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How Does My Retained Expert Witness Improve Credibility

Merrie Jo Pitera, Ph.D.

Tips for Preparing the Expert Witness

Alyssa Tedder-King, M.S. and Katie Czyz, MA

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FAVORITE THING
The Civil Jury Project

NOTE FROM THE EDITOR
Spring 2016
Rita R. Handrich Ph.D.



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NOTE FROM THE EDITOR

In my part of the country spring has sprung and the wildflowers are out in force along with some brave redbuds, 'tulip' magnolias, and Bradford Pears. In other parts of the country, there is still a long ways to go til spring and I am very sorry about that reality. In this issue, there is plenty to read whether your window shows snow and ice or the welcome blooms of spring.

We have lots of articles on witnesses this issue: expert witnesses, female witnesses, and even traumatized witnesses. We also have a research article on what happens when women express anger in decision-making groups. That one has responses from several trial consultants who universally think the message is disturbing but also think it can help you prepare women for deliberations and teach you about how to express anger as a female attorney (or witness or party). Spoiler alert: The research finds that when men express anger it is persuasive, but when women express anger, it is not persuasive at all.

And when you've read your fill of articles on witness preparation issues and what happens when women express anger—we also have an update on what is happening with the NYU Civil Jury Project in the form of a conversation between Steve Susman (founder of the project) and Supreme Court Justice Sonia Sotomayor. And because we think this is such an important project, it's also our Favorite Thing this issue.

So. Enjoy this issue. Enjoy spring as it ushers forth with signs of life after a long (or short, depending on where you are) winter. We'll be back when it's summer.

Rita R. Handrich, Ph.D.
Editor, *The Jury Expert*



How Does My Retained Expert Improve Credibility?

by Merrie Jo Pitera, Ph.D.

IT COMES AS no surprise that when a witness is perceived as being credible, his or her messages will be more persuasive to the jury. Much academic research has been conducted to determine the primary characteristics that measure credibility. There has even been a scale developed to measure the perceived credibility of an expert witness via four key factors^[1]. For evaluating an expert, the credibility factors are knowledge, confidence, trustworthiness and likability. If any of these four are compromised (e.g., perceived lack of confidence, appears unknowledgeable) then that expert will receive low credibility ratings. The perception of each of these factors is moderated by a variety of verbal, non-verbal and behavioral cues which we review below.

How Do Jurors See the Role of a Retained Expert Witness?

In our 20 years of conducting jury research and participating in trials, we have had the opportunity to interview countless numbers of jurors after actual trials and our mock trials. The feedback we have received between these two venues is virtually the same. Therefore, when we refer to jurors' feedback, we

will be focusing on the totality of comments we have received from jurors.

When faced with two competing stories from two parties entangled in a lawsuit, jurors try to simplify the evidence to determine which version of the story makes sense within their own understanding and perception of the world. Thus, jurors will filter the evidence through their personal experiences and attitudes they have formed over the years, as a result of their culture, experiences and upbringing. Not only do jurors filter the case evidence through their sensibilities, they also filter the testimony of the witnesses the same way.

When deciding which expert is more persuasive (in addition to the facts outlined below that increase or decrease credibility), jurors filter the expert's testimony through their own sensibilities. That is, the witness with the message that best aligns with the juror's attitudes and experiences will have their testimony assimilated into that juror's version of what happened. Information that is not consistent with their personal sensibilities, is often ignored and not assimilated.

Jurors see an expert as someone who clearly and concisely provides information necessary to assist them in evaluating the merits of the case. Neal (2009) tells us, “Expert witnesses are retained to take the stand and share specialized knowledge with the court — specialized knowledge that may help the trier of fact make the decision they are charged to make.”^[2] Particularly in a case with a subject area that is foreign and/or complex to jurors (e.g., patents, technical subjects, et cetera), jurors look to the expert to step into the role of professor and succinctly explain the technical concepts in a way they can understand them. When an expert fails at this one specific goal, then his/her testimony is ineffective and lost with the jurors.

When we have asked jurors about their view of the plaintiff or defense experts, virtually their first reaction is the fact that the experts were paid for their opinions. In particular, those experts making a high hourly rate or a large flat fee for their time in court are often seen as biased. Most attorneys think since both sides’ experts are paid, it will cancel each other out. However, in most cases, it doesn’t. Instead, in a juror’s ideal trial courtroom, a neutral expert would testify telling the jurors just what happened, making clear who was right and who was wrong. However, as we know, it doesn’t work that way and jurors are left to evaluate the evidence against their own attitudes, experiences and reasoning.

What Do Jurors Consider Important When Evaluating the Credibility of a Retained Expert Witness

The experts who tend to receive high credibility ratings among jurors have several clear qualities that distinguish them from the rest of the pack. Over the years we have tested numerous fact and expert witnesses to learn what factors increase or decrease credibility. For expert witnesses, jurors have provided us a concrete path for the factors that make an expert effective and persuasive. Many of these findings are also supported by the academic research on witness credibility.

- **Experience & Education.** An attorney cannot underestimate the importance of on-point experience and advanced degrees for the subject matter at issue. For instance, having an experienced pulmonologist opine on causation for an asbestos or silica case is essential. Or, having an expert who has had the schooling and experience to opine about human factors issues like warnings, helps the messages within their testimony be more believable and therefore, more persuasive.

Not all experts need to have formal advanced degrees that result in numerous initials after their names. We have worked with, and seen on the opposing side, many effective experts who relied on their field experience to bolster their credibility. Jurors like a witness who has either worked his or her way up the professional ladder to be at their prestigious position or who have the hands-on experiences to have first-hand knowledge of the subject matter. Field experience can hold as much or more credibility as a formal

degree with jurors, since jurors are in the same situation having to make their own way based on their experiences.

With this in mind, we have seen cross-examination backfire when counsel attacks witnesses who lack a formal advanced degree but have extensive field experience. Field experience can command as much or more credibility as a formal degree with jurors, who tend to view the experience-based expert as similar to themselves. That is, because the majority of jurors do not hold advanced degrees and have years of experience in their jobs, they tend to view a similarly-situated expert in high regard.

- **Personally Engage the Data.** Time and time again experts lose credibility because they failed to engage the data, research or even examine a plaintiff. An expert who has not personally engaged the materials and instead relied on research associates to run the analysis and write the report tends to be unsuccessful in persuading the members of the jury. Any witness, not just experts, who are hands on with the data and analysis command more believability. For instance, when evaluating an expert physician who was asked to opine about causation in a personal injury/products liability case, our research has repeatedly shown that jurors value a witness’ testimony less when the doctor only reviews the medical records and never “lays hands on” or examines the Plaintiff (assuming the Plaintiff was still alive at the time the expert was hired). For the physician experts that do, the persuasiveness of their testimony is enhanced.

So how does an expert counter this criticism? It is important for experts who may not have personally run all the data analyses or completed the literature review, to discuss how they supervised the research process and monitored and approved all work done to their specifications. By providing the appearance that the expert was involved in and supervised the process, that person can then take ownership of the analysis and report and regain the credibility they would have otherwise lost.

- **Source of Information.** Another criticism jurors have told us that can adversely affect an expert’s credibility is where the expert used the information received from attorneys as the foundation for their opinions and conclusions. In most cases, experts receive a “file” from the attorneys who have hired them. Similar to the previous issue of not personally engaging or taking ownership of the analysis, jurors are also critical of an expert who only relies on the information that the attorneys provided. Jurors expect that the expert will engage in his/her own level of literature review/research; otherwise, jurors become suspect of the conclusions drawn from such information. When this situation happens (and it happens more than you might think), it reinforces jurors’ belief that not only is the expert’s opinion biased, but it is also being controlled by the attorneys who hired them, thus giving meaning to the phrase “hired gun.”

Now, you may be thinking that it is unavoidable to provide an expert with the litigation file relevant to the case. That is true. However, the factor that affects the witness' credibility comes in when the expert stops after receiving the attorney's file. While jurors expect the expert to receive files from the lawyers in the lawsuit, they also expect experts to conduct their own additional work to verify the file is complete and has the most current research to use when developing their opinion. Opinions based solely on the attorney-provided files falls flat among jurors and becomes a strong cross examination topic to explore with experts.

- **Demeanor.** Jurors are attuned to a witness's tone of voice and are critical of witnesses who sound arrogant or condescending. In one example involving a corporate research scientist, jurors noted that his tone of voice and the manner in which he spoke (e.g., proud to discuss his study, provided long-winded answers) made him come across as a "know-it-all," or stated another way, "He was smarter than everyone else in the room." As another juror said, "He was so sure of what he knew, he knew more than anyone else." His "arrogant" and "cocky" demeanor severely undercut any impression he might have made as a knowledgeable witness on the particular subject matter.

As previewed earlier, experts who can channel their inner professor and be able to easily explain complex subjects in accessible, understandable terms, without sounding condescending will be more effective among jurors. Our post-verdict interviews with trial jurors have reinforced the notion that experts who believe credibility is enhanced by spewing technical jargon and complex explanations around the courtroom do not connect with the jurors so they can assimilate the information. Instead, consistent with cognitive psychology as we outlined earlier, information that doesn't line up with jurors' sensibility, attitudes or experiences will be cast aside and ignored. Therefore, experts who testify with jargon and complexities are not only confusing the jury but they also are failing in their main purpose – i.e., to clarify and teach the jurors about the subject matter they were asked to discuss. To quote Einstein, "If you can't explain it simply, you don't understand it well enough."

One cautionary note associated with a witness who defaults to using technical jargon is that jurors may perceive him/her as "talking down" to them when the witness tries to simplify his/her message. Sometimes an expert witness "dumbs the message down" to a point that it becomes condescending to the jurors. Therefore, there is a balancing act between being too technical, while at the same time not being too simple or demeaning. As such, experts need to use enough industry jargon to show their experience and knowledge, but also to simplify the technical language enough to be informational in order to establish that jurors can trust the information experts are providing.

- **Balance of Resume.** Another level of bias that undermines

an expert's persuasiveness with the jurors is the content of their curriculum vita. Certainly the education and experience play a significant role as discussed above, but it is the expert's list of cases and who the expert has testified for that can have a different level of impact. It should be no surprise that experts who have been consistently hired exclusively by same side (e.g., only plaintiff or only defense) lack the standing to provide a "neutral" opinion. For instance, if an expert witness has only testified for the plaintiffs, jurors are astute enough to realize his/her opinion is suspect. An expert that can say that, over the years of her career, she has been hired in different cases by either the plaintiff or defendant will exhibit a stronger credibility rating among jurors. Moreover, this effect is heightened when the expert can say she has been approached by the attorneys for one side in a lawsuit and after review of the facts, turned down the offer to be an expert in that case. The benefit here is derived from the fact that jurors believe that if an expert has testified for both sides at any time and/or has turned down others to not compromise their ethics or reputation, then jurors believe she "must really believe in this case." When a witness appears neutral about who hires him and won't compromise his reputation for the first one who knocks on his door, his ability to persuade jurors is enhanced.

