

SUBSCRIBE via [RSS](#)SUBSCRIBE via [Email](#)

# The Jury EXPERT

*The Art and Science of Litigation Advocacy*

A BiMonthly E-Journal

Volume 21, Issue 4, July 2009

### **Terror Management Theory and Jury Decision-Making**

*What is terror management theory and how can it be used effectively in the courtroom? With responses from three experienced trial consultants.*

Page 1

### **Lights, Camera, Action: Getting the Most out of Videos at Trial**

*An experienced videographer walks us through how to get the most out of the videos at trial.*

Page 17

### **Jury Damage Awards in Times of Recession**

*How does the current recession effect jury damage awards? A damages expert opines and three experienced trial consultants respond.*

Page 22

### **Jurors' Perceptions in Economic Decline**

*Two experienced trial consultants explore the impact of a changing economy on jury awards.*

Page 32

### **This Other Dude Did It!**

*The Alternative Defense Theory with responses from two experienced trial consultants.*

Page 37

### **How a Change in Setting Affects Witness Preparation**

*Preparing your witness to move from the office to the courtroom*

Page 45

### **Negotiating in the Mediation Millennium**

*Strategies for negotiation and mediation in changing times.*

Page 51

### **The Juror Factor: Race & Gender in America's Civil Courts--a Book Review**

Page 43

## **Terror Management Theory and Jury Decision-Making**

**by Joel D. Lieberman and Jamie Arndt**

Despite the canon that trials are to be heard by fair and impartial juries, social science research and practical experience teaches us that jurors will often harbor their own biases, and utilize these biases in their decision-making. Jurors enter the courtroom possessing a multitude of life experiences that may exert some degree of influence on their final verdict decisions. This, of course, is why attorneys use voir dire to uncover aspects of jurors' lives that may be relevant to the case at hand, to the extent that they are permitted to do so. However, research in the area of social psychology indicates that it may behoove attorneys to go beyond focusing on jurors' lives, and, depending on case facts, also consider how jurors might respond to situations that lead them to think about, even if only quite briefly, their inevitable death. Considerable empirical work has been conducted on Terror Management Theory (TMT; see Greenberg, Solomon, & Arndt, 2008, and Greenberg, Solomon, & Pyszczynski, 1997, for a review) examining the far-reaching influence of people's awareness of death (or "mortality salience") on social behavior. An emerging line of TMT research has specifically focused on how knowledge of our "existential finitude," so to speak, affects legal decision-making (Arndt, Lieberman, Cook, & Solomon, 2005).

## *Terror Management Theory*

Terror management theory is based heavily on the writings of cultural anthropologist Ernest Becker, and in particular his book *The Denial of Death*, for which he won the 1973 Pulitzer Prize. According to TMT, humans have evolved a unique capacity for incredibly complex thought. Humans can think in terms of time, in terms of symbols, and can hold themselves as the object of their attention. Such capacities allow humans to meaningfully contemplate our own life and mortality. That is, we know that we exist, and as such, we also know that one day we will not exist. According to the theory, this knowledge is problematic to the extent that humans also possess a basic animal-based desire for self-preservation. To resolve this conflict and manage the intense fear associated with knowledge of death, individuals participate in and defend a “cultural worldview.” Cultural worldviews represent complex belief systems that define socially valued behaviors. By living up to the prescriptions of socially sanctioned behavior, one can obtain a sense that one’s existence is meaningful and that we are important participants of a larger, and enduring, entity. This can take many forms, such as investing in one’s religion, nation, or even more broadly, one’s culture. Unfortunately, as decades of social science theory and research have taught us, cultural worldviews are relatively fragile social constructions; to believe that we are participating in important socially valued activities we need to have other people recognize, support, and reward the behaviors that we construe as valuable and meaningful.

Given the cultural relativity of our beliefs and values, it is inevitable that we encounter others with different belief systems and values. This is likely increasingly the case with the continued globalization of the world community. According to TMT, individuals with different belief systems pose serious threats to the validity of our own worldview, because their existence undermines the importance of our own belief structure. Thus, people are prone to respond to such threats with some form of psychological defense, often by ridiculing, derogating, attacking, or minimizing the worldview threat. By engaging in worldview defense in this manner, one can re-exert the superiority of his or her worldview.



Thus, one of the basic predictions of TMT, known as the “mortality salience hypothesis,” states that reminders of mortality will cause an individual to invest in and defend their cultural belief system, leading that person to respond favorably to others who support his or her worldview and negatively to those who threaten it. To test this hypothesis, studies have typically reminded some participants of their mortality (by any of a variety of techniques, ranging from having participants respond to a questionnaire prompting them to write briefly about the prospect of their death, to interviewing them in proximity to places, like funeral homes or cemeteries, that are likely to elicit death-related thought). Other participants are typically randomly assigned to contemplate another, generally aversive, topic so as to determine the effects of thinking about death relative to other distressing experiences. To date, over 350 published empirical studies have provided support for this hypothesis, across a wide range of samples, in laboratories throughout the United States, as well as in at least 17 nations (Motyl, Pyszczynski, Cox, Siedel, & Maxfield, 2008; Pyszczynski, Rothschild, & Abdollahi, 2009).

## *Death Reminders Within (and Outside) the Courtroom*

Within the confines of a courtroom, jurors may be exposed to death-related reminders in a variety of contexts. Within a criminal case the charges against the defendant may focus on mortality related issues, such as in a homicide trial (particularly one in which capital punishment must be considered by jurors; see Judges; 1999; Kirchmeier, 2008), an attempted murder trial, or in cases where serious bodily injury occurred to the victim. However, mortality reminders are, of course, present in civil trials as well, such as in personal injury trials where fatalities result. In addition, even if

case facts are not morality related, external events just prior to the trial, or those that occur during it, may trigger mortality-related thoughts among jurors. For example, one trial consultant has speculated that the September 11<sup>th</sup> attacks produced strong mortality salience that may have had an impact on juror decisions in criminal and civil cases tried immediately after the attacks (Rowland, 2002). Of additional concern, however, is research indicating that even unconscious exposure to reminders of death can prompt individuals to defend their cultural beliefs more fervently (Arndt, Greenberg, Pyszczynski, & Solomon, 1997).

As noted above, individuals typically respond to mortality salience by defending their cultural worldview in any one of a number of manners including exhibiting negative reactions to others who are different. Empirical research has demonstrated that this can lead to greater distress when engaging in behaviors that violate cultural values (Greenberg et al., 1995), increased hostility toward individuals who pose a threat to the social values defined by one's worldview (Rosenblatt et al., 1989), increased liking for Americans among American participants (Greenberg et al., 1990), and other such preferences for those who share similar beliefs. For example, in both Israel and the United States, mortality salience has led participants to more negatively evaluate immigrants (Florian & Mikulincer, 1997; Motyl et al., 2008). Further, following mortality salience Japanese participants became more negative in their evaluations of a target who criticized Japan (Heine, Harihara, & Niiya, 2002). As it has been shown that (in some circumstances) jurors may be more lenient to defendants who are similar to them on factors such as race, socio-economic status, important beliefs, and religion (Devine et al., 2001; Mazzella & Feingold, 1994), the relationship between mortality salience and defendant juror similarity may be important to consider. This is particularly true given the fact that the defendant-juror similarity effect may not always work in a straight-forward way. In some cases, a "black-sheep" effect may occur (Kerr, Hymes, Anderson, & Weathers, 1995), where jurors are actually more punitive towards defendants with similar backgrounds (i.e., when the demographic factors the juror has in common with the defendant make that juror a minority on the jury). Indeed, previous TMT research has demonstrated that after thinking about death, Hispanic-Americans attempted to distance themselves psychologically from their Hispanic heritage when they were made aware of negative stereotypes associated with Hispanics (Arndt, Greenberg, Schimmel et al., 2002).

Reminders of death have also been shown to lead people to think in more stereotypic ways when forming impressions of others (e.g., Schimmel et al., 1999). Such findings are particularly concerning given the myriad of ways stereotypes may be utilized by jurors as they contemplate what type of person the defendant is, or listen to witness testimony (or even attorney presentations), and consider how trustworthy those individuals are. For example, it has been repeatedly demonstrated that jurors (and even judges) are more lenient to physically attractive defendants (Lieberman 2002; Mazzella & Feingold, 1994; Stewart, 1980; 1985). Based on the findings of previous TMT studies, we would expect biases such as the attractiveness-leniency effect to exert more a more powerful influence under conditions of mortality salience. Further, as indicated by recent research, awareness of death can even influence what types of people are found most attractive and desired (Kosloff, Greenberg, Sullivan, & Weise, 2009).

### *TMT and Reactions to Lawbreakers*

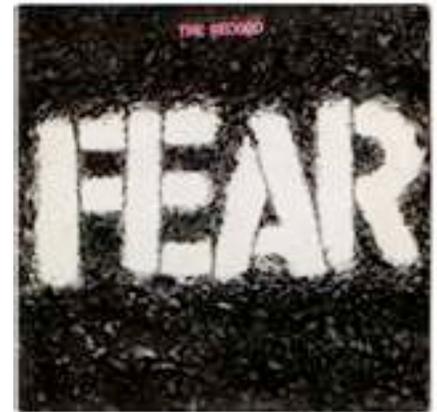
Worldview threats may come in many forms, but perhaps most relevant to legal decision-making are threats posed by lawbreakers. Laws represent the formalized rules of what is deemed acceptable and unacceptable behavior within a culture. When an individual violates those rules, they are undermining the values (and cultural worldviews) of the majority of citizens. Consequently, one would expect people's own insecurities about their mortality to provoke harsh reactions to lawbreakers. This possibility was the focus of initial TMT research examining the decisions of municipal court judges (Rosenblatt, Greenberg, Solomon, Pyszczynski, & Lyon, 1989, Study 1). In that study, judges were reminded of their own mortality or not and presented with information about a case where a woman was arrested for prostitution. After reviewing the case materials, judges were asked to set bail amounts for the lawbreaker. The

results indicated that judges who had thought about their death set bail amounts that were significantly higher than those who were not asked to contemplate their death.

Although the basic finding that mortality salience leads to more punitive reactions to lawbreakers has been replicated in a number of studies, more recent research has indicated that the relationship between psychological concerns about death and legal decision-making is more complex. For example, in a study on reactions to hate crime offenders, Lieberman, Arndt, Personious, and Cook (2001) found that participants who had thought about their death reacted more punitively towards hate crime perpetrators when no specific information about the victim (e.g., nationality, sexual orientation) was provided (Study 1). This reflects the general propensity for reminders of death to increase punitive reactions toward lawbreakers as described above. However, when participants were provided with information that indicated the victim was attacked because they possessed characteristics that represented a worldview threat to both the attacker and the participants' themselves (e.g., a Jew relative to a Christian), mortality salient participants were more lenient to the perpetrators (Study 2). Thus, in some cases, reminders of death will produce increased negative reactions to lawbreakers, but in other cases, greater leniency may be exhibited.

### *Fair Process Concerns*

TMT has been shown to be relevant to a variety of other legal issues including fair process concerns and compliance with judicial admonitions (see Arndt et al., 2005). van den Bos and Miedema (2000) and van den Bos (2001) also found that procedural fairness is a worldview component that individuals are motivated to protect out of existential concerns. Empirical research has demonstrated that this finding has implications for how evidence is used in a variety of cases. For example, in a recent study on juror decision-making in capital cases, reminders of death led participants to more carefully attend to the quality of expert testimony, and more appropriately utilize mitigating factors (Shoemaker & Lieberman, 2009). Shoemaker and Lieberman attributed this to people's heightened thoughts of death creating a need to treat the defendant in a more legally appropriate manner due to enhanced fair process concerns.



Further, although the awareness of mortality appears to lead individuals to initially be more punitive towards a defendant, this effect is attenuated when fair process concerns are salient due to specific judicial directives or individual differences. For example, in a pair of studies on the influence of inadmissible evidence, Cook, Arndt, and Lieberman (2004) found that mock jurors who were inclined to follow their own belief systems rather than the law (either identified as "high nullification prone participants" on a pretrial personality measure, or who had been given associated judicial instructions) inappropriately used inadmissible evidence under control conditions where their mortality had not been made salient. However, mortality salience actually reversed this trend among the high nullification prone participants. In that case, mortality salience participants were appropriately less punitive in the inadmissible condition compared to conditions where the evidence was ruled admissible or omitted. Thus, heightened awareness of mortality appears to motivate people to uphold relevant principles of their worldview that often include carefully following the law and an increased desire for fair treatment of others.

### *Developing Case Presentations*

From the perspective of attorneys and trial consultants, TMT may be effectively applied through the development of case presentations or through jury selection. On the surface it may appear that the nature of certain

cases makes mortality salience inevitable. However, case aspects by themselves may not always be sufficient to trigger strong mortality salience effects.

For example, it appears that mortality salience effects are most powerful when an individual contemplates their own death, rather than the demise of another. Greenberg et al. (1994) obtained weaker mortality salience effects when they directed participants to think about mortality in general or about the death of a loved one compared to participants who were asked to specifically think about their own deaths. Similarly, when given information about a civil case, stronger mortality salience effects (i.e., bias in favor of an American company) were obtained when mock jurors contemplated their own mortality rather than mortality in general (Nelson et al., 1997). During a trial, it may be possible for an attorney to capitalize on this finding in closing statements by asking jurors to think about what it would be like if they were the victim and experienced a near-death experience in the last moments of their life. At the same time, evidence also indicates that mortality salience effects may follow from even very fleeting, and unconscious, reminders of death (Arndt et al., 1997); thus, in the absence of controlled investigations, it is not always clear how and when thoughts of death may be put into play with the greatest impact.

Alternatively, an attorney might want to mitigate potential mortality salience effects from occurring. One method for achieving this may be to increase how rationally jurors approach the information to which they have been exposed. What we have been referring to as mortality salience effects tend to occur when individuals are in a more relaxed “experiential” state of mind where they rely on their gut instincts and emotional reactions, but are not apparent when jurors are in more rational and analytic mindsets (Simon et al., 1997). Research has shown that specific directives to adopt either a rational or experiential mindset can be successful. However, judges may prevent attorneys from encouraging jurors to be rational and analytic in their consideration of the evidence during opening and closing statements. In that case, analytic processing may also be achieved through evidence presentation. For example, it may be possible for expert witnesses to present testimony that emphasizes statistical analyses, such as the method of calculating DNA match probabilities or economic projections of future earnings.

It may also be possible to mitigate the consequences of thoughts of death by emphasizing a sense of shared humanity between jurors and relevant parties in the case (e.g., the defendant). Motyl et al. (2008) found that individuals were less likely to exhibit negative attitudes toward immigrants following reminders of death when a sense of common humanity had been reinforced by drawing participants’ attention to familial similarities between themselves and immigrants. This approach was likely successful because of positive feelings most people typically associate with their families as well as the near-universal nature of the family experience. Consultants may be able to effectively use mock trials or focus groups to identify successful approaches for case presentations when mortality salience is an issue.

### *Jury Selection*

The impact of mortality salience may also be either enhanced or mitigated through the identification of specific types of jurors who are likely to be more or less susceptible to these effects.

*Age and Terminal Illness.* If asking an individual to contemplate their own death produces worldview defensive reactions that may affect juror decision-making, would elderly or terminally ill jurors exhibit the same mortality salience induced behaviors? Should an attorney concerned with mortality salience effects harming his or her case exercise peremptory strikes on such jurors? On the surface, it appears that attending to these background characteristics would be beneficial, however, research has indicated otherwise (Maxfield et al., 2008). As individuals move closer to their actual death by aging or contracting terminal illnesses the effects of mortality salience may be redirected away from the trenchant defense of cultural values. This finding has been attributed to a re-focusing of

mortality-based concerns. As the reality of death sets in, individuals' acceptance of that inevitability assuages the need for worldview defensive reactions, and people prefer to manage such fears through other means.

*Self-Esteem.* Self-esteem has been shown to have an important anxiety-buffering function in the face of death-related thought, leading individuals with high levels of self-esteem to typically exhibit attenuated mortality salience effects (e.g., Harmon-Jones et al., 1997; van den Bos, 2001). Consequently, an attorney concerned with mortality salience-related factors adversely affecting his or her case may want to use pretrial surveys to identify and challenge jurors who appear to be experiencing situational or dispositional factors that could be associated with low self-esteem.

*Additional Individual Differences.* Several other personality factors have been shown to moderate terror management processes as well, including attachment style (individuals with more secure attachment styles respond differently to reminders of death, preferring to affirm their relationships rather than denigrate others) and depression (greater depression is associated with more powerful mortality salience effects - Greenberg et al., 1993; Mikulincer & Florian, 2000; Motyl et al., 2008; Simon et al., 1998). Unfortunately, attachment style and depression may be difficult personality factors to ascertain in a limited voir dire. However, other relevant individual differences may be more easily identifiable, such as authoritarianism. It is a well-known finding that authoritarians are generally more conviction prone as jurors, unless the defendant is an authority figure (Lieberman & Sales, 2007). TMT research has also found that authoritarian tendencies are activated by thoughts of death (Greenberg et al., 1990). Finally, jurors' attitudes towards religion may be particularly relevant. Greater endorsement of religious fundamentalist beliefs has been shown to be associated with certain mortality salience effects, and in particular situations, may be especially influential. For example, Vess, Arndt, Cox, Routledge, and Goldenberg (in press) found that religious fundamentalists are more likely to endorse faith-based medical interventions to illness after being reminded of death, and are more sympathetic to parties charged with (religiously motivated) medical neglect. During voir dire, religious identification or involvement may be obtainable through pretrial surveys, or to some extent by physical observation (e.g., religious jewelry or clothing).

### Conclusions

A variety of case aspects may remind jurors of their own mortality during a trial. Research on TMT indicates that such reminders lead people to more trenchantly defend and uphold the values and beliefs associated with their cultural worldview. This can lead to the utilization of individual biases when considering case evidence or parties (or even an emphasis on procedural fairness). The relationship between people's concerns about mortality and case factors may be complex and produce interactive effects. Ultimately, the nature of a juror's worldview, and the salience of key aspects of it, will influence the direction and intensity of potential bias. Although some general principles can be applied in predicting the nature of mortality salience effects (e.g., if there are no other relevant factors present mortality salience should lead to more punitive reactions to lawbreakers and self-esteem is likely to attenuate such effects), it is most useful to consider the impact of death-related thought in a case specific manner. Consequently, it is essential for attorneys to work with trial consultants to identify how jurors are likely to respond to aspects of the case that may be highly salient during a trial.

