ingredients like vanilla, chamomille, peppermint, and the like. I get them at Vitamin Cottage, but you can ask at any health food grocery store or, again, check Amazon. I fall asleep within about 15 minutes and never wake up groggy. Watch out for similar mints with valerian – I used some until I learned that valerian can cause nightmares – not a good thing before going into a high-stress environment the next day! [Submitted by Gayle Herde of [Integrity Services Group](#)]

### While using taxi services

Leave the taxi door hanging open as you go to retrieve your items from the trunk. It helps to stop the driver from taking off (because he's forgotten you have trunk items — it has happened to me), and also forms the habit of taking one last look inside the cab for things you may have left on the seat or floor when you do eventually close the door. [Submitted by John Gilleland of [TrialGraphix](#)]

I always ask the cab driver for the “standard rate” to and from the airport to the hotel. It is almost always cheaper than running the meter. I always like to know I can save my client some money, even in little ways, once in a while. [Submitted by Dan Dugan of [Trial Science, Inc.](#)]

Asheville, North Carolina is lovely but the taxis at the airport are often dirty and rundown and I was sure the driver I had was going to communicate his tuberculosis to me as he spit phlegm into a plastic cup. Then I found Marvels Upscale Transportation. The same price as the dirty cabs with a wonderfully clean town car and a charming and personable driver! [Submitted by Rita Handrich of [Keene Trial Consulting](#)]

iPhone app - Taxi Magic. Need the phone number of a taxi, this app appears to know how to find them most anywhere. [submitted by David Fauss of [Magnus Research Consultants](#)]

### Things to Leave Behind When You Return Home or Move on Down the Road

#### Bedbugs

A friend who had recently done some work for a major exterminating company gave me these instructions. When entering your hotel room, take your luggage straight to the bathroom and set it all in the middle of the tile floor. Then go directly to the bed and pull back the covers all the way down to the mattress. Carefully examine the beading around the mattress to see if you see any of the little irritating bugs. If you find any, call the front desk and ask for another room. When we were in Manhattan recently, the Ritz made the headlines with an infestation. It seems no hotel is immune. [Submitted by Andy Sheldon of [SheldonSinrich](#)]

#### Nasty (but invisible) germs and filth

Read somewhere to always pack a Ziploc or other clear plastic bag to go over the remote control. It's supposed to be one of the most germey, disgusting items in the room. The travel expert said put the bag over it and then you don't have to worry about touching it. [Submitted by Kristin Fitzgerald of [ZMF](#)]

#### Stinky gym shoes

While your shoes are still hot and steamy from that workout, stick a fabric softener sheet in each of them prior to packing them back up in your suitcase. When you unpack you can stick your nose in those shoes and inhale nothing but freshness (if you really want to do that). [Submitted by Charli Morris of [Trial Prep](#) who learned this one from Karen Lisko of [Persuasion Strategies](#)]

### Make that Cell Phone Work Harder for You

Don't want to forget what level you parked on in that parking garage? A quick snapshot can take care of that problem.

Have you been in and out of one too many hotels this week? Hotels don't have room keys anymore with the room number conveniently inscribed on it (thank goodness). But that swipe card may not help you remember if you were in Room 1114 or 1141. Take a quick shot of your room number or send yourself a text.

If you run a lot of mock trials, you end up in a lot of venues. Later, you're trying to remember what it looked like or whether it was the place with the column inconveniently placed right in the line of site of your video equipment. Take a quick snap or two, tagged the photo with when, where, or any other comments, then text or email them to yourself.

You've probably seen this done elsewhere, but if you're traveling, it's a fun and easy thing to do for those of you with smaller children at home. Take a small stuffed animal or other toy (their choice). And take shots of it in fun or weird places as you travel. Email or attach them to a text and send them home. Seeing Ginger the Horse doing a handstand on the window ledge at your hotel or looking out a taxi window while you're stuck in traffic only takes a moment, but can make your child's (or niece or nephew's) day. If you're really busy, just do it once during your trip. [Submitted by Debra Worthington, [Auburn University](#)]

### Things to Carry With You: [alphabetized by product name]

#### A Playful Attitude:

I play a kind of Pollyanna Glad Game with the myriad of hotels I spend time in. I have learned a trick to no longer being angry and resentful over the fact that the place that I am to lay my weary head for the night or week or whatever has a boisterous convention group in it. I do this in one of two ways:

1. I use the knowledge I get from staying with them for a show I am writing. For example, I just finished a short play partially based on the experience of staying in a hotel where a junior beauty pageant was taking place (think *Toddlers and Tiaras* meets me in the lobby). Another consultant and I stayed in a hotel recently in the midwest where upon entering we were greeted by a convention of Elvis impersonators and a very bewildered wedding party. You know I am using that one for something.
2. Instead of pretending that I am not with the convention, I pretend that I am. I discovered this trick while staying at the same hotel as an NRA Convention once where it just seemed...well...safer to have everyone around me believe that I actually was carrying a concealed weapon. It is fun to be an IT genius, a Financial Planner, an auditor, an office supplies regional manager, a quilter, etc. So far it has only backfired on me once when a desperate woman in New Orleans ran up to me shouting, "Are you the Port Of San Francisco???" and I blew my cover by saying without thinking, "Darling – how could you? I've really worked damned hard to keep the weight off." [Submitted by Katherine James of [ACT of Communication](#)]

**Belkin Power Cube:**

Always travel with a power strip, or even better, the Belkin power cube with USB ports. Great for charging multiple objects, like computer, phone, iPad, et cetera. [Submitted by Paul Sceptur of [Sceptur Trial Consulting](#)]

**Divers Alert Network:**

What do scuba diving and trial consulting have in common? Travel, and the potential for illness or injury while traveling. Membership in the Divers Alert Network is \$35/year and includes (as quoted from the website): "DAN TravelAssist®. As a DAN Member, you automatically receive DAN TravelAssist and up to \$100,000 of evacuation assistance coverage. This benefit is effective for both diving and nondiving medical emergencies. Evacuation coverage begins when you travel on a trip at least 50 miles (80 km) from home and call the DAN Emergency Hotline (+1-919-684-9111) for assistance or evacuation." Check [www.dan.org](http://www.dan.org) for more info – you might just want to start diving too! [Submitted by David Fauss of [Magnus Research Consultants](#)]

**Flashlight!**

Having been in a hotel during a hurricane when the power was lost and the emergency lighting was inadequate, I learned never to travel without a flashlight. Now, with the ubiquitous presence of smart phones and a plethora of free or low-cost apps, I use my Flashlight application on my cell phone to light the way. [Submitted by Steve Perkel of [Archer & Greiner, P.C.](#)]

**Google Translate:**

Google Translate is a Google app that will translate between any 2 of dozens of languages, include a speech out load option. [Submitted by Bruce A. Beal of [Beal Research](#)]

**Hotel shower caps**

Many hotels still provide you with a shower cap (although I've never used them for this). Snag them and use them to slip over your shoes to help keep your clothes clean. [Submitted by Debra Worthington, [Auburn University](#)]

**Laughter**

Before road trips, I download comedy shows from sites like [azizansari.com](http://azizansari.com) onto my iPad. Then I bring a splitter and two sets of ear buds. If we are driving, my assistant and I can both listen to the show. If we are flying, we can use the splitter and ear buds and watch something mindless after a long day. It is better than movies because sometimes you just want to listen to something hysterical while shutting your eyes. And, if you laugh out loud on the plane, chances are your colleague is also laughing so you both look and sound equally idiotic. [Submitted by Ellen Finlay of [Jury Focus](#)]

## “Polar opposites: Empathy does not extend across the political aisle”

by *Ed O'Brien and Phoebe Ellsworth*

Many people can relate to the pain of being stuck outside on a winter day or caught without water after exercise. Recent psychological research, however, reveals that visceral states (e.g., cold and thirst) affect not only people's own subjective feelings in the moment but also their broader perceptions of the world (Risen & Critcher, 2011). One of the most consistent findings highlights the assimilative effect of visceral feelings on social judgment. For example, when people are dehydrated, they perceive others as thirsty (Van Boven & Loewenstein, 2003), and when frightened, they perceive others as afraid (Van Boven, Loewenstein, & Dunning, 2005).