- **Hourly Rates.** While jurors will never be entirely comfortable with the high hourly rates that experts get paid, it is possible to reduce or perhaps even neutralize its impact upon jurors' credibility assessments. Certainly trying to put the hourly rate into context is one of the more effective ways to counter its influence upon the jurors. That is, when preparing an expert for deposition testimony, one question to ask him is how his hourly fee will be used or allocated. Learning this information may lead to a very helpful answer that will put the hourly wage in perspective. For instance, for most experts, being asked to testify takes them away from their medical practice or their work in the field. To the extent it is truthful, informing the jurors that the money collected will be used to benefit their patients in their clinic (able to do pro bono work), their practice (purchase new state of the art equipment) or their business (helping people in some way) appeals to the altruistic side of jurors. However, if the impression is left with the jurors that the expert is "lining his pockets," as quoted by jurors, then the expert will appear biased, reinforcing the "paid for hire" stereotype that most jurors hold of experts.

Non-verbal and Verbal Characteristics. And of course, the old standbys for evaluating witness credibility apply to experts as well. Many academic research studies have reinforced the findings we have seen in the real world with our actual trial jurors. Characteristics such as good eye contact, avoiding verbose answers, engaging in powerful speech, and appearing likable all impact the way jurors perceive the persuasiveness of the testimony. If experts do not have good eye contact, use powerless speech (i.e., tendency to use language that is perceived as being unsure or lacks con-

fidence, such as excessive politeness, hedges and hesitations, et cetera), the expert will be perceived as lacking in the essential four characteristics that impact and enhance an experts' credibility – knowledge, confidence, trustworthiness and likability.

Conclusion

Clearly, there are many variables that will affect an expert's perceived credibility, but, with careful preparation, these variables can be modified in order to strengthen his or her testimony and to ensure it is well-received by the panel. Unfortunately, attorneys have to work against jurors' preconceived notions about the retained expert's legitimacy since many believe they are "hired guns" that are paid a hefty hourly rate to give a biased opinion. For this reason, the trial team and expert have an uphill battle to fight from the moment the testimony begins. For the most part, the retained expert will always be walking a fine line between making it clear they have a significant command of the material and not sounding condescending or

arrogant. Each one of the factors previously reviewed in this article affects this critical balance. As mentioned, the trial team should be cognizant of the witness' experience and education and the way it is portrayed to the jurors. An expert does not always have to have an advanced degree to be perceived as legitimate. In fact, oftentimes, real life experience outweighs a formal degree. Additionally, the expert should show the jurors they have personally engaged the data and performed outside research that stretches beyond the documents given to them by the trial team to enhance credibility. Moreover, be aware of the expert's experience since experts with the most balanced resume will increase jurors' perceptions of the expert's neutrality. Finally, make sure that the expert is employing helpful verbal and non-verbal characteristics, such as good eye contact and powerful speech, which will influence the persuasiveness of the testimony. When preparing a witness, the attorney or trial consultant should pay close attention to all of these variables and keep in mind how each influences the expert's credibility since, in the end, a well-prepared expert is one of the most effective tools in helping you secure a favorable verdict. ©

With more than 25 years of experience in the trial consulting field, Dr. Pitera is a psychology and communications expert who specializes in complex litigation and preparing witnesses for depositions, trials and congressional testimony. Merrie Jo is a perceptive listener and observer of witness behavior and provides clear insights into how these verbal and non-verbal behaviors are likely to impact a witness' credibility with a jury, judge or arbitrator. She is a frequent national and international speaker on jury behavior and witness prep methods. You can reach Dr. Pitera at mjpitera@litigationinsights.com and can review her witness prep blogs on Litigation Insights' website: <http://www.litigationinsights.com/blog/>.

Footnotes

[1] Brodsky, S.L., Griffin, M.P., &Cramer, R.J. (2010). The Witness Credibility Scale: An Outcome Measure for Expert Witness Research. Behavioral Sciences and the Law, 28, 892-907.

[2] Neal, T. (2009, March). *Expert Witness Preparation: What Does the Literature Tell Us?* The Jury Expert, 44-54



Tips for Preparing the Expert Witness

by Alyssa Tedder-King, M.S. & Katie Czyz, M.A.

WORKING WITH EXPERT WITNESSES can be difficult for even the most seasoned attorneys and trial consultants. Oftentimes, egos and expertise can get in the way of an expert's ability to deliver persuasive testimony, requiring attorneys and trial consultants to be creative when developing solutions that fit both the problem and the expert witness. As trial consultants, we have gained valuable information on how to prepare expert witnesses for trial from the jury research we have conducted. For instance, we know that the best experts are capable of conveying they are honest, respectful people who have a firm grasp on the issues they are asked to testify about. When experts convey their insights in a polite, yet knowledgeable, manner they can be an invaluable asset at trial.

Recently, we had the chance to interview Dr. Merrie Jo Pitera, our CEO and resident expert (no pun intended) on witness preparation. Over the last 25 years, Dr. Pitera has prepared hundreds of witnesses for depositions, trials and congressional hearings. She offered the following tips for preparing expert witnesses:

1. Identify the Problem(s)

The first step is to determine why you need to work with this expert. For a consultant, this means getting the inside scoop from the attorney and identifying the problem(s) early so that you can begin to develop a plan. There can be a variety of reasons why an attorney hires a consultant to prepare an expert. For instance, the witness may be defensive or arrogant, display distracting nonverbal behavior, unable to remain focused, or poorly answers routine questions. From our research, we know that jurors equate an expert's style of answering to their perceived level of honesty. This means that experts who fidget, use powerless speech[1], or over-volunteer information look as though they are being untruthful. While any one of these behaviors can seem small, anyone with years of experience knows just how quickly these issues can turn into a big problem for a witness and, potentially, the entire case. Because the attorney knows the expert best, it is important to get their take on the key problems/concerns. In the long run, this will save you a significant amount of time

and help you utilize your time effectively during your witness prep session. Moreover, the witness should be encouraged to start thinking about their testimony and do some self-evaluation in advance of the meeting so they are better prepared to tackle the issues when you meet. This is important since, typically, the time you have to meet with the witness is limited.

2. Preserve the Attorney-Expert Relationship

Clearly, the goal of witness preparation is to improve the expert in some way, whether it be focused on content, delivery, or presentation. Along the road to improvement there can be a few tough moments where someone has to give the witness unfavorable, or even critical, feedback. Having a consultant deliver the tough messages can help preserve the attorney's relationship with the expert. This is important since the attorney will be working with that witness later at trial and trust is the keystone to maintaining that positive relationship.

3. An Expert Witness is Only One Chapter

Jurors filter incoming information through their own sensibilities. These sensibilities are comprised of pre-existing attitudes, personal experiences, or inferences. From here, jurors fill in the gaps such that any information congruent with their predispositions will be assimilated, while information inconsistent with their experiences and attitudes will be ignored. Jurors are attempting to piece together a coherent story from a multitude of facts and tidbits, and it is important for a witness to understand the role he or she plays in developing that story. It should be made clear to the expert that they are not supposed to try and tell the whole story but, instead, to provide jurors with an important piece of the puzzle. It might be helpful to try to get an idea of how the witness views his/her role in the case and, if necessary, help reframe their role. Make sure the expert witness understands that if the case were a book they are only one chapter.

4. An Expert Doesn't Have to "Sound" Like an Expert

Oftentimes, when working with an expert witness, he/she believes it's important to "sound" like an expert by often using jargon and relying heavily on content-specific knowledge to define and explain concepts to the jury. From our jury research, we have found that these experts come across as arrogant and jurors have a difficult time relating to them. Jurors don't like when expert witnesses use verbose answers when a sentence will do. Coach your witness to teach a concept in the way a fifth grader could understand without sounding condescending. It is important for the expert to maintain this critical balance when talking with jurors. They should communicate their expertise without sounding too academic or condescending. The goal is to succinctly and clearly explain specialized knowledge so that every single person on the jury can understand. It's best if the witness prepares for testimony with the goal of speaking to a wide audience to ensure

that no one is left out. Additionally, it is helpful for the expert to understand the composition of the jury. They should know the demographic make-up of the panel and that oftentimes few, if any, of the jurors have advanced degrees. Moreover, when possible, the expert should become familiar with each juror's personal background and interests. This understanding will help the expert engage the jury and teach the concepts effectively. This is critical since, ultimately, jurors understand and better relate to the expert witness who delivers complex messages simply.

5. Answer the Question

One thing we hear consistently in our jury research is that witnesses are evasive and, oftentimes, never answer the question they were asked. While it can seem obvious, jurors want to hear an answer to the question the attorney posed. For jurors, even the toughest questions deserve an answer and they aren't very forgiving of expert witnesses who skirt around a question. In an effort to evade a question, some expert witnesses give long-winded and confusing answers, but as one juror suggested, "if I ask you what time it is, don't tell me how to make a watch." It's OK to Say I Don't Know

6. It's Okay to Say "I Don't Know"

One thing we hear consistently in our jury research is that witnesses are evasive and, oftentimes, never answer the question they were asked. While it can seem obvious, jurors want to hear an answer to the question the attorney posed. For jurors, even the toughest questions deserve an answer and they aren't very forgiving of expert witnesses who skirt around a question. In an effort to evade a question, some expert witnesses give long-winded and confusing answers, but as one juror suggested, "if I ask you what time it is, don't tell me how to make a watch."

7. Practice, Practice, Practice

The question and answer portion of witness preparation is the most important session because this will imitate what the expert will face at trial. Because unexpected and, at times, uncomfortable questions arise during cross-examination, witnesses have to be prepared to address a wide range of issues and practicing can help them feel confident in their responses.

8. Get the Headline Out First

The important part to remember when answering questions is to have the witness get the headline (aka theme) out first and then explain the details. This is important since jurors, like the rest of us, have such short attention spans. If the witness says the important part first, jurors are more likely to remember the main theme even if they stop listening after 30 seconds. However, if the expert saves their headline until the end, jurors may get lost in the process and not walk away with a firm grasp of the expert's testimony.