### References

- Arndt, J., Greenberg, J., Pyszczynski, T., & Solomon, S. (1997). Subliminal exposure to death-related stimuli increases defense of the cultural worldview. *Psychological Science*, 8, 379-385.
- Arndt, J., Greenberg, J., Schimel, J., Pyszczynski, T., & Solomon, S. (2002). To belong or not to belong, that is the question: Terror management and identification with gender and ethnicity. *Journal of Personality and Social Psychology*, 83, 26-43.

- Arndt, J., Lieberman, J. D., Cook, A., & Solomon, S. (2005). Terror in the courtroom: Exploring the effects of mortality salience on legal decision-making. *Psychology, Public Policy and Law, 11*, 407-438.
- Cook, A., Arndt, J., & Lieberman, J. D. (2004). The effects of mortality salience on reactions to inadmissible evidence. *Law and Human Behavior, 28*, 389-410.
- Dechesne, M., Pyszczynski, T., Arndt, J., Ransom, S., Sheldon, K.M., van Knippenberg, A., & Janssen, J. (2003). Literal and symbolic immortality: The effect of evidence of literal immortality on self-esteem striving in response to mortality salience. *Journal of Personality and Social Psychology, 84*, 722-737.
- Devine, D.J., Clayton, L.D., Dunford, B.B., Seying, R., & Pryce, J. (2001). Jury decision making: 45 years of empirical research on deliberating groups. *Psychology, Public Policy, and Law, 7*, 622-727.
- Florian, V., & Mikulincer, M. (1997). Fear of death and the judgment of social transgressions: A multidimensional test of terror management theory. *Journal of Personality and Social Psychology, 73*, 369-380.
- Greenberg, J., Pyszczynski, T., Solomon, S., Pinel, E., Simon, L., & Jordan, K. (1993). Effects of self-esteem on vulnerability-denying defensive distortions: Further evidence of an anxiety-buffering function of self-esteem. *Journal Experimental Social Psychology, 29*, 229-251.
- Greenberg, J., Pyszczynski, T., Solomon, S., Simon, L., & Breus, M. (1994). Role of consciousness and accessibility of death-related thoughts in mortality salience effects. *Journal of Personality and Social Psychology, 67*, 627-637.
- Greenberg, J., Pyszczynski, T., Solomon, S., Rosenblatt, A., Veeder, M., Kirkland, S., & Lyon, D. (1990). Evidence for terror management theory II: The effects of mortality salience on reactions to those who threaten or bolster the cultural worldview. *Journal of Personality and Social Psychology, 58*, 308-318.
- Greenberg, J., Solomon, S., & Arndt, J. (2008). *A basic but uniquely human motivation: Terror management*. In J. Shah (Ed.), *Handbook of motivation science*. New York: Guilford Press.
- Greenberg, J., Solomon, S., & Pyszczynski, T. (1997). Terror management theory of self-esteem and cultural worldviews: Empirical assessments and conceptual refinements. In M. P. Zanna (Ed.), *Advances in experimental social psychology*, (pp. 61–139). San Diego: Academic Press.
- Harmon-Jones, E., Simon, L., Greenberg, J., Pyszczynski, T., Solomon, S., & McGregor, H. (1997). Terror management theory and self-esteem: Evidence that increased self-esteem reduces mortality salience effects. *Journal of Personality and Social Psychology, 72*, 24-36.
- Heine, S. J., Harihara, M., & Niiya, Y. (2002). Terror management in Japan. *Asian Journal of Social Psychology, 5*, 169-185.
- Judges, D. P. (1999). Scared to death: Capital punishment as authoritarian terror management. *U.C. Davis Law Review, 33*, 155-248.
- Kerr, N. L., Hymes, R. W., Anderson, A. B., & Weathers, J. E. (1995). Defendant-juror similarity and mock juror judgments. *Law and Human Behavior, 19*, 545-567.

- Kirchmeier, J. L. (2008). Our existential death penalty: Judges, jurors, and terror management. *Law and Psychology Review, 32*, 55-107.
- Kosloff, S., Greenberg, J., Sullivan, D., & Weise, D. (2009). Of trophies and pillars: Exploring the terror management functions of short-term and long-term relationship partners. Manuscript in preparation, University of Arizona.
- Lieberman, J. D. (2002). Head over the heart or heart over the head? Cognitive-experiential self-theory and extra-legal heuristics in juror decision-making. *Journal of Applied Social Psychology, 32*, 2526-2553.
- Lieberman, J. D., Arndt, J., Personius, J., & Cook, A. (2001). Vicarious annihilation: The effect of mortality salience on perceptions of hate crimes. *Law and Human Behavior, 25*, 547-566.
- Lieberman, J. D., & Sales, B. D. (2007). *Scientific Jury Selection*. American Psychological Association: Washington, DC.
- Lieberman, J. D., & Shoemaker, J. (2009). *The Effects of Mortality Salience and Evidence Strength on Death Penalty Decisions*.
- Maxfield, M., Pyszczynski, T., Kluck, B., Cox, C., Greenberg, J., Solomon, S., & Weise, D. (2007). Age-related differences in responses to thoughts of one's own death: Mortality salience and judgments of moral transgressors. *Psychology and Aging, 22*, 343-351.
- Mazzella, R., & Feingold, A. (1994). The effects of physical attractiveness, race, socioeconomic status, and gender of defendants and victims on judgments of mock jurors: A meta-analysis. *Journal of Applied Social Psychology, 24*, 1315-1344.
- Mikulincer, M., & Florian, V. (2000). Exploring individual differences in reactions to mortality salience: Does attachment style regulate terror management mechanisms? *Journal of Personality and Social Psychology, 79*, 260-273.
- Motyl, M., Pyszczynski, T., Cox, C., Siedel, A., & Maxfield, M. (2008). *One big family: The effects of mortality salience and a sense of common humanity on prejudice*. Manuscript submitted for publication, University of Colorado, Colorado Springs, CO.
- Nelson, L. J., Moore, D. L., Olivetti, J., & Scott, T. (1997). General and personal mortality salience and nationalistic bias. *Personality and Social Psychology Bulletin, 23*, 884-892.
- Pyszczynski, T., Rothschild, R., & Abdollahi, A. (2009). Terrorism, Violence, and Hope for Peace: A terror management perspective. *Current Directions in Psychological Science, 17*, 318-322.
- Rowland, C. K. (2002). Psychological perspectives on juror reactions to the September 11 events. *Defense Counsel Journal, 69*, 180-184.
- Rosenblatt, A., Greenberg, J., Solomon, S., Pyszczynski, T., & Lyon, D. (1989). Evidence for terror management theory I: The effects of mortality salience on reactions to those who violate or uphold cultural values. *Journal of Personality and Social Psychology, 57*, 681-690.

- Schimmel, J., Simon, L., Greenberg, J., Pyszczynski, T., Solomon, S., Waxmonski, J., & Arndt, J. (1999). Stereotypes & terror management: Evidence that mortality salience enhances stereotypic thinking and preferences. *Journal of Personality and Social Psychology*, 77, 905-926.
- Simon, L., Arndt, J., Greenberg, J., Solomon, S., & Pyszczynski, T. (1998). Terror Management and meaning: Evidence that the opportunity to defend the worldview in response to mortality salience increases the meaningfulness of life in the mildly depressed. *Journal of Personality*, 66, 359-382.
- Simon, L., Greenberg, J., Harmon-Jones, E., Solomon, S., Pyszczynski, T., Arndt, J., & Abend, T. (1997). Terror management theory and cognitive-experiential self-theory: Evidence that terror management occurs in the experiential system. *Journal of Personality and Social Psychology*, 72, 1132-1146.
- Stewart, J. E. (1980). Defendant's attractiveness as a factor in the outcome of criminal trials: An observational study. *Journal of Applied Social Psychology*, 10, 348-361.
- Stewart, J. E. (1985). Appearance and punishment: The attraction-leniency effect in the courtroom. *Journal of Social Psychology*, 125, 373-378.
- van den Bos, K. (2001). Reactions to perceived fairness: The impact of mortality salience and self-esteem on ratings of negative affect. *Social Justice Research*, 14, 1-23.
- van den Bos, K. & Miedema, J. (2000). Toward understanding why fairness matters: The influence of mortality salience on reactions to procedural fairness. *Journal of Personality & Social Psychology*, 79, 355-366.
- Vess, M., Arndt, J., Cox, C.R., Routledge, C., & Goldenberg, J.L. (in press). The terror management of medical decisions: The effect of mortality salience and religious fundamentalism on support for faith-based medical intervention. *Journal of Personality and Social Psychology*.

**Joel D. Lieberman, Ph.D. [[jdli@unlv.nevada.edu](mailto:jdli@unlv.nevada.edu)] is an Associate Professor and Chair at the University of Nevada, Las Vegas in the Department of Criminal Justice. His work focuses on the application of social psychological theories to criminal justice issues. His recent research has been in the area of jury decision-making, with an emphasis on pretrial publicity, inadmissible evidence, scientific jury selection, jury instruction comprehension, and the impact of expert witness testimony. For more information on Dr. Lieberman's research, see <http://faculty.unlv.edu/jlieberman/>.**

**Jamie Arndt, Ph.D. [[arndtj@missouri.edu](mailto:arndtj@missouri.edu)] is an Associate Professor at the University of Missouri, Columbia, Missouri in the Department of Psychology. His professional interests pertain to the motivational and existential dynamics of the human condition. He studies the social psychological impact of these dynamics for the self, legal decision-making, psychological defense, health, creativity, unconscious processes, and interpersonal relations. For more information on Dr. Arndt's research, see <http://psychology.missouri.edu/arndtj>; for more information on terror management theory see <http://www.tmt.missouri.edu/>.**

### Response to Lieberman and Arndt

We asked three experienced trial consultants to respond to Lieberman and Arndt's article on terror management. Bob Kaufman, Julie Howe and Greg Cusimano offer their responses on the following pages.

# TMT: "Salience" in the Courtroom?

By Bob Kaufman

**Bob Kaufman, Ph.D., A.B.P.P. ([bob@bonoradandrea.com](mailto:bob@bonoradandrea.com)) is a board certified forensic psychologist who serves as an expert witness in a variety of civil and criminal cases. He is also a senior trial consultant with BonoraD'Andrea, LLC in San Francisco, and an ASTC member.**

Terror Management Theory (TMT), as described by Lieberman and Arndt, is a fascinating look into the complexity of the human mind, and how it can influence an individual's behavior. As they describe, TMT may have some direct utility in the courtroom. But how a theory like this, which is conceptual in nature, and has been "tested" via specific controlled research conditions, can be directly applied to jury selection in particular, raises both challenges and serious questions. At the end of the day, jury selection is about getting to know individuals' life experiences, views, attitudes and to some degree their psychological fabric, in a contracted process and in an unnatural setting. TMT offers attorneys and trial consultants a compelling construct to consider, but we're going to have to be inventive and thoughtful regarding how the ideas are played out in court.

## *What TMT shows us*

In essence, TMT is about how people react when some of their deepest emotions are aroused, especially fear, uncertainty, helplessness and a sense of threat to their very existence. In such instances, the theory suggests that people will invoke and defend a view of the world and others that protects their sense of self, aliveness and purpose. For some, the response is adaptive; for others not. Individuals affected the most are vulnerable to lapses in empathy and caring about others they perceive to hold a different set of cultural values. These effects could have impact in the courtroom, most probably in cases thought to arouse "mortality salience." In such instances, if we can learn something about an individual's vulnerabilities, response modes and default settings, maybe we can get a glimpse into how that individual will react to the legal case at hand.

## *Problems in the courtroom*

As the authors note, there are some hurdles to the direct application of TMT in the courtroom. Limited kinds of cases are likely to achieve the threshold of "mortality salience", and the findings in controlled experiments of the impact of mortality salience on views and decision-making are mixed and clearly situation-specific. I would add that mortality salience is not likely to be a static, "either-or" phenomenon, but rather something that can be experienced in degrees and for varying lengths of time – sometimes only fleetingly. And further, the kinds of conditions that might trigger mortality salience are different for different people. That is to say, what one person finds terrifying or even life threatening, another person might not. For example, a case of violent crime might shake some people to the core, but not be nearly so de-stabilizing for others.

Furthermore, TMT is about some of our most complex social and emotional processes – how we handle fundamental fears we face as mortal beings; how we construct world views that have meaning for us and offer us a way to experience our place in the world, while having an insulating effect on unwanted thoughts or emotions. It's the kind of stuff that people spend a long time exploring in their lives. To think that these ideas can be readily understood and/or ascertained in a brief impersonal encounter (i.e. jury selection) is, of course, not very realistic. But maybe there's something to be gained here, and some ways to answer the question on every attorney's mind when picking a jury – "Is this particular juror better or worse than others who might serve, and why?"

*Possible pathway to understanding jurors*

It is clear that an array of cases can arouse the kinds of feelings and behaviors the authors describe. Violent crimes, civil rights cases, personal injury cases or others involving life-threatening events certainly come to mind. It makes sense that attorneys need to learn something about how jurors cope with fears, traumatic events, and perhaps even day-to-day conflicts. These cases have the potential to stimulate the kinds of deeper emotions and personal defense systems implied in Lieberman and Arndt's article. Hence in jury selection, attorneys should learn not only whether jurors have had prior experiences that might be analogous to the specific case-related issues, but also do their best to learn about other instances when a juror's sense of well being was seriously threatened. How have they coped with these experiences in the past? What scars might be left? How have these shaped their views?

Given that voir dire is not the same as an intake interview with a psychotherapy client, attorneys may have little experience with how to get at the emotional experiences described in TMT. Good trial consultation can be invaluable in assisting attorneys with constructing a voir dire that can elicit information on sensitive topics. Attorneys need to strike that balance between probing for information versus respecting the privacy and dignity of prospective jurors. Considerable thought must be paid to how questions are crafted to enhance the possibility that jurors will share their experiences, and not just shut down. Most attorneys realize that the manner in which jurors respond to voir dire questions can, at times, yield as much information about the juror as the content of the answers. Having a jury consultant in the courtroom provides another set of eyes to observe the process, pick up on emotional cues and evaluate their origins in light of the content of the juror's responses.

*Operationalizing the constructs for effective jury selection*

Given the limits set forth (i.e. that we cannot measure or evaluate mortality salience per se in the courtroom; that we are lucky if we can get peeks into individuals' cultural worldviews, much less understand it in any depth; that the research findings on the impact of mortality salience are decidedly mixed), there are a few things that attorneys *can* do. We get glimpses into jurors' minds and attitudes via several means:

## Supplemental Juror Questionnaires

- Whenever possible, push for a supplemental juror questionnaire. When you can get it, fight hard for those questions that might reveal important underlying attitudes and experiences that are relevant to the content and themes of the case. For example, in cases that involve violent crimes, don't just ask whether the juror has ever been a victim of a crime themselves, but also be sure to ask whether jurors have *witnessed* a violent crime, or whether *family members* have been a victim of or witnessed a crime. Inquire about *other* kinds of trauma, including natural disasters or other situations that might arouse mortality salience. Be sure to ask about religious affiliations (if you can), social and political group affiliations and, of course, what jurors read and watch on TV or what internet sites they visit most frequently. The more extreme the answers, the more the possibility that an individual will retreat to rigidly held beliefs under duress. For example, a prospective juror may have had a close friend or family member who was hurt or killed by a drunk driver. Some people might come away from that experience appreciating the fragility of life and even adopt a more caring and compassionate attitude towards people. On the other hand, if that juror has become a member of an organization that takes on fighting drunk driving as a cause célèbre, then it is *possible* that they are steeped in anger, and will seek to punish more harshly people they believe have engaged in wrong doing.

Voir dire: Acknowledging that judges and venues vary greatly in the extent and latitude they afford during voir dire, consider the following:

- Focus your efforts, aiming to go deeper with jurors you believe are likely to be leaders on the jury.
- With individuals who have experienced or witnessed traumatic or very disturbing events, be sure to ask if the juror is comfortable talking about their experience before plunging into the topic. Ask how individuals about their emotional responses to the events and where they have derived support. Jurors who have not come to reasonable terms with these kinds of events may have coped by hardening themselves to terrible events and can have little tolerance for anyone who is upset by trauma or suffering from it.
- It can be helpful to ask how jurors handle expectable conflicts on their jobs. These can reveal mini-collisions of worldviews. Find out about management experience and for those in supervisory positions, ask how they handle personnel issues when employees become emotional.
- Overall outlook on life, which can contribute to self-esteem and serve to buffer against defensive reactions, can be revealed in a variety of ways in voir dire. Ask about job satisfaction, interests outside of work, and even plans or goals for the future.
- Watch out for individuals who appear to be harsh and strident in the content of their responses and in their demeanor in court. These may be clues to identifying jurors with rigidly held beliefs who are likely to defend those views at all cost.

The “jury is out” on the direct applicability of TMT in the courtroom. But the concept certainly highlights how important and challenging it is to understand jurors’ psychological make-up and how it influences attitudes and opinions. It’s certainly an area where good trial consultants can have a positive impact.

\*\*\*\*\*

## How to Apply “*Terror Management Theory*” in a Courtroom

By Julie Howe

**Julie E. Howe, Ph.D., is a New York City based trial consultant with a background in social psychology. As the principal in her firm, J. Howe Consulting ( [www.jhoweconsulting.com](http://www.jhoweconsulting.com) ), Dr. Howe consults nationwide on all phases of litigation for both civil and criminal cases.**

“*Terror Management Theory*” provides consultants and attorneys an added dimension to consider as they seek to better understand juror behavior. Even with a cursory understanding of the underpinnings of this *theory*, attorneys can better prepare their case for trial, make informed decisions during jury selection and develop themes that are likely to resonate with a jury.

The idea that jurors come to the courtroom with their own “cultural worldview” is not a new one, nor is it new to any attorney who has ever conducted voir dire that a juror’s cultural worldview will affect how the juror views a case. However, the research indicating that reminders of a threat to a juror’s own mortality might trigger a response that causes him or her to instinctively defend their own cultural worldview provides an added dimension to ferreting out biases that might influence a verdict is something for attorneys and consultants to think about.

One of the intriguing aspects of this theory is its efforts to explain so much about human behavior, including juror behavior. At first blush, it seems simple enough: people are focused on self-preservation and use various defense

mechanisms to protect their own cultural worldview. However, understanding which mechanism they use and what circumstances trigger the mechanism makes the application of this theory more complex. When applying the theory to juror behavior, we want to understand what might lead a juror to be more punitive and/or lenient in a specific case. Because the theory can explain both outcomes, it is a challenge for attorneys to decide how to apply it for the outcomes he or she desires. At the least, attorneys need to be aware of the possible biasing effects and attempt to mitigate undesirable outcomes.

When preparing a case, consider how *TMT* might play into your case evaluation and trial preparation, jury selection and theme development.