A number of possible mechanisms could explain this bias, but it has generally been attributed to a limited appreciation for “cold” states when experiencing “hot” affect. For instance, people become overly focused on feeling thirsty (a hot state) because it is difficult to imagine a cold state – such as the sensation of having one's thirst quenched – when such a salient sensation is activated. Thus, perceptions become overwhelmed by thirst-related thoughts and judgmental cues (Loewenstein, 2005).

However, the bias may also reflect a sense of shared similarity and common humanity with other people. Because they do not have access to others' internal states, people use their own subjective experience as an immediately accessible point of reference to gauge others' private knowledge (Dunning & Hayes, 1996). As a result, people often assume that others share their traits, attitudes, and perspectives. In one classic demonstration of these egocentric projections, participants who agreed to wear a sandwich board overestimated the number of other people who would agree to wear it, whereas those who refused to wear the board underestimated the number of people who would agree to wear it (Ross, Greene, & House, 1977). In another seminal study, students who cheated on an exam overestimated the prevalence of cheating by their classmates (Katz & Allport, 1931). Thus, the projection of visceral feelings may derive from the tendency to imagine another's situation by first imagining oneself in the same situation (Van Boven & Loewenstein, 2003), reflecting a more general projection of similarity.

If this rationale is correct, it suggests that people may not project visceral states onto others who are clearly different from themselves. Previous research has demonstrated that people are less likely to generalize subjective states to others who do not share similar life experiences with them (Robinson, Keltner, Ward, & Ross, 1995). For example, in one study, college students projected their preferences (e.g., desire for body piercings, stance on capital punishment) onto students of their own university but not onto students of different universities (Ames, 2004). Although the literature has typically discussed the social projection of traits, attitudes, and values (for a review, see Robbins & Krueger, 2005), people may also fail to project strong feelings onto others if the underlying mechanism involves perceived similarity with the people in question.

To test this possibility, we recruited participants to make social judgments about a similar or dissimilar person while experiencing (or not experiencing) cold (Study 1) and thirst (Study 2). Because people should become less egocentrically biased when they perceive others as different from themselves, we predicted that judgments of dissimilar others would be unaffected by visceral states.

### *Study 1: Feeling Cold*

In Study 1, participants were recruited either outdoors or indoors during winter. We predicted that they would project their physical feeling of coldness only onto others who shared their political values.

#### *Method*

##### **Participants**

Participants were 120 student volunteers (62.5% female, 37.5% male; 73.3% Caucasian, 26.7% other; mean age = 19.48 years) recruited from public campus areas.

##### **Procedure**

In January 2011, an experimenter approached students who were sitting either indoors in the university library or outdoors at a bus stop near the library. The students were asked to participate in a study allegedly about reading comprehension. Winter weather in Michigan can be quite cold; during this study, ambient temperatures ranged from  $-14^{\circ}$  to  $30^{\circ}$  F ( $M = 6^{\circ}$ ). Thus, we manipulated visceral experience by comparing a warm indoor condition to a cold outdoor condition ( $n = 60$  for each condition).

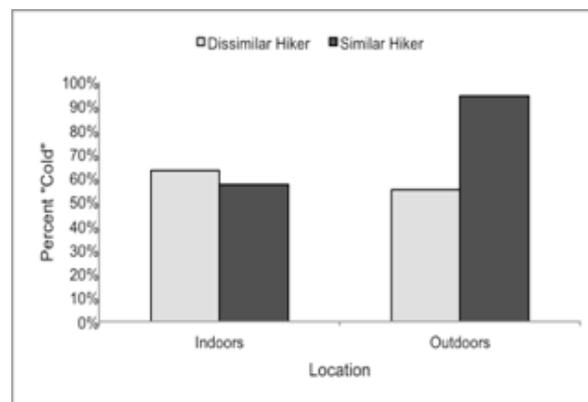
Participants were tested at the place where they were recruited. We asked participants to read a short story and answer questions about it. We adapted the story from prior research by adding a similarity / dissimilarity manipulation that has been shown in prior research to have a strong effect (Mitchell, Macrae, & Banaji, 2006): Participants were randomly assigned to read about a protagonist who was either a left-wing, pro-gay-rights Democrat or a right-wing, anti-gay-rights Republican. The protagonist goes hiking in winter to take a break from a political campaign but gets lost with no food, water, or extra clothes. After reading the story, participants answered forced-choice questions asking what was most unpleasant for the hiker (hunger, thirst, or cold) and what the hiker most regretted not packing (food, water, or extra clothes). They also rated how hungry, thirsty, and cold both they and the hiker felt using continuous scales ranging from 0, not at all, to 10, extremely. Participants then answered a forced-choice item asking whether their political affiliation was similar or dissimilar to that of the hiker.

##### **Results and Discussion**

Does being cold influence social judgment? Yes – but only when judging similar others (see Fig. 1). First, replicating previous research, our findings showed that participants in the similar condition were more likely when outdoors (94%) than when indoors (57%) to indicate that cold was more unpleasant for the hiker than hunger or thirst was. However, responses of participants in the dissimilar condition were unaffected by location (outdoors condition: 55%,

indoors condition: 63%). Second, participants in the similar condition were more likely while outdoors (81%) than while indoors (37%) to indicate that the hiker most regretted not packing extra clothes; responses of participants in the dissimilar condition were unaffected by location (outdoors condition: 41%, indoors condition: 43%). Third, participants in the similar condition rated the hiker as colder while they were outdoors ( $M = 7.81$ ,  $SD = 1.20$ ) than while they were indoors ( $M = 5.50$ ,  $SD = 1.93$ ); responses of participants in the dissimilar condition were unaffected (outdoors condition:  $M = 5.76$ ,  $SD = 1.73$ ; indoors condition:  $M = 5.67$ ,  $SD = 2.04$ ).

*Figure 1.* Results of Study 1: participants' descriptions of the hiker's visceral state as a function of their location and their political similarity to the hiker. Participants read a story about a hiker and were then asked, "Is hunger, thirst, or cold most unpleasant for the hiker?" This graph shows the percentage of participants who responded with "cold."



These findings support our hypothesis. Despite cold winter weather, participants did not project their feelings of coldness onto others who had opposing political views. In Study 2, we tested our hypothesis in a laboratory setting using a different visceral state.

### *Study 2: Feeling Thirsty*

In Study 2, new participants were randomly assigned to two conditions, in which they felt thirsty or nonthirsty, before reading the hiker story. We predicted they would project their thirstiness only onto a hiker whose political views were similar to theirs.

#### *Method*

##### **Participants**

Participants were 141 university students (49.6% female, 50.4% male; 71.6% Caucasian, 28.4% other; mean age = 19.01 years) participating for course credit.

## Procedure

Participants came into the laboratory for a study allegedly on nutrition and attention. First, they sampled a selection of food. We gave all participants the same salty snacks: vanilla wafers, potato chips, gummy rings, and saltines. Participants were randomly assigned to eat the snacks either with a cup of water (the nonthirsty quenched condition;  $n = 68$ ) or without a cup of water (the thirsty parched condition;  $n = 73$ ). They were then presented with the same story and questionnaires used in Study 1.

## Results and Discussion

Results replicated those of Study 1. First, participants in the similar condition were more likely to indicate that thirst was more unpleasant for the hiker than hunger or cold when they themselves were parched (71%) than when they were quenched (20%). Responses of participants in the dissimilar condition were unaffected by the thirst manipulation (parched condition: 37%, quenched condition: 26%). Second, participants in the similar condition were also more likely to indicate that the hiker most regretted not packing “extra water” when they were parched (54%) than when their thirst was quenched (13%). Participants in the dissimilar condition were again unaffected by the thirst manipulation (parched condition: 21%, quenched condition: 18%). Finally, participants rated the hiker as thirstier when they were parched ( $M = 7.46$ ,  $SD = 1.29$ ) than when their thirst was quenched ( $M = 5.43$ ,  $SD = 2.10$ ). Participants in the dissimilar condition were unaffected by the thirst manipulation (parched condition:  $M = 5.71$ ,  $SD = 2.10$ ; quenched condition:  $M = 5.42$ ,  $SD = 2.19$ ). These findings again suggest that perceived dissimilarity overrides strong visceral feelings. Participants in the dissimilar condition were unaffected by thirst.