9. Assign Homework

Witness prep sessions are important, but to really help the witness take ownership of their testimony and make lasting change, assign “homework”. It’s important to not make it extremely difficult, unrealistic, or time-consuming. Instead, tell the witness to practice their themes out loud in front of the mirror as they get ready in the morning or on their way to work. If they tend to gesture a lot during questioning, have them practice conversations while sitting on their hands. If one of your suggestions is for a female witness to pull her hair back into a ponytail, because she keeps fiddling with her locks, assign her the homework of wearing her hair that way for two weeks before the trial so she becomes comfortable with it. Assigning homework ensures that positive behaviors become second nature and the witness feels comfortable with, what are sometimes, significant changes.

10. Be Realistic

While witness preparation can be extremely effective, a consultant won’t be expected to move mountains in two four-hour sessions. Be realistic about what changes can be made with the witness in the time you are given. Lifetime behaviors won’t be altered just because you talk about them for two hours. However, you can get witnesses to start thinking about their presentation differently and decrease some of their distracting behaviors while increasing helpful ones.

Conclusion

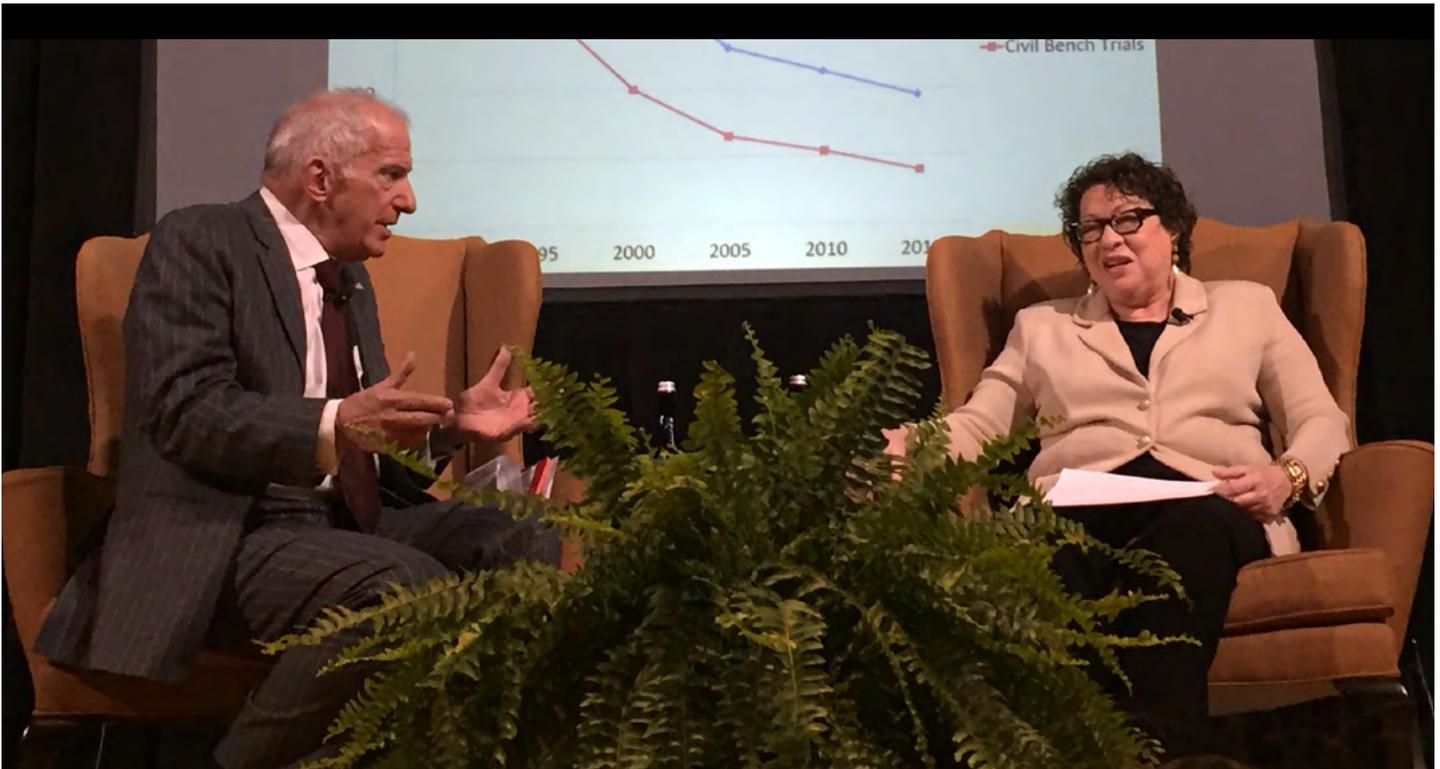
While it’s important to recognize that witness preparation cannot change major behavioral issues ingrained over a lifetime, it can help your expert rethink their testimony and make changes to their delivery which will foster a better connection with the jury. Maintaining a critical balance between educating the jurors without sounding condescending will help the expert develop a rapport with the panel which will strengthen his/her credibility. Moreover, the expert should focus on delivering his/her themes up front in order to combat jurors’ short attention spans. This will ensure that jurors walk into their deliberations with a keen understanding of the expert’s testimony. Additionally, it is important to encourage your expert to consistently practice their testimony since the more they practice the more comfortable and confident they will be when they finally take the witness stand. Finally, remind your expert that while it is important to be direct and answer the question, they are not expected to know everything. Jurors prefer a direct and honest witness to an evasive one. Witness preparation is an essential component of trial preparation. By implementing these tips, you will help your expert testify in a way that better resonates with the jury, and this testimony will serve as a critical asset at trial. 📌

If you liked these tips on preparing experts, you can read more at our firm blog. We have witness preparation tips [here](#), and [here](#), and [here](#).

Katie obtained her Master's Degree in Communication Studies from the University of Kansas where her studies focused on persuasion, conflict resolution, organizational communication and stakeholder theory. Both her education and tenure in the trial consulting field have supplied Katie with a broad range of research skills from jurors' attitudes and decision-making processes to content analysis and interviewing techniques. Moreover, Katie's extensive background in project management affords her a unique perspective when designing and implementing jury research projects. You can reach Katie at kczyz@litigationinsights.com and can review her other relevant blogs on Litigation Insights' website: <http://www.litigationinsights.com/blog/>.

Alyssa recently completed a Master of Science in Counseling Psychology from the University of Kansas where she gained valuable experience in social science research methodology and statistical analysis. Her background in the social sciences includes extensive writing and presentation skills along with experience in creating questionnaires. Her previous roles in teaching, research and counseling have provided Alyssa with a strong foundation for her work as a Jury Research Consultant. You can reach Alyssa at atedderking@litigationinsights.com and can review her other relevant blogs on Litigation Insights' website: <http://www.litigationinsights.com/blog/>.

[1] Powerless speech reduces the perception of a speaker’s power and leads to negative assumptions of the speaker’s authority. Powerless speech may include such mannerisms as hedges, hesitations, disclaimers, rising inflections and tag questions.



Citizen Juror:

Justice Sotomayor and Steve Susman Discuss Why Jury Duty Matters

by David Barnard and Tara Trask

FLIP ON THE TELEVISION, open the laptop or sit down around most dinner tables across the country these days, and it seems clear that we are experiencing interesting times. Americans are gravitating to grassroots, populist political movements on both sides of the traditional political divide. What the campaigns of both Donald Trump and Bernie Sanders share is a message that “the people” are not being heard and they are unhappy about it. Both campaigns have, albeit through different messages, attempted to appeal to a clear anti-establishment, anti-elite, anti-status quo sentiment, one in which many ordinary Americans seem to believe that they don’t have a voice in the direction of the United States. But we wonder, are Americans even aware of the opportunities they have to make their voices heard in their government? This is just one of many questions that Justice Sotomayor touched on when she visited NYU Law School this winter.

On February 8th, 2016, in front of a packed auditorium at NYU Law School, Supreme Court Justice Sonia Sotomayor sat down with the Executive Director of the [NYU Civil Jury Project](#), Stephen Susman, to discuss the current state of civil jury trials in the United States. Justice Sotomayor is uniquely

positioned to comment. She is the only sitting Supreme Court Justice with direct jury experience—having presided over jury trials as a Federal Judge and previously participating in jury trials as a trial lawyer. In this article, we will offer a historical perspective of the jury system, current day scholars’ perspectives on the jury system, and Justice Sotomayor’s perspectives from her interview at NYU on the importance of the jury system today.

The NYU Civil Jury Project began last year with the goal of gaining a better understanding of why there has been a decline in the number of civil jury trials, as well as what the implications will be for the civil justice system if the trend continues. In 1962, 5.5% of federal civil cases were resolved by civil juries, and by 2005, that figure declined to below 1%. In 1997, in Texas State Courts, approximately 3,400 civil cases were decided by jury trials, and in 2012 that figure fell to 1,200 ([Civil Jury Project, 2015](#)).

The right to a civil jury trial is guaranteed by the 7th Amendment to the Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law (*U.S. Const. amend. VII*).

The founding fathers considered the 7th Amendment to be sacrosanct for a self-governed democracy. The right of the people to be judged by their fellow citizens was, and remains today, a necessity for ensuring the stability of public sovereignty. In addition to protecting the people from the potential tyranny of government, juries allow the deliberative judgment of the people to play a central role in the administration of justice. Beyond the benefits to litigants, jury trials offer a rare opportunity for citizens to participate in their government. Unlike voting, where citizens choose representatives to make decisions on their behalf, serving on a jury affords a citizen the opportunity to decide issues directly that ultimately impact our democracy and our justice system.

Despite the importance of civil juries in our system, jury service is treated as an inconvenience or a nuisance, and the verdicts juries reach are often derided anecdotally and in the media. With a tiny fraction of cases reported in the media and coverage skewed and incomplete, many think that juries often “get it wrong”.

However, media rhetoric does not appear match reality. National polling shows that the public has a largely positive opinion of jury service, and confidence in the jury system. Additionally, a strong majority reported that if they were on trial, they would rather have their fate decided by a jury than a judge (American Bar Association, 2004).

The Framers' Intent

When Justice Sotomayor sat down with Mr. Susman, one of the first questions he posed to her Honor was her response to a man wondering: “If civil jury trials are disappearing, why does it matter?”

I would go tell him to read about the 7th Amendment, and read about what motivated our founding fathers to think that was an important protection of a sense of liberty. Their main reason was, remember, that the crown controlled justice in their time. The crown had judges, but those judges, because of the nature of the circumstances of that system, the judges hewed pretty closely to the desires of the King. You didn't keep your job if you didn't... I think that they [the founding fathers] understood, and I think that we should understand, that the jury is the front line of protecting

the society and its liberties and I think that's terribly important for us to continue and to uphold.