#### Evaluate and Prepare Your Case with *TMT* in Mind:

What factors in your case might threaten a juror's worldview? Are there factors that are likely to increase "mortality salience"? Death penalty and murder cases are obvious ones. Civil cases that involve wrongful death and serious personal injury also focus on death. Look for the less obvious factors in your case that might lead a juror to contemplate his or her own mortality.

A juror who is likely to consider, consciously or unconsciously, whether: "it could have been me?" enhances the saliency of the juror's own mortality. When evaluating your own case, think about the circumstances, facts, parties, victims, defendants, similarities and dissimilarities of potential jurors, etc. The more likely it is that a juror can place him or herself in a situation that threatens mortality, the greater the effects of *TMT* (e.g. defending one's own cultural worldview leading to possible bias).

As an example of the complexity in applying *TMT* and thinking from a defensive attribution theory perspective, jurors may try to protect their own worldview by attempting to distance themselves and say to themselves "that would never happen to me." To do this, to protect and defend their cultural worldview, they often derogate or stereotype victims. The greater the worldview difference, the easier it is to do. On the other hand, when it's more difficult for a juror to derogate the victim or it's harder to deny that "it could have been me," then they may be more punitive toward the defendant. Again, this is easier to do when there is more cultural difference and inconsistency with the juror's worldview.

Thus, it's essential to evaluate the case facts, the parties in the case, particularly the "victim" and the defendant in terms of jurors' worldviews and mortality salience. The more "innocent" the "victim," the more punitive jurors might be. The more culturally different the defendant, the more punitive jurors might be. Depending on your legal perspective, think about ways to demonstrate similarities and differences between jurors and victims/defendants as well as putting jurors "in the shoes of" or "out of the shoes of" the victim/defendant.

A "terrorism case" is a classic example of the effects of *TMT*. The defendant is already "culturally different" from the average juror (depending on the venue), sometimes Muslim, born in another country and not an American citizen – the ultimate "out-group." Combine that with the fact that "terrorism" threatens the mortality of large numbers of innocent people of whom the juror could be one. In cases with significant threats to worldview and mortality, stereotypic thinking is enhanced as is intergroup bias as well as an increase in conformity among deliberating jurors.

#### Evaluate Jurors with *TMT* in Mind:

Keep in mind the zeitgeist of the times and what is happening within the venue that might enhance prospective jurors' mortality salience. Some might argue that post 9/11 people do not feel as safe as they once did and therefore jurors are more aware of their own mortality, particularly during the years after 9/11 when the administration and media

bombarded them with the “war on terror” and need to “protect” and keep American citizens “safe” from “attack.” Consider the local venue/community. Have events happened that might enhance jurors thinking about their own mortality (e.g., environmental issues where many in the community fell ill, a mining accident, or other types of accidents or tragedies where people died, a crime spree that has people on edge, etc.). The events do not necessarily have to relate to your case to affect mortality salience which can then have an impact on the outcome of your case.

Pay attention to the particular cultural worldview of individual jurors and how it might influence their perception of case facts (including traits of the defendant and “victim”). Then assess if there are any juror experiences that might make mortality more salient. Regardless of your case facts, ask if anyone (or anyone close to them) has passed away within the last year, known anyone who was murdered, seriously injured, had a near death experience, etc. Follow up questions are crucial: Was it the actual juror, someone close to them, what were the circumstances, and, importantly, how long ago did it happen and do they still think about it. These types of follow ups will give clues as to the salience of thoughts of mortality.

Lieberman and Arndt propose that the salience affect is more powerful when individuals contemplate their own death, rather than that of another. However, also inquire about the death of another person close to the juror, or if not the death the victimization of a person close to them. Often jurors who have family members who have been victims may be more angry and punitive than the actual victims themselves.

The authors’ note individual differences that make jurors more or less susceptible to the effects of *TMT*: self-esteem, attachment style and depression, authoritarianism, and religious endorsement. To the extent possible, it’s important to question and identify jurors with these individual differences and judge how they pertain to your case. Another individual difference to incorporate is “need for cognition,” a personality variable reflecting the extent to which people engage in and enjoy cognitive activities. It stands to reason that those with a high need for cognition would be less susceptible to the effects of *TMT*.



#### Develop Themes that Resonate with Cultural Worldviews:

Although themes are usually case specific, the article hinted at “universal” worldviews that could be turned into very effective themes. For example, familial themes help humanize defendants and connect them to the juror’s worldview, principles of fairness resonate with both criminal and civil juries, lawbreaking in criminal cases and rule breaking in civil cases are universally effective themes, as are themes that involve safety, prevention and protection. All of these generic themes can be connected to the average juror’s worldview, and be framed in ways that address jurors’ concerns about their own mortality. Importantly, develop the theme consistent with the facts and issues in your case. Emotional themes focused on garnering sympathy are likely to work well when there is a higher degree of mortality salience. Although rational themes are likely to be better when there is less risk of the biasing effects of *TMT*, the authors suggest that presenting more rational arguments and information can mitigate the effects of *TMT*.

#### Other Comments:

*Procedural Fairness*: The link to Procedural Justice Theory is an example of the breadth *Terror Management Theory* has in explaining human behavior. While the idea of procedural fairness resonates with most jurors’ worldview, using it to mitigate the effects of *TMT* in cases where there are significant facts and evidence that run counter to a juror’s worldview is particularly interesting. I found the reference to death penalty cases an interesting juxtaposition. The notion that, in a death penalty case, jurors might be more attuned to procedural fairness (more attentive to quality of expert testimony and more appropriately use mitigating factors) because of the magnitude of the decision would be

interesting to examine in light of the considerable body of research suggesting that established procedures for jury selection in capital cases leads to conviction prone juries. Similarly, generally speaking, jurors who are typically more authoritarian tend to be conviction prone, yet these are also the types of jurors who buy into procedural fairness and look up to the judge for cues.

*Dangerous Defendants and Courtroom Protections:* Picture a courtroom with additional guards, bailiffs or U.S. Marshalls stationed around the room – with firearm at hand, a defendant in a prison-issue uniform, possibly shackled, etc. Certainly such an environment would lead jurors to think about the dangerousness of the defendant and their own mortality. Is the jury anonymous? Although Judges attempt to minimize the significance of these “protections” the implications of dangerousness is clear to jurors. Perhaps *TMT* could provide support for defense motions opposing anonymous juries, etc.

*Emotion and Information Processing:* One of the core components of this theory has to do with emotion and how individuals process information. The authors touch on the fact that the “mortality salience effect tends to occur more frequently in individuals who are more experiential and who rely on their gut instincts and emotional reactions, and less so in jurors who have more rational and analytic mindsets.” They suggest that the effects of *TMT* can be mitigated by efforts to have the jurors approach information more rationally. Thus it seems that identifying jurors who tend to process information more cognitively as opposed to peripherally would be an important factor in understanding and mitigating the effects of this theory. However, the authors’ suggestion that one could induce jurors to think rationally by presenting more data, statistics, etc., does not address the debate about juror comprehension of complex information. Depending on the case facts and one’s perspective, attorneys should examine ways to induce rational thinking by encouraging logic and common sense and discouraging emotional reactions.

#### Conclusion:

Lieberman and Arndt wisely note the importance of thinking about this theory case by case. Attorneys should rhetorically ask themselves: What facts and issues about the case, the parties, defendants and victims, etc., might fit or run counter to jurors’ worldviews? What issues might affect mortality salience among jurors? What questions can be asked in voir dire to uncover a juror’s particular cultural worldview and mortality salience? How can the case be presented to enhance or mitigate the possible effects of *TMT*?

\*\*\*\*\*

## A comment on Terror Management Theory & Jury Decision-Making

By Greg Cusimano

**Gregory S. Cusimano ([Greg@AlaLawyers.net](mailto:Greg@AlaLawyers.net)) is a practicing attorney and trial consultant from Gadsden, Alabama. Greg, a principal in Winning Works, LLC, along with David Wenner, AZ developed the Jury Bias Model, which has been celebrated as transforming trial and preparation strategies.**

There is no doubt we are aware of our mortality. Thoughts of death provoke anxiety. Our normal nature is to move away from pain and toward pleasure. Anxiety is painful. One way we resolve the anxiety of knowing that life is finite is to develop a worldview or “Cultural worldview” as referred to by Lieberman and Arndt. As long as we live and protect our worldview we maintain a sense of security, calm and self-esteem. Life has meaning. We like people who share our worldview, who agree with us, who believe as we believe, and who feel as we feel. We think they are bright, friendly and reasonable. We recognize bias exists in others, but not ourselves. We

believe that if others are reasonable and knew what we know, they would believe as we believe. Lee Ross, a Stanford social psychologist, says that we believe we see the world as it is and if others do not see it the same way, they do not see it as it is. Ross calls this conviction “naïve realism”.

Stewart Chase, an economist over 200 years ago said, “For those that believe, no proof is necessary, for those who do not believe, no proof is possible.” The same is true today, especially in the courtroom. This article is instructive in that regard. Lieberman and Arndt say, “Thus, one of the basic predictions of TMT, known as the ‘mortality salience hypothesis’ states that reminders of mortality will cause an individual to invest in and defend their cultural belief system, leading them to respond favorably to others who support his or her worldview and negatively to those who threaten it.” We as lawyers or trial consultants must discover the belief systems or cultural worldviews of those who make up our juries. If possible, we must strike those whose worldviews are so foreign we cannot prevail, and mold, sequence, and structure our trial story to be as consistent with the worldviews of the decision-makers as possible. “Mortality salience”, or making mortality salient, heightens one’s desire to protect their worldview. Being primed about our own death generates fear, and we often unconsciously attempt to destroy what we fear and embrace and protect beliefs we hold dear. Some do not believe in undeserved suffering. Those with such a cultural or spiritual worldview believe suffering always has a purpose, or a reason. If you represent or work for the plaintiff in a personal injury action, that worldview can undermine your case and unconsciously drive decision-making. The Just-World Hypothesis holds that many people who serve as jurors tend to believe that the world is “just”, and if suffering or injustice occurs without apparent reason, then there must be something the plaintiff or victim did to deserve it. People need to believe in a just world where people get what they deserve. This rationalization reduces anxiety and supports the belief that the world is a safe and just place.

As lawyers or consultants, all this begs the question, “How do we discover the worldviews of those who make up our juries?” We must first discover the beliefs in order to understand how they will affect the case. My suggestion is jury research—focus groups, surveys, and engaging in any and every activity that helps us understand how our potential jury is likely to think and believe. What cultural worldviews are present? TMT helps to explain the roots of certain worldviews. In the process of jury research, we will discover “jury proof”, i.e., what we need to show or prove that leads the jury to the conclusion we desire. Jury proof is not necessarily the same as legal proof although it may be. We need to adduce and include jury proof in structuring our trial story to address Terror Management Theory and whatever worldviews held by our jurors. We can use it if it helps us, and counter it if it hurts. However, we must first be aware it exists and then discover how it interacts with our trial theme and story.

Citation for this article: *The Jury Expert*, 2009, 21(4), 1-16.

# Lights, Camera, Action: Getting the Most Out of Videos at Trial

by Ian McWilliams

Since the early 1990s the use of multimedia presentations at trial, particularly video productions, has grown exponentially. Successful litigators have discovered that using visuals with their persuasive words gives them a distinct advantage in presenting their case to a jury. In this article we describe some of the different types of video productions being used in courtrooms, share tips on ways to prepare your witness and deposition space for maximum effect, and cite examples of successful use of video at trial. We also reveal some trial presentation techniques that can be used by even the most technologically challenged.

## Videotaped Depositions

Simply hearing a witness's words recited in open court does not allow a jury to effectively interpret whether an answer is belligerent, hesitant or genuine. The printed word alone cannot show if a witness is confused, hostile or earnest in a deposition response. So, perhaps not surprisingly, the most common type of video presentation viewed in court is the videotaped deposition, which certainly can communicate much more than a transcript alone. It adds the additional communication of vocal tone, inflection and witness demeanor. Hearing *and* seeing testimony from a witness can add credibility to an expert's report if that expert appears credible. It can also go a long way towards impeaching a witness's credibility if that witness appears uncomfortable or contemptuous. As a picture is worth a thousand words, a moving picture can bring words to life.

There are many reasons to capture testimony for viewing. Economic reasons include the opportunity to save money by preserving the testimony of a paid expert to be played any time during trial rather than having them wait in the gallery or hallway until they are called. Medical experts oftentimes will not agree to appear in person for less than a full day's fee because of the disruption it may cause to their schedules. Video depositions are a useful tool when dealing with out-of-state or otherwise unavailable witnesses. And by having videotaped testimony available during trial, potentially costly delays can be eliminated and valuable court time can be used to full effect. Videotaped testimony can be a very useful tool even when a witness will appear live before the jury. Video clips from depositions can be used to impeach live testimony when answers differ from what was said under oath during discovery. It is very startling to a jury to see a witness contradict themselves, and much more effective than simply asking them to read aloud their prior testimony. And with modern presentation tools the editing and playing of video clips can be almost instantaneous. With a few clicks of a mouse, transcripts can be searched, testimony highlighted, and video clips created and played to dramatic effect.

### **How Does It Look?**

But just showing a moving picture is not enough. How that picture and the elements it contains look can influence an audience to take action, in either a positive or negative way. A poorly produced video can distract the audience from the message and defeat the purpose for showing it. When planning for an audiovisual deposition, much care should be given to the surroundings and to the look and actions of the witness. You need to conduct your examination in an environment free from distractions in a space with enough room to accommodate not only a witness, court reporter and counsel, but also a videographer and all the necessary equipment. The space should have adequate,

even lighting so no additional lighting instruments are needed, as they tend to be bulky and give off a tremendous amount of heat. If a room with outside windows is used, then shades over the windows might be necessary to prevent too much sunlight from adding unwanted shadows or hot spots to the picture. A quiet location is desirable as microphones will be used to capture the audio and may also capture distracting noises from outside the room. Setting the witness against a blank wall or neutral backdrop will eliminate distractions from the picture. While you may be tempted to use a bookshelf full of law books or artwork as a background, avoid this as the shelves or other objects may look as if they are growing out of the witness' ears and distract the jury from the testimony. Eliminate clutter from the table such as water pitchers and glasses or piles of paper as these can also draw attention away from the testimony.

As for your witness, have them dress in a comfortable and professional manner. Ask them to dress as though they will actually be in the courtroom. Avoid loud ties, checks or bold stripes as these fabrics can become distorted on screen. Also, make sure they do not wear noisy jewelry as the microphones will pick up the sound and could actually drown out the words being spoken by the witness. Solid black and white fabrics can play havoc with exposure and contrast in the picture. Pastel shades, particularly light blue, work well and provide for a pleasing color balance. Make sure all cell phones and PDA devices are turned off, not just set to vibrate, as these devices have a tendency to interfere with the audio signal being recorded. As a rule of thumb, if you wouldn't have the device turned on in a courtroom, don't leave it on in the deposition location.

As to how a witness should conduct themselves during examination, make sure they act naturally. Exaggerated motions, leaning back or rocking in their chair, or stiff rigid posture can convey to a jury a sense that the person speaking cannot be trusted or has something to hide. A relaxed posture, with feet on the ground and the torso leaning slightly forward, can display earnestness and a sense that the witness is listening intently to the questions and is serious about giving a straightforward, honest answer. Instruct your witness not to look directly at the camera, but rather at the questioner. Or, if they are being asked to testify about a document, have them look at the paper in front of them. Remind your witness that they must always allow the question to be asked, and allow time for an objection to be lodged before they answer. Just as a court reporter cannot record two voices at once, a video editor cannot cut out an objection when the answer to the question is being stated at the same time.



### **What Is the Best Depo Video Format?**

Once the deposition has been taken and you are packing up to leave, your videographer will ask you for your copy order. Just as the court reporter offers different formats for your convenience, so too does the videographer. When I started videotaping depositions there was only one format available, the VHS tape. With the growth in the use of personal computers in the modern law office, the choice of formats has expanded. Now a video can be delivered on digital media in the form of CD-ROMs, TV-DVDs, Digital Video Transcript (DVT) disks and even delivered streaming over a secure Internet connection.

If you plan to use the deposition video at trial, the most effective format is the Digital Video Transcript. With a DVT the reporter's official transcript is synchronized to the video file, linking the printed word with the spoken testimony. With the testimony synched you can easily search for segments to view without having to fast forward or rewind a tape while stopping to find your place in the paper record. Simply highlight the first line of testimony you

wish to view and double click on the highlight. The video will automatically be cued up to that portion of the proceedings and you can play the video from there. Most DVT disks will contain a software program which will allow the user to conduct keyword searches, index searches and basic video editing functions. You can highlight a section of testimony, and, using the easy to follow instructions, create a video clip that can be exported into trial presentation or multi-media presentation software, can be saved to a hard drive or portable media for later viewing, or can be encoded into a file small enough to be e-mailed to a client or colleague for viewing. Edited video clips can be combined into a presentation in any order and used at trial. Rather than show a jury eight or more hours of video testimony you can create a quick and effective presentation without all of the pauses, non-responsive answers and stated objections that can be prevalent during a long deposition. And all of these processes can be accomplished by even the most basic computer user. You don't have to be a professional video editor to make great presentations.

These are only a few of the many uses for video productions for presentation at trial. The only limits are your imagination and rules of procedure. Video productions need not be costly and can be effective tools in your arsenal.

### **Experience Counts**

A professional videographer, particularly someone who has been certified as a Legal Video Specialist (CLVS) by the National Court Reporters Association (NCRA), can bring a wealth of experience and knowledge to your projects. As a videographer and trial presentation technician I have been personally involved in presenting evidence in close to two hundred jury trials and there is no doubt, some uses have been more effective than others.

### ***Impeachment Now***

During a personal injury civil trial one of the key witnesses for the plaintiff was the administrator of the facility where the injury occurred. The witness' deposition testimony had been videotaped in case the defense refused to produce this out-of-state witness at trial. As it turned out, the witness did appear and during direct testimony made statements inconsistent with previous testimony. Because we had made sure to synchronize the transcript and video, and because we were using modern trial presentation software, we were able to instantly retrieve the deposition testimony and create video clips of the previous answers to the same questions being posed live. The effect was stunning. As the witness was on the stand we projected, on a large screen right next to the stand, the prior testimony in the witness' own words. In doing so we were able to plant doubt in the minds of the jurors as to the truthfulness of the witness' testimony and drive home the point that counsel was trying to make: the facility had indeed tried to cover up their actions after the accident. The result was a verdict for plaintiff and substantial monetary award with punitive damages.

