



The Jury

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NOTE FROM THE EDITOR

WE HAVE SOME NEW and exciting developments here at The Jury Expert! [Brian Patterson](#) (who has been our Assistant Editor and an integral part of bringing us to you) has taken on some new tasks and redesigned our PDF version. Brian is very talented and the PDF of the entire issue and the separate articles has never looked so good! THANKS Brian! And thanks to Brian's firm, [Barnes & Roberts](#) for giving Brian the time to not only create the PDF version but to also keep our web version looking good AND spearheading the design of original artwork for The Jury Expert! Thanks to Brian—we've had some cosmetic surgery and we look fabulous!

This issue is packed with contributions from ASTC member trial consultants on practical issues as well as new research relevant to litigation advocacy. We had a few upcoming trials and professional obligations make a dent in our publishing calendar and ASTC members came to the rescue. We are particularly indebted to Stan Brodsky and his graduate students (Carolyn Titcombe and Jacklyn Nagle) for offering not one, but two articles on witnesses and your jurors.

This issue has three articles in total about witnesses (how they come across to observers and how to work on those perceptions to modify them for the better). We also bring you updates on neuro-law and the practice of hydro-fracking and accompanying juror concerns about the environment.

Finally, we have an article on how to use your iPad for trial exhibits. Rounding out the issue are not just one, but three favorite things shared by three consultants.

It's good to have the heat of summer receding and the promise of cooler winds in fall to look forward to as we prepare the next issue of 2012 for your perusal. As always, please let us know what you like and what you would like to see more of (as well as what you might prefer not to see!). Your feedback keeps us fresh and relevant.

[Rita R. Handrich, PhD](#)
Editor, [The Jury Expert](#)

On “Courtroom Attire: Ensuring Witness Attire Makes the Right Statement”:

This is a great article. Everyone who is anyone who is in court needs to take note of the “Do’s” and “Don’ts.” Fabulous.
- [Josh Jones](#)

On “Turning An Expert Witness Into a Great Witness”:

Lot’s of good, sound information. Great timing as I’m preparing for a multi-million class action case at this moment. On the subject of dress code. As a Manufactured Home defect litigation, installation, drainage and fraud EW I’ve found that different attorneys have different philosophies when it comes to dress so I will always ask them how they want me to appear.

As a contractor I’m told by some attorneys that they would prefer me to dress in Levis, a long sleeve blue denim collard shirt and work boots. The idea being that to the jury it would appear that I’m a down in the trenches, hands on kind of guy who really knows his stuff. Instead of a suede show snake oil salesman in a three piece suit just offering up a sales pitch.

Then there are those attorneys, like the one I just finished a case with, who insist that I look professional and wear a suit and tie. It doesn’t really matter to me as I have several pairs of Levis, long sleeved blue denim shirts and some pretty well worn work boots as well as some pretty nice suits, sports coats, slacks and dress shoes that don’t have a chance to make it out of my wardrobe very often hence look pretty nice when worn.

It’s really kind of amusing studying the different attitudes, psychology and

philosophy of the many attorneys I’ve worked for but I really don’t see how it impacts the jury one way or the other. Perhaps it some of the jurors are tradesmen or contractors I’d relate better to them. But then what if some of the jurors are business professionals or stay at home Moms? - [John DL Arendsen](#)

On “Why Attorneys Should Embrace Allowing Jurors to Ask Questions of Witnesses”:

Very informative article. Jury trials are thought to be a crap shoot because you never really know how they will perceive the evidence presented. On the other hand, my impression is that jurors generally work very hard and want to make the right decisions. Sometimes the evidence presented can be confusing especially when confounded with legal arguments and other technocalities. I really don’t see a downside to allowing jurors to ask questions.
- [Reena Sommer, Ph.D](#)

On “Subtle Contextual Influences on Racial Bias in the Courtroom”:

The point is the burden of proof. Yes, they may ask questions damaging to the State too. I recognize that, but we’re quite okay with convictions where the defense attorney is pretty incompetent and yet when the prosecutor forgets to ask a question it becomes about a quest for truth. Every player in this game has his/her own role. The jury decides based on the evidence presented to it. Why don’t we allow juries to go to crime scenes or read newspapers? Burden of proof—the State has it and the state alone must meet it. - [Diari](#)

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Thin Slices of Testimony

Thirty seconds of testimony will not tell you all you need to know

By Jacklyn E. Nagle and Stanley L. Brodsky

LAWYERING IS FULL OF MYTHS and superstitions¹¹, even more so than baseball in which many players do not change underwear during hitting streaks and refuse to step on chalk lines for fear of jinxing their teams. Some courtroom myths have elements of truth in them, and those elements make it especially hard to tease out the useful from the superstitious and frivolous. One of those persistent half-truths is that first impressions lay a foundation of thinking and believing that is, by nature, hardened-steel resistant to change, no matter what happens next. Moreover, such brief first impressions are often viewed as crystal balls, thought to forecast judgments accurately that would be otherwise reached with more consideration.

The large and robust psychological literature on brief first and other impressions uses the more precise term of thin slices (Allport, 1937; Ambady & Rosenthal, 1992; Funder, 1987; Gray, 2008; Kenny & Albright, 1987; Kruglanski, 1989; Swann, 1984). In this paper we look at the essential aspects of thin slice knowledge and discuss our research on effects of thin slices of expert testimony. Finally, we discuss what thin slices mean in the courtroom for understanding jury decision-making.

“Blink” (Gladwell, 2005) versus “Think” (LeGault, 2006)

The tendency to form quick impressions of the world around us is not up for debate (Gray, 2008). Nor is the usefulness of our reliance on cognitive shortcuts, or heuristics, to process information to save mental energy and manage a stimulating environment (Tversky & Kahneman, 1974; Kelman, Rottenstreich, & Tversky, 1996). There exists, however, a debate about whether humans are just as good at making “blink of an eye” (Gladwell, 2005) decisions as they are when relying on thoughtful, critical analyses (LeGault, 2006). In their provocative popular books, the authors of *Blink* and *Think* take opposing points of view on the issue, as emphasized in their respective title subheadings: “The Power of Thinking without Thinking” and “Why Crucial Decisions Can’t be made in the Blink of an Eye.” The root of the issue lies in the relative “value” (Gladwell, 2005, p. 17) in snapshot judgments compared to longer periods of exposure and rational analysis. LeGault (2006) espouses the superiority of critical thinking in decision-making outright but also acknowledges the prevalence of snapshot-like judgments in our modern society. LeGault challenged us to do more – to think more. As LeGault (2006)

stated, "...there is a direct connection between the way we think and the society we get" (p. 16).

Do Jurors Blink or Think During Expert Testimony?

From Gladwell's (2005) perspective, buttressed by decades of social psychological research (e.g., Tversky & Kahneman, 1974), expert testimony represents an ideal scenario for reliance on impression-based processing due to the complexity, novelty, and pressure of the situation. Conversely, given the importance of their duty as jurors and individual differences in effortful thinking, juror decision-making also may elicit cognitively complex and in-depth processing. Still, the likelihood is real that impression-based judgments arise when jurors evaluate experts' credibility and testimony (e.g., Bennett & Feldman, 2003; Fiske & Taylor, 1991; Pennington & Hastie, 2003). Take, for example, this illustrative scenario of a juror's thinking:

You have been sitting in an uncomfortable chair for four hours. You haven't been to your job in days. Instead, you've earned \$18 as "Juror Number Nine" in the state's case against a criminal defendant. By now you learned the facts of the case each side seeks to show. You've grown accustomed to the voices of the prosecutor, defense attorney, and the judge. Despite the tedious nature of the proceedings, you looked forward to today to hear "the expert." "Finally," you think, "I'll hear some hard facts, some real evidence that will help me make heads or tails of all this bantering back and forth." You soon discover you were wrong. Through 3 hours of "expert testimony," you find yourself lost in jargon, academic-speak, and drawn-out responses. You are sure you could reproduce the intricate design on the expert's shirt if asked, and, truth be told, the task would be less dull than listening to another minute of testimony. You think, "Get to the point. I zoned out after 30 seconds."

One question that trial consultants, experts, and lawyers face is whether 30 seconds of testimony is enough to make a meaningful impression. Of course, meaningful must be operationally

defined. For instance, does meaningful equate decision-making? This influence can, at times, be ambiguous in research and trial consultation. We turn to the thin-slice literature to define accuracy in impressions-based judgments, looking especially at research on how well thin slices predict judgments.

A thin slice is anywhere between 30 seconds and 5 minutes of exposure, based on thinly sliced time periods within this range (Ambady & Rosenthal, 1992). This includes brief judgments on topics such as deceptiveness, psychopathology, personality, relationship stability, and intentions (Ambady, Hallahan, & Rosenthal, 1995; Ambady & Rosenthal, 1992; Fowler, Lilienfeld, & Patrick, 2009; Funder & Colvin, 1988; Gray, 2008). In these and many other professional and social contexts thin slice impressions have shown to be accurate. Accuracy of thin slices can be defined a number of ways, most commonly either (1) the agreement between various raters of thin slice exposures, or (2) the agreement between thin slice judgments and those judgments based on longer, fuller exposures to the testimony (Ambady & Rosenthal, 1992; Gray, 2008; Kruglanski, 1989). These judgments have been tested by observing very thin slices (e.g., 30 seconds) to longer thin slice exposures (e.g., observing verbal interactions between a couple for 3 minutes to predict their likelihood of divorce). Overall, the research has supported the accuracy of thin slices in social contexts and interpersonal judgments (e.g., Ambady & Rosenthal, 1992).

Accuracy in thin slice judgments lies in its predictive utility, but not necessarily how it predicts decisional outcomes such as verdict. As Gladwell (2005) stated, the goal is to compare the effectiveness and relative usefulness of a "thin" versus "thick" slice of evaluation (p. 34).

Expert Witness Testimony

Impression formation is particularly relevant to understanding how jurors evaluate evidence, assess witness credibility, and determine verdicts; however, there is little research in this area upon which trial consultants and lawyers can draw. We wondered: Does just 30 seconds of exposure to an

expert (or a lawyer's opening remarks, a judge's instructions, etc.) yield the same impressions as would fuller exposures to that same stimulus? Jurors are charged with evaluating evidence for credibility and relative utility and are also encouraged to avoid any bias on their task. Bias can be explicit, such as pro-prosecution sentiments or racial discrimination, but it can also be implicit in decision-making processes. It is not our place to determine what is and is not biased decision-making of a juror. However, we can report that cognitive shortcuts are likely to yield biased decisions and erroneous decisions (Funder, 1987; Greene & Ellis, 2007; Kamin & Rachlinski, 1995).

You may wonder, "Why does it matter what 30 seconds of testimony means, since jurors will always hear all of the testimony?" We have two responses. The first answer is globally rooted in decades of research on how people think and process information: What we hear is not the same as what we encode, retain, and consider in our evaluations of others (Chaiken, 1980; Tversky & Kahneman, 1974). Take for instance, the juror's experience provided above. Then think back to the last time you sat through a 3 hour lecture and evaluate what you retained and how much central versus peripheral processing dominated your thinking style.

The second response draws on the nature of trial consultation and interpretations of evidence interpretations. In multimedia or in vivo simulations of expert testimony, or in lawyer arguments, consultants often show a brief excerpt, for example, five or ten minutes worth, of the stimuli^[1]. The justification goes like this. The mock jurors need to experience enough of the testimony to form an impression of it. Two assumptions underlie this practice: (1) impressions act as strong influences in decision-making, and (2) impressions are just as predictive as judgments based on a fuller experience. Given the influence of these assumptions on trial consultation practices, it is critical that they be tested and validated from an empirical standpoint. Suppose an attorney asks a trial consultant, for example, "Don't we need to show more than five minutes of testimony to get it right?" To answer this

question, we turn to research on jury decision-making.

In academic research, mock jurors are given little time – often 5 to 10 minutes – to view experimentally manipulated excerpts from testimony or opening/closing statements prior to making credibility or outcome decisions. The practicality of mock jury data collection in both academic and trial consultation contexts must be balanced with the relative usefulness or predictive utility of information obtained. So how do we draw the line? How short is too short of an exposure when it comes to uncovering accurate impressions of an expert's credibility, the relative weight of testimony, or the impact of a lawyer's opening statement? In our own investigation, we used a thin slice manipulation of expert testimony – the first empirical use of thin slice methodology in this context.

We included a manipulation of deliberation in our study, where half of the participants deliberated for a short period and half completed an unrelated group task. The case was adapted from *People v. Goldstein* (1999), in which a defendant pled Not Guilty by Reason of Insanity to Second Degree Murder. We created three testimony conditions delineated by the amount of exposure to a defense expert witness. Thus, 188 mock jurors (undergraduates at a large southern university) were randomly assigned to one of three testimony conditions: 30 seconds, 5 minutes, or 10 minutes. The 30 second and 5 minute window were the thinly sliced exposures to the expert. An experienced forensic psychologist was filmed. Each excerpt included the expert's opinion regarding the defendant's impaired mental state at the time of the offense. In addition, to balance factual information, all mock jurors were given a handout outlining the primary facts from both the prosecution and defense in the case.

What We Found

Mock jurors were asked to rate the expert's credibility, using Brodsky and colleagues (2010) four-facet Witness Credibility Scale, as well as the likelihood of awarding a NGRI verdict. Recall that participants exposed to the 30 second or 5 minute condition were forced to rely on this "thinly sliced" testimony in their judgments. We examined these impressions relative to "thicker sliced" experiences (the 10 minute condition), and to see if this comparison differed after deliberation. In other words, were thin versus thick impressions more in line with each other before or after deliberation, or not at all?

When jurors did not deliberate, thin slices were not fully predictive of the thicker slice. Credibility and verdict ratings were significantly different for the thinnest slice (compared to the fuller 10 minute slice), while five minutes of testimony was indeed equivalent to the longer condition.

When jurors deliberated, thin slices were not predictive of verdict of the thicker slice. However, after accounting for

deliberation, 30 seconds of exposure to the testimony was in fact enough to generate accurate credibility ratings. In other words, there were no meaningful differences in credibility judgments across all three time slice conditions when deliberation was considered. As noted, for verdict, deliberation made a difference in the pay-off of thin slice judgments. While 5 minutes of testimony yielded accurate verdicts pre- and post-deliberation, 30 seconds of testimony generated different verdicts pre- and post-deliberation. We came to these conclusions:

- Snapshot-like, very brief impressions of about 30 seconds do not hold much predictive utility due to their susceptibility to influence from deliberations.
- The longer of the thinly sliced impressions (5 minutes) emerged as a meaningful predictor in overall credibility ratings and verdict, even when compared to the thicker time slice and even after deliberations.
- The 5 minute impression provided predictive ratings of expert witness knowledge and confidence. However, expert trustworthiness and likeability continued to increase over time, which suggests that these may be more malleable and may change (increase or decrease) over longer exposures to testimony. Thus, 5 minute-impressions may not accurately account for ratings of trustworthiness and likeability.