Securing the people's right to a jury trial was a central issue in the ratification of the Bill of Rights. Charles Wolfram, (1973) examined the historical materials relating to the drafting the 7th Amendment, providing a historical context for how the Framers considered civil juries to be a check on governmental authority:

“A deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England in 1774-1776 had been the extent to which colonial administrators were making use of judge-tried cases to circumvent the right of civil jury trial ... Legal writers and political theorists who were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen” (pp. 654).

The 7th Amendment was central to protecting the right of the people for self-governance and to guard against the tyranny of the government. Jury trials were considered by the Framers to be a check on judicial power stemming from English oppression. Judges, although better versed in the law than most citizens, represent a branch of the government, and their loyalties and situated position can influence their decisions. As Justice Sotomayor explained:

And I think our founding fathers understand that no matter how you appoint your judges, whether they are elected or appointed, politics will always play a role in the appointment of judges. Sometimes in a big way, with a capital “P” as one of my judge friends once said who knows a Senator. Or a small “p” that you are involved in community affairs.

The Framers' intent was not only for civil juries to be a safeguard against judicial bias. A jury is not empaneled because it is more likely to reach the same conclusion that a fair judge would reach, but because it is likely to reach a different one. Jurors bring more than a layperson's perspective; they bring the multiple unique perspectives of citizens that are engaged to settle a dispute. The decisions reached by the jury are the result of a dynamic deliberative process representing the views of a collaborative group of citizens. This process is unique to juries and would not be afforded by one judge returning a verdict.

As Wolfram further explains, the antifederalists support for civil juries was not rooted in an efficiency analysis, such as we often hear leveled at civil juries today, (too time consuming, too costly, et cetera). The importance of the jury trial was viewed as so significant that it outweighed the fact that jury trials were costlier, time consuming, and labor intensive. The antifederal-

ists believed jury trials so necessary to ensure a free nation that the benefits outweighed the costs. Further, the Framers supported the institution of the civil jury with the awareness that the decisions juries reach can sometimes result in verdicts that are at odds with the “substantive rules that the judge instructs the jury to apply” (pp. 671).

“The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach. Those who favored the civil jury were not misguided tinkerers with procedural devices; they were, for the day, libertarians who avowed that important areas of protection for litigants in general, and for debtors in particular, would be placed in grave danger unless it were required that juries sit in civil cases”(pp. 671-72).

In the modern era, we have to wonder if we’ve wandered too far afield of the original intention the Framers—where proving that juries can make decisions just as well as a judge could, or at least as *predictably*, is an argument for saving them. It is not predictability of decision-making that the framers were focused on, but rather they wanted to ensure a *diversity* of decision-making. In addition to bringing the perspective of the people to decide matters of law, civil juries grant the people ad hoc authority in the legislative process. As jury verdicts are upheld, are jurors, and their decisions, not inherently part of the common law system? As Wolfram explains, the Framers intent was that juries would allow the will of the people be interjected into the legislative process:

“Specifically, it is clear that the amendment was meant by its proponents to do more than protect an occasional civil litigant against an oppressive and corrupt federal judge-although it certainly was to perform this function as well. There was substantial sentiment to preserve a supposed functioning of the jury that would result in ad hoc “legislative” changes through the medium of the jury’s verdict. Juries were sought to be thrust into cases to affect a result different from that likely to be obtained by an honest judge sitting without a jury. The effort was quite clearly to require juries to sit in civil cases as a check on what the popular mind might regard as legislative as well as judicial excesses” (pp. 653).

Jury nullification, a form of ad hoc legislative change, is when a jury intentionally returns a verdict against the evidence, or otherwise chooses to take the law into their own hands. However, there has been debate as to whether juries should be in-

structed on the option of jury nullification. In *U.S. v Thomas (1997)* the Second Circuit Court of Appeals considered jury nullification to be “a violation of a juror’s sworn duty to follow the law as instructed by the court.” Justice Sotomayor commented on this position:

You know the Second Circuit has an opinion that basically says that juries should never be instructed about jury nullification, and that any instruction that would suggest it, is wrong. And I leaned very closely to the Second Circuit warning for many, many years. As I have grown more in the system and watching it, I’m not so sure that’s right. Think about what juries did during the civil rights movement. If it weren’t for jury nullification, we would have many civil rights individuals who would be convicted felons for things that we think today are protected by the 1st Amendment. There is a place for jury nullification. Finding the balance of that and the role that a judge should and should not play in advising juries about that is important.

This clearly presents an interesting Constitutional question regarding jury nullification. Many courts, in accordance with the Second Circuit, will not include jury nullification in its instructions to the jury; however, given the historical context of the Framers’ intent, could this be a restriction on the peoples’ right to self-governance, and importantly, knowledge of those rights?

Juror Benefits

Beyond the benefits to litigants, the civil jury is a right, duty, and opportunity for those who are serving. The right to serve on a jury and to participate hands-on in the administration of justice is guaranteed to each citizen. It is the only compulsory service that is placed upon citizens, with the exception of a draft, which is not currently in effect. It is a rare opportunity for people to work together with a diverse group of their fellow citizens to reach a reasoned decision. Justice Sotomayor describes the experience of jury service:

Such a fascinating experience, and it is the one responsibility of citizenship that no one else can actually do. And by that I mean everybody pays taxes whether you are citizens or not...the only other thing you can do is vote as a citizen. But this is the one activity where you’re asked to serve and to actually come to a decision on the behalf of the society that we represent, and I think that is a very, very important thing to remind people of.

Specifically, the activity of deliberating is a unique process that dynamically engages the people to reason and to apply the rule of law. As described by Mr. Susman, the act of deliberating is a rare opportunity in the lives of most citizens:

For many people serving on a jury and going to lunch, and sitting in the jury room with the jury and deliberating is the one time that we have in our lives to work collaboratively with people who are totally different, both racially, religiously, totally different demographics, and they work together to produce a product that they are all proud of.

In fact, in addition to experiential benefits, jury service has been shown to increase civic engagement. Gastil and Weiser (2006) argue that jury service has a *transformative effect* on citizens who participate in the deliberative process. People called for jury duty reported increased civic and political engagement (taking political action, discussing public affairs, group involvement, and staying informed) when they had a positive subjective experience participating in jury service:

“Although the criminal or civil juror does not make sweeping policy decisions, he or she does have the experience of sitting in the seat of government, deliberating with fellow citizens, and rendering decisions that have real consequences for plaintiffs, defendants, and the state...In other words, the jury is a sacred, institutionalized opportunity for citizens to experience the transformative power of public deliberation” (pp. 607).

Alexis de Tocqueville expresses similar sentiments in *Democracy in America* (2010). de Tocqueville states that while he cannot speak to the benefits of the jury system to the litigants, the benefit to the jurors is apparent:

“The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.... I look upon it as one of the most efficacious means for the education of the people which society can employ” (pp. 309-12).

Opinion of Jury Service

Jury service is often portrayed in popular culture and water cooler conversation as a waste of time and something that is to be dreaded and avoided. Jurors themselves are said to be unintelligent. Axioms such as, “I am being judged by twelve people too stupid to get out of jury duty” are all too common. High profile cases are often held up as examples of how

the civil jury system is out of control. We haven’t participated in a single civil jury selection in the last 20 years without at least one juror mentioning the *McDonald’s Hot Coffee* case as an example of how the jury got it wrong.

Human beings tend to be critical of others but forgiving of themselves, which is likely the only explanation for the change of heart once a person actually serves as a juror. The empirical evidence shows that most adults have a highly positive view of jury service once they have served. Justice Sotomayor shared her experiences with jurors:

In my experience, virtually every jury that served would tell me later that they were happy after they were picked, they were happy...I have to tell you that when you talk to jurors, many of them become friends maybe not the entire group of twelve or six or whatever, but they will always make a couple of friends that they will all keep for life. There is something about that experience. We don’t often make decisions like that and this is a way of forcing people to think about how useful that collaborative effort can be.

In fact, the Justice’s experience is consistent with what the data show. In 2004, the [American Bar Association](#) commissioned a national opinion poll of adults to evaluate opinions of jury service. The results were more positive than one would anticipate given what is generally conveyed in the media.

Of those surveyed, 62% of adults had been called for jury service and 29% had actually served on a jury. Three-fourths of adults did not believe that jury duty is a burden to be avoided, and 84% agreed that jury duty is an important civic duty that should be fulfilled, even if it happens to be inconvenient.

Overall, a majority of jurors had a positive view of jury service, but those who had been called for jury service had a more positive view than those who had not. Eighty-seven percent of adults who had been called believed that jury duty is an important civic duty even if it’s inconvenient, whereas only 80% who had not been called believed so. Seventy-eight percent of adults who had been called disagreed that jury duty is a burden to avoid, whereas only 70% who have not been called disagreed.

Finally, 75% of adults, if they themselves were on trial, would want their case to be decided by a jury rather than a judge. This figure was the same for those who have and have not been called for jury service.

Although the above poll suggests a positive view of jury service, jury service can be subject to the influence of derisive narratives. For example, in 1995, near the end of the highly publicized O.J. Simpson trial in Los Angeles, an opinion poll of Californians (Holding, 1995) showed a more negative opinion

of the jury system. Only 13% of adults reported that they had a great deal of confidence in the jury system and 42% reported that they did not have confidence in the jury system. As discussed below, defenders of the 7th Amendment need to take action to educate the public about the importance of jury service.

What Now?

The antifederalists believed that the rights afforded by the 7th Amendment were absolutely necessary to maintain a popular sovereignty and yet we hear very little about the 7th Amendment—or even the 6th Amendment for that matter. By contrast, the 2nd Amendment, with powerful corporate and commercial backup is one most Americans know very well. Can you imagine the outrage if a citizen could just “click away” his or her 2nd Amendment Rights every time an employment contract was signed? That happens every day when a citizen is forced to agree to terms that include an arbitration clause in lieu of resolving disputes through the court system.

In fact, most jury-centric narratives go well beyond just neutralizing the issue. For example, many people consider the *McDonald's Hot Coffee* case to be the embodiment of the civil jury system run amuck. It is held up as the epitome of a frivolous and unjust lawsuit. A shallow knowledge of the case pervades cultural divides throughout the United States and beyond. Although many people are aware of the case, their knowledge is at a newspaper headline level and often inaccurate. Many people believe that a woman was awarded nearly three-million dollars because her coffee was too hot. Often, when people learn more about the case—such as the extent of the injuries and the jurors' rationale for awarding damages—they quickly realize the issues are more nuanced. But, despite the release of a documentary film, “*Hot Coffee*,” highlighting the details of the case, the exposure of the film is miniscule compared to the *McDonald's Hot Coffee Case* axiom. This inaccurate but pervasive narrative can aid in undermining the jury system. Other narratives are also pervasive, such as the *Patent Troll* narrative, which has been at least as successful in closing the courthouse doors for litigants and, ultimately limiting the authority of the jury. Although the jury system was intended to be a check on the power of the government, in the modern era, it clearly also should provide a check on the power of corporations.