## General Discussion

Social life is typically divided between people who share the same values and beliefs and those who do not. Prior research suggests that people often isolate their internal perspectives from those on the other side of this divide (for a review, see Robbins & Krueger, 2005). The present research extends the power of dissimilarity to visceral experiences. Despite the well-documented effect of visceral states, participants were unaffected by their cold and thirst when evaluating people with opposing political values.

## Theoretical implications

These findings illustrate the operative role of perceived dissimilarity in social judgment. Previous research suggests that people are less egocentrically biased when judging dissimilar others because they rely on stereotypes (e.g., “Those students don’t share my stance on capital punishment because they are all uptight conservatives”) or on pre-stored knowledge (Ames, 2004). However, this suggestion cannot account for the failure to project visceral states. Our findings cannot be explained by any obvious stereotype about feeling cold or thirsty (e.g., “Liberals don’t share my thirst because they drink more water than I do”). All else being equal, knowledge of another person’s politics should not influence how cold or thirsty one thinks he or she is, but these findings suggest that it does.

These effects might further apply to broad social judgments. For example, people exposed to hot weather become more concerned about global warming (Li, Johnson, & Zaval, 2011). However, the same people may not care about global warming in dissimilar areas of the world

because they fail to link their own hot states with the condition of those regions; thus, Westerners may inadvertently neglect the woes of problematic areas.

### Applied consequences

The inability to appreciate “cold” states while experiencing “hot” affect has occasionally been conceptualized less as a bias than as an enhanced capacity to empathize with other people (e.g., Loewenstein, 2005). For example, in one study, participants were less likely to endorse torture while experiencing various forms of pain themselves (Nordgren, McDonnell, & Loewenstein, 2011). Our research, however, suggests that people may not be influenced by their own pain when gauging pain felt by dissimilar others. Thus, if lawmakers first test interrogation practices (as suggested by Nordgren et al., 2011), they may not project the experience onto those for whom it is designed (e.g., suspected terrorists), and this could lead to an unintended acceptance of torture. Similarly, homeless populations often struggle with poor nutrition and intemperate weather; personally feeling hungry and cold may be insufficient to sensitize people who have no long-term worries about food and shelter to the plight of this highly stigmatized out-group (Harris & Fiske, 2006). These consequences suggest a surprising limitation in people’s capacity to empathize with others with whom they disagree or differ from. Perceptions of dissimilar others are uninformed by visceral feelings.

To illustrate this point, we ran a follow-up study with University of Michigan students either before ( $n = 34$ ) or after ( $n = 28$ ) they ate lunch. In each group, half were asked the following question: “What percentage of the University of Michigan budget should be dedicated to maintaining food quality on campus and ensuring that students have access to high-quality food?” The other half was asked the same question about Ohio State University, a rival school. As expected, hungry students said that a larger percentage of the University of Michigan budget should be allocated toward food ( $M = 19.19\%$ ,  $SD = 4.83\%$ ) than did students who had already eaten ( $M = 11.12\%$ ,  $SD = 5.92\%$ ,  $p < .001$ ). However, hungry students ( $M = 11.24\%$ ,  $SD = 5.36\%$ ) did not say that Ohio State University’s food budget should be raised any higher than nonhungry students did ( $M = 10.93\%$ ,  $SD = 3.99\%$ ,  $p > .40$ ). Painful first-hand experiences apparently do not translate into an appreciation of similar pain felt by dissimilar others. Thus, people may not be motivated to help out-groups, even when experiencing shared states.

## Conclusion

The results of the two studies reported here suggest that the effect of visceral states on social judgment is eliminated when people judge dissimilar others. It seems counterintuitive that people outside in the freezing cold or eating salty snacks without water could be indistinguishable from those who were warm and whose thirst was quenched, yet participants whose political views were dissimilar to the individual they were judging were surprisingly unaffected by their own strong visceral-drive states. This observation has not been made by prior researchers investigating social judgment, and it reveals the need for a better understanding of when people's own internal experiences influence their perceptions of the internal worlds of others and when they do not. Perceived dissimilarity – even in an incidental domain such as political values – may expose deep constraints on people's ability to appreciate the experiences of those who may be in greatest need of their consideration.

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*We asked three trial consultants to respond to this research by O'Brien and Ellsworth. On the following pages, Charli Morris, Judy Rothschild and Ken Broda-Bahm respond.*

*Charli Morris responds:*

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***Attitude is a Little Thing that Makes a Big Difference:  
More than Motivational Speech for Getting Jurors to Relate to Your Case***

*Charli Morris has written two articles in The Jury Expert on voir dire. You can see them [here](#) and [here](#).*

Maybe my title reminds you of one of those corny posters you've seen hanging on the wall at the physical therapist's office. You know the one: there's a picture of a person standing at the base of a big mountain, or perhaps a cute baby bird peering out over the edge of a nest, determined to take its first flight.

But the title really says it all about the research by O'Brien and Ellsworth, who remind us that jurors can (or cannot) relate to our cases and our clients on at least two temporal levels: in the short-term (viscerally) and in a more lasting and meaningful way (empathically). More importantly, the results highlight the significance of the latter.

In fact, their empirical study confirms our shared practical experience. It works this way on all sides of every case:

- Jurors relate to the vulnerable patient, and they relate to the over-worked staff nurses who cared for him.
- Jurors relate to the innocent victim rear-ended by a delivery truck driver, and they relate to the small business owner whose family-owned trucking company distributes locally-grown foods to neighborhood grocery stores.
- They relate to the inventor who turns his passion into a patent, and they relate to the company who turned its improvement on the idea into a life-saving medical device found in every modern-day emergency room.

The goal for all of us is to turn the power of empathy into powerful persuasion.

Most, if not all, of what we have written about jury selection in the pages of The Jury Expert features strategies to make the most of the capacity jurors have to relate – based on attitudes, values and beliefs because they are more stable than short-term visceral states. The questions we recommend to our attorney-clients recognize that even similar life experiences (those beyond transient feelings of hunger or thirst) are not enough to guarantee that jurors will make judgments consistent with those similarities, if they also perceive there to be significant differences between themselves and your client.

In fact, we caution attorneys against assuming that experience alone will predict jury behavior, and promote best practices for questioning to assess the extent to which a juror may (or may not) relate. We hear this play out in focus group research all the time and it goes something like this:

<b>Similar Experience:</b>	<b>Dissimilar Attitudes and Beliefs:</b>
My mother was a plaintiff in a lawsuit, but...	She didn't ask for money for pain & suffering; all we wanted was to get her bills paid.
One time my doctor prescribed the wrong medication and my son had a bad reaction, but...	Doctors are human; things turned out okay for us; all's well that ends well.
I've also been responsible for keeping company records, but...	I always kept a back-up of critical documents and only someone who had something to hide would delete or destroy them.
I've been the foreman on a manufacturing crew, but...	Safety was always my highest priority and no one ever got seriously hurt on my watch.

So the voir dire questioning goes like this:

**[Experience]**

Raise your hand if there's ever been a time when you or someone close to you...

- Tells us about that.

**[Attitudes/Beliefs/Values]**

- How did things turn out?
- Were you satisfied with the outcome? Why or why not?
- What did you learn from the experience?
- What advice would you give someone else in that situation?

**But what about before trial – long before trial?**

What does the research like this suggest about what you can do when you are deciding whether to take the case, how to conduct discovery, how to prepare your witnesses for depositions, and how to build the theme (or themes) within the case to maximize the likelihood that jurors will find more similarities than differences between themselves and your client?