Practical Applications

How thin can attorneys go without jeopardizing their payoffs? Just 30 seconds of testimony will likely not work in credibility and evidence interpretations, but 5 minutes might. However, it is not known at what point between 30 seconds and 5 minutes usefulness begins to take effect.

People are bad at introspecting and even worse at understanding why they make the decisions they do. As Gladwell (2005) emphasized, "There are times when we demand an explanation when an explanation really isn't possible," (p. 71) which he refers to as the "locked door" of our unconscious. As empiricists, we do not go that far. However, we acknowledge the quicker we make decisions (form impressions), the less likely we are to understand what led us to that judgment. Longer exposures to the stimuli may generate more useful data and malleable outcomes. Still, information obtained from only a thin slice of exposure (5 minutes) to testimony or lawyering can help, given jurors' likely reliance on these impressions.

Deliberation makes a difference for impressions' predictive utility: Had we not included a 30-second deliberation condition in our study, our results would have been different and, less informative. Our findings speak to the importance of considering group effects and the power of time exposure when relying on impression-based data to inform trial consultation (Salerno & Diamond, 2010). ●

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

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[i] See <http://legalcareers.about.com/od/practicetips/a/lawyermyths.htm>

[ii] See <http://keenetrial.com/blog/2012/03/16/feeling-good-about-yourself-allow-us-to-introduce-our-mock-jurors/> for one such example of a mock juror evaluation of a witness's testimony, provided with just six minutes of exposure in some cases.



Getting the Most Out of Your iPad in Litigation

By Morgan Smith

APPLE'S SLEEK TABLET has found its way into countless attorneys' homes. Perhaps it began as a gift and now sits on the coffee table as an email portal or a fun way to read the newspaper. Or, maybe it has fallen into the hands of the children as a means for playing Angry Birds. While attorneys use laptops and iPhones for work-related tasks, the iPad often remains underutilized at the office. But the iPad has numerous useful applications for the courtroom that set it apart from a computer or a smartphone.

The iPad is a perfect tool for displaying case information during trial. With new apps, easy touch-screen navigation, connectivity, and portability, the iPad can act as a remote control and quick editing device for your presentation. I'll describe some apps and connectivity options for turning your iPad into a powerful litigation tool.

Transferring Files

In order to use iPad apps for displaying slides and case documents, it's essential to understand how to transfer files from your computer to the device. The iPad doesn't function like a thumb drive—you can't plug it in and drag-and-drop files. The simplest way to load files is to use an online storage

site, like Dropbox.com. You can open an account and upload up to 1GB of files from your computer, then log in on the iPad and download them. Apple's iCloud is a similar online storage site that you can use to sync files to the iPad. Once you are comfortable with these methods of transferring files, you can start using presentation apps.

Slide Presentation

New apps make it possible to display and control a slide-based presentation using the iPad. Since the iPad isn't bulky and has an intuitive touchscreen, it's a perfect device for strolling around the courtroom while changing to the next slide that the jury sees projected on a screen. Whether you use PowerPoint or Keynote to assemble your presentation, there are apps that integrate the iPad with both programs.

PowerPoint is the most popular slide presentation program. Despite PowerPoint's wide use, it has some flaws to keep in mind; for example, its graphic creation is limited, and PowerPoint does not embed video well, so you often must keep track of video files in a separate folder.

If you use PowerPoint, the SlideShark app allows you to display your presentations on your iPad. The app does not

support hyperlinks on slides, embedded videos, animated GIFs, audio, or fancy slide transitions, and so it limits many of PowerPoint's features. But it does display simple slides and does a fade transition between them. To use the app, you open a free account with them online and upload your PowerPoint file to their server. It is then converted into a playable format that you can access within the iPad app.

[Keynote](#) is Apple's version of PowerPoint, and it integrates seamlessly with the iPad. It's easy to add media—just drag and drop photos and videos and format them within the program. Keynote embeds videos into the presentation and accepts any file format that QuickTime supports, including high-quality MP4 videos. Keynote has a range of drawing tools and tasteful background templates.

Once your presentation is complete, there are two iPad apps you can use to play the presentation.

[Keynote Remote](#) transforms your iPad into a simple remote control device. The presentation is stored and played through your Mac laptop, which is connected to the projector. Keynote Remote shows you the slide that is currently projected, plus the next slide in line, so that you can calibrate your images and discourse. To set up Keynote Remote, first make sure both the iPad and laptop are connected to the same Wi-Fi network. On the laptop, open your presentation in Keynote and choose "Preferences > Remote." On the iPad, start the Keynote Remote app, and you will see an option to "Link" to the laptop. Then, you are free to walk around the courtroom and wirelessly control the slideshow from the iPad's touchscreen.

If you want to eliminate the laptop completely, the [Keynote App](#) allows you to create a presentation on the iPad, and then project it directly. I find it a bit

difficult to create a presentation from scratch using this app, so I recommend loading a Keynote file that you made on the computer, then using the Keynote App for last-minute pre-trial edits. Either of these Keynote apps can transform the way you interact with your courtroom presentation.

Exhibit Presentation

These apps allow you to store of your exhibit documents on your iPad and display them to the jury as needed. Like Keynote Remote, these apps use a "Presenter View" that lets you see on your iPad what is currently being projected and what exhibit will follow. Over the last year, exhibit presentation iPad apps have improved their functionality, and can certainly handle a small trial.

[Exhibit A](#) (\$9.99) is lowest on the price spectrum. You can load case documents of up to 3MB onto the iPad via Wi-Fi, email, FTP, or iTunes, then create folders to organize them. A preview mode allows you to see the exhibit before displaying it to the jury. I would recommend this app for a smaller trial or mediation, because it has trouble handling large files.

[TrialPad](#) (\$89.99) is a more comprehensive program. It can display a range of file types, including MP4 videos. You can import an entire case folder through Dropbox.com, which speeds up the file transfer process. TrialPad allows you to highlight text and create document call-outs, so you can visually emphasize your point.

Another option is [TrialTouch](#) (\$69 per month), which allows you to upload files to their online server and access them on the iPad. This replaces Dropbox and provides a secure place for case-sensitive information. The presentation software handles the same file types as TrialPad and is easy to learn and use.

Display

The final piece of the puzzle is connecting the iPad to a courtroom projector. The simplest way is by hardware. [AV Adapters](#) (\$39.99 from Apple) are available from Apple in various formats that you can attach to any projector. Plug the cable into the projector, attach the adapter to the other end, and connect the adapter to the iPad. Any content displayed on the iPad will show up on the projector's screen. The "presentation mode" in some of the apps I discussed can sense the external connection and will only display the current slide on the projector. The disadvantage to hardwiring is that the cable physically tethers you to the laptop, limiting your strolling ability.

Connecting wirelessly is a bit more complex. The newest version of the iPad features AirPlay, which wirelessly links the iPad to an [AppleTV device](#) (\$99.99). The palm-sized AppleTV box hooks up to the projector with an HDMI cable, and then uses a Wi-Fi network to connect to your iPad. By using an [Apple Airport Express](#) (\$99.99) or other WiFi hotspot, you can create your own Wifi network, and connect to Apple TV and project Wirelessly. You must activate Air Play on the iPad to share your screen with the projectors.

In Conclusion

I recommend giving some of these apps and connectivity tips a try. See what works for you. Practice using the presentation apps and learn their functionality. Set up the projection display by yourself before you go to mediation or trial. Turn the equipment on and off, run through your presentation several times. Get comfortable with the technology. You just might find that the shiny tablet on your coffee table is your newest courtroom asset. ☺

Morgan Smith is the owner of [Cogent Legal](#), a litigation graphics and trial strategy firm based in the San Francisco Bay Area. A longtime trial attorney, Morgan excelled at complex litigation, class actions, personal injury and products liability before founding Cogent Legal. His [blog](#) is a member of the ASTC's Red Well blog aggregator.

The Witness the Jury Is Going to Hate

By Katherine James



The PHONE CALL I've had hundreds of times:

ME

(soothingly)

What do you see as the problem with the witness?

LAWYER

(groaning)

Everyone is going to hate him."

ME

(gently)

Why?

LAWYER

(desperately)

He has the worst demeanor - the most unattractive personality - of any human being I have ever met.

THE JURY IS GOING TO HATE THIS WITNESS."

ME

(calmly)

I have ways of fixing that.

LAWYER

(exploding)

Oh, come on - a leopard can't change his spots!

ME

(in my best Mother Teresa voice)

True...so let's find the personality in the witness that is a kitten rather than a leopard.

"The Old Salt" – Part One

Shortly after the phone call I've had hundreds of times I find myself shaking off the raindrops from my hair and casually walking to the elevator of a high-rise office building in a major American city. I press the "up" button. The doors swish open and I glide inside and press "25". As the doors are swishing closed a collapsed umbrella pokes its way through the almost closed elevator doors. It keeps coming and coming because it may be the longest umbrella in the history of umbrellas. This veritable jousting lance is aimed straight at me and I back all the way up and then manage to jump to one side before it literally hits the back wall of the elevator. It is followed by a gnarled and craggy fist grasping the ugly handle. The fist is accompanied by a mate that is grasping the elevator doors and prying them open. I try to push the "open door" button but the umbrella stands as a barrier between me and the side of the elevator with the buttons. The elevator alarm starts to ring. Suddenly the elevator is filled with a tall, gray skinned, scowling, hideous looking old man. He glares at me. The alarm goes silent as the doors swish closed and we start to climb. I say, "I tried to push the open door button, but –" I am silenced by the hate in his eyes and a growl. Silently we climb, climb, climb. He glares at me nonstop. I am convinced he is going to kill me before we reach the 25th floor. How could I have left Alan and the boys at home and ventured forth to this city in another state to work with a witness? I can see the headlines, "Mother Killed – Stabbed By Lunatic With Hideous Umbrella Point 17 Times!" When the doors swish open I begin to move. But instantly, like the descending arm at railroad crossing, the umbrella is down in front of me, barring me from the doors. He pushes his way past me so he can be first out the door. On his way out, he pushes the "close doors" button on the elevator and gleefully grunts as the doors close before I can leave. The elevator starts to move. I start to climb, climb, climb. I am shaking. I breathe many sighs of relief. Okay, so he's made me late for the appointment with one of my favorite lawyers for this witness preparation session. But he is gone and I am alive. ALIVE! The elevator reaches the top floor and I am so much better! I jauntily hit "25" and begin to go down, down, down. By the time I get to the 25th floor I am cool, calm and relaxed. I glide down the hall, open the door to the great lawyer's beautiful office. There, in the reception area, glaring at me, is the hideous lunatic from the elevator. Next to him is the wonderful lawyer smiling much too broadly and saying through clenched teeth, "Two minutes late! I told The Admiral that is so not like you." My eyes meet The Admiral's. His narrow. He scowls. He grunts. "Shall we go in?" says the lawyer with much bravado. I am terrified. "After you," I squeak.

Task: Finding The Winning Personality In This Witness

Introduction – Multiple Personalities

Each of us has multiple personalities. I'm not talking Sybil, The Three Faces of Eve or United States of Tara. Those people had what is called "Multiple Personality Disorder". This is a form of mental illness where people can't control and aren't necessarily aware that they turn into different people.

We are, each of us, aware to a certain extent of the different personalities we have and use either consciously or unconsciously. Each of us has a number of personalities. We bring them out and use them depending on:

- the situation we find ourselves in;
- the person we are with; and
- what we want from that person.

Each of our personalities is made up of very specific sets of behaviors. These behaviors are what tell other people which personality we are using at any given point in time.

You may say at this point, "No way. I am always the same. What you see is what you get with me! You are an actor, and so you think that everyone plays different characters. I don't want my witness ACTING – I want my witness to be REAL."

True, I am an actor. And good actors are able to play and seem to disappear into many different characters. Why? We first find what we have in common with any given character we are playing – where their personalities intersect ours – and build from there.

You might not do this for the stage or screen...but you do this in real life all the time and are simply not aware of it. Or if you are aware to some extent, you might not be aware of how many different personalities you actually have and draw on during any given twenty-four hour period.

I'll give you four sets of behaviors that I know that I have exhibited that others would interpret as four of my personalities all within one twenty-four hour period. They are dependant on the situation I am in, the person I am with, and what I want. You might recognize yourself in at least one if not all of these sets of behaviors:

1. ...kind and gentle with a small child who wants me to read a book we both love.
2. ...insistent and brusque with the hotel clerk who just informed me that I have to switch rooms for the third time tonight because of the lack of hot water (this time) on the 11th floor.
3. ...friendly and open with a potential client who will or will not hire me after this meeting.
4. ...cautious and protected with the homeless drunk who just asked me for money for a cup of coffee.

Here are names for those four different personalities exhibited by those four sets of behaviors:

- Kind and gentle nurturer.
- Pain in the butt consumer.
- Great future collaborator.
- Arrogant rich person.

Where did I get these names? From the individuals who are on the "receiving" end of them. Those people are the ones who get to say just who I am – what my personality is. Those people in the individual situations would be:

1. The small child.
2. The hotel clerk.
3. The potential client.
4. The homeless person.

Let's add in what I want which causes me to don that particular personality:

1. Love.
2. Revenge.
3. A job.
4. To be left the hell alone.

Let's chart the four of me I've just introduced to you:
Take a look at the fourth column again entitled "Personality Name".

Personality Number	Situation I'm In	Person I'm With	What I Want	Personality Name
(1)	Family Gathering	My Nephew	Love	Kind & Gentle Nurturer
(2)	12th Day on the Road	Hotel Clerk	Revenge	Pain in the Butt Consumer
(3)	Meet & Greet	Potential Client	Job	Great Future Collaborator
(4)	Dark Sidewalk Walking Alone	Homeless Person	To Be Left the Hell Alone	Arrogant Rich Person

If I am your witness, and when you meet me I act like "2" or "4" in the above chart, your instinct as an attorney is going to say to you, "The jury is going to hate this witness." You are not even aware of the "1" or the "3" in the chart who might be exactly who I need to be on the witness stand or in the video taped deposition.

It is up to you to find "1" or "3" in me. Then it is your job to get the "1" or "3" to serve as the personality of mine that I use for the deposition, hearing or trial.

How do you get the witness to acknowledge that the personality they are currently using as a witness is "impossible"? How do you find the "right positive" personality in the repertory company of personalities in your "impossible" witness? Then, once you've found it, how do you get the witness to accept that personality as the one to be used for the upcoming legal event? And once they've accepted it, how do you get them to use it and not revert to "impossible" behavior?

"The Old Salt" – Part Two

The Admiral plops down. The wonderful lawyer faces him. I ask The Admiral, "Do you have any questions or concerns about having your deposition taken?" (see "The First Question" Appendix __, page __) The Admiral is silent as stone. The wonderful lawyer says, "She's talking to you, Admiral." The Admiral snarls, "Well, I'm not talking to her."