One could argue that a large reason people are susceptible to

derisive narratives, is because they do not have any competing narrative to contradict what they are told. This history of the 7th Amendment and the importance in securing our liberties needs to be shared.

Judges have a prime opportunity to educate citizens who appear before them as prospective jurors about the value of jury service and its role in our democracy. Justice Sotomayor spoke in reference to inspiring jurors to serve:

...most of it was in preliminary instructions, in explaining to jurors the importance of the process, their individual importance in being part of the process, in talking to them about the attempt that the trial is going to be efficient and not waste their time. A lot of that kind of preliminary discussion goes a long way towards convincing jurors to serve.

Clearly many judges, but not all, take great pride in educating jurors about the unique opportunity they are afforded. We have heard many different styles, areas of emphasis and even tone used to great effect. And sometimes the effect those efforts yield becomes abundantly clear.



There is a judge in Las Vegas Superior Court, who in his opening instructions to the venire, always reads the Preamble of the Constitution:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do

ordain and establish this Constitution for the United States of America.

His staff had a large plaque with the Preamble printed on it made for him and it hangs over his jury box. He begins his instruction there, and tells a very remarkable story of the soldiers in the Revolutionary War, what they were fighting for, and why “Justice” is the first establishment of the newly formed U.S. Constitution. It’s very inspiring.

Several years ago, during a jury selection, a prospective juror at the back of the room sent the Judge a letter. The juror was a veteran of Desert Shield and Desert Storm. He thanked the Judge for reading the Preamble and he said some other very important things excerpted here:

Dear Honorable Judge,

I am Juror Name (badge number). I want to thank you for educating the other jurors on the Preamble... For the last approximately two weeks, I had to listen and witness the complaining of the dreaded jury duty. These are the people for whom I laid my life down? It is. And would gladly do it again and twice on Sunday...

Not everyone understands what it is to sacrifice your time for justice. We are receiving pay to sit and give our opinion based on facts under a blanket of freedom, which is provided by my brothers, and sisters fulfilling their patriotic duty even till this day...

Your Honor, I see your summons as a direct order to fulfill my duty as a public member of This County. And so, I follow orders. It does me great pleasure to see a system work especially since I fought for this system.

I am used to “Hurry Up and Wait”.

I am glad I have the privilege to order Starbucks and go where I please.

I am glad I am judged by a Jury of my Peers.

I am glad I live under a blanket of Freedom.

I am glad to be a part of this Great Nation and The Preamble.

Many do not understand what it is to sacrifice a little time for the better of all.

With All Due Respect,

Espirit De Corps,

U.S. Army Veteran (Operation Desert Shield and Desert Storm)

When the next group of jurors was brought in, the Judge read the prospective juror's letter, being careful to protect the juror's identity. At the completion of reading the letter, the judge dabbed tears from his eyes on the bench. He now reads it to every incoming panel.

Given the populist and grassroots political climate that exists on both sides of our political spectrum, there may be no time like the present to refocus on what rights we have as citizens to participate in our government in the most direct fashion. Proponents of the 7th Amendment have a unique opportunity to re-frame the narrative in a manner that represents the historical context, and the central role jury trials fill in a self-governed democracy. 🗳️

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Juror Perceptions of Women as Expert Witnesses: Suggestions for the Effects of Testimony Complexity, Gender-Intrusive Questioning, and Perceived Credibility

by Brittany P. Bate

THE USE OF EXPERT WITNESSES has become commonplace within legal proceedings. As a result, research regarding how jurors perceive expert testimony has become of increasing importance. A variety of variables can influence juror perceptions of expert testimony, ranging from content-related variables (e.g., quality of the testimony, complexity of the testimony) to witness-related variables (e.g., age, race, gender, years of expertise, credibility, personality factors; Brodsky, 2009; Gardner, Titcomb, Cramer, Stroud, & Bate, 2013; Brodsky, Griffin, & Cramer, 2010). These factors have been thoroughly researched in a variety of contexts; however the present paper will provide an analysis of the literature pertaining to juror perceptions of testimony of women expert witnesses, compared to men. Issues involving gender-congruent case testimony, the effects of gender on juror processing of testimony, the relationship between gender and complexity of testimony, the interaction of race and gender, as well as the impact of gender-intrusive questioning will be examined. Implications and recommendations for attorneys will be discussed.

Gender Congruent Cases and Gender-Role Stereotyping

Some studies have found support for a female expert advantage, compared to male experts (Memon & Shuman, 1998; Schuller & Cripps, 1998; Swenson, Nash, & Roos, 1984); however female expert witness support was found within gender-congruent case domains. For example, Schuller and Cripps (1998) conducted a study involving a simulated homicide trial in which a battered woman had murdered her abuser. The expert in this case was a clinical psychologist testifying to information regarding the battered woman syndrome, including emotional and psychological reactions that occur as a result of spousal abuse. Results demonstrated that the female expert led to greater verdict leniency when compared to testimony given by the male expert. In a mock case involving child abuse, Swenson et al. (1984) found jurors rated the female expert as having a greater degree of expertise in comparison to her male counterpart, though these findings were marginally significant. As previously hypothesized, such findings could be a result of a societal stereotype that women, as opposed to men, are better at judging the needs of children.

Areas such as domestic violence or child custody may be viewed as more female-congruent, and as such expert testimony given by women may be perceived as more appropriate, trustworthy, and knowledgeable (i.e. more credible) than when given by male experts. However, gender-stereotyping and congruency works both ways. Schuller, Terry, and McKimmie (2001) investigated this gender-congruency hypothesis and found support for a male expert advantage, in a male-congruent case domain (i.e., construction industry). Participants read transcripts for a civil trial pertaining to a price-fixing agreement within the construction industry and were asked to award damages to the plaintiff. Researchers found that the male expert testimony resulted in significantly more favorable findings for the plaintiff, compared to female expert testimony.

Further, Schuller et al. (2001) also investigated the effect of expert gender in a female-congruent domain (i.e., women's clothing industry) and, although a pattern did exist in favor of the female expert, statistical significance pertaining to mock jurors' findings for the plaintiff based on expert gender were not found. It was considered that, although the type of business in which testimony was given was female-congruent (i.e. women's clothing), the true content of the testimony was far more male-congruent (i.e. price fixing in business and industry). Further, the expert witness in this case was a statistician; an area and career stereotypically viewed as more male dominated/male-congruent. Collectively, this idea suggests that congruency may well extend beyond case content, and may circle back to expert characteristics alone, such as occupation (statistician versus clinical psychologist) or expert testimony content (price-fixing agreements versus battered women syndrome).

Gender as a Heuristic Cue

Previous research has shown that gender plays a role in juror perceptions of expert testimony (Memon & Shuman, 1998; Schuller & Cripps, 1998); however, gender may play a particularly important part as expert testimony becomes increasingly more complicated. Drawing from the social psychological research regarding persuasion and processing routes (e.g., elaboration likelihood model, Petty & Cacioppo, 1986), individuals are able to engage in two types of processing: central or peripheral. Central route processing requires effort, and likely involves careful scrutiny of the information presented regarding quality and content, as well as having the motivation and ability to do so (Schuller et al., 2005). However, when individuals are unable or unmotivated to engage in systematic processing of the message, they utilize decisional shortcuts, or heuristic cues, to try to evaluate the quality of the message via the peripheral route (Petty, Cacioppo, & Goldman, 1981). As expert testimony can at times be quite complex, jurors may be especially apt to follow heuristic cues when evaluating such testimony (Cooper, Bennett, & Sukel, 1996). Research has found that when testimony was complex, mock jurors were more persuaded by experts they found to be more credible (i.e., those with higher credentials) compared to their lower credentialed counterparts (Cooper et al., 1996). Variables that con-

vey information related to source credibility can be influential when individuals have limited ability to systematically process presented information (Schuller et al., 2005).

In this way, gender may operate as a heuristic cue, conveying information about supposed expertise within the confines of expert testimony. Schuller et al. (2005) asked participants to award monetary damages in an antitrust price-fixing violation case, in which guilt had already been established. Researchers manipulated the testimony by complexity (high vs. low) and gender of the expert (male vs. female). Results showed when jurors were unable to systematically process the testimony (i.e., in the high-complexity condition), mock jurors awarded higher damages to the plaintiff when the expert was male, in comparison to when the expert was female. Further, in the high-complexity condition, mock jurors rated the impact of price-fixing agreements significantly greater when the expert was male compared to when the expert was female. In the low-complexity condition, however, mock jurors rated the impact of price-fixing arrangements as higher when evidence was presented by a female expert, compared to her male counterpart (Schuller et al., 2005). Further, though statistical significance was not reached, mock jurors displayed a tendency to award higher damages to the plaintiff when the expert was female, compared to when the expert was male.

One explanation for the effect found in the low-complexity condition is that jurors engaged in flexible correction (Wegen er, Kerr, Fleming, & Petty, 2000), meaning that in an effort to appear unbiased, mock jurors instead overcompensated within their assessment of the female expert's testimony and thus offered her higher ratings than they felt she deserved. Another explanation of the female advantage in the low-complexity condition may again link back to gender stereotyping. It could be that the simplicity of the testimony was more gender-congruent to a language and presentation style that would be expected of a woman (Schuller et al., 2005). In the same vein, the more technical language used by the expert in the high-complexity condition may have been viewed far more negatively for the female expert, as it was stereotypically gender-incongruent. Combined, these findings may suggest jurors interpret and use gender differently, depending on the complexity of testimony offered and their ability to process such evidence.

The Interaction of Gender and Race: Gender Congruency, Stereotypes, and Flexible Correction

Integrating a number of the concepts discussed so far, Memon and Shuman (1998) examined the role of race and gender in juror's perceptions of perceived expertise and persuasiveness of an expert witness. A community jury sample from the Dallas, Texas area participated in a mock jury design in which they were presented with one of four experts – Black Female, Black Male, White Female, or White Male. The experts were testifying in a simulated medical malpractice case, in which the plaintiff was alleging negligence of her obstetrician/gynecologist, resulting in the profound birth defects of her daughter. Spe-

cifically, information pertaining to curettage and tubal ligation was discussed. The expert testified to the actions performed by the defendant (the OB/GYN), concluding that the defendant had acted appropriately. Results indicated the predominantly white jury sample was most likely to be persuaded by the black female expert. Further, of the participants exposed to the black female expert, white juror members rated the black female expert higher than the black jurors (Memon & Shuman, 1998). However, ratings on reasoning, believability, and objectivity did not vary with the race or gender of the expert. Further, the main effect of gender was not significant.