We all work in litigation because on some level we get a kick out of solving problems. You don't necessarily have to love all of your clients, love the process, or even love your job every day to recognize that lawsuits are a legitimate way to resolve conflict, achieve balance, and maybe even satisfy our inherent need for justice once in a while. But you have chosen a specialty and your clients first choose you. That means they show up looking like the kind of person you've represented before, with problems you've solved before. Your natural tendency is to relate to your prospective client.

The problem is that you might not know if people on a jury will relate. The jury will be told that sympathy should play no role in decision-making, but we absolutely need empathy to be a factor every single time. I am often surprised at how long it takes an attorney to get around to telling me the unlikable things about a client and it will always count against them in the case.

So consider adding these questions to your initial client interview checklist to find out what attitudes, beliefs and values you will need potential jurors to share with your client:

- What have you learned so far from your experience?
- What advice do you have for someone who might be in a similar situation?
- Why is it important to you to file this lawsuit?
- What do you hope to achieve with the lawsuit if we are successful?
- What thoughts did you have about the issue of \_\_\_\_ before you found yourself in this situation? Are they different now? Why or why not?
- What thoughts did you have about lawsuits before you found yourself in this situation? Are they different now? Why or why not?
- How would your best friend describe you?
- What do you most want the jury to know about you and about this case?
- How would your worst enemy describe you?
- What are you most afraid the other side will find out about you?

The answers to these questions will also inform your goals for preparing your client to testify in deposition and at trial.

In terms of the narrative you develop for the opening and closing speeches and in your examination of witnesses, once you have gathered the experience, attitudes and beliefs of focus group participants in pre-trial research and again from jurors during voir dire, you will want to feature as many similarities between them and your client and the case facts as possible. You may never be able to pick a jury full of Democrats or Republicans to match your client's political affiliation, but you can stack the deck in your direction if you are mindful that a small thing like attitude can make a big difference in the outcome of your case.

***Judy Rothschild responds:***

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*More Than Skin Deep:  
Visceral States Are Not Projected Onto Dissimilar Others*

I'm freezing, you must be freezing, too. I'm dying of thirst, you must be thirsty, too. I'm famished, you must be hungry, too! Did you know or would you expect that people are likely to project their strong personal feelings of discomfort referred to in the field of psychology as "visceral states" onto others? Do you think people will readily engage in what psychologists refer to as "egocentric projections" onto others, or will such projections vary depending on whether one feels similar or different to another? Well, the simplest answer to this question is in the title of this paper. In the three studies O'Brien and Ellsworth describe in this article, the authors found that similar to prior research on this topic when people experience strong visceral states they are likely to assume that others share similar visceral feelings. However, unlike prior research, O'Brien and Ellsworth found that these strong visceral feelings did not spill over as expected when others were perceived as different from study participants.

Ed O'Brien, a University of Michigan doctoral student, together with Phoebe Ellsworth, an esteemed contributor to the fields of psychology and law, report the findings from two studies and a short follow-up they conducted which investigated how individuals' visceral experiences are projected onto others and how these projections vary in relation to perceptions of similarity or dissimilarity with others. They explain how their research builds on research about the effects of visceral feelings on social judgment (Van Boven & Lowenstein, 2003; Van Boven, Lowenstein, & Dunning, 2005) and prior work about how visceral states influence both subjective feelings and broader views of society (Risen & Critcher, 2011; Robbins & Krueger, 2005).

In short, a key empirical finding from this research is that participants readily projected their feelings of discomfort onto others whose political views were similar, but did not project these egocentric visceral states onto those whose political views were dissimilar. The authors conclude that "the effects of visceral states on social judgment is eliminated when people judge dissimilar others." They note this is a new and surprising finding, not recognized in prior research.

In the first two studies, participants read a story about a hiker in the winter that gets lost without food, water, or additional clothing. In Study 1, O'Brien and Ellsworth creatively optimized the often freezing cold of winter in Michigan to explore if egocentric feelings of coldness were projected onto others who shared or differed in the political values of the study's participants. Participants were volunteer students recruited from one of two settings, a very chilly bus stop near the University library, or from the warm indoors of the library. Study 2 focused on the egocentric state of thirst. Subjects (students who participated in a lab setting for course credit) were fed salty foods, but only some were given water to quench their thirst. In both these studies, the dimension of similarity/dissimilarity turned on characteristics of the "other" as either a pro-gay rights, left-wing Democrat or an anti-gay rights Republican. For comparison purposes, participants were asked to identify their own political affiliation. The authors also conducted an additional, smaller follow-up study that compared how feelings of hunger were projected. In this last study, students who had just eaten lunch were compared to with those who hadn't (and were thus likely to be hungry). The subjects of this third study were asked about university budget allocations for high quality food where the identity of

the university was given as either the University of Michigan or Ohio State University. Those familiar with the rivalry between these schools will no doubt smile as they read about this study.

In their concluding discussions, O'Brien and Ellsworth extrapolate about how perceptions of dissimilarity interact with social judgment. Moving from the research setting to the social world, the authors demonstrate how intellectually inquisitive minds can make connections that may not initially appear to others as they move on to talk about how perceptions of similarity / dissimilar may be related to concern / acceptance of conditions of global warming, torture, and homelessness.

Sounding like a researcher, I venture to say that one's interest and enjoyment of this article is likely to vary by one's interest in the field of experimental psychology, research on law and psychology, and the readers' prior appreciation of Dr. Ellsworth's exceptional theoretical and applied contributions to the field of psychology, and law and society. Citations of her contributions are too numerous to list here, however readers are advised to turn to the July 2010 issue of *The Jury Expert* for an article describing one area of her many contributions, "[What We Do \(and Don't\) Know about Race and Jurors](#)" written by her colleague, Samuel R. Sommers.

The academic research design and questions of this study are very different than the research conducted by most trial and jury consultants, and all three studies relied on student subjects. We need to ask, can we extrapolate to actual jury behavior from this research and its sample of youthful undergrads? This is a question that should always be raised when evaluating this type of academic experimental research.

In the applied world of trial research and juror evaluations, as consultants we are always concerned with assessing how jurors' experiences are likely to influence their judgments about our clients' cases. A central axiom of the profession is that no single demographic is predictive. Skilled consultants know to consider how these variables, along with how jurors' life experiences and opinions influence juror reasoning and judgments.

Does similarity lead to compassion? Does ethnic, religious, or racial affinity influence empathy? Not necessarily. In reading this article, I am reminded of a wrongful death case I consulted on twenty-plus years ago. Eight girls on a high school track team were on a practice run on a two lane road in farm country. Three of the girls were struck by a car that attempted to pass a truck. Two girls, both Hispanics, died as a result of the accident. Would affinity as a high school athlete lead to empathy? Would ethnic affinity between Hispanics lead to a finding for the plaintiffs? Not so. Neither characteristic led to any empathy for the plaintiffs. In the research we conducted, I will never forget the response of a Hispanic mock juror who played football in high school and college. His response to the case continues to send chills down my spine: "The plaintiffs don't have a case. I played football; in sports you have to watch out for your safety. Fatal accidents are nature's way of thinning out the herd!"

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***Ken Broda-Bahm responds:******Empathy for those Devils:  
Some Thoughts on the Complex Role of Similarity/Dissimilarity in Litigation***

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Differences are barriers when it comes to political orientation. If, as the study shows, we avoid applying our own visceral states to the evaluation of others who hail from the opposite end of the political spectrum, then it implies that we're less likely to extend basic empathy to those who are different, not just in demographic or observable terms, but different in beliefs as well.

What does this mean for litigators and those who advise them? For one, it reminds us of the common observation that jurors are likely to project onto similar others (e.g., "How would I feel," "What would I have done?"). For another, though, it potentially shows that those evaluations may not be as simple or as conscious as we expect. In addition, it suggests that empathy isn't a given, and when it occurs, isn't an unambiguous advantage. It is noteworthy that, in this case, the lack of empathy relates to a kind of mental mistake that comes in thinking that if we are cold or thirsty, then cold or thirst is likely to be more salient to those who are more like us. So one way of looking at it is that we are reserving the more accurate and less psychologically biased assessment for those who don't share our politics.