Okay. "Buckle your seatbelts," I hear Bette Davis say in the film All About Eve, "It's going to be a bumpy ride." I decide to move immediately into Rehearsal and Role Playing (see "Rehearsal and Role Playing" Appendix __, page __) I say, "Let's try it, then." I

ask the lawyer, "Are you ready to play The Deponator and ask The Admiral some questions?"

I turn on my camera to record our session. It rolls as the wonderful lawyer asks a few really basic questions like "What is your name?" and "When did you join The Navy?" The Admiral snarls and growls his way through the answers. He gets all the answers right, and the content is pretty good, but he looks like a dragon. About the sixth question, the wonderful lawyer playing The Deponator is following up with the information that he has just gotten from The Admiral. It seems that The Admiral is in The Nuclear Navy and his command is a Nuclear Submarine. He has, in fact, been in The Nuclear Navy since the early days of the 1950's. The wonderful lawyer playing The Deponator asks, "What were some of the scientific discoveries you made in those early years?" The Admiral looks at him and smiles – kind of like the smile a shark in a cartoon wears when looking at a surfer – and says, "I could tell you, but then I'd have to kill you."

The wonderful lawyer, sits slack jawed. I say, "Cut! Okay. Let's look at this and talk about it, shall we?" As I rewind the tape, the wonderful lawyer, shaken, says to The Admiral, "Are you serious?" The Admiral shoots back, "Of course I'm serious. As far as I'm concerned it's all classified information. No one has personally told me other wise." Silence. The tape is whirring backwards. I'm thinking, "So much for the articles from such well known publications as Time Magazine from ten years ago and all that Navy Research from way back when that backs up our case. The Admiral is supposed to be our expert who gets it in. How am I going to pull this one off?"

Usually when I play back a recording for the lawyer and witness

and me to watch it is kind of a stop start. We play back a bit, talk about it, play back some more until we've gone through the whole segment of tape (see "Playing Back In Rehearsal" Appendix __, page __). This time I just play it through in complete silence. The Admiral watches himself. The wonderful lawyer watches in shock and disbelief. I watch, not daring to have my eyes anywhere but on the screen lest I end up the target of more wrath.

The tape ends. More silence. I'm afraid to speak, the wonderful lawyer is in despair, and The Admiral has not changed his facial expression, position in the chair nor uttered a word.

An eternity passes.

The Admiral looks at me, eyes as cold as steel. "I look and sound like a gargoyle," he snarls. "What are we going to do?"

"The Tasks – First, You Gotta Find The Personality"

These are the tasks you must complete:

- get the witness to recognize and acknowledge that the current personality that is being manifested is "impossible".
- find the "right positive" personality in the repertory company of personalities in the witness.
- get the witness to accept the "right positive" personality as the one to be used for the upcoming legal event.

The tasks almost always appear in this order. For the first task, get the witness to recognize and acknowledge that the current personality that is being manifested is "impossible", I almost always find, as in the case of "The Old Salt", that capturing the session on camera and playing it back does wonders.

Why?

Quite simply: the camera is an absolutely hideous medium because it shows the viewer the exact truth. In the legal profession this is still called "video" (as in "Do you use video, Katherine?") Whether the image of the witness in a witness preparation session is captured on an "old fashioned" video tape system, a digital system or whatever medium is created through the brilliance of new technology the result will always be the same: stark terrifying reality. When I am occasionally accidentally captured on camera during a witness preparation session and that moving image is played back I am simply appalled at the number of chins I have and how bad my hair and breasts look. My husband, who makes a good living as a film and television actor has to see any movie he is in at least two times. That is because the first time he faces his image on a theater sized movie screen he mutters over and over again, "That's not a nose. That is a seven foot monstrosity on the front of a ridiculously ugly face!"

In my experience, most witnesses recognize "the problem" right away. I often say before we first play back a recording "Now...I don't want you to be shocked by what you are about to see. I swear, this girl doesn't even look like you. I mean – well – you tell me what you see." Some are shocked. Some are horrified. Many laugh uproariously. All make verbal comments that back up exactly what concerns the trial consultant and the lawyer have. Here are some of my favorites in addition to The Admiral's line "I look and sound like a gargoyle."

- "I sound like a whining victim. Ugh."
- "Look at me – I'm acting like a robot. Someone tell R2D2 I'm after his job."
- "My ex-wife is right! When I talk about something I'm passionate about I look like I'm furious – even when I'm not mad..."
- "Do I really sound that stupid all the time?"
- "I thought at first this was a tape of my mother. Uh-oh. That can't be good."
- "Turn it off! I'm scaring the hell out of me!"
- "Hahahaha – I'll be right back – I'm going to wet my pants – hahahahahahaha...."

Self recognition comes in many forms. They laugh, they are crestfallen, they are horrified. You name it, I'll bet I've seen it.

But they pretty much all at this point are able to recognize that something needs to be done.

The next task, find the "right positive" personality in the repertory company of personalities in the witness, often begins right here. Guard down, speaking freely, the witness manifests quite a different personality from the toxic one reflected on the small screen of the depo preparation room. It may very well be the "right positive" personality that you want on the witness stand. Or it may be the first one on the pathway to the "right positive" one.

This is talking time. That is, time for the witness to talk and you to listen. You need to ask questions that invite better personalities to come out so that you can weigh them.

Here's the non-intuitive part for many attorneys. You are not necessarily going to be having a discussion about the case. You may find yourself saying to yourself, "I sound like a shrink or something." Fine. What is important is that you are seeking out a personality that lies in your witness. The "right positive" personality that you want this witness to manifest in the legal setting ahead.

Here are some "ways in" that I use:

- For an "older" man - "Do you have grandchildren?" The face lights up, the pictures come out, and there is a softness, openness and tenderness that follows.
- For an angry young man – "Are you scared about all this?" I often find that the other side of anger is a lot of sadness. A young inventor whose patent and future have been stolen away can be just as close to tears as a young man whose baby was brain damaged by a doctor.
- For an abrasive, nagging woman – "Why do you suppose people say you act like a nag?" You find the fearful story of a life led trying to make sure nothing bad ever happened to anyone she loved...and now here we are in this lawsuit.
- For a person who looks and acts guarded and guilty, even though you know that they did nothing wrong – "What are you feeling guilty about? Because it sure isn't this! You did nothing wrong here!" You get a soft dissolve into a person who is sad and open and is willing to say, "I can't help feeling I should have stopped it –

even though I know I couldn't! Isn't that crazy?"

And listen. Listen, listen, listen. Let their stories pour out and watch and listen and be aware of the personality that is manifesting itself. Keep asking yourself, "Is this the one? Is this the one?"

It's a little tricky – you have to keep totally committed and hooked into the witness. But you also need to be completely aware of the repertory company that unfolds in front of you as they tell you the story of their lives.

"The Old Salt" – Part Three

I ask my first "right positive personality" finding question for "older" men: "Do you have grandchildren?" I ask. "God, no!" he snarls. "No wives, no ex-wives, no children, no grandchildren." "Ah," I reply in as neutral a way as I can. "I have no friends, no parents, and no siblings. No neighbors I can stand. And every one in my command has always been an idiot. In case you thought you'd ask," he said coldly. My client chimes in, "But you have a lawyer who loves you." "God, David!" sighs The Admiral. "My gorge is rising."

Okay. So people were out. As were hobbies ("Do I look like someone who spends time gluing things together?") pets ("I first became intrigued with the sea as a boy when I discovered kittens don't float."), places ("You've seen one seventh wonder of the world, you've seen them all."), times of life ("My childhood? A nightmare. Hated adolescence. Early days in The Navy – please! Being a commissioned Admiral was the second best time of my life. As a retired Admiral they leave you alone completely. Perfection."

Wearily, shell shocked, almost unable to think clearly enough to articulate, I say, "So you're retired." It isn't a question, and he clearly is not going to lower himself to respond to a statement. Especially not one that I make. Grasping at anything he said from his last tirade, I ask, "Where do you live now that you are retired?" I immediately think, "That was so lame." He pauses and looks at me as if he is about to answer the lamest question anyone has ever asked. "Omaha," he says hollowly. "My," I say. "Omaha is pretty land locked isn't it? I mean – I would think that someone would retire from The Navy and live somewhere near the ocean."

The silence is deafening. I don't dare close my eyes – what if he hits me with the umbrella? Or maybe he has a gun! I don't take my eyes off of him. At least – I think it is he. This fellow looks like him. But he's looking back at me. His face is softening. His eyes are getting bright. The edges are crinkling into little attractive wrinkle lines. He is...GOD BE PRAISED!...smiling! He leans forward, his presence suddenly an inviting bonfire on the shore of the impossibly cold ice pond we've been skating on together for hours. Is he opening his smiling mouth? Is he speaking to me? Is that his voice? He sounds warm and jolly...and human! "When an Old Salt retires, he ties an anchor around his ankle and throws it as far inland as he can – and wherever that anchor lands is home. And my anchor landed in Omaha." "That's it!" I scream. "What's it," he says...starting to look and sound like The Admiral again. "The Old Salt! That's the guy you have to be in this case!" I crow. "How are we going to pull that off?" asks David. "I like The Old Salt – but how do we get him on the stand? How do we get

The Admiral to be The Old Salt and not The Admiral?"

"The Tasks – Making It Stick"

The question David asks is the final and most important part of the process:

- get the witness to use the "right positive" personality and not revert to "impossible" behavior in the deposition, trial, hearing, or ADR setting.

In my experience, this is done best in this fashion:

1. turn on the camera
2. talk
3. role play for 10 minutes
4. play back and discuss during playback.

You might have noticed that there is a new step that has been added here:

2. talk

What do I mean, "talk"? This works best when I have turned on the camera and the witness and lawyer are unaware that the camera is "rolling" or "on". We talk about something light that is in the expertise of the life experience of the witness. By this I mean something that you know this witness knows everything about from life experience. After finding that "right positive" personality you should have a few topics. Remember – nothing is "off topic". The topic of this "talk" will probably have absolutely nothing to do with the content of the case and testimony.

I have had witnesses "talk" for a few unaware moments about literally hundreds of topics. A few have included:

- how to make babies laugh or sleep
- why living in this city is better than or worse than living in my city (I can never leave Los Angeles – way too many people I help prepare have way too many opinions about it)
- the worst or best parenting moment ever experienced
- the most humiliating or rewarding moment during "the" game in a team sport
- the funniest thing a grandmother ever said
- why riding horses is less dangerous than riding motorcycles
- how to deep fry a turkey
- why gun control is impossible or ridiculous or is good for Europe but not here or needs to happen now
- why Paris or London is the better place to spend a free month
- how living on the street can sometimes be better than living in a house
- how the "unconditional" love of a dog is superior to or inferior to the "picky" love of a cat
- why becoming a vegan is an impossible life choice (I am a vegan and remain amazed at how many people

want to confess to me in a heartfelt way why they are not.)

After a minimum of thirty seconds (usually not longer than a minute) I say to the attorney, “Ready when you are, counselor.” Usually the attorney says, “Oh, are you ready? Is the camera on?” I say, “Yep.” Then comes the 10 minutes of role playing. Then we play it all back and talk about it – “talk” as well as “role playing”. The most important thing we will be discussing – sometimes the only thing we will be discussing in this playback session is the “right positive” personality.

It is amazing how a witness will go from being “great” while doing the “talk” part of the session to “the witness the jury is going to hate” during the role playing part of the tape. That is okay! This is the time to recognize it and to discuss what just happened.

The first comment I usually get is from either witness or attorney, and it is about the “talk” portion. “That wasn’t fair – we didn’t know the camera was rolling.” I get to say, “Exactly! That’s the point – when you are ‘off camera’ you are so much better. That’s the guy/gal we want! Can you see that?” Of course they can see that.

Now, we thoroughly examine the “transformation” from the great witness during the “talk” section to the “not so great” witness during the role-playing. You can literally see it. The camera doesn’t lie. You can find all kinds of physical manifestations:

- Eyes with light and joy become cold
- Smile disappears, blank face appears
- Go from leaning forward and eager to leaning back and guarded
- Voice changes from warm to chilly
- Vocal tone goes from varied to one note
- Language choices go from casual and conversational to formal and presentational
- Interaction with others goes from open and inviting to cut off

Here’s where things get a little sticky for me nine times out of ten. It is not just the witness who has changed personalities from the “talk” to the “role-play”. It is the attorney. Of course, the attorney isn’t being captured by the camera – so all you have to go by is the sound of the voice and the memory of what just happened in the room. Take a look at the list I have given above for how the witness has changed. The attorneys change, too. In addition to the above list they can manifest:

- legalspeak (“Please state and spell your name for the record.”)
- no longer looking witness in the eye while asking questions
- looking at “next” question on legal pad while witness is answering
- major personality shift (from warm to cold, from real to fake, from nurturing to punishing, etc.)
- control freak direct exam questions (“When I ask you

that question I want you to say, _____”)

In my experience, the witness changes IN RESPONSE to the change that is manifested in the attorney. Again and again and again.

Some attorneys are wise enough to recognize their own change, how it affects the witness and cop to it right away. They say things like, “Wow – of course you changed, Ralph. So did I. Jeez – I was ridiculous wasn’t I? I promise I’ll do my best not to change if you’ll do the same, okay?”

Some attorneys are wise enough to recognize it and make defensive excuses for it. “I was imitating opposing counsel. After all, Ralph is going to be taken as an adverse witness and this is how I expect opposing counsel to act. I’m telling you, Ralph – you have to do what Katherine says and not change no matter how opposing counsel acts. Like I was just acting. On purpose. To help you. I won’t act that way when I’m me actually asking you my questions.” Yeah. Right. Whatever.

And, of course, there are those who are quick to recognize the speck in the witness’ eye, but are oblivious to the log in their own. Denial ain’t just a river in Egypt. That’s okay. I can work with that. After all, the witness has to stay in the “right positive” personality no matter what attorney is asking the questions. I point this out with all kinds of praise for the attorney in front of the witness – after all, part of my job is to build trust between witness and lawyer. I say things like, “Wasn’t that great how your lawyer turned into what he thinks opposing counsel is going act like? Very impressive. Now lets work on how you don’t let his change in personality affect you and make you change yours.” Much of the time a gleam of recognition flickers in the eyes of the attorney.

But some attorneys just don’t get it during the immediate role-playing and feedback segment of the session. However, during a break if such an attorney asks me, “Hey, Katherine – I know you train lawyers as well as witnesses. Got any advice for me?” I will break the news gently but firmly. “Stay yourself. Otherwise, the witness is going to change personalities from the one we want to the one you saw when you changed.”

And then there are those...who just never get it. But if they are reading these words – maybe they do now.