A number of explanations are posited to explain the results. First, it is again possible that flexible correction occurred. In an effort to provide socially desirable responses, white jurors rated the black female expert witness higher than what they truly believed she deserved. It is also possible that flexible correction interacted on some level with gender stereotyping, as previously discussed. As this case involved issues of pregnancy, gynecology, childbirth, and tubal ligation, it is possible that jurors tended to rate the testimony of women as being overall better than their male counterparts. Taken together, the interaction of flexible correction with gender-role stereotyping may account for the highest persuasion ratings being given to the black female expert witness.

Juror Perceptions of Gender-Intrusive Questioning

Jurors are continuously forming judgments of witnesses that aid in determining differential perceptions and perceived credibility of that witness (Brodsky et al., 2010; Gardner et al., 2013). Due to the adversarial nature of the interaction, how a witness handles cross-examination is particularly important to juror perceptions (Brodsky, 2004). Further, personally-intrusive questioning has become more common, especially with women witnesses. Larson & Brodsky (2010) examined the effects of personally-intrusive questioning of both male and female expert witnesses on juror perceptions. First, their research found in both the non-intrusive and intrusive questioning conditions, jurors perceived the female expert as being less credible than the male expert. The female expert was also rated as less believable, likeable, trustworthy, and confident when compared to her male counterpart. However, the female expert was not perceived as less credible in the intrusive questioning condition compared to the female in the non-intrusive questioning condition. To the contrary, researchers found that intrusive questioning of both experts increased juror perceptions of experts as more believable, trustworthy, and credible compared to when they were asked non-intrusive questions (Larson & Brodsky, 2010). This countered the expectation that such questioning would diminish or devalue the experts' competence.

Implications For Trial Lawyers and Considerations for Practice

Though gender is just one way in which an expert may be per-

ceived and, consequently, have their testimony rated as more or less credible, it is an important area of research nonetheless. Gender is static, and no amount of witness preparation or training is going to be able to change an expert's gender. Because of this, it becomes even more important to realize how gender impacts juror perceptions of expert testimony. It is clear from the research presented that stereotyping, case-congruency, testimony complexity, race, and intrusive questioning all play some role in differential juror perceptions of credibility of male and female expert witnesses.

Gender-congruency is important to think about when considering juror perceptions of expert witnesses. As the research has found a female expert advantage within female congruent legal cases (i.e., domestic violence, child custody, tubal ligation) and a male expert advantage within male congruent cases (construction industry), the attorney should contemplate this information when considering expert testimony and witness preparation (Schuller & Cripps, 1998; Swenson et al., 1984). However, the literature suggests gender-congruency may go beyond case facts, and extend into expert occupation and testimony content. Schuller and colleagues (2001) were unable to find statistical significance between male and female expert testimony pertaining to mock jurors' findings for the plaintiff in a female-congruent domain (i.e., women's clothing industry) when the true content of the testimony was more male congruent (i.e., price-fixing in business and industry), as was the occupation of the expert (i.e., statistician). A similar null expert gender effect was observed in a mock jury study in which the testimony content was female congruent (i.e., gynecology and tubal ligation) but the case content (i.e., medical malpractice) and occupation (i.e., medicine) were more male-congruent (Memon & Shuman, 1998).

Taken collectively, attorneys and their trial consultants must consider the impact of gender-congruency among case, testimony, and occupationally related content when choosing and prepping a witness. While an attorney surely would prefer to obtain the best-qualified expert for the job, the literature suggests that unfortunately juror perceptions of credibility, and thus decision-making, have less to do with qualifications or background and more to do with congruency and stereotyping. Put bluntly, a possible reason for the often seen lower credibility ratings of female expert witnesses in comparison to men is that society continues to hold an expectation of men as being the appropriate sex to be in positions of authority and influence, suggesting sexism is alive and well in mock jurors (Larson & Brodsky, 2010).

Both Cooper et al. (1996) and Schuller et al. (2005) found results suggesting that mock jurors use gender as a heuristic cue when the evidence presented is complex, resulting in higher credibility ratings for the male expert, compared to his female counterpart. This suggests a need for women as expert witnesses to be particularly cognizant of the level of complexity within the evidence they are presenting. Attorneys retaining a female expert witness should consider this research in wit-

ness preparation. If possible, when delivering expert testimony, women should strive to make their testimony as simple as possible, to allow for systematic processing by all jurors. As suggested by Schuller et al. (2005), testimony of the female expert was indeed rated more negatively when presented in a complex, rather than simplistic, way. Further, women may even obtain an advantage when presenting low-complexity testimony, in comparison to their male counterparts. Taken cumulatively, evidence exists to suggest that female experts are most credible when the evidence they present is less complex, and sometimes female experts gain an advantage over their male counterparts when testimony is presented in such a manner. This is an important finding for attorneys to keep in mind.

As women are increasingly becoming victims of personally-intrusive cross-examination, this has important implications when utilizing a female expert witnesses. Larson and Brodsky (2010) showed when the female expert was assertive in identifying these types of questions as rude or outside the scope of the case, it is possible that this identification increased the awareness to the intrusiveness of such questioning for the mock jurors, resulting in higher ratings of the expert and lower ratings for the cross-examining attorney (Larson & Brodsky, 2010). It is important for female experts to recognize, then, that it is far better to be appropriately assertive in denying personally-intrusive questioning as opposed to giving a submissive, or purposefully avoidant, response. It is imperative to make a female expert aware of this research during witness preparation, especially if opposing counsel has a reputation for being aggressive or personally-intrusive. Similarly, this is an important consideration for an attorney to remember when cross-examining any witness, especially one who is female.

Future Directions: Does Juror Gender Make a Difference?

Research has found that men and women perceive the credibility of male speakers and female speakers differently. In legal contexts, a juror's perception of an attorney's credibility can itself be influenced by the attorney's gender, the juror's gender, or a combination of these two variables. Hahn and Clayton (1996) assessed the relationship between attorney gender, attorney presentation style, and juror gender. Mock jurors viewed videotape of either a passive or aggressive male or female defense attorney interrogating a witness, and subsequently rendered a verdict. Additionally, participants rated attorney competency, assertiveness, and credibility. Results suggested both juror gender and attorney presentation style affected ver-

dict rendered. Male mock jurors were more influenced in the aggressive defense attorney condition, compared to the passive defense attorney condition, and even more so if the attorney was male. Specifically, male jurors found the defendant guilty significantly more often when the defense attorney was aggressive. This result was not duplicated among female mock juror participants, who found the defendant equally as guilty in both the aggressive and passive defense attorney conditions. As such, researchers concluded while men were clearly influenced by the attorney's presentation style, women might consider trial evidence to be more important than presentation style of the attorney. This finding may extend into the larger legal picture, and is perhaps applicable when considering how juror gender may interact with gender of the expert witness.

Few studies have empirically assessed the relationship between juror gender, expert gender, and juror decision-making. In the aforementioned simulated homicide case in which the defendant was a battered woman who had murdered her abuser (Schuller & Cripps, 1998), male mock jurors were more likely to believe the defendant's claim, hold the defendant less responsible, and hold the husband more responsible when the expert witness was a female. However, these same differences were not found among female mock jurors. Further, in a medical malpractice case involving tubal ligation (Memon & Shuman, 1998) no significant differences were found in regards to ratings given of the expert witnesses as a factor of juror gender. Finally, in a mock case involving child abuse, female participants rated *all* experts as being more credible than did male participants. While expert gender seemingly made no difference for female jurors in terms of credibility within this realm, it provides an interesting consideration for potential effects of juror gender in considerations of expert testimony and indicates an explicit need for further research investigating the relationship between gender of the juror and gender of the expert.

More research is needed to further explore the relationships between expert gender, juror gender, and juror decision-making. Further, research is needed in other areas pertaining to expert gender, such as dress, years of expertise/credentials, age, and/or the interaction of a number of those factors. All in all, jury research is still in its infancy. Further research pertaining to women as expert witnesses has an infinite number of directions in which it can expand. With the aforementioned studies as a small but sturdy base, this area of research will prove necessary for informing the practice of attorneys and trial consultants alike for quite some time.

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Understanding the Traumatized Witness

by Laurie Hood, M.S.

ONE OF THE BIGGEST challenges lawyers face is witness examination. You know your job, you have done the preparation and yet, somehow, at some point, your witness seems to transform right in front of your eyes. You know the story. Witness “X” has presented in your office as thoughtful, credible, and in control of his or her faculties and when the witness becomes stressed through the process of being questioned, he or she falls apart. Not the “break-down, cry, ‘I need a minute’” kind of fall apart, but the “morph into what seems to be a totally different person” kind of fall apart.

The once thoughtful and articulate person suddenly stops finishing sentences or completely loses the train of thought. The pitch of the witness’ voice goes up and their speech becomes rapid, pressured, and choppy. The witness may become overly defensive and appear aggressive or say things that seem to come out of the blue. What is going on?

“How Did My Witness Suddenly Become a Complete Train Wreck?”

If your witness has transformed into a different person right

before your (and the jury’s) eyes, you could be dealing with someone who has unresolved trauma. And while it’s not your job to diagnose trauma, it *is* your job to present your case.

It helps to understand what happens physically, psychologically and physiologically when unresolved trauma is activated. It also helps to have a few of the terms psychologists and trauma-informed researchers and therapists use:

1. **Trigger:** Something that sets off a **memory** or flashback transporting the person back to the event of her/his original **trauma**.
2. **Trauma:** Something that overwhelms an individual’s ability to cope and produces a sense of helplessness and/or fear of devastating loss or death.
3. **Flashback:** a sudden recollection of the past which can involve any of the senses. The key is that the person *relives* the experience and is unable to fully recognize it as a memory.

4. Reptilian brain: The oldest and most primitive parts of the human brain and is shared by all reptiles and mammals, including humans. It is responsible for coping and unconscious and survival functions.

When an individual's prior trauma is activated (I prefer the term "activated" over "triggered"), their fight or flight response hijacks their brain and body. Cortisol and other stress hormones flood their system and their reptilian brain takes over. Depending on the circumstances and degree of the trauma suffered, a person may become mildly agitated and distracted or completely unable to function.

"How Can I Help My Witness Regain Composure and Focus?"

While each person is unique, most people will respond positively to the following thought processes and actions from you:

1. Realize that your witness is triggered
2. Focus first on *yourself*
3. Take a slow, deep breath
4. Slow your speech
5. Lower the pitch of your voice
6. Lower the volume of your voice

If you are well trained or have a consultant who is trained in trauma informed work to support you, you can try the following:

1. Move closer (if appropriate)
2. Make eye contact (if appropriate)

Let's take each of the above actions one by one and begin to build an understanding of how and why they might impact your witness.