### ***Show us please***

Video cameras in the courtroom? They can be useful for much more than Court TV. During two different product liability trials we used small video cameras to give jurors an intricate view of the products in question. In one case for defense counsel, we rigged a small camera above a gas stove and projected onto a large screen an overhead view of the inner workings of the stove as an expert witness disassembled and explained the construction and operation of the device. Rather than try to crowd the jury around the stove as it was explained, we were able to provide a clear and up close view to every member of the panel and demonstrate that used properly, the product was designed with safety foremost in mind.

In a case for plaintiff counsel, we needed to show the jury the inside of a truck tire where a design defect had caused the inner tread to come apart and fail, which counsel contended had caused the accident which had harmed his client. One option was to cut out the portion of the tire in question and publish that sample to the jury. But that would have altered the evidence and would have taken a great deal of time to pass around the sample as the expert witness testified as to what was being shown. The solution was to mount a miniature flashlight to a small “lipstick” camera (a video device about the size and shape of a tube of lipstick) and, with the intact tire mounted on a display stand and with me seated on the floor in front of the jury box, counsel proceeded with the direct examination of the expert as I stuck the camera inside of the tire and displayed the image of the part in question onto video monitors mounted in the jury box. The witness was able to explain to the panel, all at the same time, what they were seeing and how this portion of the tire affected the overall safe operation of the product. Of course, using video technology in court is no guarantee of success, but it makes sense to use all available technology to your advantage. If you don’t, your opponent might use it and leave you behind the times.

### **Tips from the Courtroom Roadies**



In Massachusetts, we are fortunate to have a wide variety of architectural and technological styles at use in the court systems. From the new U. S. District Court building on Fan Pier in Boston to the other end of the spectrum, the Charles Bulfinch-designed Essex County Superior Courthouse, built in 1805 in the picturesque Town of Newburyport, the design and usage of technical presentations are subject to the various venue capabilities. These capabilities must be kept in mind when planning and implementing your trial technology. These tips should come in handy for any location where you may practice. They have been gathered through much trial and error throughout the past decade.

### ***Oh, say can you see***

There is a wide range of display equipment to choose from when designing a courtroom presentation. Some buildings are designed with technology in mind, such as the U. S. District Court in Boston, where courtrooms there are equipped with state of the art presentation tools. These include individual computer monitors in the jury box, the bench and on counsel tables; telestrator touch-screen monitors on the witness stand and counsel podium; and audio-visual playback devices built in to the room. Attorneys are invited to make the most of the equipment and use their technology to full advantage. In other venues, particularly at the State Superior Court level, display equipment must be brought in because nothing is available in the courtroom but electrical outlets (and many times, very few outlets at that.) When planning for display equipment, care must be given as to the layout of the courtroom. In order for all jurors to have an unobstructed view of the visual evidence, oftentimes counsel will find their options to be limited. We have had the greatest success using small video/computer projectors and large, portable movie screens. Not only can they be used in confined spaces, but by having one place for all the jurors to focus their attention, counsel can often control where the members of the panel look as well as the amount of time they spend studying the evidence.

We also recommend using of the “rule of threes”. For example, if the witness stand is to the right of the jury box and the counsel podium is to the left, then position the display screen in the center, directly across from the jury box. That way the attention of the panel can go from question, to display to answer without having to focus attention somewhere out of this visual arc. And if a deposition video is to be played, then jurors do not have to look at an

awkward angle or crane their necks to get a good look at the picture. The care and comfort of the jury should be foremost in the mind of the presentation technician and the layout of the room and equipment will go a long way towards maximizing your use of the technology.

## Final Thoughts

A successful litigator must wear many hats and develop and master many diverse skills. Investigator, counselor, legal expert and, most of all, teacher. These are just some of the things you must become and talents you need to successfully advocate for your client. As with any discipline, tools are available to make the job easier. Video technology is one such tool, and by using the technology you can bring to life your thoughts and words and create a vivid image in the minds of your jurors. By capturing their attention and teaching them everything they need to make an informed, just decision, you will have done your job to the best of your ability and find success in your endeavors.

**Fade to black...**

**Ian A. McWilliams, CLVS [[imcw@newenglandtrialservices.com](mailto:imcw@newenglandtrialservices.com)] is a videographer, trial presentation technician, and consultant based in Brockton, Massachusetts. He does primarily civil work and has worked in venues throughout New England. You can read more about Mr. McWilliams at his webpage [<http://www.newenglandtrialservices.com>].**

Citation for this article: *The Jury Expert*, 2009, 21(4), 17-21.

## July 2009's Favorite Thing!

Every issue The Jury Expert features a favorite thing--something very special that we think you should know about to inform, educate, entertain, or otherwise enlighten you. And best of all, our Favorite Things are always free!



July's Favorite Thing is a terrific resource from the National Center for State Courts (NCSC). The Jur-E Bulletin comes out every Friday and reports on news, research, and events that have to do with the jury system. In any given week you may read about activities in a particular courtroom; research on jury selection/deliberation; or newspaper articles featuring stories about juries and courtroom like the one on "old shoes lead to a mistrial" featured in a recent Jur-E Bulletin.

Get your own subscription to the Jur-E Bulletin by taking a look at this [sample issue](#) and then signing up with your email address and look forward to your Friday delivery.

Citation for this article: *The Jury Expert*, 2009, 21(4), 21.

# Jury Damage Awards in Times of Recession

By Edie Greene

These are no ordinary times. Unemployment figures continue to creep upward; more Americans are receiving food stamps than ever before; the manufacturing and construction sectors, real estate values, retirement accounts, and investment savings have all gone south. In the largest industrial bankruptcy in U.S. history, the federal government is now the majority stakeholder of General Motors.

Yet in the midst of this upheaval, plaintiffs continue to file lawsuits, cases continue to work their way through the civil justice system, and jurors continue to assess what money, if any, some of those plaintiffs should receive to compensate them for apparent injuries and losses. So isn't it inevitable that our vast economic woes will trickle down to jury deliberation rooms across the country, affecting how jurors perceive plaintiffs and defendants and influencing the ways they transfer money between the two? In a word, no.

Despite the apparent certainty expressed by some commentators (e.g., Baldas, 2009), I suggest that we have little data at this point to support any firm conclusions related to the effects of the 2008-2009 recession on jury decisions regarding damages. Instead, we have commentators' beliefs and suspicions—some of them contradictory and few, if any, of them informed by research findings. But we also have a wealth of information, based on empirical data, about how jurors think about plaintiffs, civil defendants (primarily corporations), and damage awards in more flush times. And while it is worth pondering how jurors' judgments might be influenced by an ailing economy, we should do so in light of what we already know about the processes by which most juries make damage awards. In the sections that follow, I will share what lawyers and commentators are saying about the effects of the recession on jury damage awards, point out some contradictions in their forecasts, and place the discussion in the context of what research studies say about how jurors make damage awards.

## *What commentators surmise about the recession's impact on damage awards*

### *The recession is good for plaintiffs*

Without a doubt, Americans are angry about the role played by large corporations generally, and financial institutions in particular, in fueling the recession. According to an ABC News/Washington Post poll of 1000 adults conducted in late March of 2009, approximately 2/3 of respondents said so (Washington Post-ABC News, 2009). Three-quarters of respondents said they were angry about the levels of compensation paid to top corporate executives and four-fifths expressed anger about large bonuses paid to employees of companies that have accepted government loans. Fewer than 1 in 5 respondents said they had a positive opinion of executives at the major U.S. automotive companies. I can discern three reasons that corporate defendants expect this anger to work against them: 1) because it translates into rampant anti-corporate sentiment; 2) because some jurors will have lost jobs; and 3) because working people may want to send a message to "corporate America."

The climate seems ripe for anti-corporate sentiment. Indeed, much of the speculation about jurors' attitudes reflects this belief. According to corporate defense attorney Michael Jones, "[a]ny company heading to trial needs a strategy for dealing with juror anger." Jones further alleges that juror anger knows no boundaries: "When it comes to anger and fear, no group of jurors is exempt. White-collar workers are just as angry as blue-collar workers. They have also suffered greatly in this economy, and they also blame corporate greed. In some ways, newly disillusioned white-collar workers may be more dangerous than jurors who are constitutionally anti-corporation because the former are harder to

spot in voir dire and stronger advocates against the corporation in the jury room” (Jones, 2009). On his blog, *george’s employment blawg*, commentator George Lenard wrote that because we are experiencing a “much-publicized economic crisis in which many corporate leaders, particularly in the financial sector, have been blamed [and] even vilified...many jurors will tend to view businesses and their leaders as perpetrators, not victims, of the nation’s economic hardships” (Lenard, 2009). Viewing corporate executives as perpetrators does not bode well for defendants.

The fact that many Americans have lost their jobs is, according to Lenard, another reason that corporate defendants, particularly those who face inner-city juries, should be worried. He reasons that a “jury of 12 is likely to have at least one unemployed member and one or more who are underemployed or ‘discouraged workers’ not counted in the unemployment rate because they are not looking for work. The more the jury pool draws from inner cities or other higher-unemployment areas, the wors[e] this effect is likely to be...I would expect economic circumstances to generally favor employees in employment jury trials” (Lenard, 2009).



Jurors’ apparent desire to punish corporations also concerns the defense bar. According to Andrea Johnson of the energy law firm, Burleson Cooke, jurors already skeptical about the integrity and decision making of corporate managers may “drive home a point through verdicts with large punitives” (Baldas, 2009). Keith McMurdy, an attorney who defends employers in wrongful discharge and discrimination cases, put it more succinctly: “I think juries are just going to hammer us” (Baldas, 2009).

#### *The recession is good for defendants*

But not all commentators see it that way. Some believe that jurors may actually be *more* sympathetic to corporate employers in hard economic times. Mara Levin, a management-side attorney, suggests that jurors “bring to deliberations their life experiences. In this economy, that means that they’re acutely aware of how badly companies are suffering—some on the brink of shutting down” (Baldas, 2009). And though jurors may not feel much sympathy for corporate executives, they may also not want to hurt business defendants financially for fear of further job losses.

Even the news about growing unemployment and its related hardships may soften jurors to corporate defendants. At least in the context of employment disputes, the more that jurors hear about layoffs and terminations, the more commonplace they seem, and the less likely jurors are to view them as suspicious or wrongful. But more broadly, jurors probably understand that as corporations are made to pay more in damage awards, at least some of their workers are likely to suffer.

According to commentators, there is yet another reason that corporate defendants may be able to weather recession-related legal conflicts. When all Americans are affected, at some level, by economic hardships, jurors may distrust the motives of plaintiffs, especially those whose injuries and losses are not catastrophic. Why, jurors might reason, should they enhance the standing of a few plaintiffs when other people continue to suffer financially? In fact, jurors who have recently lost jobs may be especially hard on plaintiffs. Although these sentiments may have minimal impact on awards for economic damages, they could affect thoughts about compensation for noneconomic injuries (so-called “pain and suffering”) and punitive damages (Lenard, 2009).

Obviously then, there are conflicting beliefs and speculations about the recession’s impact on jury damage awards. Recession-related anti-corporate sentiments may work *in favor of* plaintiffs, making it easier for them to prevail and

win sizeable damage awards but concerns about further layoffs and windfall profits may work *against* plaintiffs. Until we can learn—through juror interviews, simulation studies, or Verdict Reporters—about the *actual* impact of these trying economic times on damage awards, I suggest another approach. I propose that we take account of what we already know about how jurors' attitudes toward plaintiffs and corporate defendants shape their judgments about damage awards. This scientific literature should provide a starting point for ongoing evaluations of the recession's impact.

*What we know about jurors' thoughts on damage awards*

*Skepticism about plaintiffs*

Despite rhetoric and supposition that juries are biased in favor of plaintiffs and freely dole out large damage awards for trivial losses, verdict data, juror interviews, and simulation studies suggest quite the opposite. In the most recent large-scale study of jury verdicts in civil trials, the Bureau of Justice Statistics reported that plaintiffs won only slightly more than half the time in state courts in 2005 (Langton & Cohen, 2008). The median compensatory damage award was only \$28,000 (with half the awards below that amount); fewer than 14% of winning plaintiffs received more than \$250,000 in damages; and fewer than 5% received more than \$1 million. Only approximately 5% of winning plaintiffs were awarded punitive damages and the median award was a modest \$64,000.

Interviews of jurors who served in civil cases involving business and corporate defendants also provide evidence that jurors are not overly sympathetic toward plaintiffs (Hans & Lofquist, 1992). Jurors reported that during deliberations they carefully scrutinized plaintiffs' motives and questioned the legitimacy of their complaints. They were especially hostile toward plaintiffs who had pre-existing medical conditions, did little to mitigate their own injuries, and did not seem to be as injured as they claimed to be. (I once worked on a case in which jurors told me they noticed that the plaintiff—a middle-aged woman who lived alone and claimed her back pain was so excruciating that she could not bend over to tie her shoes—changed the color of her toenail polish midtrial. Needless to say, they questioned the extent of her suffering.) Some jurors said they acted as a defense against illegitimate grievances and frivolous lawsuits.

Simulation studies also challenge the belief that juries are overly-sympathetic toward plaintiffs. In a study in which researchers manipulated the plaintiffs' blameworthiness in order to assess whether jurors' judgments tracked relevant legal criteria, researchers found that mock jurors held plaintiffs accountable even when their actions were legally blameless (Feigenson, Park, & Salovey, 2001). Other research has shown that mock jurors discount a compensatory damage award to a partially negligent plaintiff even when instructed to award the full damages proven and that the judge would discount the award to reflect the plaintiff's negligence. In essence, the award was "doubly discounted" (Zickafoose & Bornstein, 1999). Finally, filmed deliberations of mock jurors in a personal injury case make clear that jurors speculate about the role of insurance—of both plaintiffs' and defendants'—making certain that plaintiffs are not doubly compensated by receiving payment from their own insurance and then again from the defendant (Diamond & Vidmar, 2001; Greene, Hayman, & Motyl, 2008).

Even punitive damage awards reflect moderation on the part of most juries: punitive awards tend to be proportionate to the extent of wrongdoing (Rustad, 1998) and to the level of compensatory damages awarded. For example, analysis of Florida state court verdicts between 1989 and 1998 showed that although the ratio of punitive awards to compensatory awards varied considerably by case type (ranging from 0.1:1 in impaired driver accidents to 6.3:1 in cases involving the improper treatment of deceased people), the mean punitive damage award was only 68% of the compensatory award (Vidmar & Rose, 2001). So despite rhetoric to the contrary, most indices of damage awards suggest that they are of modest size and related to the facts in evidence. When they err, jurors hold blameless plaintiffs accountable for their

losses and, in comparative negligence cases, reduce their awards even when instructed that the judge will do so. There is little evidence that jurors and juries are overly indulgent of plaintiffs.

### *High expectations of defendants*

According to Peter Huber, senior fellow at the Manhattan Institute, juries are committed to running a charity for plaintiffs and if they can't find a negligent defendant, they simply settle for a wealthy one (Huber, 1988). This notion is consistent with the media's rapt attention to large awards assessed against corporate defendants (e.g., \$79.5 million in punitive damages awarded to the widow of an Oregon smoker who sued Philip Morris) and their lack of attentiveness to the more common but less sensational case in which a plaintiff receives a \$15,000 award to compensate for medical expenses related to a closed-head injury.

Archival studies and simulations have both shown that jury awards *do* tend to be higher when the defendant is a corporation, as compared to an individual (Chin & Peterson, 1985; Hans & Ermann, 1989). But this effect may be wholly unrelated to the defendant's wealth. In an experiment in which the identity of the defendant in personal injury cases was varied (i.e., the defendant was described as a corporation, a wealthy individual, or a poor individual), mock jurors' damage awards were insensitive to differences in perceived defendant wealth. Although corporate defendants paid more than wealthy individuals, those wealthy individuals paid no more than poor individual defendants (MacCoun, 1996). This finding suggests that jurors may treat corporations differently because they find it easier to impose a costly sanction against an impersonal entity like a corporation and because they hold corporations to a higher standard than individuals. They expect that corporate resources—both human and capital—should allow corporations to anticipate harm and act proactively to prevent it. In essence, corporate defendants may be treated differently than individual defendants but not, apparently, because of their financial standing.

### *Integrating what we surmise with what we know*

What we have learned about jury damage awards in recent years is that they are generally modest and reflective of the evidence presented to the jury. More severely injured plaintiffs generally receive more money than less severely injured plaintiffs and more egregious wrongdoing generally results in higher awards than less egregious wrongdoing (Greene & Bornstein, 2003). Jurors are careful not to award plaintiffs more than they rightfully deserve and not to bankrupt defendants in the process. They have high expectations of corporations.

So considering what empirical research has already shown regarding juries and damage awards, I will make some tentative predictions of my own concerning the recession's impact. I acknowledge that my predictions, too, could be wrong and look forward to seeing data on the *actual* effect of the downturn on jury decisions. But I would bet that even in the deepest recession we have experienced in generations, jurors' past priorities will hold in the vast majority of future trials. Juries will continue to scrutinize the motives of plaintiffs and the actions taken by defendants. They will continue to make crucial credibility judgments and evaluate the evidence carefully. They will continue to try mightily to understand and apply the jury instructions to the facts they believe were proven. And though there may be a few recession-related exceptions to such careful analysis (one can imagine that jurors might be biased against and harsher on defendants in the narrow set of cases that involve CEOs or CFOs of financial institutions being sued by shareholders or employees), I suspect that for most plaintiffs and defendants, what



they are experiencing in this recession regarding damage awards is very similar to what they would have experienced prior to it. The main action still happens on the witness stand; the recession is merely a backdrop.

### References

- Baldas, T. (2009, January 13). Recession-era juries a hurdle for business. *National Law Journal*. Retrieved May 19, 2009 from [www.inhousecounsel.com](http://www.inhousecounsel.com).
- Chin, A., & Peterson, M. (1985). *Deep pockets, empty pockets: Who wins in Cook County jury trials*. Santa Monica, CA: Rand Corporation
- Diamond, S., & Vidmar, N. (2001). Jury room ruminations on forbidden topics. *Virginia Law Review*, 87, 1857-191
- Feigenson, N., Park, J., & Salovey, P. (2001). The role of emotions in comparative negligence judgments. *Journal of Applied Social Psychology*, 31, 576-603.
- Greene, E., & Bornstein, B. (2003). *Determining damages: The psychology of jury damage awards*. Washington, D.C.: American Psychological Association.
- Greene, E., Hayman, K., & Motyl, M. (2008). Shouldn't we consider...?" Jury discussions of forbidden topics and effects on damage awards. *Psychology, Public Policy, and Law*, 14, 194-222.
- Hans, V., & Ermann, M. (1989). Responses to corporate versus individual wrongdoing. *Law and Human Behavior*, 13, 151-166.
- Hans, V., & Lofquist, W. (1992). Jurors' judgments of business liability in tort cases: Implications for the litigation explosion debate. *Law and Society Review*, 26, 85-115.
- Huber, P. (1988). *Liability: The legal revolution and its consequences*. New York: Basic Books.
- Jones, M. (2009, April 17). When faced with an angry jury, laughter may be the best defense. *Legal Times*. Retrieved June 1, 2009 from [www.law.com/jsp/ihc/index.jsp](http://www.law.com/jsp/ihc/index.jsp)
- Langton, L., & Cohen, T. (2008). *Civil bench and jury trials in state courts, 2005*. Bureau of Justice Statistics Special Report (NCJ 223851), Washington, DC: U.S. Department of Justice.
- Lenard, G. (2009). Employment law prediction: Jury sympathies in recession times. Retrieved May 19, 2009 from [www.employmentblawg.com](http://www.employmentblawg.com)
- MacCoun, R. (1996). Differential treatment of corporate defendants by juries: An examination of the "deep-pockets" hypothesis. *Law and Society Review*, 30, 121-161.
- Rustad, M. (1998) Unraveling punitive damages: Current data and further inquiry. *Wisconsin Law Review*, 15, 15-69.
- Vidmar, N., & Rose, M. (2001). Punitive damages by juries in Florida: In terrorem and in reality. *Harvard Journal of Legislation*, 38, 487-513.