After the discussion about the “transformation” from “talk” to “testifying” in this first playback session, the next step is to closely look for where the witness goes back to the “right positive” personality. If ever. It happens in all kinds of places, not just in the actually role-play testimony. It often comes “in between” words. Kind of like how in the Midwest where I grew up there is no Prairie – it is all highly cultivated farm land mile after mile after mile. But – if you look in the ditches at the side of the road, there you see the wild and beautiful splendor untamed. Look for those “prairie” moments of “right positive” personality in what you’ve captured on tape here:

- when the witness says the names of that witness’ children.
- when the witness has to think for a moment about the answer to a question, and actually goes back in time and remembers and is “good” for a split second

- when the witness screws up the answer, laughs, and goes “off record” for a moment and makes a comment like “whoooooops!”
- when I say, “Let’s stop there and play it back and talk about it” but I keep the camera rolling as the witness breathes and relaxes and smiles and says, “How bad was that?”

In this first session we may or may not deal with the content of the case at all. Ten minutes of tape that is played back looking intently looking at physical and vocal manifestations of when a witness is “in the Prairie” and “out of the Prairie” as far as “right positive” personality is concerned can be vital to establishing a baseline of how to hold onto that personality for all of the testimony.

Next, we repeat the process of roll camera, role-play, play back and discuss. We do this again and again. For how long? For as long as it takes to have the “right positive” personality testify no matter what the content, no matter what the personality of the attorney – no matter what. Until you no longer have to say, “There! That’s you! There you are! See that?” over and over again. Why? Because now the person is only testifying as the “right positive” personality.

Yeah, but – how long is that? Seriously, Katherine, how long does that take? Sometimes it happens immediately. Sometimes this process takes a matter of hours in the session at hand. Sometimes it is a matter of another half-day or day-long session with time between for the lessons to sink into the mind of the witness. Sometimes several. When I say “as long as it takes” I mean “as long as it takes”.

“The Old Salt” – Part Four

“Wait-that wasn’t me as The Old Salt! I was The Admiral again! God DAMN it!” says the Admiral yet again as we look at yet another ten minutes of role-playing on the small screen in front of us. But he is learning. He is determined. He is competitive. And we have only been at it for about a half an hour. “I’m screwing up,” he says to me looking just about as vulnerable as I think he may be capable of looking. “Hey, it’s only testimony – it’s only about three billion dollars on the line. It’s not like it’s life and death,” I joke.

He looks at me hard and I want to slap myself. Just when things are going so well, why do I say stupid things like that? “Why do you remind me of things I’d rather forget?” he says. “Like what?” I say before I can stop myself. He sighs. “We were fathoms and fathoms below. Young seaman has a heart attack. Just a young kid – but with a bad ticker. I tell the men I am going to call for us to surface – in jig time. Of course, we can’t surface in jig time at that point – I mean, we can – but if we do, all this seawater is going to come rushing in and ruin all the surfaces of everything with salt – I mean this submarine cost millions of dollars and getting that kid to the top was going to ruin it. You know?” I clearly don’t have a clue of what he is talking about – I want to ask, “But if water comes into a submarine won’t everyone drown?” but I don’t since I think it might be a stupid question at that moment. The attorney says in horror, “Of course!” Whew. So glad I kept my mouth shut. The Admiral’s voice fills with wonder. “Don’t worry, Sir!” say my men. They know. I ruin that submarine, I lose my commission, I am done in The Navy. But that kid – he’s fading fast and they keep saying, ‘Don’t worry, Sir!’ and I give the command and we surface in jig time. All that salt from the water is on everything. Everything. In jig time we are in port. I get in the ambulance with the kid thinking it is my last act as an Admiral. I sit with him. I’m there through the surgery, through his waking up – through his family coming in and my getting to tell them, ‘He’s safe! He’s alive!’ I knew it was worth it. That the price was all worth it for that kid’s life. It had been hours. Hours and hours. I get back to the port. I board the sub. Every inch was clean. How they did it I’ll never know. They scrubbed every bit of salt off of it. Stayed up all night to do it. You’d never have known.” He gets misty eyed. “I told you every one who had ever been in my command has been an idiot.” We are silent for a moment. The attorney and I are both humbled by the love he has shown for the men he has commanded and the loyalty they have shown him in return. “If we need that story as part of your testimony when we get to trial, will you tell it?” I ask softly. He looks at me, and then at the attorney. “If David needs me to, I will,” he says as The Old Salt. I smile. Mission accomplished. ©

Note: This is an excerpt from an as yet untitled work by Katherine James

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

AppAdvice, KeyRing, and Gallup News

By Steven E. Perkel, Edward P. Schwartz, and Susan Macpherson

THIS ISSUE WE HAVE THREE Favorite Things submitted by three different trial consultants. Two are apps (both free) and one is a means of monitoring the issues that divide us (also free). We hope you will visit these Favorite Things and take a look at our past Favorites as well.



AppAdvice

I really like the following website and guides for iPad apps: Appadvice.com. The site provides daily updates on apps that have gone free, has useful news stories and the Appstart section reviews the editors best selections for a variety of content areas.

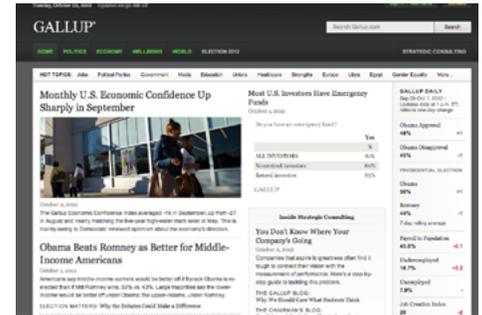
Submitted by Steven E. Perkel, DSW, LCSW, the Senior Litigation Consultant at Archer & Greiner PC.



KeyRing App

I love my KeyRing App. No more little tags weighing down my keys or club cards bulking up my wallet.

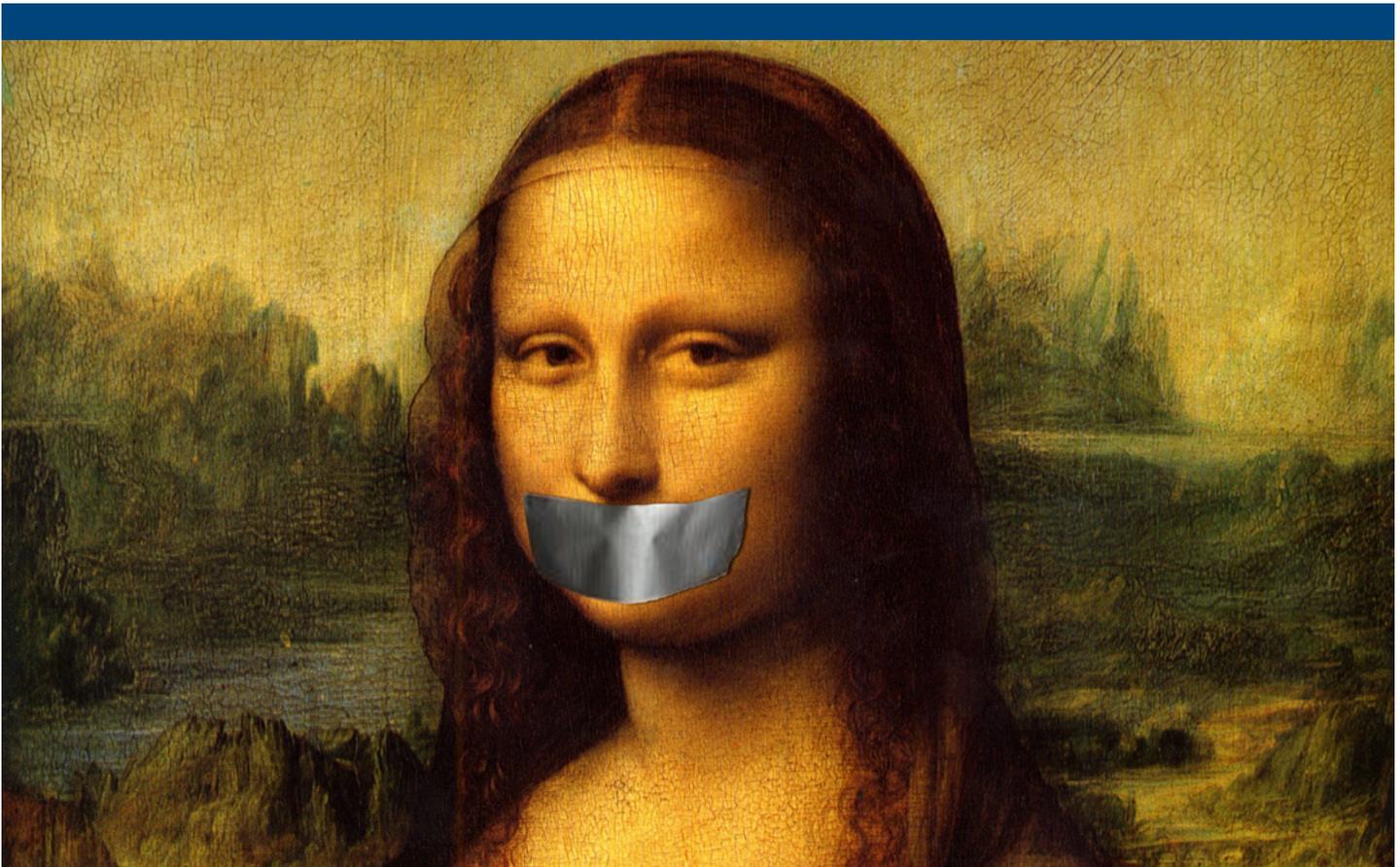
Submitted by Edward P. Schwartz, Jury Consultant at TrialGraphix.



Gallup News

I rely on Gallup News to keep me grounded in public opinion on a variety of issues that go well beyond the current political horse race. For example, I am working on some cases where attitudes toward government regulation is a critical component, and in today's email I find a current snap shot of same. They send out "data bites" in one or two sentences and a link to their site if you want the details. No subscription needed. Even when I don't have an immediate need for a particular "data bite," knowing there is a recent survey out there saves me time when I do need it. Some days I find these snap shots to be a source of encouragement about the state of popular opinion, others days not so much, but it is always good to keep an eye on the issues that divide us and the depth of that division.

Submitted by Susan Macpherson, Senior Litigation Consultant at NJPLitigationConsulting/Midwest.



Good Witnesses Don't Smile (Much)

By Jacklyn E. Nagle and Stanley L. Brodsky

IT IS NATURAL AND EASY to smile; even cavemen and cavewomen did it. People of all ages and cultures smile as a natural response when expressing emotion and even very young babies respond positively to smiles. Although smiles are most frequently associated with positive emotions like happiness, they are sometimes used for other feelings (Ekman & Friesen, 1969). For instance, some people have nervous smiles, embarrassed smiles, polite smiles, or even devious smiles. Think of the Cheshire cat's smile in *Alice and Wonderland* or the toothy, terrifying, yet occasionally contagious, smiling of Jack Torrance in *The Shining* (Hess, 2010).

Smiles Aren't All Happiness

But not all smiles are readily interpretable. While some smiles reflect genuine happiness and pleasure, other smiles are posed – much like the simulation of pleasure one is directed to produce for photographs. People may use the explicit association between smiling and happiness to mask their feelings of nervousness, embarrassment, or even deviousness (Ekman, Friesen, & Davidson, 1990). Think of a time you have been embarrassed: your heart is beating fast, your face is warming

up... but then you smile to let any onlooker know that you are okay. By flashing a grin, you display a positive facial expression in order to conceal the negative emotions beneath the surface (Ekman, Friesen, & O'Sullivan, 1988).

Separate ... and Unequal Smiles

Smiles are not created equally. How can one tell when a smile is genuine or fake? Genuine smiles and fake smiles have been attributed to different parts of the brain, which control different muscle movements displaying these smiles (Ekman, 1993; Ekman, Roper, & Hager, 1980). Although we cannot observe the different brain processes to detect genuine or fake smiles, we can look at a person's face and make judgments on the authenticity of a smile. Many of us can recognize when a best friend is faking a smile. It is less certain when a stranger – say, a waiter at a restaurant – is faking a smile.

Genuine smiles are expressed automatically during conscious and unconscious feelings of happiness or other positive emotions. One way to spot a fake smile is by looking at the eyes. Eye muscle movements allow us to distinguish between genuine and fake smiles. With a genuine smile, the muscles

surrounding the eye tense up, the eyelids flatten, and the skin wrinkles up to make “crow’s feet” at the corners of the eyes. The crow’s feet wrinkles are created by the outer pars lateralis section of the obicularis oculi muscle, movements that are difficult for individuals to voluntarily and intentionally produce (Ekman, Roper, & Hager, 1980).

On the other hand, fake smiles are consciously controlled expressions that use deliberate processing (Ekman & Davidson, 1993). There is less movement displayed around the eyes with a phony smile due to the difficulty in producing the crow’s feet wrinkles. Therefore, when judging whether a smile is genuine or fake, a general rule is to scan the eyes and not only the mouth and lips.

Smiles vary by emotional states and feelings of authenticity, but they also vary by context. Think about when you smile the most; it is probably in easygoing, social situations. Now think about the formal, professional context accompanying the trial process in a courtroom. It is hard to anticipate much smiling occurring there, especially with the serious nature associated with trials. That brings us to the essence of this article: should smiling be mostly or completely absent from the courtroom, in terms of the interpersonal aims of the participants?

Most research on smiling behaviors has been conducted in social contexts different than that of a courtroom. During trials, it is expected that there will be a high degree of seriousness and a modest frequency, at most, of positive content. Testifying as a witness may lead to a variety of emotions such as fear or nervousness (Brodsky, 2004; 2009). Witnesses may also be worried about cross-examination, about potentially making errors, or about remembering case facts. Given this context, what does it mean when one observes a smile in the demanding world of testifying?

Should Witnesses Smile?

It may be beneficial for witnesses to think about what their smiles (or lack thereof) communicate to a jury. Scholars have asserted that facial expressions are important when attempting to use deceptive behaviors. It appears that

individuals are aware of their facial expressions, and may control their smiling behaviors to communicate a specific image or feeling to others.

Not only are individuals aware of their own smiling behaviors, but they also respond to smiling by others as well. Jurors may use their perceptions of smiling behaviors to determine the credibility of witnesses. Researchers have recognized that facial expressions, including smiling, are important when assessing whether speakers are presenting deceptive information. The recognition of both types of the aforementioned smiles – genuine smiles and fake smiles – are related to the processing of deception.