1. Realize that your witness is triggered: Just by recognizing that your witness may be experiencing the triggering of unresolved trauma, you will shift your perception. Most of us feel compassion for others when we realize they are hurting or struggling. It is also helpful to understand that if your witness is truly triggered, their reaction and perceptions are largely, if not completely unconscious and out of their control.
2. Focus first on *yourself*: While this seems counterintuitive to most of us, it is one of the most powerful tools avail-

able to you. First, it is truly the only thing under your control and second, your level of tension, intensity or stress—what I call "rev" (as in revving an engine), has an impact on those around you. So, even if you are happy and positive, if you are all revved up, you will likely add to a person's level of angst if they are triggered. So, focus on yourself and try to lower your intensity (rev).

3. Take a slow, deep breath: One way to lower your rev is by taking a deep, slow breath. I am talking about a letting go, relax *your* body kind of breath. If you are able to do this so that it is obvious (to your witness), it will almost certainly help to relax him or her. Much like a contagious yawn, when one person takes a slow, deep and cleansing breath and releases their own tension and anxiety, those around him or her unconsciously relax as well.
4. Slow your speech: When someone is already feeling overwhelmed, whether by the stress of being on the witness stand or by truly being triggered by past trauma, anything that adds to that feeling of overwhelm, is unhelpful. By slowing your speech, you give your witness the additional time necessary to think and process his or her thoughts, bodily sensations and signals and emotions.
5. Lower the pitch of your voice: The same thing goes for lowering the pitch of your voice. Most humans respond to and read (correctly) that a voice that is higher in pitch due to strain or stress is the sign of a person being less in control of themselves or stressed. People who are less in control are more threatening. When you lower the pitch of your voice (especially in conjunction with slowing your speech) you signal to your witness that you are calm and in control (translation = safe).
6. Lower the volume of your voice: Lowering the volume of your voice (within acceptable limits in a courtroom setting) will have a similar effect as slowing your speech and lowering the pitch of your voice.
7. Eye contact: One of the most powerful things you can do to help your witness calm down and find their balance is to gain and maintain eye contact with them. We are social beings and have evolved to connect with others. When we make eye contact with another person, our frontal lobes (our higher order thinking centers), become engaged. And, at this point you can probably guess what happens. When an individual begins to engage their frontal lobes, they are no longer operating out of their reptilian brain. This should only be attempted if you have received actual training or support from a trauma informed consultant. Done without this nuanced training or support could wind up making matters worse.
8. Move Closer: This works the same way as eye contact and can go just as wrong. Please only attempt this if you have appropriate training and/or support.

Obviously, you won't be able to do all of these things all of the time and they won't all work 100% of the time. However, think of them as skills that you can hone. Practice seeing and attending to different aspects of each of the above skills or tools outside the courtroom. Watch people *closely*. Watch *yourself closely*. Try to approach these skills and understandings of human behavior and psychology with some curiosity and experiment with them. Learn to watch for signals that someone may be triggered. What does it look like? What feelings are elicited in you? The better you are at reading and understanding people and the more aware you are of your own responses and reactions, the more powerful you will be as a litigator.

Lorie Hood, M.S. (PhD candidate) is a clinical psychotherapist, certified coach and is board certified in forensic traumatology, emergency crisis response, and domestic violence. Her research revolves around mind-body integration, trauma, creativity and human potential as they inform litigation, witness preparation, and attorney performance. Lorie uses her experience as a professional musician, actor (SAG), and dancer to expand the trial consulting field. She is a senior trial consultant at The Hood Group, LLC, a performance firm in Washington, DC.

Katherine James responds:

Plan A Is to Practice and Practice and Always Have a Plan B Just in Case!

Ms. Hood points out a very traumatic moment in the life of any attorney. She offers a very useful list of "what to do when this happens to you." What she very kindly does not offer is what I offer here.

If this happens to you because you have a third party witness on the stand, that is, someone with whom you have not been allowed to meet before the trial, follow Ms. Hood's instructions to a "T".

If, however, your own client or a witness you have had the opportunity to prepare has a breakdown like this I must say, "Shame on you." Why? It is part of your job to figure out if this witness has a predisposition to this kind of melt down. Especially when you have been working with a client.

How Do You Discover This Predisposition?

If you have role-playing as the major cornerstone of your witness preparation practice, you are much more likely to realize that somewhere along the line of questioning you are hitting some odd nerve--or that the witness is presenting "emotionally" in a way that you don't expect. Not only does this require that you role-play, but that you are open to dealing with your client beyond the simple "four squares" of the case.

I love lawyers. I love lawyers so much that I have worked with them almost every working day of my life for 39 years. Heck, I love them so much I gave birth to one. That being said, most lawyers get so caught up in the nuts and bolts, facts and law, timeline and theory of any case that they forget that the human being in front of them isn't just a repository of logically ordered testimony that neatly fits into their perfectly orchestrated case.

They prepare their witnesses in a lecture form, going over documents, timelines and events in a barrage of information. This is like reading a lengthy impenetrable brief loudly at someone. Without ever bothering to look up and how it is being received and experienced by the poor, barraged listener.

Role-playing at least gives an attorney a shot at observing what experience the witness is having in role. For example, as you are practicing you notice that the witness stops breathing, their voice goes up in pitch, all words desert the witness, the witness can't repeat what you've just said...in other words, exhibits even in a small way the symptoms that Ms. Hood describes.

THIS IS YOUR HEADS UP THAT THERE IS SOMETHING GOING ON HERE THAT MIGHT NOT HAVE ANYTHING TO DO WITH THE CASE.

Human beings have had experiences in life that are traumatic, deep-seated, and can leap up and grab your witness by the throat if you don't figure out what's go-

ing on in the "safe" space of your office conference room. For example, some people have wounding experiences during which some person in authority has been asking them questions. Sounds a lot like testifying, doesn't it? However, those experiences involved everything from parents demanding, "Do you want me to hit you again? Is that what you want?" to rapists seething, "Or I'll kill you." Ms. Hood is right. You aren't a psychologist. But, you are someone who can teach the witness to breathe, how to mirror your slowed down speech, how to look to you and trust you. In other words, set up a "Plan B" for if the witness gets triggered on the stand.

What is "Plan A"? That is the plan where you have worked through the issues enough to put the witness on the stand without needing "Plan B". Where the witness trusts and believes in you and has come to rely on you to be the port during their internal storm.

The moral of Ms. Hood's story for me remains: Really prepare the ones you can and have Ms. Hood's wise advice in your back pocket for those you can't.

Katherine James, founder of ACT of Communication, has been helping attorneys and their witnesses to be successful in live communication for almost 39 years. Proud member and past board member of ASTC.

Elaine Lewis responds:

The Importance of Listening, Teaching a Witness the Rules, and Practicing Responses

I commend the author for choosing to offer guidance on the under explored topic of how to help a traumatized witness regain composure. The issue is certainly fertile ground for helpful input.

Unfortunately I find the author's premise, that an attorney can be blindsided at trial by his own witness suffering an unexpected total meltdown, to be unlikely, unless trial preparation has been meager to non-existent. Meltdowns tend to occur before trial, when the witness is being prepared for direct examination, or in deposition when the witness is asked questions by the opposing attorney. It's hard to imagine that the triggers and flashbacks responsible for a meltdown had been benign in practice and suddenly activated at trial, unless the triggers had no relevance to the testimony to be presented.

In order to be sure my experiences with traumatized witnesses are not somehow unique, I made calls to a few litigators for whom I have prepared witnesses, to ask if they ever had a witness surprise them by unexpectedly falling totally apart at trial. Every attorney I spoke with reported this had not happened to them, nor had they any recollections of it happening to other attorneys at trial. Among the voices weighing in was Joel C. Bender, a highly regarded matrimonial attorney from New York. As you can imagine, the field of matrimonial law is particularly fraught with the potential for traumatized witnesses. Mr. Bender, a Fellow of the American Academy of Matrimonial Lawyers, has been a litigator for more than 40 years and has taught trial techniques at CLE programs run by the American Bar Association. He too said an attorney finds out about any testifying problems his client may have when preparing the client for trial – not during trial. Before trial is when to deal with a traumatized witness. Either the problem gets fixed then, or “you damn well better figure out how to settle the case.”

It Seems the Advice Offered in This Paper Addresses a Very Narrow Problem.

But let's assume, as does the paper, that for some reason there has been no hint to an attorney that he might be faced with a traumatized witness at trial. The author offers a list of 8 actions an attorney should take to calm his witness. In reviewing the list, my reaction is that some of the recommendations would be intuitive to a good litigator, and some not workable in a trial.

Surely any litigator faced with an incoherent babbling witness recognizes a problem whether or not it's caused by trauma, and will do anything in his power to help his witness. The advice to attorneys to focus on themselves first, take slow deep breaths, and lower vocal pitch, all assume an attorney would exhibit uncontrolled readable stress. I believe good litigators would be good actors in another life. The last thing they would reveal to their witness in trouble is stress or tension.

The directions to slow down speech, and lower volume, seem unnecessary. In direct examination an attorney has little reason to fire questions at his witness or raise his voice. He is there to be supportive, not challenging.

Moving closer to the witness may not work for a number of reasons. Often the closer an attorney stands to a witness, the more intimidated and nervous a witness can become. Further, the option may not even be available because where an attorney stands in relation to the witness is often a courtroom rule.

As to the direction to make eye contact with the witness, I find myself wondering where the attorney would be looking in the first place if not at his witness.

I don't doubt the author's expertise in dealing with trauma. Perhaps the techniques are helpful and effective in the quiet of a therapist's office, but I question their usefulness to an attorney in the middle of trial. The list of actions to take might have been more persuasive had the article included examples of the

successful application of the advice. As it stands, the impression is that the 8 steps are unproven theory.

I have prepared quite a few traumatized witnesses during my more than 20 years as a consultant. Not atypical of traumatized witnesses is Brooke, an articulate, highly educated woman, accustomed to speaking before large groups, who suddenly became totally incoherent at her deposition. The questions she was asked didn't seem to register. She couldn't focus. Her answers made no sense. She would lose track of what she was talking about. She dissolved into a puddle of tears so often that the deposition day was filled with endless exits from the room so her attorney could try to get her back on track. She was never able to pull herself together that day, although her attorney was kind and sympathetic, and tried to help. It was after this I was called into the case. When I met Brooke, she was still so distraught she burst into tears immediately after “hello.”