Washington Post-ABC News (2009). Washington Post-ABC News Poll. Retrieved June 22, 2009 from [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_033109.html](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_033109.html)

Zickafoose, D. J., & Bornstein, B. H (1999). Double discounting: The effects of comparative negligence on mock juror decision making. *Law and Human Behavior*, 23, 577-596.

**Edie Greene is Professor of Psychology at the University of Colorado in Colorado Springs. She is the author of many articles and book chapters on jury decisionmaking and co-author of *Psychology and the legal system* (7th edition, Cengage, 2010) and *Determining damages: The psychology of jury awards* (American Psychological Association, 2003). A past-president of the American Psychology-Law Society, Professor Greene has also been a fellow in Law and Psychology at Harvard Law School, a lecturer at the National Judicial College, and winner of several research grants and awards, including the American Psychology-Law Society Award for Outstanding Teaching in Psychology and Law. Her webpage is <http://www.uccs.edu/~faculty/egreene>.**

**We asked three experienced trial consultants to respond to Edie Greene’s article on damages in times of recession. Charli Morris, Rich Matthews and Leslie Ellis offer their responses on the following pages.**

## **Response to Jury Damage Awards in Times of Recession**

**By Charli Morris**

**Charlotte A. (Charli) Morris, M.A. ([cmorris35@nc.rr.com](mailto:cmorris35@nc.rr.com)) is a trial consultant in Raleigh, North Carolina. She has worked on criminal and civil cases since 1993.**

Edie Greene does an artful and articulate job of combining recent poll results about our current economic climate with jury research on how jurors make damage awards. I agree with several of her most important conclusions:

- Lawyers on both sides of the bar are concerned that the slumping economy will hurt them.
- Calls for “tort reform” greatly exaggerate the need for limits and caps.
- More often than not jurors come down on the side of reason and moderation.

I also share her faith that future juries will continue to:

- “Scrutinize” plaintiffs and defendants closely;
- Make “crucial credibility judgments and evaluate the evidence carefully” and
- “Try mightily to understand and apply the jury instructions to the facts.”

But I disagree with the idea that there will be **no** effect on how jurors perceive plaintiffs and defendants and **no** influence on the way they transfer money between the two.

I think there are many provocative questions that tough financial times beg for our attorney-clients:

- How would things change if we actually achieve universal health care for all Americans? Won't jurors discount damage awards for future medical care if they believe (rightly or wrongly) that everyone is covered?
- Same question if we actually make college more affordable: will jurors think that anyone could go back to school and improve his earning potential if he really wanted to?
- If housing remains unaffordable for many and unemployment hovers near double-digits for more than one or two years, won't jurors' discussions about what it takes to "pick yourself up and dust yourself off" reflect the reality that there are fewer opportunities overall?
- In venues that are hardest hit – think Detroit – can jurors really ignore the elephant in the jury room? Why would they? Why should they?
- Won't Baby Boomers be thinking about the fact that many of them have seen their investments reduced by half, just a decade (or less) before they planned to retire? If our work-lives have already extended to age 72 (up from 65) isn't that likely to be reflected in the awards jurors make for future lost wages?

Given that life-changing events can and do affect decision-making in important ways, I still think that figuring out how a recession (or any other sizable societal shift) affects jury decision-making is a one-case-at-a-time proposition. There will not likely be a one-size-fits-all strategy.

- Not every community weathers a recession the same way, so focus group research in the trial venue (or a match venue) will be essential.
- Witnesses will need to be prepared to articulate damages (and opinions about damages) in a way that jurors can relate to based on their own real-world experience.
- And if everyone agrees that times are tough, we'll need to distinguish through thoughtful and strategic voir dire between the person who is more sympathetic to plaintiffs as a result and the person who is hardened by the experience.

I'm comfortable knowing that jury decision-making research gives us a solid foundation for understanding how jurors award damages. But if, in fact, this recession is second only to The Great Depression I'm not betting that we know how that plays out in the years to come.



# Response to Edie Greene's Article on Damages in a Recession

By Rich Matthews

**Rich Matthews ([www.Juryology.com](http://www.Juryology.com)) is a senior trial consultant. He consults nationwide in all types of cases.**

## There is No *One* Effect the Economy (or Anything) Has on Jury Verdicts

Like Edie Greene, for the past several months I have been reading and hearing pronouncements about The Effect of The Bad Economy on Jury Verdicts – one can almost hear the capitalization in the voices. It was to be expected that the opinions would conflict, as in the old tale of blind people holding different parts of an elephant and concluding that the creature is a snake, a spear, a suitcase, an umbrella stand, and so on. Their observations are accurate as far as they go and based in truth, but based on observations that are very local and specific to their circumstances, which do not necessarily coalesce into a worthwhile generalization.

In conversations and in counsel, I have the same reactions that Ms. Greene suggests: let's start with the basic unchanging truths about how jurors reach decisions and factor in the economy as simply one more variable; and before we in Law World make any grand pronouncements about the effect of the economy on verdicts, let's see some data.

In discussions with other consultants and with attorneys, hypotheses abound. For instance, one attorney has said that after 12 months of hearing news reports of billions and trillions of dollars, laypeople are no longer shocked by large numbers and thus damage awards could go up (a hypothesis I would need to see very well tested before believing). Another trial consultant has seen juries in employment cases be more willing to make the plaintiff whole up to the time of trial but less willing to go beyond that. We have all seen juries put aside their generalized anger at “corporate America” when it comes to the possibility of assessing so large a verdict that their town's largest employer might have to lay off other workers. These localized indicators are all over the graph.

I reject the notion that there is one singular effect that the current economy has on damages verdicts. Rather, I believe that the economy has *an* effect on just about every civil verdict, but that it is not one effect that is generalizable across all litigation nor even a whole category. This is because each verdict is idiosyncratic and specific, an artifact of many variables, including: the subject of the lawsuit, the facts of the individual case, the local factors that are implicated in the trial (e.g., town's biggest employer as defendant, state of local economy), the balance of the harms that the plaintiff is proposing, the performance of the attorneys involved, and the actual jurors who get selected.



Certainly, this highlights the need for trial counsel to do adequate and valid research in advance of the trial (with a trial consultant, not the “we can use the barn and my mom can make the costumes” variety) to discern what effect the national and local economic conditions have on the individual case, and thus learn how to select jurors and present the case to maximum advantage.

But the entire notion that any one factor has an effect that is both discernible and generalizable across the country or across subjects is, I believe, folly. Yes, the effect is real; no, the effect is not unified or constant.

# Response to Edie Greene’s “Jury Damage Awards in Times of Recession”

by Leslie Ellis

**Leslie Ellis, Ph.D. ([lellis@trialgraphix.com](mailto:lellis@trialgraphix.com)) is a Jury Consultant based in the Washington, DC office of TrialGraphix|KrollOntrack. She primarily works on complex civil litigation nationwide.**

There have been numerous predictions about how the current economic woes will impact jury decision-making, but as Dr. Greene points out, they have all been based on supposition and anecdotes. The author reminds us of the key finding that we as jury consultants see over and over again – juries base their verdicts largely on their interpretations of the evidence and not on atmospherics. The best predictors of how closely their verdicts track the evidence are: a) how well they can understand, and therefore use, the information they are given during trial, and b) how credible and reliable they deem that information to be.

Both of those issues are already a large focus of trial preparation, and the big take away from Greene’s article seems to be “Keep doing what you’re doing.” Both plaintiff and defense counsel still need to be concerned about whether jurors will hold their clients to unreasonably high standards of behavior. Jurors may be tough on plaintiffs and corporations, but they’ve always been tough on plaintiffs and corporations. The question is whether they will be tougher than they were before and on whom, and that is yet to be seen.

Two extralegal factors that are particularly relevant to the impact of the economy on damage awards, and were the focus on many of the quoted comments, are sympathy with the plaintiff and anger at the defendant. Sympathy with a plaintiff is more closely tied to compensatory damages and jurors are less sympathetic with plaintiffs who contributed to or did nothing to mitigate their own predicament, even if the plaintiff did nothing to directly cause his or her own injuries. Anger with a defendant is more closely tied to punitive damages, and jurors get angry with defendants who were aware of a potential danger or risk and chose not to do anything about it (Hans, 2000), even if the defendant’s decision may not be seen as violating the law.

As before, counsel will need to differentiate their client from “the rest” – either the rest of the greedy, windfall-seeking plaintiffs or the rest of the greedy, evil corporations that brought down our mighty economy. And as before, it should not be done explicitly. Rather, offer whatever evidence is available to emphasize the merits of the plaintiff’s claims. Additionally, we know that jurors focus on components of damage awards and can reduce overall awards by picking apart their various components (Greene & Bornstein, 2003). Plaintiff counsel should offer as much concrete support as possible for damage demands. This will also reduce the likelihood that jurors will see the plaintiff as looking for a lottery jackpot.

Similarly, defense counsel should focus on what the defendant(s) did rather than what they did not do. Concretize the efforts the defendant made to meet and exceed the standards he or she was supposed to meet. Let jurors know this was one company that was not looking for the easy way out. If the company has a solid and well-documented history of philanthropy, mention it but don’t focus on it.

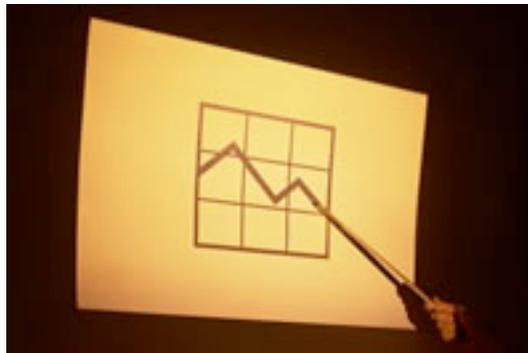
Another lesson to continue to follow is not to pander to the jury. Jurors know when counsel has made assumptions about them, and they usually bristle under such assumptions. Jurors also know when counsel is trying to speak directly to them as individuals (e.g., using analogies that relate to, or explicitly mentioning, a specific juror’s job), and it makes them very uncomfortable. Assuming that individual jurors will be less sympathetic with plaintiffs or more judgmental toward corporate defendants is dangerous business.

However, we do know that jurors' personal experiences influence how they interpret evidence, and everyone has their own life experiences upon which they rely. We also know that the economic downturn has affected some areas more than others. Judges are readily granting hardship excuses for jurors who are job hunting. Additionally, some have speculated that economic hardships will reduce minority representation on juries. These factors can all influence who shows up for jury duty, as well as who will survive cause challenges and hardship excuses. And while we cannot safely make assumptions about the impact of the economy on damage awards, *voir dire* is still the best way to protect litigants from individual biases against plaintiffs or corporate defendants. *Voir dire* or juror questionnaires should also be expanded to include specific questions about how changes in the economy have impacted jurors and whether these changes cause jurors to feel resentful towards any of the parties.

One researcher has collected data on citizens' experiences with the economic downturn and their opinions of damage awards (Cinquino, 2009) that can begin to shed some light on the topic but that also illuminate the need for more data. In a survey of jury-eligible, venue-matched citizens in various parts of the West, South, Northeast, and Midwest, she found that slightly more than half of the survey respondents felt that their economic situation stayed the same over the past year and were positive about their financial future. And while 75 percent of respondents agreed the economy will get worse before it gets better, 57 percent also agreed that it will get better sooner rather than later.



The most interesting data in the survey came from a comparison of opinions of damage awards in 2005 to the same opinion in 2009. In 2005, 5 percent of respondents believed damage awards were too low, while 41 percent said they were too high. However, in 2009, 20 percent said damage awards were too low and 28 percent said they were too high. The survey does not allow us to understand which awards were too low (i.e., compensatory or punitive damage awards), why more people now believe they are too low, or how this would impact their actual behaviors were they to serve on a jury. The data simply indicate a shift in opinion about whether damage awards are generally appropriate. One reason may be that jurors are upset at defendants and want them to pay. Another reason may be that, after constantly hearing about numbers like \$700 billion and \$1 trillion in the news, people have become desensitized to large numbers. As Dr. Greene points out, we simply don't know yet. Only time, data, and trials will tell.



Citation for this article: *The Jury Expert*, 2009, 21(4), 22-31.

# Jurors' Perceptions in the Economic Decline

by Tara Trask and Linda Petersen

The current financial crisis has infiltrated American life in a way unmatched by other events in recent history. We are clearly at a turning point in many ways, and just how this decline will ultimately influence Americans is yet to be fully understood. On a more specific level, the ways in which these issues will affect the legal system, lawsuit filings, juror decision-making and, ultimately, verdicts is also still unknown. Nonetheless, trends are beginning to emerge that may shed light on what the future holds. One thing is certain - the implications for litigators are complex.

## Effects of a Changing Jury Pool

What do corporate cutbacks and the declining economy mean for juries? What we know is that the pools of jurors appearing in courts are changing daily and will most likely continue to do so. With unemployment rates on a steady increase, it is apparent that more jurors will have recently lost their jobs, or are in jeopardy of doing so. Despite reports a few months ago that this trend seemed to be waning, recent data indicate otherwise. In one recent Florida trial, 10% of the pool interviewed on the first day of jury selection had lost their jobs within the past six months, and two of those had just become unemployed that week (Duret, 2009).

The sudden appearance of the recently unemployed in jury pools changes that group in at least three respects. First, some of those people will be from the wealthier, more highly educated cohort who, when employed, may have been excused from duty in the past. Second, those jurors who were laid off may harbor deep resentment toward corporate America in general. Third, these jurors are surely stressed due to financial strain and their uncertain future. In fact, and as expected, more jurors are asking to be excused from service out of consideration for the risk involved in being away from their jobs at times of layoffs, or because they are actively looking for employment. Financial pressures in general are looming and jurors are feeling it.

More Americans are worried about debt than ever before, with 30% reporting they are “somewhat” or “very” worried (Gallup, 2009), and that worry translates into chronic stress and anger. The lower the education level, and the lower the income, the higher the worry, stress and anger. Among the most worried, nearly three quarters reported feeling stress “a lot of the day,” and nearly a third reported feeling angry much of the time.

These strains have become apparent in the courtroom. Jurors distracted by worry over paying their mortgages or putting food on the table are having a more difficult time concentrating. And jurors who are angry are looking for a target. Clarity, brevity and a respect for jurors' time has always been important – it is even more so now.

## The Impact of the “Financial Fear Factor” on Jurors

Mass media coverage of the financial crisis seems to be driving a recession like no other. Economists are reporting several factors that are contributing to increased unemployment. It is apparent that ordinary Americans have cut back sharply on spending in the past few months as they have watched the value of their homes and investments decline. At the same time, businesses, sensing lower demand, are trimming hours and payrolls to conserve resources. Fear, economists say, is fueling a vicious cycle, with companies

and consumers taking preemptive action in anticipation of further bad news, which in turn helps assure that the future news will be indeed be bad (Reynolds and Nicholas, 2009).

UCLA economist Lee Ohanian (Reynolds and Nicholas, 2009) drives home the point: “The reason why employers are letting people go is not the traditional reason that employees are costing more than they are bringing in. It’s the fear factor. The crisis of confidence is having a big impact on employer decisions to hire and invest, and on consumer decisions to purchase. This is the first recession I’ve seen that has that characteristic.”

Worry is rampant among the general public. The percentage of Americans who say they are worried about keeping up with their monthly payments over the next six months reached 25% in May of 2009 (Gallup, 2009). A recent community attitude survey of 400 participants conducted in the Southern District of New York (Empirical Creative, 2009) found that 75% had been personally affected in a negative way by the economic crisis. Moreover, of those participants who reported they had *not* been affected in a negative way, a majority of them (56%) said they were concerned that at some point in the near future they *will* become negatively affected.

The bleak outlook of the general public affects both attitudes and behavior. The Pew Research Center (2008) reports that 92% of the public rate the national economy as only fair or poor, and a substantial majority (61%) judge their personal finances that way. Both measures are among the lowest recorded in the past 15 years. This bearish view is causing growing numbers of consumers to say they are cutting back on purchases or reconsidering their saving or retirement decisions.

Importantly, this survey suggests that the psychological impact of bad times, rather than an actual decline in family financial conditions, is the principal driver of cutbacks and reconsiderations. Nearly 60% of those who say they are cutting back or delaying purchases report they are doing so because they *worry* things might get worse. Just 28% say they are cutting back because their financial situation actually declined. And this worry is accentuated among the more affluent consumers. A full 72% of those with family incomes of \$75,000 or more per year cite concerns about what might happen as a reason for their intended cutbacks.



### Enough Blame to Go Around

So, how does this fear and anxiety play out when deciding who to blame for the current state of affairs? Data we have collected on 116 mock jurors from Texas, Louisiana, and Oklahoma over the past few months indicate that jurors hold consumers, government, lenders and big corporations alike responsible. Other national research (Harris Interactive, 2009) shows that Americans spread the blame around to the public and private sectors as well, but a majority places “a lot” of blame on banks (76%), Wall Street (57%) and big business (55%).

A community attitude survey (Empirical Creative 2009) shows that a majority of New York jury-eligible residents blame senior-level corporate executives for the recession, and they are angry. Specifically, 74% believe that the United States is currently experiencing an economic crisis because senior-level corporate executives have acted with greed and carelessness. Sixty percent believe those executives actually committed financial crimes. A majority (55%) has a lot of anger toward executives and most (70%) feel that their trust in the integrity and honesty of senior-level corporate executives is at an all-time low, something to be considered when calling one as a witness.