Smiling is linked to perceived attractiveness (Abel & Watters, 2005; Darby & Jeffers, 1988; Mueser, Grau, Sussman, & Rosen, 1984; Remland, 1993), and attractiveness is related to perceived likeability, trustworthiness, credibility (Brodsky, Neal, Cramer, & Ziemke, 2009) and positive evaluations (Lau, 1982). Attractiveness has also been associated with the “halo effect” (Darby & Jeffers ; Remland, 1993) of “what is beautiful is good” (Dion, Bersheid, & Walster, 1972). In simulated trials research, attractive defendants are seen as less culpable, guilty less often, and given more leniency (Darby & Jeffers, 1988; Efran, 1974; McFatter, 1978). In addition, the absence of smiling and physical attractiveness has been associated with ratings of culpability and punishment of defendants (Abel and Watters, 2005). The “smile-leniency effect” (LaFrance & Hecht, 1995) is seen with defendants and also seen with testifying witnesses.

The findings from Witness Credibility Scale (WCS; Brodsky, Griffin, & Cramer, 2010), indicate that witnesses are perceived as more credible when they show confidence, knowledge, likeability, and trustworthiness. Some of these components are positively associated with factors such as kindness, friendliness, charm, competence, and talent; almost every component is negatively associated with factors like phoniness (Brodsky et al., 2010). Witnesses with genuine smiles may be perceived favorably and as having positive traits, while witnesses with fake smiles may be perceived negatively as

coming across as phony.

Our Findings

For approximately 8 months in 2011-2012, we conducted a naturalistic observation to investigate the presence and frequency of smiling behaviors during actual trials. We watched witnesses testify in 11 criminal and civil trials in a courthouse in a medium-sized southern county. Our objective was to evaluate the relation between believability and amount of smiling, with independent ratings generated for each variable.

The single most compelling finding was that few smiling behaviors were seen during witness testimony. Most witnesses stayed serious and often grim. Even though smiles were mostly absent during testimony, approximately 72% of witnesses did exhibit smiling behaviors at some point during testimony. Genuine smiles were significantly and positively correlated with likeability, as measured by the WCS.

Our study was the first to use the WCS with a methodology outside of the laboratory environment, and among the few studies to look at credibility with actual witnesses testifying in trial. Additionally, we were the first to use the WCS to measure credibility not only with expert witnesses, but with lay witnesses as well. Therefore, our findings on smiling behaviors may generalize to practices because we examined them in actual lay and expert witness testimony.

Smile A Little?

Even though it is less likely that individuals will smile in a courtroom trial than a wedding or most social situations, witnesses have been encouraged to smile and show happiness when sincere and when the behavior fits with the situation. (Boccaccini, 2002; Brodsky, 2004; 2009). For instance, Brodsky (2004) suggests that humor may be a useful strategy for witnesses during testimony. Humor can help to humanize a witness, but only if used in a good-natured, gentle, and respectful manner.

Additionally, there are informal opportunities during trials that allow witnesses to show emotion and to smile genuinely. There may be greetings, compliments, jokes, or other events that

elicit an emotionally positive response. There may even be pleasant moments in pauses during direct and cross-examination. We saw a judge to hand out peppermints to a witness and jury, an act that elicited shared smiling. With such a light-hearted and friendly gesture, it is appropriate for a witness to smile at the jurors while passing along treats during a long trial.

Good Witness Don't Smile (Much)

In conclusion, our title says it all. Good witnesses do not smile so much that they seem disingenuous or fake, but they do offer smiles at appropriate times. Whether it is a polite smile during introductions with the attorney or a restrained but happy smile during a break, witnesses should smile on occasion to show sincerity and credibility. Although there are few chances in a courtroom context that would warrant a genuine smile, witnesses should act naturally and use opportunities to display authentic emotion. So before your witnesses testify on the stand, be mindful of their emotional expressions and be sure that they use (and not overuse) their chance to smile in court. ☉

[Jacklyn E. Nagle](#) is a master's candidate in The University of Alabama Clinical Psychology and Law in Tuscaloosa, Alabama. Jacklyn is a third year student in Stan Brodsky's [Witness Research Lab](#). Her research interests include witness credibility, nonverbal communication, gender, race, and sexuality. Jacklyn is interested in pursuing a career in treatment and therapy, and would like to gain experience working with victims of crime, law enforcement, and military personnel.

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

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The Jury Expert, To Go

By Brian Patterson

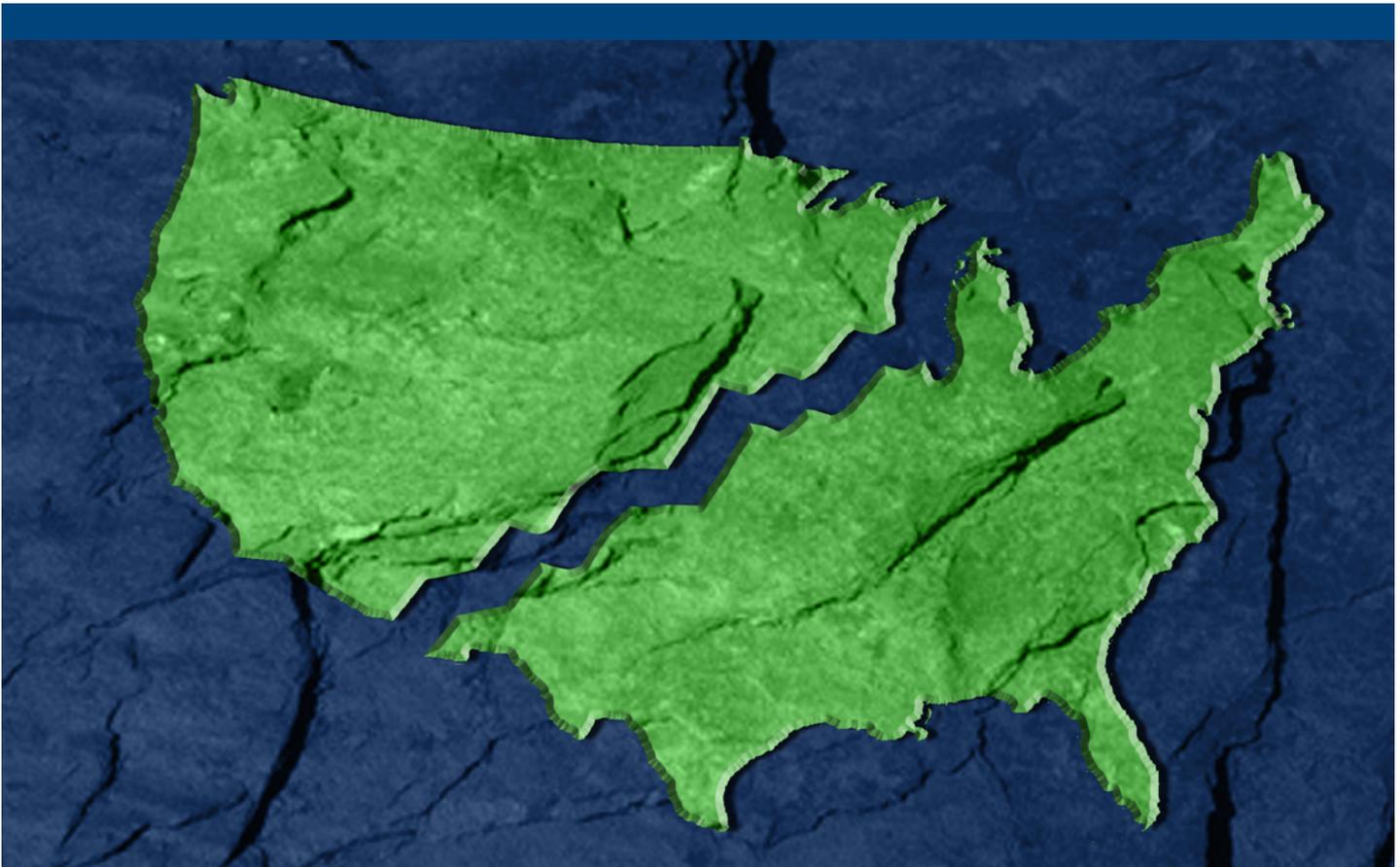
IN ADDITION TO THE CHANGES highlighted in the last issue, there is another change to The Jury Expert we want to mention.

We've been tweaking the visuals of The Jury Expert over the past year, creating more original editorial art to accompany the articles and trying to bring a more compelling online experience. And beginning with the September 2012 issue, we've redesigned the PDF version of the journal, hoping to bring a better experience to the offline version as well. You can see the result of the redesign by [downloading the full issue PDF](#) or the individual article PDFs. If you'll be somewhere you don't have access to the internet—like in a plane or a train or a hurricane—you can download The Jury Expert and get caught up on the research, insight, and tips from our fantastic

authors. Or you can print the articles for clients and associates, sharing information that will lead to better preparation for the courtroom. This also gives our authors a nice presentation of their work they can share with others.

One new feature we've added to the full issue PDF version is a Reader's Comments section. The feedback we get from readers is an important part of publishing The Jury Expert, and we hope that by highlighting your contributions it will spark even more dialogue in the comments section.

Any publication, online or offline, is a work in progress. As we adapt to meet the changing needs of our readers, we hope that you will let us know what you like or don't like about what we are doing at The Jury Expert, so that it will continue to be a valuable tool in your practice and in your casework. 



Hydrofracking & the Environment: Juror Attitudes, Beliefs, and Priorities

By Doug Keene and Rita Handrich

HYDRAULIC FRACKING IS A TECHNIQUE for recovering natural gas from difficult underground geological formations that would otherwise not be sufficiently productive to be economical. By injecting fluids (water and chemicals) under high pressure into the gas well, fractures in the rock develop. After the injection procedure is complete, a successful hydraulic fracturing procedure (also commonly referred to as “hydraulic fracturing”, “hydro-fracking”, “fracking” or “fracing”) results in higher rates of gas flow into the bore hole, and a more productive well.

It is unquestionably a very successful procedure for increasing well production, and one that has become heavily utilized in recent years. Wells that had been closed after their production fell off have been revitalized, and wells (such as those in the Marcellus Shale formation in the northern Appalachian mountains and the Barnett Shale formation in North-Central Texas) have been wildly productive. However, since this technique has been employed, public concern over environmental impact on ground water has skyrocketed in the gas field areas. Some local water supplies have developed a terrible taste. Others carry chemical concentrations in ground water that had not been previously noted. In this paper we

generally describe typical positions taken by both Plaintiffs and Defendants, but we will not attempt to weigh the scientific evidence that is typically presented in the toxic tort actions. Instead, we will focus attention on jurors, and the related concerns that litigants are going to face from jurors before the first word is spoken.

Americans are consistently concerned about the environment, especially the environment of their own ‘backyard’. This concern is seen in surveys done at national, state, and local levels. As is typical in surveys, the closer the issue is to the respondent’s individual life circumstances, the more concern they express. In response to the increase in litigation activity relating to the impact of natural gas drilling methods on the environment, this paper will provide an overview of American concerns regarding:

- the environment and the economy;
- the environment in general;
- groundwater pollution;
- toxic waste/contamination of water supplies;
- the increasing skepticism of scientific ‘findings’;
- attitudes toward the oil and gas industry;

These topics are followed by a look at hydraulic fracturing and

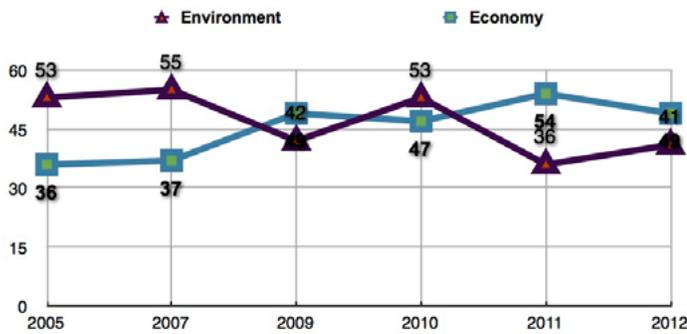
the American perception of the impact of fracking on the safety of drinking water and in groundwater contamination, all with an eye toward implications for litigation.

Framing the Battle: The Environment or The Economy?

Americans are concerned about the environment although the level of concern has varied over time. Gallup conducts an annual environment status poll and concluded in [March 2012](#) that

“Americans continue to prioritize economic growth over environmental protection, by a 49% to 41% margin, as they have since 2009. This eight-percentage point gap in favor of economic growth is smaller than last year’s record 18-point gap. Prior to the recession and financial crisis, in 2007, most Americans across subgroups prioritized the environment (55%) over economic growth (37%). Today’s margin in favor of economic growth reflects a 26-point shift toward economic growth compared with 2007.”

“With which of these statements about the environment and the economy do you most agree: protection of the environment should be given priority, even at the risk of curbing economic growth or economic growth should be given priority even if the environment suffers to some extent?”

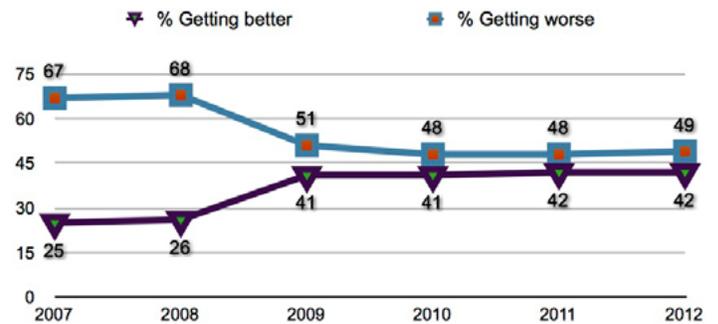


[Gallup Poll](#) conducted by telephone interviews conducted March 8-11, 2012, with a random sample of 1,024 adults, aged 18 and older, living in all 50 U.S. states and the District of Columbia.

While still concerned, Americans are also less worried about future environmental conditions. In 2006, the highest numbers ever recorded in Gallup polls on this issue (67%) said the quality of the environment was getting worse. At that time, Gallup opined that the growing credibility of concerns related to global warming, biological terrorism, and the need for sustainable energy were all likely to add to the demand for a safer water supply. Since then, public concern has moderated.

“Americans’ perceptions that the quality of the environment is getting better have stabilized in recent years after improving shortly after President Obama took office. While slightly more Americans still say the environment is worsening rather than improving, the current 49% to 42% split is much narrower than what Gallup measured throughout George W. Bush’s presidency.”

“Right now, do you think the quality of the environment as a whole is getting better or getting worse?”



[Gallup Poll](#) via telephone interviews conducted March 8-11, 2012, with a random sample of 1,024 adults, aged 18 and older, living in all 50 U.S. states and the District of Columbia.

Gallup also identifies a relationship between perceptions of [environmental quality based on political affiliation](#).