Looking at the results broadly, O'Brien and Ellsworth's study might fit into an evolution in the ways that litigators and litigation consultants have looked at similarity when it comes to fact finders' evaluation of parties. We could see our beliefs about the role of similarity as moving through several stages.

**Stage One:****We Want Similar Fact Finders, Because We Want to Be Judged by ‘Our Own Team.’**

On the theory that similarity builds identification and identification fosters favorable treatment, the idea is that we would want our evaluators to be as similar to us as possible. For example, during jury selection for the recently concluded trial of former Senator and Presidential candidate John Edwards, this assumption could be seen in some of the media commentary on the defense strategy. They wouldn't want older women or those with serious illnesses because they would be too similar to the perceived victim of the candidate's extramarital affair that was at the heart of the case, his late wife Elizabeth Edwards. On the other hand, Edwards might be seen as wanting, "a young guy with swagger," as consultant Kenneth Pangborn told the New York Post (April 16, 2012), "a chick magnet, with hair." While some attorneys and even a few consultants still may be at the stage of believing that similarity broadly equals sympathy, most experienced trial lawyers and consultants have moved on to stage two.

**Stage Two:****Wait, We Need to Be Careful About Similarity Because It May Lead to Increased Personal Responsibility.**

This stage matches the observations that many of us have on a daily basis: Peers tend to be tough on peers. A professional may evaluate another professional's actions in a harsh light, and a vulnerable investor might be the one to apply the most critical judgment to another investor's losses. Why? Because a "Just World Hypothesis," (Lerner & Miller, 1978 <http://psycnet.apa.org/journals/bul/85/5/1030/>) suggests that when bad things happen (e.g., you experience an injury or you get sued), then there is some motivation for third parties to believe that you had it coming, or at least that you could have done something to more effectively protect yourself. The tendency to reach for the psychological comfort of believing that "It couldn't or wouldn't have happened to me" applies all the more strongly when the person being evaluated is similar to yourself. Greater similarity creates a greater need to rationalize the bad outcome and that can translate into greater attributed personal responsibility.

Stage two is where I believe most thoughtful trial attorneys and litigation consultants are regarding most forms of similarity. But based on the current study, it still may not be far enough. The reliance on a more or less conscious attribution of responsibility differs from what the O'Brien and Ellsworth study suggests, indicating that we may be looking at a stage three.

**Stage Three:****Maybe We Need to Be Even More Careful About Similarity If It Influences Not Just Conscious Judgment, But More Implicit Perception As Well.**

Looking more closely at the results of the study, it suggests that a different mechanism may be at work than that implied by either stage one or stage two. If, as the authors point out, individuals' "internal experiences influence their perceptions of the internal worlds of others," then we won't simply evaluate dissimilar others differently based on our beliefs about that difference, we will perceive them differently. In that sense, those with different fundamental

beliefs almost inhabit a different reality. “All else being equal,” they pointedly conclude, “knowledge of another person’s politics should not influence how cold or thirsty one thinks he or she is, but it does.” And if it influences the perception of such basic states as cold and thirst, to what extent will it also influence all of the subtle factors that matter to those who study and practice legal persuasion?

As additional research on social projection moves forward, my hope is that the same methods of manipulating similarity and dissimilarity are applied to the creation of legal scenarios. But instead of looking at the projection of visceral feelings, the researchers look at the projection of traits that bear the closest relationship to issues in litigation. That should include not just attitudes, which appear to be already well researched, but also the deeper and more implicit structures that underlie attitudes: intention, agency, responsibility, and credibility. For example, assume that there is a product user - either a left-wing, pro-gay-rights Democrat or a right-wing, anti-gay-rights Republican - who fails to read a product warning, and is then injured by a dangerous product. It is possible that Republicans will blame Democrats more and vice versa based on stereotypes (e.g., “liberals are careless” or “conservatives are ignorant”), but it is also possible that the form of empathy that gives birth to personal responsibility (“the I wouldn’t have done that” effect) will be less accessible when evaluating a dissimilar other and play less of a role. Research that teases out those possible effects would be of great interest to this field. As is, the study has already helped to frame a number of very interesting questions relating to the ways similarity and dissimilarity matter in litigation.

*Response:*

This research was not conducted with juries in mind, and we agree with the respondents who urge caution in the application of our findings to jury selection or communication with the jury.

First, we have studied only one kind of difference - political difference - and as we say in the article, we have no idea what other kinds of differences might or might not eliminate the usual empathy bias.

Second, as all of the commenters recognize, there is no juror characteristic that is always or automatically good or bad for the plaintiff, prosecutor or defense. If the person is seen as an innocent victim of circumstances or others’ evil intentions, similarity may help, but if the person is seen as somehow contributing to his or her misfortune, similarity may hurt, as in the Just World Hypothesis (“This couldn’t happen to me, so she must have done something to make it happen to her. She may look like me superficially, but she’s really very different.”)

Questions about attitudes can provide useful information about topics that should be followed up in voir dire, but they are no substitute for open-ended questions that get the prospective juror talking about those attitudes - where they came from, what they mean, and how they might influence the juror’s current behavior. The juror’s answers may not be truthful, but they are likely to be useful, certainly more useful than superficial information about similarity.

## COURTROOM ATTIRE:

### Ensuring Witness Attire Makes The Right Statement

by *Merrie Jo Pitera*

While witnesses' verbal and non-verbal behaviors affect their credibility, another factor in jurors' perceptions of them is their appearance. Witnesses often ask us, "What should I wear when I testify in court?" Of course it is important to remember that a courtroom is a very conservative arena; therefore, our golden rule for witness fashion is: "If you aren't comfortable wearing it to a religious ceremony, then you shouldn't be wearing it in the courtroom." Witnesses should choose attire that shows respect for the judge and the court proceedings keeping in mind that the way they dress and present is a direct reflection of their credibility. A witness's appearance and manner should never distract the judge or jury from careful consideration of their testimony.

For all witnesses, the goal is to look professional, dressing appropriately for their position in the company or community. The goal is not for a witness to be noticed because of his outfit, but for the value of her testimony. Because jurors tend to perceive witnesses they identify with more favorably, another goal is for the witness to select clothing and accessories that do not "distance" her from the jury. In other words, a witness doesn't want to make herself seem different from the jurors simply by her appearance. For example, by wearing expensive jewelry or a designer suit, both of which would likely be beyond the means of most jurors, a witness risks creating a perception she is "very wealthy." Thus, she can inadvertently distance herself from the jury. As mentioned previously, a witness should dress appropriately for her role and position (e.g., CEOs should avoid jeans), but steer clear of selecting items that highlight differences between her and the jurors (e.g., cufflinks).

Below are some basic "DOs and DON'Ts" for witness fashion:

#### DO

- Dress for your role. Look professional.

#### Men:

- Wear a business suit; if a suit is not available, then slacks, sports coat, white shirt and tie.
- Wear a long-sleeved shirt with shirt tail tucked in.
- Style hair in a manner that is well-groomed and neat.
- Wear only one ring (wedding band, if married) and a modest watch.

## Women:

- Wear a dress suit (or pantsuit if appropriate), or business casual (e.g., nice sweater set).
- Wear a solid-colored blouse.
- Wear conservative dress shoes.
- Style hair in a manner that is neatly groomed. Long hair should be pulled back from the face to convey professionalism and avoid distracting nervous behavior (e.g., twirling, putting behind ears). If a witness is not used to having her hair pulled back, we recommend she practice wearing the planned courtroom hairstyle in advance to allow time to become comfortable with it.

## DON'T

- Appear disheveled.

## Men:

- Wear a short-sleeved shirt.
- Wear a shirt with French cuffs and / or cufflinks.
- Wear sneakers.