Concerning guilt, almost half of the people participating in this survey believe that if the United States government accuses a senior-level corporate executive of committing financial fraud, he or she probably did it. And, nearly a third admit that the current economic crisis would make it very difficult for them to presume that senior-level corporate executives accused of committing financial fraud are innocent until proven guilty. Notably, these same jurors say they would tell a judge that they can be a fair and impartial juror in such cases. Presumably, the effect of this attitude would not be limited to criminal trials, but would extend to civil cases involving large corporations as well.

Distrust extends to insurance companies as well. According to a recent Harris poll (Harris Interactive, 2008), many people blame the insurance industry the most for rising healthcare costs. When asked who is most to blame, insurance companies were viewed as the culprit more than pharmaceutical companies, the government, hospitals, or physicians. And this blame was expressed across all demographic groups – young and old, male and female, rich and poor, no matter where in the country they lived, and regardless of political party.

In fact, cynicism about business in general is growing. The American public is increasingly skeptical about the power and profits of large companies and business corporations (Pew Research, 2008). A majority (59%) say that business corporations make too much profit, up from 53% in 2004. The percentage saying that business corporations make a fair and reasonable amount of profit fell from 39% to only 33%. While large majorities over the past 15 years have said they think too much power is concentrated in the hands of a few large companies, the numbers who feel strongly about this has grown to 70%, up from 64% in 2004.

In fact, Gallup reported in June 2009 that most Americans endorse government action to limit executive pay at major companies. A majority of Democrats (77%), and Independents (56%), and even a large segment of Republicans (42%) supported such controls. Younger people, under the age of 65 (63%), were more likely than older Americans (46%) to favor limits. And, while support for limits was higher among lower income individuals, a majority (51%) of those making \$90,000 or more a year favored limits.

### **Conflicting Findings for Trial Lawyers**

What does this distrust, blame, and anger aimed at business mean for juries in civil suits? On the face of it, one would assume this is not a good time to be a corporate defendant. And, in fact, our recent experience in mock trials supports the notion that the public's view of big business is becoming increasingly negative. Even in disputes between large corporations, we have noted that jurors tend to view the larger as the "big" guy who is out to get the "little" guy, even when the little guy is a multimillion dollar business. The larger and wealthier the company, the less jurors trust them. And, they are more likely to hold them responsible for wrongdoing. Indeed, national research indicates that while consumer confidence in big business was exceedingly low, American's faith in small business remained strong with 60% reporting "a great deal" or "quite a lot" of confidence in those operations (Gallup, 2008).

Experts on both sides of employment litigation say they expect juries this year to be more sympathetic to employee plaintiffs than to employers, holding management to higher standards and doling out larger verdicts in cases involving everything from wrongful termination to retaliation to age and race discrimination (Baltes, 2009). Most jurors - having lost a job themselves, or watched a friend or relative lose one - will likely identify more with employees.



An interesting conflict arises, however, when jurors consider the implications of their verdicts. In deliberations we have witnessed a sharp increase in mock jurors struggling with the effect of a pro-plaintiff decision on the employees of the defendant corporation. They articulate concern and questions about the number of people they may put out of work with a large damage award. While jurors are willing to hold corporations responsible, they are hesitant to award excessive damages out of concern for the trickle down effect on workers. From an anecdotal perspective, this reasoning seems to have increased sharply in recent months in the mock trials we have conducted.

### **What Will Jurors Do Next?**

Clearly, the specifics of a case will influence the perceptions of jurors, and it will be imperative to ask the right questions in voir dire. Our recent research with mock trials continues to confirm our expectations about which jurors may lean toward the plaintiff or defense on a particular matter, but there are sometimes interesting surprises. One type of personality that is appearing more and more in these times is the one who simply does not want a plaintiff to get something “for nothing” (even if that “nothing” is ownership of a patent). They seem to resent the idea that, while their own hard work has yielded very little, someone else may get millions. It’s the “if I can’t have it, you can’t have it” mentality and it is particularly resistant to large damage awards. From the plaintiffs’ perspective, identifying those jurors is crucial..

Staying on top of the pulse of the nation, and the venire, is also important. The mood of the country swings with current events, and there is recent evidence that citizens are becoming a bit more optimistic about the economic climate. What might be predictive one month in one location may shift the next month; what may be true in one locale may vary significantly in another. These are volatile times; requiring constant vigilance to maximize the reliability of our research and increasing the importance of current, case-specific testing.

Anecdotally, the intersection between a perceived increase in liability awareness and thoughtful moderation of damages will be an interesting trend to watch. The tort reform movement, quite active in several states, has brought terms like “frivolous lawsuit” into everyday American vernacular and indeed in these times, anything “frivolous” may well be frowned upon, particularly if jurors believe it will cost jobs. And taken from the opposite perspective, in the current climate, what plaintiffs’ counsel can afford to bring such a suit? Perhaps the trend most likely to take root in the coming years is simply one of moderation. Time will tell.

### **References**

- Baldes, T, (2009). *Recession-era juries a hurdle for business*. Law.com’s In-House Counsel. (<http://www.inhousecounsel.com> )
- Duret, D. (2009). *Courts mindful of potential jurors who fear job loss*. TCoast Talk (<http://www.tcoasttalk.com/2009/01/16/courts-mindful-of-potential-jurors-who-fear-job-loss/>).
- Empirical Creative (2009). Community Attitude Survey Southern District of New York.
- Gallup (2008). (<http://www.gallup.com/video/108232/Sinking-Confidence-US-Banks.aspx>).
- Gallup (2009). (<http://www.gallup.com/poll/114124/Worry-Making-Monthly-Payments-Adding.aspx>).

Harris Interactive (2008). The blame game: Congress, Wall Street, Home Buyers and Big Business Top Americans List for Economic and Financial Crisis. ([http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=964](http://www.harrisinteractive.com/harris_poll/index.asp?PID=964)).

Pew Research Center (2008). Public not desperate about economy or personal finances. (<http://people-press.org/report/?pageid=1400>).

Pew Research Center (2008). Psychology of bad times fueling consumer cutbacks. (<http://people-press.org/report/475/economic-worries-mount>).

**Tara Trask, [[tara@taratrask.com](mailto:tara@taratrask.com)] is a Trial Consultant with Tara Trask and Associates based in San Francisco, CA. and Dallas, TX. She does primarily civil work and has worked in venues across the country. Ms. Trask's full service practice includes all types of complex litigation including intellectual property, products liability, insurance and securities. You can read more about Ms. Trask on her firm's website [<http://www.taratrask.com>].**

**Linda Petersen [[lpetersen@taratrask.com](mailto:lpetersen@taratrask.com)] is a Trial Consultant with Tara Trask and Associates and is based in San Francisco, CA. She brings extensive experience in public policy work, legal research and qualitative and quantitative research methodology to the firm. She does primarily civil work and her full service practice includes all types of complex commercial litigation. You can read more about Dr. Petersen on her firm's website at <http://www.taratrask.com>**

Citation for this article: *The Jury Expert*, 2009, 21(4), 32-36.



## “This Other Dude Did It!”:

### A Test of the Alternative Explanation Defense

by Elizabeth R. Tenney, Hayley M.D. Cleary and Barbara A. Spellman

How does a criminal defense attorney argue for a Not Guilty verdict? One strategy is simply to argue that the state’s case is incomplete and has not been proven beyond a reasonable doubt; no more is required. Another strategy is to provide alternative explanations of each piece of evidence: for example, how the defendant’s blood got in the victim’s car or that other people had keys to the home. A more specific version of this strategy would be to provide a complete alternative story—implicating unnamed or named others—that explains all of the evidence. Thus, the defense may choose to enumerate some of the possible explanations for individual pieces of evidence or for the crime as a whole. TODDI (“This Other Dude Did It”) is a slang term for the defense strategy in which attorneys point to a specific other possible perpetrator who could have committed the crime. Our laboratory study suggests that a defense strategy that argues not only that the defendant is innocent, but also that some other individual(s) could have committed the crime, is more likely to result in acquittal.

#### *Does It Really Help to Point the Finger Somewhere Else?*

Our study participants (253 college undergraduates) read a fictional transcript of the trial of Richard Wilson for the second-degree murder of his wife, Laura Wilson. Several pieces of evidence (e.g., fingerprints on the murder weapon, no evidence of forced entry, history of domestic violence) incriminated the defendant, but there were no eyewitnesses. In the basic version of the transcript, the defense rebutted each piece of evidence and argued that the defendant was not guilty beyond a reasonable doubt. In the alternative version of the transcript, the defense not only rebutted the evidence but also turned against one, two, or three witnesses and argued that the witness(es) could have committed the crime.

The transcript was conceived so that virtually all direct evidence incriminated the defendant. To introduce an alternative suspect, new circumstantial and probative evidence was revealed to unpack the possibility that another specific individual could have committed the crime. For example, in one story it was revealed that the victim’s stepbrother, a frequent gambler, did not get along well with his stepsister, and he was now the primary beneficiary of his mother’s will because his stepsister was no longer alive. Thus, the alternative suspects were individuals against whom an accusation of guilt was not too farfetched. Many criminal trials have the potential to contain such suspects. There may be a will, or an angry ex-lover, or an unknown, unnamed drug dealer. Like the defendant, a TODDI suspect might have a plausible motive, an unsubstantiated alibi, or some other suspicious indicator around which the defense could weave a story that is not refuted by the evidence.



After reading a transcript, the participants rendered a verdict and then rated the likelihood that the defendant was guilty on an eight point scale. Results showed that the minimal TODDI strategy worked—that is,

providing testimony from at least one alternative suspect successfully reduced estimates of the defendant's guilt. However, accusing more than one alternative suspect was not clearly better than accusing only one.

Participants in all TODDI versions, in which there was an alternative suspect, still believed that the defendant seemed guiltier than any one of the alternative suspects. That is, the TODDI story was never better than the prosecution's story. Yet, adding one TODDI story decreased the number of participants who rendered guilty verdicts from 73% to 35%, and ratings of the likelihood that the defendant committed the crime decreased as well. Adding the second and third TODDI stories was not statistically significantly better than employing a single TODDI story (although all measures of guilt did decline slightly). See Figure 1.

The results of the current experiment suggest that in court, the addition of one or more alternative suspects would decrease jurors' belief in the defendant's guilt, even when the alternative suspect is not actually believed to be the culprit. (See Tenney, Cleary, & Spellman (2009) for more study details.)

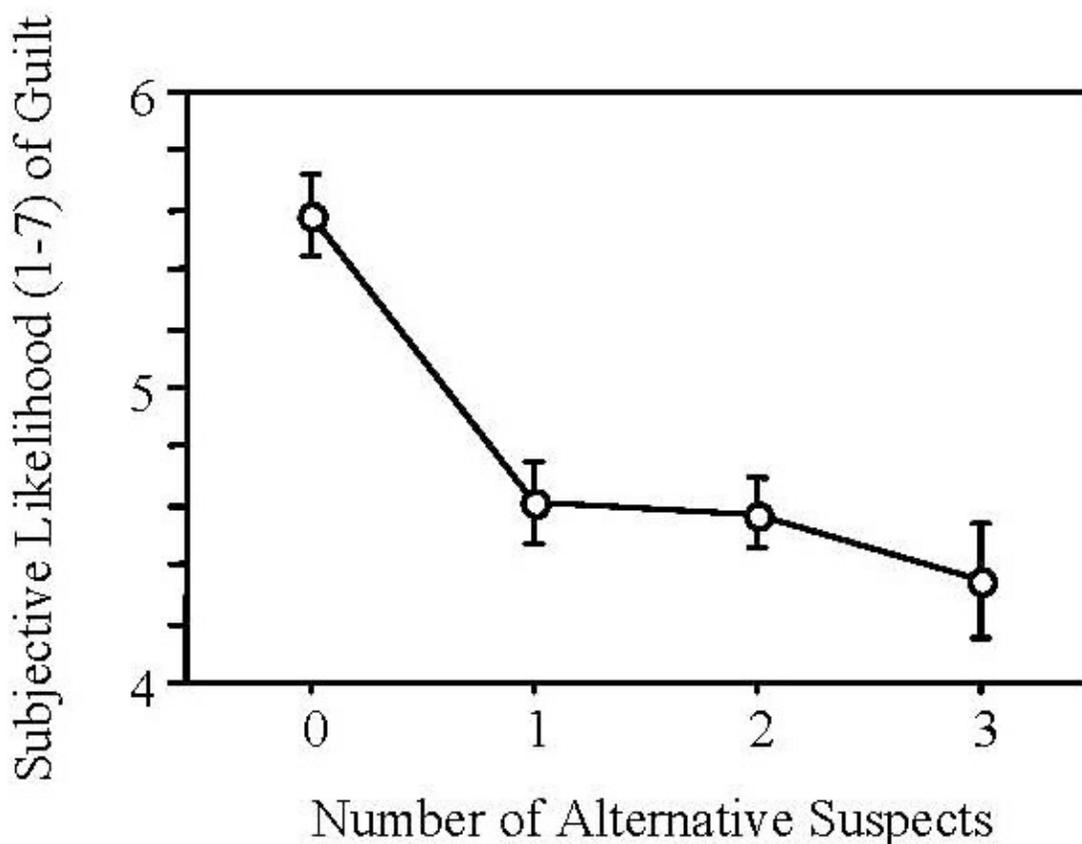


Figure 1. Mean subjective likelihood that the defendant is guilty as a function of the number of alternative suspects (with standard error bars).

## Why Doesn't Adding More Alternative Suspects Help?

We know that jurors construct a story of how they believe a crime occurred and then match that story to a verdict category. For example, if jurors believe a defendant planned a murder and carried it through, they select the verdict category of first degree murder. If there are two plausible stories of how the crime occurred—one advocated by the defense and one by the prosecution—jurors tend to reduce belief in both stories. This process is called the story model of juror decision making (Pennington & Hastie, 1986). Using the story model as a basis, what happens when multiple stories fit the *same* verdict category (e.g., multiple stories describe how the defendant is not guilty)? Perhaps jurors first compare stories within a verdict category to each other before comparing across verdict categories. More specifically, they might consider all the TODDI stories together, then determine which TODDI story best fits a Not Guilty verdict, and then compare only that best story to the prosecution's story (making the rest of the alternatives irrelevant).

Another possibility is that once the notion that someone else might have done it is introduced via the first TODDI story, adding more TODDI suspects does only a little to further unpack the idea that some other individual instead of the defendant is guilty; for the most part, the idea that someone else is guilty has already been raised by the first alternative suspect. Thus, bringing up a particular *type* of defense (e.g., the TODDI defense that someone else did it) is more powerful than giving multiple examples of the same type of defense.

Future studies should determine whether explicating different types of not guilty arguments would further reduce guilty verdicts. For example, in addition to pointing at a TODDI suspect, a defense attorney could explain how a homicide could have happened by accident, or that it could have been suicide. Unpacking the hypothesis that the defendant is not guilty into such diverse components could be more effective than unpacking it the same way multiple times.



### Warnings About Using a TODDI Defense

Research has suggested that providing a weak defense can actually raise confidence in the prosecution's case because jurors might think, "If this is the best the defense can do, the defendant must be guilty" (McKenzie, Lee, & Chen, 2002). More generally, this argument follows from the "dud alternative" effect, in which the addition of implausible alternative outcomes may increase judgments that the focal outcome will occur (Windshitl & Chambers, 2004). If employing the TODDI defense, one should be careful to construct *plausible* alternative stories; however, in our experiment, none of the TODDI suspects were ever thought to be guilty. Exactly what constitutes "enough" plausibility remains to be seen, and is likely to depend on the case-specific circumstances.

Also, it is possible that some jurors become suspicious when a defense attorney tries to incriminate too many other people. If a defense seems desperate (here by presenting multiple alternative scenarios rather than just one weak one), some jurors might surmise that the defense is weak, and the defendant is, in fact, guilty. We saw some slight hints of that from our participants who read about three alternative suspects. Litigators employing a TODDI strategy may want to avoid accusing too many alternative suspects, lest it appear they are grasping at straws.

**Elizabeth R. Tenney, MA ([tenney@virginia.edu](mailto:tenney@virginia.edu)) is a graduate student pursuing a PhD in psychology at the University of Virginia in Charlottesville, VA. She is interested in what information people use to make inferences about each other—specifically, how people judge credibility or decide whether they like someone. More about her research can be found at <http://people.virginia.edu/~ert8f>.**

Hayley M. D. Cleary ([hd35@georgetown.edu](mailto:hd35@georgetown.edu)) is a fifth-year doctoral student in Developmental Psychology at Georgetown University. Her research interests involve adolescent development in legal contexts, including youth violence and police interviewing and interrogation of youth.

Barbara A. Spellman, J. D., Ph.D., is Professor of Law and Professor of Psychology at the University of Virginia. Her research is in the areas of memory, reasoning, and decision making and their applications to law. Her law website is: <http://www.law.virginia.edu/lawweb/Faculty.nsf/FHPbI/7605> and her blog, "Just Thinking", on the intersection of Law and Psychology, is at: <http://blogs.psychologytoday.com/blog/just-thinking>.

### References

- McKenzie, C. R. M., Lee, S. M., & Chen, K. K. (2002). When negative evidence increases confidence: Change in belief after hearing two sides of a dispute. *Journal of Behavioral Decision Making*, *15*, 1-18.
- Pennington, N., & Hastie, R. (1986). Evidence evaluation in complex decision making. *Journal of Personality and Social Psychology*, *51*, 242-258.
- Tenney, E. R., Cleary, H. M. D., & Spellman, B. A. (2009). Unpacking the doubt in "Beyond a reasonable doubt:" Plausible alternative stories increase not guilty verdicts. *Basic and Applied Social Psychology*, *31*, 1-8.
- Windshitl, P. D., & Chambers, J. R. (2004). The dud-alternative effect in likelihood judgment. *Journal of Experimental Psychology: Learning, Memory, and Cognition*, *30*, 198-215.

We asked two experienced trial consultants to respond to the article by Tenney, Cleary and Spellman. Julie Blackman and Stan Brodsky offer their perspectives on the following pages.

### A Response To:

## “This Other Dude Did It! A Test of the Alternative Explanation Defense”

by Julie Blackman

Julie Blackman, Ph.D. ([jblackman@julieblackman.com](mailto:jblackman@julieblackman.com)) is the principal of Julie Blackman & Associates in NYC. She offers trial strategy consulting in criminal and civil cases in the NYC area and beyond.

Tenney, Cleary and Spellman report that their research shows that “a defense strategy that argues not only that the defendant is innocent, but also that some other individual(s) could have committed the crime, is more likely to result in acquittal.” In “whodunnit” type cases this finding makes perfect sense. Jurors in such cases seek narratives to explain “whodunnit.” A narrative including an alternate vision of whodunnit is richer and more compelling than the simple negating reflected in the idea that the prosecution failed to meet its burden of proof beyond a reasonable doubt.