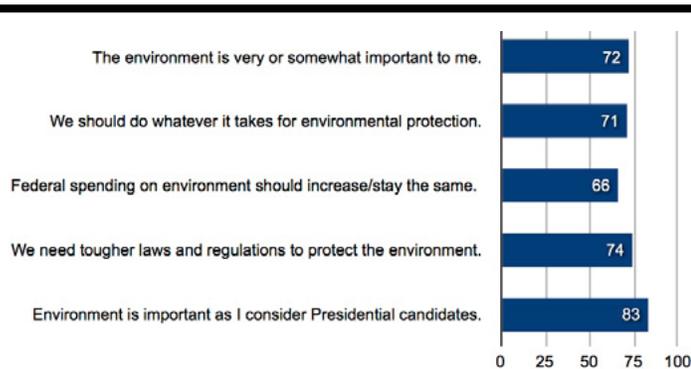
“Among party groups, Republicans’ rating of environmental quality as “excellent” or “good” is the highest, at 60%. Democrats’ ratings have steadily increased since 2010, and now 41% rate the environment positively. Independents’ ratings increased in the first two years of the Obama presidency but have since declined, currently giving them the least positive rating of the three groups.”

What we cannot know is whether the improved ratings are related to actual improvements in the quality of the environment, or a general sense the Obama administration is more environmentally friendly than was the George W. Bush administration, or weariness about environmental concerns in the face of a fragile economy.

Who Can You Trust?

There is a feeling in the country of increased suspicion and lack of trust in government. We’ve seen that lack of trust extended by mock jurors (and real jurors) to corporations, schools, and our federal, state and local governments. It also extends to beliefs and values related to the environment.

Polls have been completed on how much Americans approve of the way our government (the Congress), American businesses, and the energy industry are reacting to environmental concerns. Americans seem to have overall negative reactions to how the environment is being cared for and they see environmental issues as needing serious attention. They no longer know whom they can trust to ensure it happens.



How important is the environment?

Economist/YouGov survey of 1000 Americans conducted online from August 18-20, 2012.

The country should do whatever it takes to protect the environment.

Economist/YouGov survey conducted online with 1000 Americans on March 6, 2012.

Federal spending on the environment should increase or stay the same.

Pew Research Center survey of 3,029 Americans by telephone from February 22-March 14, 2011.

There needs to be stricter laws and regulations to protect the environment.

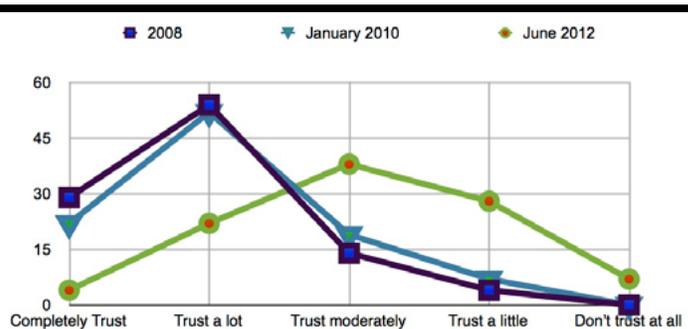
Pew Research Center April 4-15, 2012 survey of 3,008 Americans via landlines (1,805) and cell phones (1,203). [Completely agree: 36%; mostly agree: 18%].

The environment is an important issue as I consider Presidential candidates.

Pew Research Center survey of 2,008 Americans via telephone on April 4-15, 2012. [Very important: 51% and somewhat important: 32%].

We Can't Trust Scientists Any More Either

Just as with other issues in this time of increasing uncertainty—Americans are increasingly wary of scientists' statements about the environment. There is a level of suspicion that even the traditional perspective of scientific neutrality cannot surmount (ABC News Poll, 2006). This lack of trust is seen in the [scientific literature](#) as well as in the [mainstream media](#). Americans don't particularly trust what scientists say about environmental issues with only slightly more than 1/4 (26%) strongly trusting [i.e., completely trusting or trusting a lot] in scientists' statements. While the most public discussions about scientific credibility surround issues such as global warming and endangered species (skepticism about which is higher with those opposed to regulation), this end of the environmental spectrum doesn't have a lock on mistrust. Those who are active in the environmental movement are also skeptical of scientific findings regarding remediation and "safe levels" of environmental pollutants.



2008: Survey conducted by the School of Forestry and Environmental Studies at [Yale University](#).

January, 2010: Survey conducted by the School of Forestry and Environmental Studies at Yale University of a nationally representative group of 1,001 adults.

June 2012, 2012: Survey conducted by Washington Post-Stanford University. Poll was conducted by telephone June 13 to 21, 2012, among a random national sample of 804 adults, including landline and cell phone-only respondents.

Trust seems to be particularly damaged around issues related to how much of a particular harmful particulate, pollutant, or other contaminant is in our water. Studies focusing on "relative risk" (i.e., how much is too much in our water supply?) report that citizens tend to not like the idea of any exposure to cancer causing agents in the water supply (Johnson & Chess, 2003). ([Benzene](#) is one byproduct of fracking that is [known to cause cancer](#) in humans.)

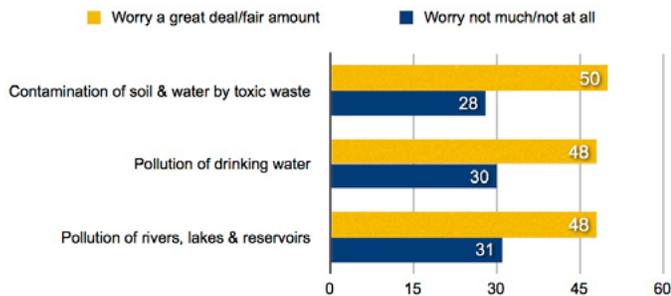
Further, there is a sense that when citizens hold the idea that there are "no safe levels" of exposure—education is unlikely to alter that perspective. This conclusion has definite implications for expert testimony on "relative risk" and even on the idea that showing "before and after" cleanup concentrations of toxic chemicals will have a positive/soothing effect on jurors (Washington Environmental Council, 2009).

Worries About Water Pollution

Just as Americans are less concerned about the environment in general in our downturned economy, they are also decreasingly [concerned about the water supply](#) in particular. Gallup Polls comment that these concerns are now at a historical low. Concerns about the water supply are, however, still at the top of Americans concerns regarding environmental issues polled. The chart immediately below is constructed from the results of the most recent [Gallup Survey](#) and presents only items of interest on this specific topic. Having our water contaminated or polluted is a concern of about half of Americans--and that number is the lowest number since 2000 when environmental concerns were at an all time high.

As Gallup says: "On a relative basis, Americans tend to worry more about environmental threats to the nation's water supplies than those that affect other parts of the environment. The highest levels of worry this year are for contamination of soil and water by toxic waste, pollution of drinking water, and pollution of rivers, lakes, and reservoirs."

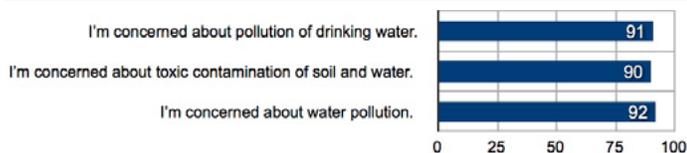
Despite the lowering priorities of Americans when it comes to the environment, the three items presented below are related to daily survival--a significant issue when considering the effects of hydraulic fracking on the water supply.



Telephone survey conducted by Gallup, between March 8-11, 2012, with a random sample of 1,024 adults, aged 18 and older, living in all 50 U.S. states and the District of Columbia.

North Carolina: Worry About Water Pollution

A small survey queried North Carolina residents in 2010 regarding their concerns about water pollution. North Carolinians generally are very concerned about the water and soil--with percentages ten points higher than those found in the national survey only months later. [We were unable to locate more recent surveys to see if North Carolinian's concerns have lessened in the fading economy (like other Americans) despite the increase in hydro-fracking in their state.]

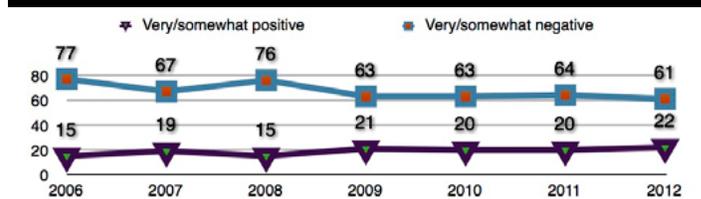


Poll conducted by Eton University and the Eton University Institute for Politics and Public Affairs. Poll done by telephone with 508 North Carolina residents February 22-25, 2010.

Perceptions of Oil and Gas Companies

Perceptions of the oil and gas industry have always been more negative than positive. Surprisingly, the BP Deepwater Horizon spill and the current controversy over hydraulic fracking have not changed industry ratings--perhaps because they were already so low. The oil and gas industry was at the bottom in the annual Gallup survey of confidence in industries done in 2010. In 2011, the federal government took that honor (of the lowest rank) with oil and gas in the pentultimate position.

In 2012, oil and gas industry ratings retook the bottom place in industry rankings. Obviously, jurors will come to the courthouse with both a low level of regard and trust for the oil and gas industry, and tremendous skepticism about government regulators.



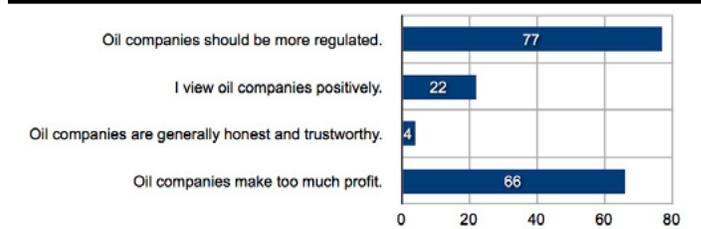
2010: Gallup telephone interviews with a random sample of 508 adults conducted August 5-8, 2010.

2011: Gallup telephone interviews with a random sample of 1,008 adults conducted during August 11-14, 2011.

2012: Gallup telephone interviews conducted Aug. 9-12, 2012, with a random sample of 1,012 adults, aged 18 and older, living in all 50 U.S. states and the District of Columbia.

Most Americans believe oil and gas companies should be watched closely. The prevailing view is that the companies should be subject to more regulation, they are unlikely to act in the public best interest and they cannot be trusted to behave honorably. And in addition to all that, their profit margins are too high.

Gallup comments on the negative perceptions of the oil and gas industry: "The cause of the oil and gas industry's bad image is most likely the frequent and sometimes inexplicably large spikes in the price of gas. At the time of this survey, in fact, the price of gas was on the rise. Plus, the oil and gas industry may get dinged by some Americans for its perceived poor environmental record."



Oil companies should be more regulated.

Financial Times/Harris poll conducted online with 1,001 Americans from July 20-29, 2010. Respondents were aware of oil spill in Mexico Gulf. (51% strongly agreed and 26% agreed.)

My view of oil companies is generally positive.

Results for this Gallup poll are based on telephone interviews conducted Aug. 9-12, 2012, with a random sample of 1,012 adults, aged 18 and older, living in all 50 U.S. states and the District of Columbia.

Oil companies are generally honest and trustworthy.

Harris Poll of 2,303 Americans conducted online from October 20-27, 2008. This Harris finding mirrors the consistently low Gallup Poll numbers for the industry.

Oil companies make too much profit.

Zogby International poll of 7,815 Americans who were likely voters conducted online May 6-9, 2008.

Hydraulic Fracking: Proponents, Opponents and Controversy

Having generally described the patterns of American concerns about the environment, water pollution, toxic waste contamination of the water supply, skepticism directed at scientists and perspectives on the oil and gas industry, we turn our attention to American attitudes toward hydraulic fracking.

Even before the new [EPA draft findings](#) on the Pavillion, Wyoming ground water were released (December, 2011), there was a [raging controversy](#) over the [safety of hydraulic fracking](#).

[Proponents](#) say it is the best way for America to produce more fuel for future needs. They say it is “incredibly unlikely” (Editorial Staff, 2012) that fracking would contaminate aquifers lying very far above the gas resources. They warn that the hyperbole around the practice of hydro-fracking is dangerously emotional and that the arguments should “stick to the fracking science” (Miller, 2012). They point out that fracking causes [little mess or disruption](#) above the surface of the ground--unlike traditional oil drilling or strip mining practices.

[Opponents](#) say it is dangerous for the environment, will contaminate our groundwater and is likely bad for our health--whether as workers in the industry or water-drinkers around fracking sites. The controversy over fracking and subsequent media coverage has heated significantly thus far in 2012. When a University of Texas at Austin researcher [published a report](#) saying there was “[no direct evidence that fracking itself has contaminated groundwater](#)” he had instant media scrutiny. Unfortunately, the researcher failed to disclose a potential [conflict of interest](#), which cost him dearly in [the court of public opinion](#). As of August, 2012, the University of Texas at Austin has established [a panel of experts](#) to review the report and to determine if its findings are scientifically credible.

Proponents of fracking say there has [never been a documented case](#) where it has contaminated drinking water. Opponents say that is only because fracking involves a series of steps in addition to the actual act of ‘fracking’ and the narrow definition proponents apply (by taking other steps involved out of the equation) is [only clever semantics](#). [Environment America](#) has just released [a new report](#) identifying multiple costs associated with fracking and conclude the practice simply isn’t worth the price we will pay. They point out that too much of the [cost is borne by taxpayers](#) rather than by the oil and gas industry.

When the EPA draft report was released that found that ground water in Pavillion, Wyoming showed water contamination from fracking, there were [overnight rebuttals](#) from those supporting the practice of fracking. It is clear this [debate is far from over](#).

Fracking has been accused of (among other things) causing [earthquakes](#), [tainting water wells](#), causing [respiratory issues like asthma](#), [killing all life in bodies of water](#), killing all vegetation and trees in a West Virginia forest treated with [fracking wastewater](#), causing lung disease in oil and gas workers breathing in the silica dust formed around work sites (OSHA/CDC, 2012) and turning ordinary household tap water into a flammable liquid (see photo right) as depicted in the award-winning 2010 HBO documentary [Gasland](#).

An article published in the journal Risk Management (Chung & Hoffnagle, 2011) lists three primary areas of risk (each with multiple entries of specific concerns): “legal liabilities emanating from negative environmental and health impacts, regulatory risk from new state and federal laws that would impose new costs or restrict hydro-fracking operations, and reputation risk from the growing public and political concern paid to this issue--something exemplified by NYC Mayor Michael Bloomberg’s vocal opposition, alleging that hydro-fracking poses an unacceptable threat to the water supply of nine million New Yorkers.”

Between September 2009 and September 2011, 15-20 lawsuits were filed “by landowners in various states against oil and gas drilling companies alleging groundwater contamination,” most of these cases are still in the early phases. “Nearly all of the plaintiffs in these suits are either landowners who leased oil and gas rights to the defendants or landowners who reside in close proximity to where hydraulic fracturing operations were conducted” (Blanson & Nicholson, 2011).

Despite the concerns about health risks, rigorous evidence of negative health impact remains slim (Mitka, 2012). The tension between our floundering economy and the need for jobs versus the possible health risks associated with fracking is spurring [environmental audits](#) in states considering fracking. Some researchers believe there has been an agenda change as the policy issues surrounding fracking have moved between the state and federal governments--and become increasingly contentious due to rising public concerns over pollution impacts of fracking (Davis & Hoffer, 2012).