## Women:

- Wear a blouse that is low-cut or that is busy / patterned.
- Choose skirts that are short; they should be at knee level or no more than one inch above the knee.
- Be provocative in your appearance by wearing tight-fitting or form-fitting clothes.
- Wear spike heels, flip-flops (even dressy ones), sandals or other open-toed shoes.
- Wear a black suit. A woman's suit color can impact jurors' perceptions of her. Academic research suggests that people can make negative or positive attributions about a person based on the colors they are wearing; and this fact is particularly true for women. For example, people wearing black have been perceived by others as aggressive; and for women specifically, black may convey a "cold" persona. Therefore, a female witness should steer away from wearing a black suit.
- Wear loud colors. Instead beige, gray or blue suits encourage the perception of a more approachable witness.
- Over-accessorize. Too much jewelry can distract the jury from your testimony (e.g., rhinestone belt, glittery jewelry, diamond-like bracelets, large earrings, etc.).

As the well-known saying goes, one never gets a second chance to make a first impression. By following these guidelines, and keeping in mind jurors' perceptions of themselves and each witness's particular role / position, a legal team will optimize their witnesses' credibility and thereby the believability of their case.

*Merrie Jo Pitera, Ph.D. is CEO of Litigation Insights, a women-owned trial consulting firm headquartered in Overland Park, Kansas, and with offices in Minneapolis, Dallas and St. Louis. Dr. Pitera has over 20 years of jury research experience and regularly conducts witness preparation for deposition, trial and congressional testimony. In addition to making frequent presentations, on behalf of in-house legal departments at large corporations, to guide corporate and fact witnesses as they prepare case testimony, she has also written several white papers discussing the characteristics that increase/decrease witness credibility. Dr. Pitera is a member of the American Society of Trial Consultants and in August 2010, the Kansas City Business Journal named her among the "25 Women Who Mean Business."*

## A Book Review

by Rita Handrich

### **The Science of Attorney Advocacy: How Courtroom Behavior Affects Jury Decision Making.** [298 pages]

By Jessica D. Findley and Bruce D. Sales - 2012 from the American Psychological Association

We are all constantly trying to prioritize all of the reading that we'd love to do. We hear about something new, and it can idle on the to-do list for too long. Truth be told, this new book by Findley and Sales would have been stuck there for too long, if it wasn't for this review. I'm glad I was obliged to tackle it; it was time well spent.

This is an academic book written in a very accessible style with limited jargon and lots of information as to what advocacy lore is supported (and what is not supported) by the research literature. The book covers a wide variety of topics: attorney demeanor, attorney verbal communication as well as paralinguistic and kinesic communications (all are defined), the attorney-client relationship and attorney storytelling.

The authors say the book was written to document which aspects of trial advocacy lore are actually supported by the literature. They comment that:

“trial commentators are [typically] relying on ‘pop’ psychology and seldom using social and behavioral scientific research as the basis for their proposed strategies.”

This book addresses that omission by summarizing trial advocacy lore in each area and then examining the research literature to see what is actually supported and what is not. Each chapter is similarly structured. An overview of the trial advocacy literature is followed by a review of the social and behavioral research to see what recommendations are supported and which are not.

For example, the initial chapter on attorney demeanor addresses likability (how to be likable, honest and credible) based on trial commentator's published advice. Then the authors review the research to see what of trial advocacy lore is supported or not supported by the literature. In the chapter on attorney demeanor, they address whether likability affects whether the jury sees you as truthful, credible and persuasive and whether any of those things is related to ultimate success in your advocacy efforts. It's kind of like a “Mythbusters” for trial strategy and persuasion. The first chapter alone is a 48-page sprint through the research literature underlying much of what we know about the role of the various facets of demeanor on persuasion.

As an avid blogger, I was entranced by the potential blog topics I saw as I read through the book.

- Why you should limit your use of homographs [words spelled alike], homophones [words that sound alike], and homonyms [both of the former] in courtroom communication [page 73];
- Contractions are not good things [page 84];
- Painting a picture with your words is very persuasive [page 78];
- Communicating at a 10-year old level (common advocacy lore according to the authors) is not a good idea [page 86];
- Why channeling your inner Meryl Streep and using accents in the courtroom is sometimes a terrific idea and sometimes not so much [page 104];
- The vagaries of facial hair, hair in your face and, even long hair for both men and women [page 130];
- Really liking your client can save his or her life and how you can communicate that liking to courtroom observers [page 144];
- Four ways the story model works in the courtroom [page 203].

And there is a lot more. This is a good introductory book for many of us:

If you are a law student wanting to know more about the intersection between trial advocacy lore and the research literature, this is a good introduction.

If you are a trial consultant or professor and want a good resource for finding lots of references quickly or a quick overview of the literature to which you may not have been introduced in your academic training, this is a good introductory and readable text.

If you are a fairly new trial attorney and want to understand the “why” behind much of trial advocacy recommendations, this is a good overview with an easy to digest narrative style.

If you are an experienced attorney and just want a reference for information on, for example, how accents work for or against you depending upon your role in the case, this book has references and examples.

It would serve you well as a chapter book you pick up to learn about one area of trial advocacy lore at a time.

It is not perfect. I was disappointed in the time frame of the research cited. Most of the references range from 1970 to 2005. There are a dozen or so thrown in after 2005—as if the research was done and then a few well-known, more recent pieces were tossed in to make the book seem more comprehensive than it actually is.

There is a huge amount of research conducted and published since 2005 that could have been used to great effect in this volume. There are no easy answers to the questions raised about how what the trial lawyer does, says and communicates in court impacts jurors. It depends on many and myriad factors. While Findley and Sales have done a terrific job of addressing the classic research studies and research through 2005—I'd like an update that includes the huge quantity of research churned out by social sciences researchers in 2006 through the present day.

*Rita R. Handrich is a trial consultant with Keene Trial Consulting and an avid reader of all things research [the more recent the better]. She is also Editor of The Jury Expert and blogs regularly at the Keene Trial Consulting blog: [The Jury Room](#).*

## Hero or Hypocrite?

### A Psychological Perspective on the Risks and Benefits of Positive Character Evidence

By Daniel A. Efron

In criminal trials, defense attorneys can call witnesses to testify about a defendant's good character. Although the Federal Rules of Evidence technically limit these character witnesses to describing general personality traits, in practice many judges allow such witnesses to support their claims with examples of specific good deeds (Uviller, 1993). Once a guilty verdict has been reached, the defense can introduce evidence of the defendant's prior good deeds to seek a mitigated sentence. For example, during his recent sentencing for fraud, a former CEO submitted over 60 letters from friends and acquaintances enumerating even the most mundane of his positive behaviors, such as serving coffee to his housekeeper (Lee, 2011). Although people do sometimes judge transgressors more favorably in light of their good deeds (e.g., Birnbaum, 1973), positive character evidence has not consistently been shown to exert a strong influence on the kinds of decisions with which jurors are typically faced (Hunt & Budesheim, 2004; Maeder & Hunt, 2011). Moreover, introducing such evidence during a trial can be risky because, under the Federal Rules of Evidence, it allows the prosecution to counter with negative character evidence that would not otherwise have been admissible (Ross, 2004). It is thus important to understand the situations in which a defendant's history of good deeds is most likely to positively – or negatively – impact judgments of him or her. The present article describes research that examines when and why a history of good deeds can make a defendant seem more like a hero – or more like a hypocrite.

To illustrate how one's history of good deeds can have different effects on judgments of one's subsequent wrongdoing, consider two verdicts rendered in the court of public opinion. First consider reactions to allegations that Martin Luther King, Jr. committed adultery (Abernathy, 1989). Because of King's status as a moral paragon, many people might be likely to give him a "pass" and withhold their condemnation. His contributions to the civil rights movement might seem to outweigh his extramarital dalliances. By contrast, consider the public's reaction to former New York governor Eliot Spitzer, who in 2008 was found to have committed adultery with prostitutes. While no moral paragon, Spitzer did have a virtuous history: As district attorney, he cracked down on sex trafficking, which no doubt reduced its number of victims. In light of these good deeds, was the public willing to excuse Spitzer for soliciting prostitutes? On the contrary, he was widely condemned as a hypocrite (Hakim & Santos, 2008). How can we explain these opposing reactions to King and Spitzer? Why does a history of good deeds only sometimes excuse transgressions?