Few cases, however, are “whodunnit” type cases. What’s more, some defendants are charged with crimes for events over which they had special responsibility. Consider the case of corporate executives indicted in white collar crime cases. Then, the potential benefits to the defense of blaming alleged criminal acts on the “other dude” are reduced or eliminated. Efforts by high level executives to blame the “other dude” may be roundly resented by jurors who think that top level executives, who earned many millions of dollars, should take responsibility for whatever happened on their watch. They may be judged harshly for efforts to pass the buck. In such scenarios, blaming the other dude is a risky defense strategy.

So, while the advice that follows from Tenney et al.’s study (i.e., blame it on the other dude) seems likely to be useful in simple “whodunnit” type cases, its utility may end there. The “blame the other dude” strategy seems

likely to work only when no expectation of special responsibility attaches to the defendant.

## When There Aren’t Any Other Dudes: Beyond the Alternative Dude Defense

by Stanley Brodsky

**Stanley L. Brodsky, Ph.D. ([sbrodsky@bama.ua.edu](mailto:sbrodsky@bama.ua.edu)) is Professor in the Department of Psychology, The University of Alabama, Tuscaloosa, where he directs the Witness Research Laboratory. He is author of the 2009 book *Principles and Practice of Trial Consultation*.**

The TODDI is an appealing and potential useful approach. It puts together two important foundations: empirical research along with common sense. It is reasonable for attorneys to seek out and develop a plausible case for at least one alternate defendant, even if the evidence is circumstantial and somewhat weak.

However, there is a problem. In a majority of cases, other possible defendants are not only difficult to identify, but essentially impossible to find. For example, there may have been only one person who was accused of embezzlement and who had access to records. Consider the additional example of a case in which the evidence is unequivocal that the neighbor-defendant was the one person who spent time alone with the children who were allegedly molested. In another example, many witnesses might have observed the assault at issue.

The more broadly usable approach is the concept of the alternative explanation in general. Juror processing of case information may be examined according to how many constructs or perspectives jurors have to organize their perceptions and understandings. In a capital case on which I consulted, the one eyewitness identified the defendant from a single photo shown to her by the investigator. She was asked (as part of discovery) to name the identifying characteristics of the defendant that made her so certain that he was the perpetrator. This Caucasian witness said of the African-American defendant that it was his broad nose, very dark skin, and whites of his eyes -- traits common to many African-Americans. The alternative explanation that was developed, in opposition to that of accurate eyewitness identification, was racist stereotyping; this explanation was supported in part by the simplistic and race-related traits of identification.

When claiming, “The Other Dude Did It,” the defense attorney has to move beyond the starting position of arguing that the state has to prove its position and that the defendant is innocent unless proven guilty. In one rural county, I included in the jury questionnaire a query asking, “No matter what the law says, do you agree that a defendant in a murder trial should have to prove his innocence?” Over 40% indicated agreement. Even though the judge later rehabilitated these people in response to defense challenges for cause, the statement probably accurately reflected the actual positions of the venire. Jurors need to have something to believe in as a substitute for the prosecution’s case.



Finding that alternative is not a simple task. Early on in the development of any case, experienced attorneys and consultants often delve in depth into many choices for case conceptualization. If dozens of alternative explanations, even ones that are not obvious on the surface, can be put forth, the subsequent process of vetting usually leaves the trial team with two or three alternate perspectives. I find that this first task, the job of considerable time invested in mobilizing multiple theories of the case, is always a demanding, essential, and complex task. It calls for lateral thinking, for deferring judgments about the worth of theories, and for proposing a great many alternatives so that good ones will emerge.

Such gathering of large pools of possible case conceptualizations is much like the principle of personnel selection. If you get one hundred applicants for a position, any method of selection will work well. If there are only two or three applicants for a position, the selection methods have to be extraordinary to make a difference. Remember, inexperienced attorneys often do what may be thought of as a line-by-line rebuttal of charges. The alternative explanations discussed here are part of a broader way of approaching and understanding case conceptualization that allows jurors to get past the reflexive attribution of guilt to the only person who is sitting in the room and being accused.

## **A response to the Trial Consultants from Tenney, Cleary & Spellman...**

The responses to our article make some excellent points. Both Blackman and Brodsky note that we only discuss how the TODDI defense can be used in "whodunit" type cases -- but that whodunit cases are few in number.

We agree; we limited our discussion to those types of cases because those are what we used in our study. But Brodsky notes the more important general point: TODDI is an example of a strategy in which the defense does not merely try to refute the prosecution's case but instead (or in addition) creates plausible alternative explanations of the events. Those plausible explanations need not center around alternative suspects but could center around alternative motives, alternative interpretations of ambiguous behaviors, alternative explanations for the most damning piece of evidence, etc. The most important lesson here from psychology is that humans are explanation seekers: people are not content to know THAT something happened, we want to know HOW and WHY.

Providing plausible alternative stories -- whether or not they are about other possible perpetrators -- satisfies the jury's need for an explanation of the events in question. (See Pennington & Hastie, 1991, for further discussion.)

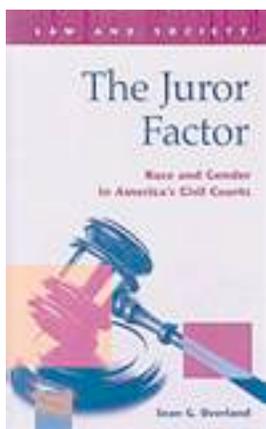
Pennington, N., & Hastie, R. (1991). A cognitive theory of juror decision making: The story model. *Cardozo Law Review*, 13, 519-557.

## *The Juror Factor: Race and Gender in America's Civil Courts*

### A Book Review

by Rita Handrich

Rita Handrich, Ph.D. ([rhandrich@keenetrials.com](mailto:rhandrich@keenetrials.com)) has been a trial consultant with Keene Trial Consulting in Austin, Texas since 2000. She consults on primarily civil cases nationwide. She is also the Editor of *The Jury Expert*.



Sonia Sotomayor's nomination to the US Supreme Court in May 2009 unleashed a storm of controversy based on her remarks on her own judicial decision-making:

"I would hope that a wise Latina woman, with the richness of her experiences, would more often than not reach a better conclusion than a white male who hasn't lived that life" (<http://www.cnn.com/2009/POLITICS/05/28/sotomayor.latina.remark.reax/>).

While Rush Limbaugh chastised her for showing "reverse racism" and Newt Gingrich suggested she should withdraw her name from nomination for this "racist" statement, others considered her remarks (taken in context) to reflect a simple truth that judicial decision-making is strongly influenced by the life experiences of the individual judge (<http://www.psychologytoday.com/blog/science-small-talk/200906/judging-diversity-part-i>).

In its own way, Sean Overland's new book, *The Juror Factor: Race and Gender in America's Civil Courts* (published in 2009 by LFB Scholarly Publishing) explores a similar theme. This book examines the manner in which a juror's gender and race affect how they make individual decisions on various civil cases. The author cites the "color-blind ideal" and acknowledges that we are often uncomfortable voicing the perspective that "race matters" and yet insists we must consider that race (and gender) often do matter. Simply put, our mistakes have been in incorrectly measuring important demographics and assuming that criminal jury decision-making research also applies to civil jury decision-making.

*The Juror Factor* is unusual in that it efficiently reviews the voluminous past research concluding that demographic factors such as race and gender are inconsequential in juror verdict decisions—and then opines the exact opposite: demographics do sometimes matter. Overland goes on to tell us why race and gender matter in verdict decisions using data from pre-trial research conducted with jury-eligible citizens rather than college students. As most of us know, most research on jury decision-making is conducted with college students using one-page written case vignettes or other, often unrealistic trial simulations. By using more diverse mock juror samples in pretrial research data, Overland's conclusions are drawn from as close to a courtroom simulation as we can achieve with real attorneys presenting the case facts and real jury-eligible citizens deliberating to a verdict. Overland stresses a reality that those of us doing pre-trial research know very well: mock jurors take their tasks seriously and struggle with their decisions. The use of pretrial research/mock juror data lends credibility to the conclusions in *The Juror Factor*.

According to Overland, race and gender *do* impact verdict choices (especially in civil litigation) and he provides detailed information on how juror gender and race are related to verdicts in three different kinds of cases (car accident cases, prescription drug cases and accounting malpractice cases). For each of

these exemplar cases, he reviews the impact of juror race and gender as well as political attitudes, attitudes toward corporations, and attitudes toward litigation. These are not simple relationships like the dated (and incorrect) “women and ethnic minorities go for plaintiffs” but rather are complex relationships based upon a number of factors which take life experiences, attitudes and case facts into consideration.

There are lessons in this book for anyone interested in the jury system, decision-making, and the role of politics in crucial jury selection case law (an informative treatment of *Batson* among other decisions). Overall, it is a research-based exposition on how to explore ways in which jurors are predisposed toward a case based on mostly visible characteristics and straightforward questions to venire members. As such, *The Juror Factor: Race and Gender in America’s Civil Courts* represents a novel contribution to our litigation advocacy work.

Wishful thinking aside, Overland doesn’t claim (or provide) any “silver bullet” for detecting bias. As Albert Einstein memorably said: “A little information is a dangerous thing. So is a lot.” In this instance, the danger lies in our desire for quick and easy answers to complex and difficult decisions. Sean Overland gives readers new insights into factors and strategies, which always fall short of a magical predictive model. Overland provides a useful review of the literature and a persuasive explanation of how the existing research methodology and findings can be flawed. The value of pre-trial research lies in identifying the surprises, the unexpected, the potential landmines in the specific case. Use the ideas presented in *The Juror Factor* but do not wholly commit to preconceived notions as to their validity for your specific case—that sort of cognitive process results in blind spots. Employ his guidance. Do the work. Use the data. And form your best conclusions.

As someone who has followed the research on issues related to race, racism, bias and decision-making, I wondered if I would learn anything new from *The Juror Factor*. To my surprise, not only did I learn a lot, both new and worthwhile, but I also read this 150-page book in a single and raptly attentive session. I came away curious about whether I will find similar patterns in litigation types beyond those that Overland examines. The book is well-documented and referenced and while perhaps daunting in places for those without statistical training, it is a fairly straight-forward and intriguingly different read. We are so used to hearing “demographics don’t matter, attitudes matter” that it is refreshing to hear that “all of it matters”. Am I planning to use what I learned from this book in future litigation consulting? You bet I am.

Citation for this article: *The Jury Expert*, 2009, 21(4), 43-44.



# From the Conference Room to the Courtroom: How a Change in Setting Impacts Witness Preparation

by Valerie Blum and Alexandra Rudolph

During witness preparation, what you hear from a witness in an attorney's office may be worlds apart from what you hear from that witness on the stand. The environment in which witnesses are questioned has a profound impact on their behavior, demeanor and testimony. A lawyer's office or conference room provides a very different set of stimuli from a realistic courtroom environment. As a result, what witnesses say and how they act can differ vastly based on where testimony is elicited.

This article explores how the environment where a witness is prepared affects testimony's substance and style. Transitioning between a conference room and a courtroom setting can have a dramatic impact on what witnesses say and how they say it. While many lawyers may conduct witness preparation in settings that fall somewhere in between these two extremes, the way witnesses respond to the transition provides valuable insights into preparing witnesses.

## Conference Room versus Courtroom: Two Very Different Settings

The most basic goal of witness preparation is familiarization: witnesses learn what kinds of questions may be asked, attorneys learn about the facts of the case as their witnesses see them, and each learns some basic information about the other's style of asking or answering questions. Witness preparation is commonly conducted in a conference room or office. These tend to be smaller, less imposing spaces than courtrooms and the tone of preparation is generally more casual. The lawyer is usually seated, and all parties tend to be somewhat more relaxed and comfortable than in court.

At the other end of the spectrum are exercises that take place in a mock courtroom, which is designed to duplicate the atmosphere of an actual courtroom. This familiarizes witnesses with the trial process by immersing them in an experience that looks and feels as much like "the real thing" as possible. One of the primary advantages of using this setting is to expose witnesses to the various stresses of the courtroom and the unfamiliarity of the environment – making for a very different experience from in-office preparation.

## What Can We Learn from Each Environment?

### *The Conference Room*

Preparation that is conducted in the lawyer's office or conference room can generally be considered an open-ended process. Parties are free to stop and start questioning, revisit or rephrase questions and answers, and become acquainted with each other's styles and personalities.

Preparing witnesses in the conference room allows the attorney to see a more natural side of witnesses and gain insight into personality and demeanor. It makes the exercise feel less like an examination and more like a conversation, often encouraging the witness to explain "what really happened" in a narrative form. Everyone present may ask questions, take risks and share information to develop case themes, strengthen existing arguments and defuse counterclaims.

In contrast to the courtroom setting, in an office or conference room witnesses are more likely to be relaxed and, therefore:

- Give longer and more in-depth responses
- Use layperson's terms and colloquialisms
- Use analogies and more expressive language

It is much easier to gain insight into the natural personality and demeanor of the witness in the office. It is also much easier to address issues with testimony, such as gaps in the story or witness discomfort, on the spot. If any part of the testimony does not pass the “sniff test” – perhaps because the witness is making assumptions or leaving out important facts – those involved in the preparation are free to backtrack and get clarification.

In the office or conference room, it is possible to put the witness at ease by, for example, prefacing a question with the phrase “off the record.” These three words transform the dynamic of the room, and equate to a “commercial break” in witnesses' minds. This alleviates much of the pressure to perform and helps witnesses let their guard down, leading to more effective and authentic responses.

Unfortunately, the primary advantage of the office setting is also its main drawback. For most people, courtrooms are unfamiliar and intimidating theaters where they feel judged – and, in fact, they are. As a result of the stress, a witness who was sitting across from us at the conference table can suddenly transform into someone else when thrown into the theater of the courtroom, with correspondingly dramatic alterations in the substance and style of testimony.

### *The Courtroom Simulation*

By exposing witnesses to a setting and experience that looks and feels like the “real thing,” the attorney or trial consultant can begin familiarizing them with what lies ahead. This witness orientation is an important and frequently overlooked part of witness preparation.



Simulating the courtroom environment provides an opportunity to inoculate witnesses against myriad factors that can cause anxiety, including seemingly insignificant details, such as the layout of the courtroom, which can significantly impact the quality of the testimony. Imagine if you were cast as the lead of a play but never saw the stage until opening night. Not knowing what the set looks like, size of the theater or audience capacity would, understandably, impact the quality of performance. Even seasoned actors would balk if asked to perform under such conditions, yet this is what lawyers frequently require of their witnesses.

While this comparison is not intended to suggest that testifying in court is like spouting out lines in a play, it is intended to convey the impact testifying in an unfamiliar environment can have. The physical courtroom layout can affect even the most basic aspects of the experience, such as the witness's ability to see and hear. In addition, a courtroom-like setting can help witnesses get acquainted with the feeling of testifying at a distance from the attorneys or the judge, and learn the ins and outs of interacting with trial demonstratives. The more witness preparation can reproduce and familiarize witnesses with these factors, the more witnesses feel in control at trial.

At the same time, one of the most important reasons to bring witnesses into a simulated courtroom setting is to make them *uncomfortable*. Witnesses who are prepared in an attorney's office eventually become acclimated to their surroundings. They may come to think that they and their attorneys have more control over the proceedings than they actually do. Indeed, this is one of the main dangers of using an office or conference room setting, where either party feels free to interrupt the flow of questioning to backtrack, clarify or regroup.

When plunged into the surroundings of the courtroom, the comfort level of the witness is dramatically reduced. The witness must get used to being in unfamiliar territory in the presence of unfamiliar people. This can initially provoke anxiety, but the benefits of duplicating the discomfort witnesses can experience in a courtroom before trial is immensely valuable in getting them ready for what lies ahead. Perhaps the most beneficial aspect of duplicating the courtroom atmosphere is to provide lawyers insight into what they can actually expect from their witness at trial, as well as a chance to address behavior that undermines credibility.

Upon entering the mock courtroom, a witness's responses range from somewhat to *extremely* different from what they were in the office. In this setting, witnesses tend to:

- Use more formal language, technical terms and “legalese”
- Be either more or less responsive to questions, answering tersely or providing too much information
- Engage in more “role playing”
- Exhibit fears of public speaking or speaking in front of an authority figure

We have observed dramatic changes in witnesses' demeanor during preparation sessions. For example, a likeable company president who cracked jokes in conference room sessions became deadly serious in our mock courtroom, and dropped much of the expressiveness from his conference room language. Moreover, he made statements that the trial team never heard in the conference room.



After repeated witness preparation sessions, it was apparent that the witness, who was a former FBI agent, believed he had to play a role in the courtroom, before the authority figure of a judge, that he did not play in the conference room. In the mock courtroom, he adopted a “just the facts, ma’am” demeanor, used rigid language and appeared defensive, all of which impeded his ability to tell his story or convey likeable or sympathetic characteristics. It was only by observing him closely as he transitioned between the two settings that we were able to make recommendations that allowed him to reinstate normal language back into his testimony – and eliminate the undesirable persona of “The FBI Agent” from his courtroom demeanor.

Witnesses often diminish their authenticity by assigning themselves such a character or role to play in the courtroom. Other roles we have seen emerge in the courtroom setting are “The Expert” who speaks with authority on every topic, and “the CEO” who feels responsible for overseeing every business transaction. But, because authenticity is the cornerstone to credibility, witnesses who embrace their

more relaxed, conference room personality on the stand, rather than role-playing, are generally more likeable and credible. Since it is only possible to eliminate such undesirable behavior if you know about it, duplicating at least some of the important aspects of the courtroom environment can be very helpful preparing your witness – and yourself.

### 10 Ways to Bring the Courtroom into the Conference Room

In many cases, gaining access to a mock courtroom is not feasible. There are, however, other ways you can reproduce important aspects of the courtroom. Below are ten suggestions to help you change your office environment to enable you get a better sense of how witnesses may react in court.

#### 1. *Vary settings*

After you have questioned your witness in one location for a few sessions and feel the witness is ready, change your environment to some other room or office to test how the witness will behave in territory that is unfamiliar.

#### 2. *Create distance*

Changing the distance between you and your witness can have almost as great an impact on testimony as changing the location. Some people have a dramatic response to changes in distance during questioning, dropping or raising their voices and experiencing significantly more or less anxiety depending on how far they are from other speakers and listeners.

#### 3. *Incorporate anticipated techniques*

Learn as much as possible about the personality, demeanor of the judge and opposing counsel. Does the judge like to interrupt and ask questions? Is he or she completely silent and hands-off throughout the trial? Is opposing counsel especially aggressive? Does he or she lure witnesses into saying too much by creating a false sense of security or allowing silence to hang? Remember, the more you and your witness know in advance, the better you both will be able to respond at trial.