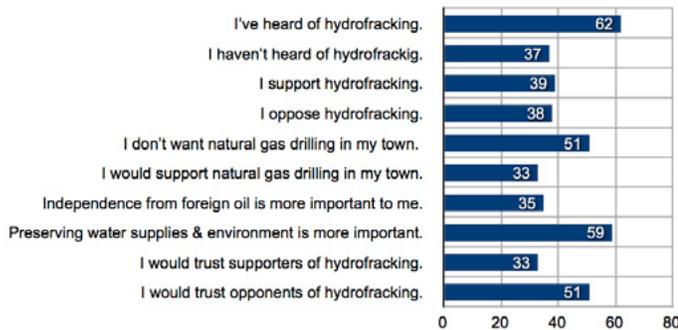
This is the landscape in which the controversy resides. For this paper, we are going to focus not on the science behind hydraulic fracking disputes per se, or on the political debates surrounding hydro-fracking. Instead, we will focus on the evidence of American attitudes toward fracking and how those attitudes might guide a litigation strategy. We rely on recent polls using random samples of Americans from various parts of the country. Obviously, research would need to be done in specific locales to ensure attitudes are similar closer to the time of trial, but generally we find that the range of opinions is present everywhere, with the primary difference being in the frequency of support or criticism of an issue in a given locale. As we saw in the preceding polls on the environment and our water supply--Americans are mercurial. When there are environmental disasters (like the BP DeepWater oil spill or the Japanese tsunami rendering nuclear facilities at risk--we are concerned about the environment. But as time passes--and it doesn’t even take that much time--we again return to other concerns. In this time of recession and economic uncertainty, the public tends to prioritize the economy and jobs over the environment. Until the next environmental disaster occurs and then we will, once again, return briefly to a renewed emphasis on environmental issues.

New York: Attitudes Toward and Awareness of Hydraulic Fracking

Polls about hydraulic fracking focus on two distinct facets: 1) questions about whether Americans support or oppose the

practice and how close they want it to their personal homes and 2) questions about concerns for environmental safety, the risk for contamination of ground water, and whether those concerns would spur them to activism. We will look at these two areas separately, beginning with support or opposition to fracking itself.

When it comes to awareness of and opposition to hydraulic fracking, even in [New York](#) (a [hotbed of fracking activism](#), as the southern and western parts of the state includes a great deal of fracking in the Marcellus Shale formation) there is a mix of opinions and a range of understanding. It is not as though residents of New York are completely against fracking--almost half of them have not even heard of it. While they are not anti-fracking in theory, half of them don't want it to come to their town.



Have you heard or read anything about hydro-fracking?

Poll by Quinnipiac University of 1,779 New York registered voters (conducted by phone) from July 17-23, 2012.

Support or opposition to hydro-fracking:

Poll by Siena Research Institute of 671 New York likely voters conducted by telephone August 14-19, 2012.

Oppose or support natural gas drilling in my town:

Poll by NY1/Marist Institute for Public Opinion of 201 upstate New York registered voters conducted by telephone July 28-31, 2011.

Independence from foreign oil versus preserving water supplies and the environment:

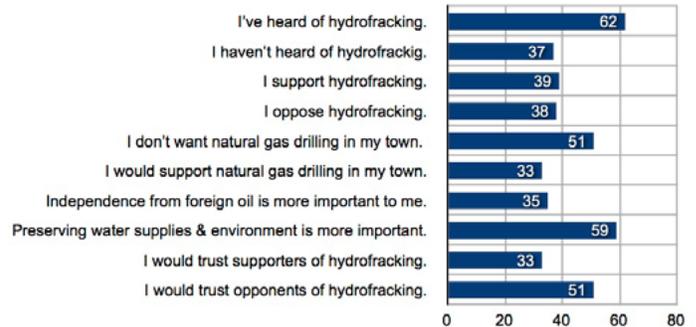
Poll by NY1/Marist Institute for Public Opinion of 517 New York registered voters conducted by telephone July 28-31, 2011. Another question asked was whether preserving the environment (50%) was more important or if creating jobs (44%) was more important.

Who would you trust more: supporters or opponents of hydro-fracking?

Poll of 808 registered NY voters conducted by telephone by the Siena Research Institute from September 15-21, 2011.

New York: Safety Concerns and Attitudes Toward Hydraulic Fracking

The public conversation about fracking in the last several years has progressed from silence, to “the technology that unlocks hidden natural gas reserves”, to “a threat to clean water”. And people are becoming more worried. Many of the surveys done about the issue have been conducted in states where hydro fracking has been conducted, anti-fracking activity has been high, and press reports of environmental concerns have started to mount.



Do you think hydro-fracking will cause environmental damage or not, or don't you know?

Poll conducted by telephone at Quinnipiac University of 1,779 registered voters in New York during July 17-23, 2012.

Do you favor or oppose fracking in a large portion of the Marcellus Shale?

Poll by Siena Research Institute via telephone with 808 registered NY voters during September 15-21, 2011.

Do you think we should drill in the Marcellus Shale?

Poll conducted via telephone by Quinnipiac University of 1,640 NY registered voters from August 3-8, 2011.

I support a new tax on companies drilling for natural gas in the state's Marcellus Shale.

Poll conducted via telephone by Quinnipiac University of 1,640 NY registered voters from August 3-8, 2011. [Only 29% oppose the idea of a tax.]

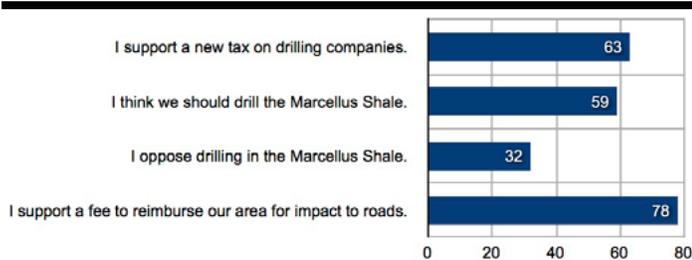
Drilling for natural gas in the Marcellus Shale will create jobs.

Poll conducted via telephone by Quinnipiac University of 1,640 NY registered voters from August 3-8, 2011.

Again, even in New York State (that hotbed of anti-fracking advocacy), one-third of registered voters are not informed about fracking but half believe it will cause damage to the environment. They are split on whether the Marcellus Shale should be drilled for natural gas but if it is drilled, more than half think there should be a new tax on drilling companies. Three-quarters of them believe drilling the Marcellus Shale will create jobs.

Pennsylvania: Safety Concerns and Attitudes Toward Hydraulic Fracking

Quinnipiac University conducted similar surveys in Pennsylvania to those done in New York. Slightly more Pennsylvanians favor drilling in the Marcellus Shale and they are similar to New York respondents in their support of a tax on drilling companies. They like the idea of a fee to reimburse their local area for impact on their environment and their roads.

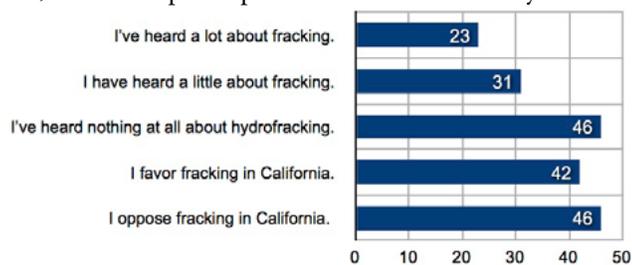


All of the above queries were posed during a Quinnipiac University poll.

The poll was conducted via telephone of 1,258 Pennsylvania registered voters July 25-31, 2011.

California: Safety Concerns and Attitudes Toward Hydraulic Fracking

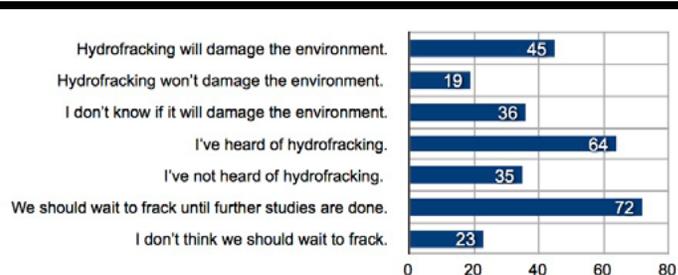
The Public Policy Institute of California conducted telephone surveys of 2500 Californians (2000 via landline and 500 via cell phones). The survey was conducted between July 10th and 24th, 2012 and participants included 1131 likely voters.



There is significantly less familiarity in California with the process of hydro-fracking than we see in other state polls (due to lack of fracking activity in California). However, despite the dearth of knowledge and familiarity, almost half of Californians surveyed who knew either “a lot” or “a little” about hydro-fracking ultimately opposed hydro-fracking in their state.

Ohio: Safety Concerns and Attitudes Toward Hydraulic Fracking

Ohio citizens also have concerns about hydro-fracking’s impact on the environment despite the fact that fully 1/3 have not even heard of hydro-fracking (although the Marcellus Shale extends into Ohio). When given the choice, Ohioans, like others, are more likely to urge caution until we know more about the environmental and health impacts.



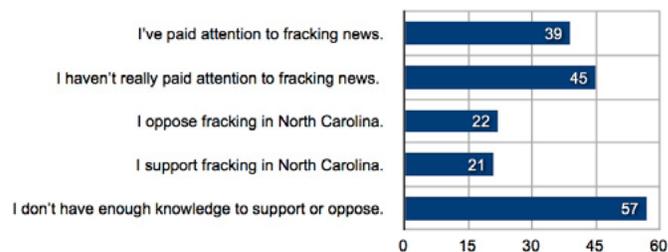
Do you think hydro-fracking will cause environmental damage or not, or don't you know? and Have you heard or read anything about hydro-fracking?

Polls conducted by telephone at Quinnipiac University of 1,069 registered voters in Ohio May 2-7, 2012.

Some people have proposed halting hydro-fracking in Ohio until further studies are done on its impact. Do you think that is a good idea or a bad idea?

Poll conducted by telephone at Quinnipiac University of 1,610 Ohio residents from January 9-16, 2012.

North Carolina: Safety Concerns and Attitudes Toward Hydraulic Fracking



How much attention have you paid to the news about fracking in North Carolina: A great deal, some, not very much or none at all? [A great deal/Some: 16% and 23% respectively. Not very much/None at all: 20% and 25% respectively.]

Survey conducted of 534 North Carolina residents by telephone between March 26 and March 29, 2012.

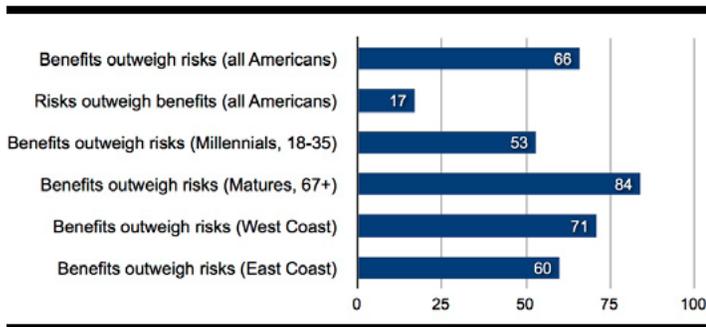
Do you support or oppose the use of fracking to extract natural gas in North Carolina, or do you not know enough about it to say?

Survey conducted of 534 North Carolina residents by telephone between March 26 and March 29, 2012.

We’ve seen earlier that North Carolinians are concerned for their environment but they seem to be open-minded as to whether fracking makes sense for their state. More than half of those polled say they simply do not know enough to decide either for or against hydro-fracking in their state.

National Reactions to Hydraulic Fracking: Awareness and Concerns

In 2012, the Harris Polls looked at what Americans think of the cost-benefit ratio of obtaining natural gas. As a whole, Americans think the benefits outweigh the risks, however, there were some intriguing generational and regional differences that should be explored in specific venues prior to litigation.



The [Pew Research Foundation](#) recently published a report illuminating the divide between the Millennials and their grandparents, the Matures. This poll again illustrates that point-retirees and the youngest jurors see the world quite differently. And geography makes a difference as well. When you look only at national polls, you get a skewed sense of perspective--just as you do when you assume someone feels a certain way because of their gender, generational assignment or socioeconomic status. With an issue as emotionally charged as hydro-fracking--the more you can know who holds what attitude and when--the better off you will be approaching trial in that venue. The national polls provide a baseline for understanding the general levels of public opinion, but not trial strategy.

Additional research on perception of hydraulic fracking

Finally, there are several research studies (as opposed to polls or surveys) on public views of hydraulic fracking. These provide us with a more controlled look at how attitudes, beliefs, values and perhaps some individual characteristics are related to perceptions of fracking. They are also, however, less accessible than polls and surveys since the findings are often buried deeply in pages of statistical analysis.

Following are brief summaries of two of the very few public and published (as opposed to industry-sponsored and private) research projects completed on fracking and public attitudes.

There are regional differences in attitudes toward fracking (Forbis & Kear, 2011). These differences boil down to whether the priority in the region is on environmental protection or on economic security. When comparing the Western region and the Northeast region, for example, politicians in the West emphasize economic gains and politicians in the Northeast emphasize protecting the environment. Their constituents (potential jurors) likely have similar sensibilities.

It should be noted that recent nationwide Gallup polls show concerns with the economy edging out environmental concerns. The financial concerns are clear and present, while

the environmental issues are theoretical and abstract to most people. It becomes far less theoretical if the drilling is taking place in the venue where the trial is to be held.

As noted above, economics and environmental concerns are in a reciprocal relationship with one another (one worry goes up as the other goes down). But when both issues are close to home, the dynamics change. When public skepticism about scientific testimony serving private interests is combined with a sense that “my drinking water tastes different than it did 5 years ago, but they say I shouldn’t worry”, the drilling interests have a difficult challenge in the public mind.

There may be some identifiable variables in individuals that point toward opposition to fracking (Berg, 2010). Variables such as whether one is a homeowner or renter, whether one opens the water bill, awareness of source of home drinking water, and even whether you are male or female seem fruitful for exploration. This is based on an initial study done in New York State and would need to be investigated further in venues specific to litigation and closer to the time of trial.

Summary: America is worried and skeptical about solutions

At a time when Americans are worried about the future, financially uncertain, and skeptical of the commitment of government to solve systemic problems in an increasingly overwhelming world, it is fair to say that the public is distressed. No problem becomes more frightening or fundamental than the need to trust the water we drink.

The data reviewed in this paper suggest there is a bias toward believing the opponents of hydraulic fracking, and this bias is based in self-preservation tendencies coupled with mistrust of corporate and government authorities. If there is a chance drinking water could be tainted, everyone pays close attention.