One of the many differences between King and Spitzer is that King's alleged infidelity was unrelated to his prior good deeds. That is, there is nothing inherently contradictory about advancing civil rights and committing adultery. By contrast, Spitzer's infidelity was closely

related to his prior good deeds. Someone who fights prostitution and then solicits prostitutes himself appears to be “saying one thing but doing another” or failing to “practice what he preaches” – defining features of hypocrisy (Barden, Rucker, & Petty, 2005; Stone & Fernandez, 2008). Spitzer’s fight against prostitution seems less sincere and perhaps more politically strategic when one learns of his subsequent crime. Not only do people dislike hypocrites (see Gilbert & Jones, 1986), they also feel a certain glee when hypocrites are punished (Smith, Powell, Combs, & Schurtz, 2009). This analysis suggests that when you have clearly done something wrong, good deeds can help you get off the hook – but only if those good deeds are unrelated to your transgression. Otherwise, hypocrisy will prevent you from getting a pass.

Spitzer and King represent interesting case studies, but numerous other factors could explain the public’s different reactions to them. To investigate the impact of good deeds on judgments of subsequent transgressions more systematically, my collaborator Benoît Monin and I conducted a series of experiments (Effron & Monin, 2010). In a first experiment, research participants (students at Stanford University) read a fictional newspaper article about a high school principal who had committed a blatant act of sexual harassment: While dining at a local restaurant, he had made provocative comments to a waitress, touched her in an unwelcome way, and offered her money for sex. Not surprisingly, participants condemned the principal and his behavior, and thought that he should resign from his job.

A second group of participants read about the same act of harassment, but first they learned that the principal had a history of virtuous behavior that was unrelated to his transgression: He had worked tirelessly for years to reduce illegal drug use among students at his school. Participants in this second group were less condemning of the principal and his behavior towards the waitress, and were less eager for him to resign. In other words, the principal was more likely to be let off the hook for the same act of sexual harassment when he had done an unrelated good deed. Participants acted as if his transgression were at least somewhat balanced out by his prior acts of virtue.

A third group of participants read that the principal had a history of virtuous behavior that was closely related to his misdeed: Before committing sexual harassment himself, he had worked tirelessly for years to reduce sexual harassment among his students. Under these circumstances, participants reacted to the principal much like the public reacted to Eliot Spitzer. Instead of showing any inclination to reduce their condemnation of him, they labeled him as a hypocrite and dismissed his prior good deeds as insincere. Given this negative reaction, the principal would have been better off if his history of fighting sexual harassment had never come to light.

We found complementary results using a different version of the newspaper article – one that described how the principal had committed a drug-related offense rather than an act of sexual harassment. Participants were relatively happy to let the principal off the hook for his drug offense when he had fought sexual harassment at his school (an unrelated good deed), but not when he had fought drug use (a related good deed). Once again, we see that a virtuous track record can help get one off the hook for an unrelated transgression, but will make one look like a hypocrite for committing a related transgression.

Note that participants in this study judged how much the principal should be condemned for wrongdoing that he had clearly committed. In this sense, participants were in a similar position to judges determining a sentence after a guilty verdict has already been rendered, or jurors during a trial who have no doubt that the defendant is guilty. Given the results of the experiment, defense attorneys should hesitate before introducing positive character evidence that seems closely related to a crime for which their client has already been convicted or that their client clearly committed. Rather than mitigating a sentence or softening judgments, good deeds that are related to blatant wrongdoing may invite attributions of hypocrisy (see top row of Table 1).

Table 1: Effects of prior good deeds on judgments of an alleged wrongdoer

		Are the prior good deeds closely related to the alleged transgression?	
		YES	NO
Is the person on trial clearly guilty?	YES	<b>HYPOCRITE</b> Condemnation not reduced	<b>HERO</b> Reduced condemnation
	NO	<b>HERO</b> Reduced condemnation Allegations assumed false	<b>HERO</b> Reduced condemnation

There are, however, some situations in which a virtuous history that is closely related to subsequent wrongdoing can be an asset to a defendant rather than a liability. Specifically, when a defendant's guilt is uncertain, introducing positive character evidence may be less likely to raise the specter of hypocrisy and may, in fact, benefit the defendant. To illustrate, imagine a white corporate manager who has been accused of racial discrimination because, of the seven employees eligible for advancement, he promoted only the five who were white, and held back the two who were black. Although this decision falls suspiciously along racial lines, the manager claims that the more meritorious employees just happened to be white. Would the manager seem like a hypocrite if one knew that he had previously fought to reduce racial discrimination at his company? Probably not, even though these good deeds are closely related to his alleged wrongdoing. Instead, these good deeds make his promotion decision seem less likely to have been racially motivated. Because he is not clearly guilty, a history of virtuous behavior that is closely related to his alleged wrongdoing will likely lead people to give him the benefit of the doubt. By contrast, if he were clearly guilty of racial discrimination (e.g., if he had been recorded saying that he refused to promote racial minorities), then a history of opposing racial discrimination would likely make him look like a hypocrite.

We found evidence for this idea in a second experiment (Efron & Monin, 2010, Study 2). Research participants read a fictional newspaper article reporting a situation like the one described above: a white manager was accused of racial discrimination, but there was ambiguity

surrounding whether he was guilty. Participants who had previously learned that the manager had a history of opposing sexual harassment (an unrelated good deed) condemned him less and were less supportive of taking legal action against him than participants who had been told nothing about the manager's history. As we saw in our first study, these unrelated good deeds seemed to balance out any wrongdoing that the manager might have committed, but they did not make the allegations seem any less likely to be true.

A different group of participants who had previously learned that the manager had a history of opposing racial discrimination (a closely related good deed) expressed even less condemnation and were even less supportive of taking legal action. Instead of merely balancing out any wrongdoing that the manager many have committed, these related good deeds made participants more confident that the manager had not committed any wrongdoing at all. Rather than seeming hypocritical, the manager's history of opposing racial discrimination made participants less likely to believe that he was guilty of committing such discrimination himself.

By contrast, a history of fighting racial discrimination did make the manager seem hypocritical to a different group of participants who read a version of the newspaper article in which the manager was clearly guilty of racial discrimination. In this version, participants were told that the media had uncovered emails in which the manager had written that the black employees' race made them "unsuitable for management." Because his history of fighting racial discrimination directly contradicted behavior that was clearly discriminatory, participants accused him of hypocrisy and urged legal action against him.

These results suggest that introducing positive character evidence that is closely related to a client's alleged wrongdoing can sometimes be an effective strategy for the defense. If the jury is unsure about the defendant's guilt, this closely related character evidence could increase the odds of an exculpatory verdict. But if the jury is already convinced that the defendant is guilty, this strategy could backfire by sparking perceptions of hypocrisy and increasing the jury's willingness to condemn the defendant (see bottom row of Table 1).

### *Summary and implications*

The results of our studies suggest that people are often willing to soften their judgments of a defendant in light of his or her history of good deeds – but whether and how much depends jointly on two factors which are summarized in Table 1: (a) how clearly guilty the defendant is of wrongdoing, and (b) how closely related people think the defendant's good deeds are to the alleged wrongdoing.

When a defendant is clearly guilty (e.g., during a trial in which the evidence against the defendant is overwhelming, or during sentencing after a guilty verdict has already been rendered), emphasizing that he or she has a history of good deeds can be risky for the defense (see top row of Table 1). On the one hand, if the good deeds are perceived as being unrelated to the alleged wrongdoing, then this strategy will likely mitigate condemnation. For example, if Eliot Spitzer had had a history of fighting illegal drugs, then the public might not have responded with such outrage when they learned that he paid for sex. On the other hand, if the good deeds are perceived as being related to the alleged wrongdoing, then highlighting them can

backfire: instead of mitigating condemnation, they can make the defendant seem like a hypocrite. This, of course, was the sort of public opinion that Spitzer actually faced when he paid for sex after fighting against prostitution.