#### 4. *Enlist others*

It is invariably a good idea to get your witness used to being questioned by someone other than yourself. Make sure to observe both desirable and undesirable changes in your witness in response to other questioners.

#### 5. *Alter language*

Witnesses tend to respond differently to different language styles. For example, a witness almost instinctively copies or “mirrors” the pace of the questioner. If the lawyer speaks quickly, the witness will speak quickly; if she is high-energy, he is high-energy; if she is calm, he is calm. Teach your witness techniques such as consciously slowing down, pausing, and asking for the question to be repeated to regain control of the line of questioning. It is helpful for witnesses to keep in mind that the lawyer cannot ask the next question until the current question is answered. Witnesses should know that they can control the courtroom and can usurp the power from opposing counsel by simply using silence.



6. *Include audience*

Whether your witness is being prepared for a bench or jury trial, he or she will be testifying in front of several people. Bring in a small audience of people to observe at a witness preparation session. Since it is a truism that people are more afraid of public speaking than of death, pay close attention to how the witness reacts when testifying in front of an audience and be ready to help with some stress-reduction tactics.

7. *Replicate courtroom*

Go to the courthouse in advance and note how the room is set up. Find out where the judge, the jury and opposing counsel will be located and duplicate as many of these conditions as possible to familiarize the witness with the layout of the courtroom.

8. *Do a dry run*

Question the witness for at least an hour at a time without interruption in order to assess how the witness reacts as he or she begins to tire, and how this impacts trial strategy. Do not take any breaks or allow yourself or your witness to backtrack or ask questions.

9. *Interact with visuals*

Effectively interacting with graphics takes practice. Make sure the witness is comfortable with demonstratives and is prepared to explain them when necessary. Exhibits are meant to help the witness teach the jury but are ineffective if the witness is unfamiliar or uneasy with the material. The witness should know exactly which demonstratives will be used, and when, in order to seamlessly interact with them.

10. *Positively reinforce & empower*

In the field of witness preparation, we are always thinking about how to construct new situations to put witnesses to the test. If you take the initiative to record, remember and reinforce the positive aspects of your witness's performance as you alternate between the conference room and the courtroom, you can help increase the confidence and comfort level that make for truly effective testimony.

## Conclusion

The physical setting where a witness is prepared can have a dramatic effect on the content and delivery of testimony. Though it is not always feasible to gain access to a mock courtroom for witness preparation, it is possible for a creative attorney or trial consultant to duplicate some important aspects of the courtroom in the office, and observe how this affects the witness. The more witnesses know what to expect on the day of trial, the better job they can do, and the more you know what to expect from your witnesses, the better job you can do when you your side makes the transition from the conference room to the actual courtroom.

### References

Futterman, R. (2008). Advanced Witness Preparation Using Psychological Techniques. In Solomon, S. H., Gallant, J., Esser, J. P. (Eds.). *The Science of Courtroom Litigation: Jury Research and Analytical Graphics*, New York: ALM Publishing.

Posey, Amy J., & Wrightsman, Lawrence S. (2005). *Trial Consulting*. New York: Oxford University Press.

Waites, R. D. (2003). *Courtroom Psychology and Trial Advocacy*. New York: ALM Publishing.

**Valerie Blum is a Trial Consultant in New York City. She applies her background as a lawyer, writer and designer to shape effective case narratives and visual strategies for her clients. Her focus is predominantly on civil and white collar criminal matters. You can contact her at [valerie.blum@gmail.com](mailto:valerie.blum@gmail.com).**

**Alexandra Rudolph is an experienced Trial Consultant with DOAR Litigation Consulting in New York City who has consulted on hundreds of cases across the USA and in the United Kingdom. Alexandra uses her insight into juror decision-making to develop winning trial strategies by increasing credibility of key witnesses and crafting a compelling case story. Her practice areas include: mock trials, jury selection, shadow juries and post-trial interviews although she specializes in witness preparation for experts, executives and lay witnesses. She is frequently invited to serve as faculty for CLE programs, speak at national conventions and is an active member of ASTC. Contact her at [arudolph@doar.com](mailto:arudolph@doar.com).**

Citation for this article: *The Jury Expert*, 2009, 21(4), 45-50.

# IF A CASE IS GOING TO SETTLE: A Guide to Negotiating in the Mediation Millennium

by Matthew McCusker

*“The fellow who says he’ll meet you halfway, usually thinks he is standing on the dividing line.”*

– Orlando Batista

## Introduction: Welcome to the Mediation Millennium

When young trial attorneys first enter law school, they arrive with dreams of being charismatic lawyers who stride into the courtroom and mesmerize jurors. These students have spent countless hours honing their skills through pre-pre-law tutorial programs like *Boston Legal*, *The Practice*, and *Ally McBeal*. Some want to be the altruistic plaintiff’s counsel who rights wrongs and helps the helpless. Others picture themselves as the silver-tongued defense attorney who can manipulate words like a surgeon uses a scalpel. Everyone has a dream.

These fascinating caricatures born from ‘must see TV’ always win and never compromise. Rarely does Hollywood venture into the land of boring negotiations over the phone or extensive preparation for a major arbitration. For some reason, the mediated settlement agreement has considerably less sex appeal than a hushed courtroom listening to a verdict being read: “We the jury, find in favor of . . . .”

As we all know, the truth is far from John Grisham’s latest novel. The ABA estimates that fewer than 2% of federal cases filed and less than 16% of state court cases filed are actually going to trial (Galanter, 2004). In fact, some estimates suggest a 1% to 2% trial rate overall (Gross & Syverud, 1996; Galanter, 1990). While a portion of these cases are dismissed, the actuality is that settlements are the chief outcome. This has not been a sudden change, but a steady decline in the proportion of jury verdicts over the past 40 years. Interestingly, the field of civil litigation has been surprisingly slow to react and to adjust tactics in the face of this new definition of victory.

People do not like change. People like predictability and doing things as they have always been done. Attorneys are no different. In 2009, most civil cases are very likely to end well before a trial date is ever set. Imagine a sport that has an 84% to 98% chance that every game would end at halftime. Would you coach your players as if the full game was likely to be played? Probably not.

Unfortunately, even though the practice of law has transformed and there is a new definition of winning, the old preparation methods remain the same. Attorneys’ tactics have not significantly altered with the arrival of the mediation millennium. This is a mistake. As the theory of evolution suggests, it is not the strongest that survives, but the one that is the most adaptable to change.

## What’s the point if the case will settle?

Why has there been so little change? Many practicing attorneys will say, ‘Why spend time, money, and energy if the case is going to settle?’ Those with this attitude tend to speak about a settlement amount like an agreement that has already been predetermined but has not yet been uncovered. This creates a vision of a stone on which has been carved a dollar value that will somehow be revealed on mediation day.

Settlements are not preordained; they are negotiated. This could be through mediation, arbitration or even simple conversations between attorneys. Much like a trial, the case with the strongest presentation will have the most negotiation power. As a result, effective presentations will translate into significantly more favorable settlement agreements. While it is true that there are upfront costs associated with the development of a strong case presentation, these costs are dwarfed by the potentially favorable movement in the final settlement amount.

This begs the question, how does one create a strong negotiation presentation? The answer is simple: preparation, preparation, preparation. By preparing the case as if the negotiation is as important as the trial, the attorney simultaneously increases negotiating power and completes vital groundwork in the unlikely event that a settlement is not reached.



### How do I prepare?

This may seem like a silly question, but it is a necessary one. Too often, attorneys view negotiation preparation as simply determining a realistic settlement amount and knowing the case well-enough to argue in favor of their proposed amount at negotiation. The presentation of the case is a vital component in securing the most favorable settlement possible. Preparations should begin far earlier than mediation and must encompass

many strategic aspects of the case.

### Witness Work

For some reason, it has become commonplace for witness preparation to begin after a trial date has been set. Deposition preparation often consists of a brief meeting, sometimes only moments before the deposition begins. As a result, there are two unfortunate outcomes:

1. Poor depositions hurt negotiating power by creating new problems within the case. At worst, a witness may give damaging testimony or disclose problematic facts that seriously impede a successful settlement agreement. At best, an unprepared witness may seem nervous and unconvincing. This can give the opposing counsel a sense of false confidence in the value of their case.
2. Even if the witness gives an adequate deposition, an opportunity has been lost. Well-prepared witnesses are intimidating to the other side and suggest both a strong case and skilled opposing counsel. As a result, settlement negotiations will likely be influenced when the other side meets to discuss relative case strengths.

### Case Strategy

Telling a powerful story is crucial to any negotiation. Not only must the story convince the mediator or arbitrator of the case's strength, but it must undermine the other side's rebuttals. Effective stories take time and effort. As Emerson said, "*Put the argument into a concrete shape, into an image, some hard phrase, round and solid as a ball, which they can see, and handle, and carry home with them, and the cause is half won.*"

Often, attorneys do not commit the necessary time to create an effective story until the case has moved to the trial phase. As a result, the negotiations are based on a simple exchange of random helpful facts and arguments that are thrown back and forth across a table. This does not present a cohesive story or a powerful case.

Instead, it is most effective to enter the negotiation with a powerful case strategy that will catch an opponent off-guard. While many attorneys worry about showing their hand at mediation, there is a greater than 84% chance that this may be the only opportunity to ever play the cards they have been dealt.

### Focus Groups and Mock Trials

A focus group or mock trial provides a test scenario that will help refine the storyline and determine what evidence is most powerful. It will also arm an attorney with data to bring to the negotiation. In the case of mediation, lawyers have the option of revealing focus group or mock trial results to the mediator alone, or showing the results to the other side. Assuming that the outcome was positive, a focus group can be helpful by casting doubt on an opponent's predictions of likely victory.

Additionally, a mock trial of substantial size can be helpful in understanding the potential value of your case. While there is no guarantee that the results of pre-trial research will mirror an actual jury verdict, it will still produce valuable information when analyzing case values. It may provide a picture as to what some of the dollar parameters are and what would be a fair settlement amount according to jurors in your jurisdiction.

### Video Presentations

A growing trend in the field of mediation preparation has been the use of professionally created video presentations. We live in a television age that has predisposed us to being moved by potent visuals accompanied by effective soundtracks. Whether it is 'day in the life' clips or choice statements from focus group participants, video is a powerful medium to use when making arguments on behalf of your client.



Often, these videos will be interlaced with strong PowerPoint presentations that create multi-modal performances. Imagine how the negotiation dynamic shifts when one side enters the room with a high-tech, polished, and well-organized demonstration of their case and the other side simply has a legal pad with several facts written on it. Of added benefit, videos demonstrate a commitment to the case that will often create alarm in opposing counsel.

### Day-of Negotiator

Negotiations can often be tension-filled environments. The culture of civil litigation has created a battlefield between those who typically represent plaintiffs and those who represent defendants. This pressure can sometimes create entrenchment before the sides ever meet to discuss a case. To avoid unnecessary road blocks, the use of a day-of negotiation consultant can add a valuable outside opinion to an attorney's decision-making process. These consultants are skilled in the art of negotiation and will not be swayed by questionable proclamations or perceived slights in presentations, offers, and counter-offers.

Day-of negotiation consultants can also help adjust client expectations without endangering the attorney-client bond. If clients are present at the mediation, emotions can run high and decision-making can be influenced. Due to a close personal relationship, an attorney may have some difficulty telling his or her client to

take an offer that seems like a significant compromise. A negotiation consultant can help to be both a neutral evaluator of the case and a tool for providing reality checks for the client.

### What if it doesn't settle?

If the case does not settle, the prepared attorney is ahead of the game. While opposing counsel is trying to schedule all of his or her groundwork in a much shorter time frame, the prepared attorney is refining strategy. While opposing counsel is attempting to fix poor depositions, the prepared attorney is focused on witness ordering for trial. While the opposing counsel is writing an opening statement, the prepared attorney is practicing his or her overall presentation. In essence, the prepared attorney has the time to truly develop a trial victory while opposing counsel is playing catch up and trying to develop a trial strategy.

Again, remember that trials are occurring in fewer than 16% of all filed cases. The odds are that a case will not move beyond mediation. It is far more likely that all of the hard work and preparation has resulted in a very beneficial settlement. However, if this has not occurred, the prepared attorney is poised for action.

### A financial cost-benefit analysis

The idea of spending such a large amount of time and money on a case prior to mediation will likely cause some lawyers to scoff. Upfront costs prior to the negotiation of a settlement are often viewed as wasted expenditures. Why prepare a witness that will never see trial? Why test opening statements in front of a focus group when they will never be utilized in front of a jury? The answers to these questions (and many more) require attorneys to perform honest evaluations of the costs and potential rewards of their cases.

For example, let us assume that an attorney does a little bit of everything that is suggested for preparation. This includes an exploratory focus group, a video presentation and some help with various aspects of witness preparation and negotiation. While much of this may be completed through the use of consultants, other portions could be performed by the lawyer. Let's assume that the total cost ends up in the neighborhood of \$40,000.

While \$40,000 is a large number, think of it in the context of a settlement negotiation. Would witness preparation, case strategy development, an exploratory focus group, a professional video presentation and the presence of a negotiation consultant move a \$300,000 settlement to \$350,000? Would it move a \$1.2 million settlement to \$1.1 million? The question is not how much money was wasted prior to mediation, but instead, how far the number has moved as a result of effective preparation.



### Conclusion

A recent review of 2,054 civil cases by Kiser, Asher, and McShane (2008) evaluated the decision-making of plaintiff and defense attorneys when choosing whether or not to take a settlement offer. The authors compared settlement offers during negotiations to eventual trial outcomes. The study corroborated what other research has demonstrated, that parties would often have been better off with the settlement than the trial verdict (Gross & Syverud, 1996; Gross & Syverud, 1991; Rachlinski, 1996; Priest & Klein, 1984; Priest, 1985). The research found that plaintiffs would have fared better when accepting the settlement offer in 61.2 percent of the cases and defendants would have gained more in 24.3 percent of the

cases. However, even though defendants made the correct decision more often, the magnitude in the dollar values of the defendants' errors dwarfed that of plaintiffs' errors. As a function of dollar amounts, both sides should have settled at even higher rates than we already see. This suggests that if attorneys notice the trends, the number of settlements will continue to increase while the number of trials will continue to decline.

Attorneys must adapt to this changing legal landscape. While jury trials will continue, they are no longer the norm and should not be considered likely. As a result, the strategies for representing clients must also change.

The realization that the game will likely end at halftime is a significant tactical advantage over opponents. Those attorneys who adapt and use their skills earlier rather than later will find themselves in stronger bargaining positions. Those who continue to view settlement negotiations as mere pit stops on the path to trials will find themselves facing opponents who are inches from winning the race.

**Matt McCusker [[Matt@SheldonSinrich.com](mailto:Matt@SheldonSinrich.com)] is a trial consultant based in Atlanta, Georgia. He does both civil and criminal cases and has worked in venues across the country. He specializes in negotiation, focus group research, jury selection and case strategy. You can read more about Mr. McCusker at his webpage [<http://www.SheldonSinrich.com>].**

### References

Emerson, R.W. *The Atlantic Monthly*, Volume 02, No. 11, September, 1858.

Galanter, M. (2004). *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*. American Bar Association.

Galanter, M. (1990). *The Civil Jury as a Regulator of the Litigation Process*. University of Chicago Legal Forum.

Gross, S. & Syverud, K. (1996). Don't try: Civil Jury Verdicts in a System Geared to Settlement. *UCLA Law Review*, 44, 1-64.

Gross, S. & Syverud, K. (1991). Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial. *Michigan Law Review*, 90, 319.

Kiser, R.L., Asher, M.A. & McShane, B.B. (2008). Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations. *Journal of Empirical Legal Studies*, 5, 3, 551-591.

Priest, G.L. & Klein, B. (1984). The Selection of Disputes for Litigation. *Journal of Legal Studies*, 13, 1.

Priest, G.L. (1985). Reexamining the Selection Hypothesis. *Journal of Legal Studies*, 14, 215.

Rachlinski, J. (1996). Gains, Losses and the Psychology of Litigation. *Southern California Law Review*, 70, 113.

Citation for this article: *The Jury Expert*, 2009, 21(4), 51-55.

# 13,450+

13,450. That's the number of reads our May issue of *The Jury Expert* had as of Monday, July 20 (the day before we published this issue). Our online debut issue (in May 2008) had a few more than 500 reads. Over the past year we have grown a lot and we are grateful to the thousands of you who read our pages every issue. And even more grateful (dizzily so!) when you pass us on to your friends and colleagues.

We are also grateful to the academics and researchers who write for us and turn theory into practice and especially grateful to the members of the American Society of Trial Consultants (ASTC) without whom we would not exist. ASTC member trial consultants continue to inform, educate and surprise us with creative and practical articles focused on improving litigation advocacy. So thanks to all of you and to paraphrase a young Sally Fields--"you like us, really like us".

This issue is filled with lessons for uncertain times. We have articles on terror management theory and how to use it at trial, two articles on damages in times of recession (does it make a difference in awards and if so, how?), getting the most out of videos at trial, exploring the TODDI defense (this other dude did it!), how to prepare your witness for the environment change from office to actual courtroom, and negotiating in the new millennium. Plus our July favorite thing and a book review. It's hot outside! Stay inside, enjoy the air conditioning and read *The Jury Expert*!

--- *Rita R. Handrich, Ph.D.*



*The Jury Expert* [ISSN: 1943-2208] is published  
bimonthly by the:

**American Society of Trial Consultants**

1941 Greenspring Drive  
Timonium, MD 21093  
Phone: (410) 560-7949  
Fax: (410) 560-2563  
<http://www.astcweb.org/>

*The Jury Expert* logo was designed in 2008 by:  
Vince Plunkett of *Persuasium Consulting*

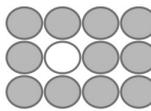
## Editors

Rita R. Handrich, PhD — Editor  
[rhandrich@keenetrial.com](mailto:rhandrich@keenetrial.com)

Kevin R. Bouilly, PhD — Associate Editor  
[krebouilly@persuasionstrategies.com](mailto:krbouilly@persuasionstrategies.com)

Ralph Mongeluzo, Esq.--Advertising Editor  
[ralph@expertvisuals.com](mailto:ralph@expertvisuals.com)

The publisher of *The Jury Expert* is not engaged in rendering legal, accounting, or other professional service. The accuracy of the content of articles included in *The Jury Expert* is the sole responsibility of the authors, not of the publication. The publisher makes no warranty regarding the accuracy, integrity, or continued validity of the facts, allegations or legal authorities contained in any public record documents provided herein.

**ASTC**   
AMERICAN SOCIETY OF TRIAL CONSULTANTS