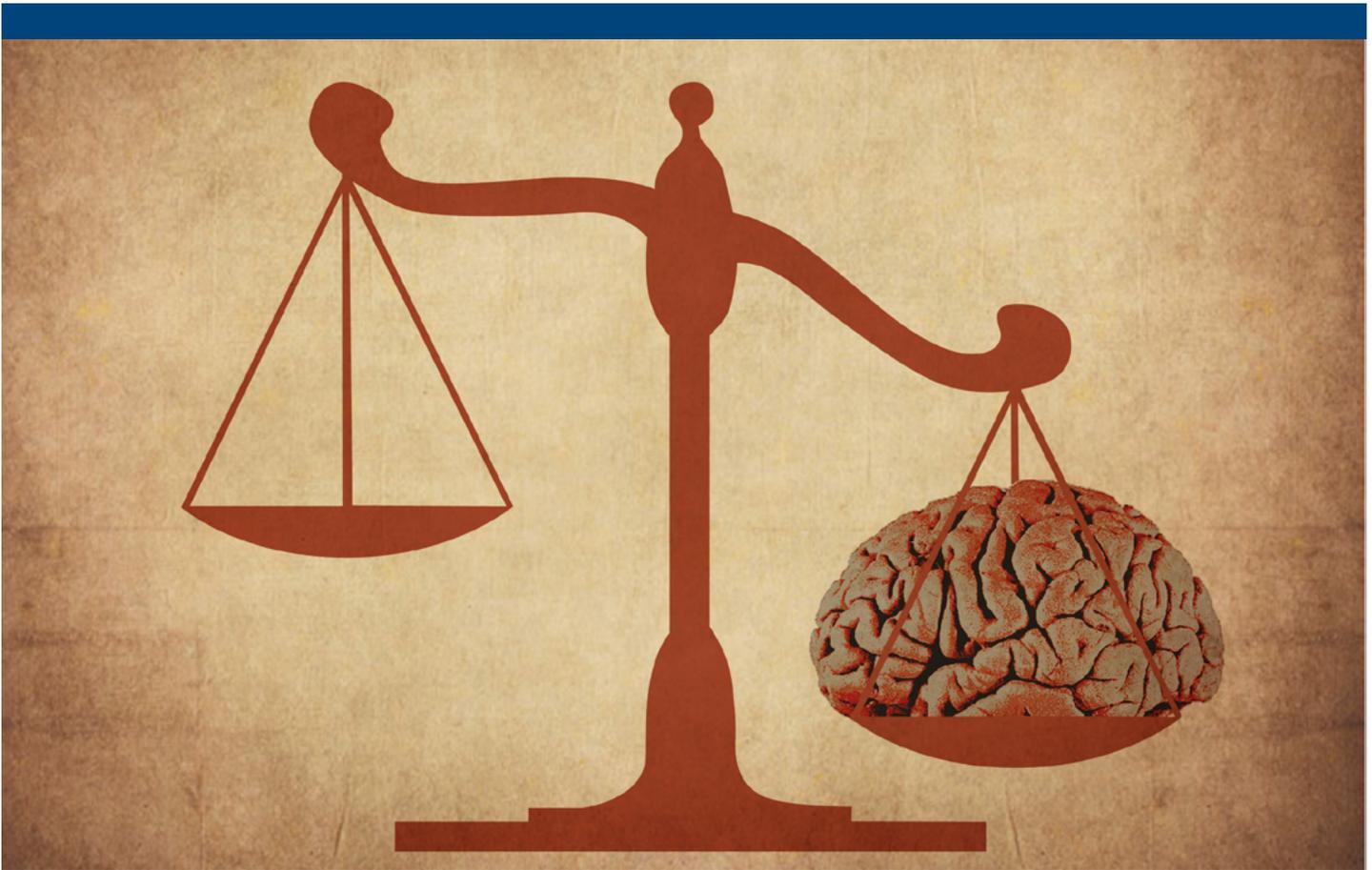
The public tends to worry about that which has its’ attention. When crises arise, the public becomes concerned. That happens both on a distant level (with oil spills in the Gulf of Mexico) and locally (in the courthouse serving a hydro-fracking region). Adversaries in hydro fracking litigation face the same challenge--to convince jurors that they share juror values and concerns, and they applied the best science available to serve the public interests-- both economic and environmental. What must be of concern to defendants, as well as to government officials who are charged with protecting the public, is that a violation of trust when it comes to the environment affects people on a very deep and personal level. When the water is tainted, jurors fear, life as their community has known it, is over. Reassuring them to trust is a particularly daunting challenge in this era of mistrust and skepticism. 🗣️

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Neurolaw: Trial Tips for Today and Game Changing Questions for the Future

By Alison Bennett

THE FUTURE OF LAW is standing on the courthouse steps. Neurolaw – the combination of neuroscience research and the law – is worthy of attention for a number of reasons. Neuroscientists are conducting ground-breaking research with a machine called a functional MRI, or fMRI, which is similar to traditional MRI technology but focuses on brain activity, not just structure. Some would argue the use of neuroscientific evidence based on fMRI research is a premature adoption of a novel technology, but neurolaw evidence is already influencing jury trials in the United States and abroad. Billions of dollars are being poured into interdisciplinary neuroscience research each year in the United States and abroad. While we cannot predict the point in time at which the intersection of technology and law will merge to create credible courtroom evidence, we can look to neurolaw research today for research findings that confirm current trial practice techniques and offer new insights into jury decision making and the art of persuasion.

Current Criminal Trial Applications

In the United States, neuroscientific evidence has been admitted in over one hundred criminal trials now, has been

cited in at least one U. S. Supreme Court case, and is being admitted as evidence in other countries as well. In many cases, neuroscientific evidence was offered to mitigate sentencing by presenting neuroimaging highlighting brain damage that could have diminished the perpetrator's capacity and ability to make rational decisions. In one recent trial in Montgomery County, Maryland, Circuit Court Judge Eric M. Johnson allowed pretrial testimony about issues from the minutiae of brain analysis to the nature of truth and lies. After testimony by renowned experts in the field, Judge Johnson decided to keep the evidence out of trial, concluding the current lack of consensus among neuroscientists casts too much doubt on the results to present them as evidence to jurors. However, brain scan evidence was used in 2008, in Mumbai, India, to convict a woman of murder, along with circumstantial evidence. This conviction prompted strong criticism from bioethicists, who posit neurolaw research is still in its infancy, suggesting brain scan findings are not reliable at this point in time.

Implications for Civil Trials: Reading Minds

Neuroscientists, using fMRI technology, are essentially exploring ways to read a person's mind. Civil trial applications

are still in the experimental stage, but it is tantalizing to think about the prospect of being able to identify what a person is thinking or has thought in the past, to be able to quantify intangible claims such as pain and suffering, or to identify if a person is lying. Still, there are already companies, such as [No Lie MRI, Inc.](#), which are banking on commercial applications. No Lie MRI is currently testing brain scan technology, boasting it “will enable objective, scientific evidence regarding truth verification or lie detection to be submitted in a similar manner to which DNA evidence is used.” It is unclear if any hard data exists to substantiate these claims, but neuroscientists Francis Shen and Owen Jones posed a number of questions that should be considered before adopting fMRI evidence in the courtroom as fact, in a Mercer Law Review article entitled, [“Brain Scans as Evidence: Truths ,Proofs, Lies, and Lessons.”](#) Shen and Owen raised the following questions:

1. Can one be reasonably sure the brain activation pattern being reported is being caused by “lying,” or the absence of lying, as opposed to some other mental process? Along the same lines, do neuroscientists have enough data to determine if the measured responses of fMRIs vary from person to person?;
2. Does a lie told without consequence in the real world activate the same region of the brain as one told in the real world with a greater consequence?; and
3. Are there countermeasures a subject could use to manipulate an fMRI result, such as the way some people can control their physiological responses enough to manipulate a polygraph? In other words, can someone create a false positive or negative by employing his or her imagination? Researchers have discovered that words describing an experience and experiencing it in real life activate the same regions of the brain. In a [study](#) by cognitive scientist Véronique Boulenger, of the Laboratory of Language Dynamics in France, the brains of participants were scanned as they read sentences like “John grasped the object” and “Pablo kicked the ball.” The scans revealed activity in the motor cortex, which coordinates the body’s movements, indicating imagining an action can look similar on an fMRI scan to the action itself. With this in mind, it may be too early to tell if someone can outsmart the fMRI with imagination, or by contrast, could be detrimentally judged by false findings created by an overactive imagination.

With these questions and others in mind, most neuroscientists today are eager to research the possible impact technology could have on the law, but only a few are ready to start experimenting with findings in the courtroom.

Trial Practice Tips Based On Neurolaw Research

While neuroscientists debate whether or not neurolaw research has reached the point of contributing valid, reliable evidence, most would agree research on jury decision making processes, using fMRI technology, has confirmed the validity of current wisdom for some trial techniques and has offered insights into

new methods of persuasion.

Trustworthiness

When jurors look at players in the courtroom, they rapidly make subjective judgments of trustworthiness, experienced as intuition. At this time, neuroscientists are just beginning to understand why different people may judge similar stimuli differently when forming an opinion, but current research findings are leading them to focus on how the amygdala processes emotional information. Ralph Adolphs examined this issue in a Nature Neuroscience journal article entitled, [“What Makes Someone Look Trustworthy, Trust in the Brain.”](#) Adolphs reported expressions of happiness were positively correlated with trust, lending credibility to previous research findings on the positive benefits of building rapport with jurors. Accordingly, trial attorneys and witnesses wishing to engender trust should project happiness where appropriate. Happiness is an emotion that may seem counter-intuitive in the solemn atmosphere of most courtrooms, and indeed could appear disingenuous if employed at the wrong time, but smiling during voir dire and at jurors as they enter the room is almost always appropriate. In the courtroom, the significance of a smile cannot be overstated.

Third Party Punishment Research: What Drives Jury Decision Making

According to a [decision-making model](#) proposed by neuroscientists Joshua Buckholz and Rene Marois, jurors make punishment decisions based on their evaluation of the actions and intentions of the parties involved, driven by a negative emotional response to the possible harm. This finding may not be particularly insightful, but Buckholz and Marois have been able to identify five distinct areas of the brain associated with the decision-making process: two in the frontal cortex, which is involved in executive decision-making, the amygdala, which is involved with emotional responses, and two other areas of the brain involved in social evaluation and response selection. This is significant, as breaking down the complex cognitive processes involved in jury decision-making can aid us in better understanding what drives the process as a whole, offering rich insight into the art of persuasion. Today we know emotional responses in the amygdala appear to play a primary role in the decision-making process, making emotional judgments of the attorneys and parties in a lawsuit key to the decision-making process. This finding further reinforces the need to develop positive rapport with jurors, but it also confirms what trial attorneys have known for years, that emotion guides the decision-making process over logic. Knowing this should influence the way trial attorneys prepare their cases. For example, an Opening Statement written to touch a juror’s emotions begins with a story narrative focusing on the big picture, guiding the juror through the most important facts using sensory-inspired language and rhetorical questions designed to encourage empathy. By contrast, an Opening Statement focused on logic drowns jurors with details, leaving them to construct their own story of the events. Persuasion in the courtroom begins with emotion wrapped around the facts,

not the other way around.

Memory

Scientists used to think about memory in terms of the processes of encoding, storage and retrieval, but today more attention is being paid to the concept of long term memory consolidation. Memory consolidation is the processing of memory over a period of time. Research indicates people need time – and sleep - to process a sequence of actions before they commit them to long term memories. In simple terms, memory consolidation fixes memories in the brain so they can be retrieved later. This process was originally thought to occur during the time information was being encoded, but neuroscientists are discovering that long term memory takes a longer period of time to form. In the courtroom, the trial team that encourages the best memory of the facts important to their case has a distinct advantage in the deliberation room. To this end, recent research indicates the following three practices can aid in the creation of positively persuasive memories for a juror during a trial:

1. Answer the juror's questions. Encourage jurors to pay attention and engage in an internal dialogue during the trial by raising rhetorical questions during Opening Statement and proactively addressing questions jurors are already asking themselves throughout the trial. Since most people learn by discussing information, including asking questions, a trial attorney desiring to be persuasive will focus on answering questions the jurors are asking themselves, instead of trying to persuade jurors with information she wants them to know. If you are meeting their need for knowledge, they are more likely to pay attention to you;
2. End a line of questioning on a surprise. Recent research on memory consolidation indicates people are more

likely to remember something if they are surprised by it. Thus, while the presentation of courtroom testimony and evidence should answer the questions jurors are asking themselves, surprising them with a new insight or unexpected facts at the end of a line of questioning, or at the end of Opening Statement or Closing Arguments, can be equally important in gaining their attention and helping them remember important facts. Attorneys could conceivably “train” jurors to pay attention by ending each line of questions with a surprising question or surprising insight; and

3. Encourage jurors to get a good night's sleep. Simply put, it is becoming apparent that sleep plays a key role in memory consolidation. Knowing this, attorneys should be reluctant to seat a juror who has a night job, as a sleep-deprived juror will be more difficult to persuade. Along the same lines, a prudent attorney will be respectful of a juror's time and encourage the early release of jurors when possible.

Conclusion

Neurolaw research has already generated rich insights into jury decision-making and is being introduced in courtrooms in the United States and around the world. If neuroscience research is one day able to link brain scan findings with behavior, or the presence or absence of certain thoughts, it will change litigation at a fundamental level. As the law changes with technology, it will be imperative for legal professionals to educate themselves and be prepared. To this end, it would be advisable to attend a Continuing Legal Education course on neurolaw, or attend a symposium such as Penn State's annual [Neuroscience Boot Camp](#), which offers a basic foundation in cognitive and affective neuroscience to equip legal professionals to be informed consumers of neuroscience research. With neurolaw, the future is now.

[Alison K. Bennett, M.S.](#), a Senior Litigation Consultant with Bloom Strategic Consulting, has accumulated extensive nationwide civil and criminal litigation consulting experience. Her specialties include [witness communication training](#), jury research in the form of focus groups and mock trials, and jury selection. Over the years, Ms. Bennett has addressed a variety of courtroom psychology and trial advocacy topics, both as an author and as a featured speaker at a number of conferences, including American Bar Association and Texas Bar Association events.

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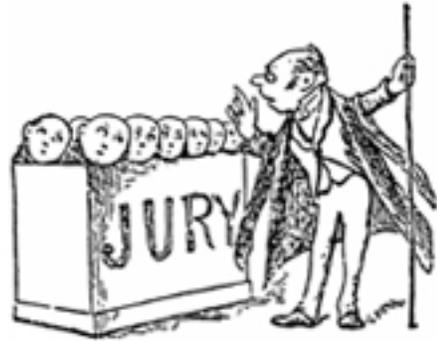
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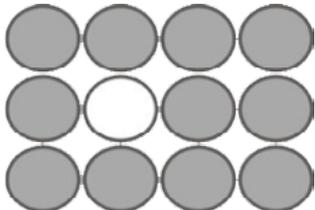
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