When people are uncertain whether a defendant is guilty, there is less risk in emphasizing his or her history of good deeds (see bottom row of Table 1). In such situations, good deeds that seem unrelated to allegations may not convince many people that the defendant is innocent, but these good deeds can still mitigate condemnation by seeming to balance out any wrongdoing that may have occurred. By contrast, good deeds that seem related to the wrongdoing can convince people of the defendant's innocence, and can thus dramatically reduce condemnation without seeming hypocritical. To use the language of evidence law, if jurors are unsure about the defendant's guilt, they will treat good deeds that are related to the alleged crime as propensity evidence. If it had been unclear whether Spitzer was guilty of soliciting prostitutes, then his history of fighting prostitution would probably have convinced some people that he was innocent.

Some caveats should be kept in mind when applying our research findings. First, the fictional individuals in our studies performed good deeds before they allegedly committed transgressions. We might have found different results if they had performed good deeds only after the allegations against them had come to light. On the one hand, good deeds performed after a transgression could seem like a sincere act of atonement, lessening any perceptions of hypocrisy (Barden et al., 2005). On the other hand, good deeds performed after a transgression could seem like an insincere strategy for winning support and therefore magnify perceptions of hypocrisy. A second caveat is that the extent to which good deeds are related to a transgression is to some degree subjective. For example, is it hypocritical to condemn others for sexual harassment and then to commit racial discrimination? Our research participants tended to think not – but we suspect that the fact that harassment and discrimination both involve abuses of power, for example, would allow a clever prosecutor to convince jurors that it does.

### *Conclusion*

When deciding during a trial or during sentencing whether to introduce positive character evidence, defense attorneys should consider how closely related the good deeds will seem to the defendants' wrongdoing, and how confident the judge and jury are about the defendant's guilt. Otherwise, attempts to make a defendant look like a hero could backfire, and instead make him or her look like a hypocrite.

*Daniel A. Effron is a visiting assistant professor and postdoctoral fellow at the Kellogg School of Management at Northwestern University. He recently received his PhD in social psychology from Stanford University. Dr. Effron's research interests focus on how people judge moral transgressions, and on the psychological processes that allow people to act in morally questionable ways without compunction. More information about his research may be found at [http://www.kellogg.northwestern.edu/Faculty/Directory/Effron\\_Daniel.aspx](http://www.kellogg.northwestern.edu/Faculty/Directory/Effron_Daniel.aspx).*

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*We asked two trial consultants to respond to Daniel Effron's paper and on the following pages, Holly VanLeuven and Katherine James respond.*

*Holly VanLeuven responds:*

*Continuum of Likely Judgment*

*Holly G. VanLeuven, MA, has been a practicing Trial Consultant since 1972. She is president of Genesis Group in Scottsdale, Arizona.*

Effron's study is based upon responses by college students to a series of fictional newspaper accounts describing a variety of transgressions along with a variety of types of good deeds attributed to the alleged transgressor. I haven't seen the statistics from Dr. Effron's study. His conclusions do, however, coincide with conventional wisdom and my personal experience.

How and to whom will these conclusions be useful? At the very least, a review of this research gives the signal to trial consultants and members of the litigating team to seriously consider how to deal with positive and negative character evidence.

Risks and benefits of character references deserve a prominent place on every trial strategy check-list. What will be the impact of a parade of people who have had personal experience with the client's good and/or bad acts? Is it better to have none, some or many people? Is it better to try to match character witnesses to the demographics of the jury...or doesn't it matter? If the client is well-known to be a person of ill-repute, is it smart to acknowledge that up front, going on to say that in spite of past deeds, the law requires that the accused have a fair trial to determine his/her culpability for the charges at hand. If the client has been seen in the past as an honorable person...a priest, a teacher, a Sandusky...can that possibly mitigate an overwhelming body of evidence against him/her or is it instead seen as lack of integrity from the beginning, earning the client the dreaded "Hypocrite" label? The great danger of failing to develop the best strategy is in compromising the jury's perception of the accused as innocent until proven guilty.

These questions, and especially the answers to them, are very tricky and will vary from case to case. The important thing is to ask the questions and to KNOW they are tricky. With that knowledge, the trial team can carefully develop the answers and test the answers by means of talking it through with experts and people whose judgment you trust, doing focus groups or mock trials, as well as simply applying your own knowledge and experience to the issues.

*Katherine James responds:*

*Katherine James, MFA is a trial consultant based in Culver City, CA. Her specialization is live communication skills.*

### *Hero or Hypocrite Response*

What a fascinating theory that Effron puts forward. I wonder if the results would change if, instead of dealing only with students, his study subjects included people of many generations and diverse backgrounds to more closely represent real-world jury panels.

The concept of “atonement” – making up for past sins – has some pretty deep roots in human experience. For example, making a racist remark in the workplace, having it pointed out and then working to end racist comments in that very workplace seems to be in keeping with “atonement.” If the purpose of punishing someone is to get that person to pay for his or her sins, well, the payment has been made.

However, Setting up a program to end racism in the workplace, then committing a racist act in the workplace is hypocritical. My experience tells me that younger jurors are less forgiving than older jurors in this regard. The older we are, the more likely we are to have learned from our previous mistakes. We realize we are works in progress, and unless the transgression is heinous, we are more apt to forgive than a younger, more idealistic juror.

I am certainly not the only trial consultant who has experienced a major backfire of inundating the jurors with the “good deeds” of a corporation when working to defend a lawsuit. No one wants to hear how you helped the local youth basketball league if you did it with the money that you earned while ripping off someone else’s intellectual property.

Although Effron’s conclusions seem logical, a study that involves not only students but a well-rounded and diverse group of people would do more to reassure me of the accuracy of his research.

Perhaps Effron and a dedicated group at ASTC could further develop this theory through research. It certainly is a question at the heart of both civil and criminal cases.

## Ch-ch-ch-changes! And the mercury keeps rising...

Welcome to the dog days of summer. It's been a busy summer here at The Jury Expert as we've transitioned to being published by the [ASTC Foundation](#) and are busy (still) working on catching all our documentation up so it reflects that shift.

The world of litigation has been busy too with the Jerry Sandusky verdict and the recent release of voicemail he sent to the previously unidentified Victim #2. George Zimmerman is giving interviews. Conrad Murray (Michael Jackson's final doctor) is inviting Katherine Jackson (Michael's mom) to visit him in prison even as Michael Jackson's children take to Twitter to denounce Michael's siblings having "abducted" Katherine Jackson and refusing to let them speak to her. In other news, Anderson Cooper comes out while Sally Ride doesn't—but that doesn't stop the debate on whether she should have done so. A gunman (who will not be named here) dyes his hair red and kills many in a theater showing the movie *Dark Knight Rises*. Sometimes it's tough to separate fact from fiction and we are pelted with media sound bytes of every twist and turn.

It's no wonder jury-eligible folks are often wary and suspicious of our legal system. As we brought our last issue to press, I sat in voir dire in Travis County and watched as potential jurors were questioned (while I was studiously ignored). While it was apparent no one was gung-ho to serve, no one was [dressed like a Star Wars character](#) and there were no overt efforts to lie to get out of serving.

The judge did a good job of educating about serving. Perhaps I was summoned on an atypical day. I doubt it though. I think it was likely a typical day in the halls of justice. As you know, if you read our lead article, the ASTC Foundation is trying to learn more about what happens on YOUR typical day. We want to understand the attitudes and practices of those involved in litigation in order to better advise the legal community about these issues.

If you are an attorney, a judge, a paralegal or otherwise involved in the litigation process, please do us a favor and fill out this survey for the Foundation.

<http://www.surveymonkey.com/s/3TN9WQZ>

And then, read the rest of our hot summertime issue and let us know what else you'd like to hear about!

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