I approached the task of turning this traumatized witness into someone who would be able to string complete sentences at trial in the same way I work with all similarly suffering witnesses. I didn't start with rules. I didn't start with practice. I listened to her. I let her talk and cry and tell me all the things that were upsetting her. She wanted sympathy and I gave it. She told me how her husband of 14 years, with whom she was deeply in love, had out of the blue served her with divorce papers. Just 20 days prior to serving the papers, on her 42nd birthday, he had written her a note saying, “Every year with you is a gift. I love you.” To make matters worse, as soon as the papers were served, he left the marital home to live with the ex-wife of one of his frat buddies, who Brooke learned was carrying her husband's child. Another looming assault was the husband's threat to seek custody of their 10-year-old son. The husband, a hedge fund professional earning more than \$10 million dollars in the final year of the marriage, had plenty of money with which to go to war. This much of the story is only the tip of the iceberg. The case details would fill a novel. At any rate, I allowed Brooke

to go on and on until the flood of tears ran down.

Then I slowly introduced the idea that in spite of how hard all of this was for her, I was going to give her techniques for answering questions that would help her get through testifying at trial without a repeat of her tortured deposition experience.

Most witnesses I work with are grateful for help. Testifying is stressful, and particularly so for traumatized witnesses. Once a witness learns there are rules and techniques to follow I find their fighting spirit returns. They become motivated and focused.

My method is to begin by teaching the differences between direct examination and cross examination. I explain the rules attorneys must follow when examining their own witness and the rules they follow when cross examining the opposing attorney's witness. Full understanding of when to talk and when it's best to keep answers short is very empowering to a witness – especially a traumatized one.

I don't just talk about rules for testifying. I make sure the witness has a lot of practice.

For practice on direct examination I take the witness through the story over and over again until the sensitive parts begin to lose their power to activate trauma. Repeating the story many times is not about memorizing anything. The purpose of the repetition is to help the witness become comfortable discussing material mined with potential trauma triggers. A side benefit of all the work on direct is that the story becomes more organized and clear.

Although one can't be certain what questions will be asked in cross examination, it's important for a witness to get enough practice answering the types of questions that could be posed. There is no memorizing of specific answers to anticipated questions. The practice on cross is to make sure the witness can answer appropriately, whether or not a question had been expected.

Traumatized witnesses are especially sensitive, so I try to build up their confidence by praising something they have done well before making any corrections. I feed criticism slowly. I have learned that giving a witness a long list of mistakes all at once can activate additional trauma or trigger some other unknown insecurities.

Eventually Brooke was able to handle herself quite well in practice sessions with her attorney. The real test was trial. As it turned out, Brooke was called first by the husband's attorney. At the end of the day of testimony, her attorney phoned me, almost giddy, to tell me that not only had Brooke been calm, she had been so effective he chose not to rehabilitate. He was even considering not doing a direct examination with her because she had been so good. All the hours of preparation paid off.

It takes much more time to prepare a traumatized witness for trial than it takes to prepare the garden-variety poor witness, or the uncooperative witness from hell. There is no short-term magic approach that I am aware of, such as the actions the writer offered for use at trial. It takes many hours of practice to desensitize a traumatized witness from triggers.

Although I am not a psychologist I manage to have good luck preparing traumatized witnesses. I know what works for me, but I also know there is more than one road to Rome.

The topic of dealing with a traumatized witness is a good one. What would have been more helpful than what is offered in the author's paper, is specific techniques used by trauma specialists that could be employed by attorneys during trial preparation of a traumatized witness. Lawyers rarely have much time for hand-holding. Most are not particularly interested in what is causing the problem. They only want to know what to do to fix it.

Elaine Lewis is President of Courtroom Communications LLC and has written widely on the topic of witness preparation. She specializes in the preparation of witnesses (particularly those

with testifying issues that threaten the successful presentation of the case), helps to develop case themes, and works with attorneys on opening statements and closing arguments.

Amy Hanegan responds:

There Is No Quick Fix with a Traumatized Witness

What I believe the author is trying to communicate is that to be a better lawyer, one must identify the traumatized witness, understand that something in his or her past is causing the trauma, whether it is the facts of the case or personal history, and that a kinder, gentler approach is appropriate once a witness is unable to testify further. I do not believe that if this is the intent, this article meets the objective.

If the intent of the article is to truly understand the traumatized witness, then I would like a more thorough analysis of why a witness is traumatized, why the trauma or "falling apart" only surfaces when the witness is testifying and why it is important for anyone preparing witnesses to understand the traumatized witness may actually be incapable of testifying. That the sentinel event that brought him or her to the witness chair may be too overwhelming in that moment, and that the witness' testimony may have to be rescheduled or cancelled altogether. Other than very short definitions of Trigger, Trauma, Flashback and Reptilian Brain the article does not really address the physical, psychological and physiological response to trauma that it outlines. And I believe that, other than the reptilian brain, most readers know these definitions, so I am not sure what we are gaining by just seeing the definitions.

The action steps were somewhat limited. Taking a breath, using a quiet voice, a slower cadence and good eye contact; basically being gentle and kind in one's response to the traumatized witness, is a good approach, but the author fails to comment on how these steps are going to aide the traumatized witness. A more thorough discussion that these steps may make a witness feel "safe" would be great,

if the witness truly is not feeling “safe”. And often a traumatized witness may be able to communicate this, but often not. That may not be the problem. The witness may feel safe, but just cannot find the courage to testify.

Though the action steps seem to be common sense, it is never a bad idea to remind those in authoritative positions (attorneys) that a kinder, gentler approach is appropriate, even when their case may rest on the testimony of the traumatized witness. Being stern, loud and distant or thinking that wood-shedding the witness is going to turn them around is incorrect and should be completely avoided. This will only make things worse. It should also be understood that none of the eight steps suggested by the author may actually work in getting the witness back on track if the witness is truly traumatized and the testimony may have to be abandoned. Once a traumatized witness is identified, the lawyer may have to lower his or her expectations as to the intended outcome should it be determined that the witness will not be able to testify or continue testifying.

The article also does not identify in what situation the testimony is being presented. Is the witness testifying at deposition or trial? Is there a jury present? Is this a criminal or civil matter? Does it matter to the author’s premise?

My Own Approach to the Traumatized Witness

With almost thirty years experience of working with witnesses, I have seen many traumatized witnesses in witness preparation sessions. It happens more often than one might think. Preparation of the witness is key; and more than one preparation session is required when working with an obviously traumatized witness. Working multiple times may bring the witness around and it may not. What I have found is that if the lawyer and consultant can gently bring the witness to a point of sharing what is most difficult for them, it is only a first step in understanding whether the witness is truly capable of testifying or whether they are not. And what a lawyer must understand is that it is up to the witness

to make this determination. The 8 action steps identified in the article are to get to this point.

And one should be clear that just because you have a client who is a professional, such as a doctor, nurse or company executive, their trauma has no less impact on their life than a victim in a criminal matter. When one finds his or her professional integrity being challenged, it is often traumatizing.

Here are a few steps I have incorporated many times when I am faced with the traumatized witness:

1. Give the witness a chance to cry or show their upset without saying anything. You want to, but just wait. Be patient. The witness will usually start apologizing for their behavior and be quite embarrassed. It is at this time when you just let them speak. Nod your head. Provide tissues. And very quietly say, “it’s okay”. After a few moments, encourage the witness to express what is causing the response to the questioning. Being able to express what is overwhelming them may not be possible as it often the sentinel event or the entire lawsuit that is traumatic. However, with encouragement, it is my experience that most witnesses will be able to express themselves. Again be very patient. Nothing is more important to you, than this witness, at this moment.
2. Once there is relative calm, help the witness focus on the facts of his or her testimony: what they did, how they did it, why they did it, and if possible, they did it right. Re-focus and limit the witness to the most important aspects of their testimony. And don’t overdo it. Don’t spend an inordinate amount of time talking about their trauma. At this point the witness needs direction.
3. Ask the witness if he/she is willing to try again. Give it a try. Practice the questions and the answers.

Don’t talk about them, do it. Have the witness focus on the answers, not everything and everyone surrounding their answers.

4. Should things improve, and you believe the witness will be able to testify, it is wise to check in with them in the interim to find out how they are feeling and whether they believe they can move forward with their testimony. On the day of their deposition or trial testimony, it is critical to meet with the witness directly before they testify and have them practice answering questions, getting them back in their role as a witness.

Further, if in working with a witness, one discovers that the witness is traumatized, it might be best to discuss with the witness whom he or she might feel most comfortable speaking with to address the trauma. The witness may need to seek counseling from a professional. This may be the best “counsel” a lawyer can provide.

I believe the article should stress that should one encounter a traumatized witness, there is no quick fix. The witness will need several preparation sessions to see if he or she can meet the challenge of cross-examination. If the witness is on the stand, their testimony may need to be continued, or abandoned. It is unlikely they will be able to continue.

In summary, either a more comprehensive study of the traumatized witness needs to be explored or in the alternative what one should do once one recognizes that the witness is traumatized and unable to move forward. I believe the author has ideas on both topics but needs a more comprehensive approach to both topics.

Amy B. Hanegan is the President of Better Witnesses, Inc. She is a past vice-president of ASTC and a current member. She began working as a trial consultant and preparing witnesses to testify at deposition and trial in 1987.

The author replies to the trial consultant responses:

The intention of this column was to introduce the readership of The Jury Expert to a trauma informed perspective and to highlight the benefit to attorneys of using trauma experts in witness preparation; as such, it was not assumed that witness preparation was conducted in collaboration with a trauma informed expert. It is beyond the scope of the current column to provide a complete treatment of this topic, however, based on the feedback and response, the need to understand this topic at a deeper and more nuanced level is apparent. Lorie Hood writes frequently about specific areas relevant to attorney training and witness preparation from a trauma informed perspective. For further information about this topic, academic book chapters, articles and blog posts written by Lorie Hood, please visit: <https://hoodgrouptrialconsulting.wordpress.com/>



Expressing Anger Increases Male Jurors' Influence, but Decreases Female Jurors' Influence, During Mock Jury Deliberations

by Jessica Salerno, Ph.D., Liana Peter-Hagene, MA, and Justin Sanchez, BA

IN HER AUTOBIOGRAPHY, Justice Sonia Sotomayor highlights emotion expression as a powerful persuasion tool—an argument that dates back to the 4th century B.C.E. (Aristotle, Rhetoric). Yet, expressing emotion has not always served her well. Her minority dissent from the Supreme Court's decision to uphold Michigan's affirmative action ban (*Schuette v. Coalition to Defend Affirmative Action*, 2014) was discredited for being “fueled by emotion” and, as a result, “legally illiterate and logically indefensible” (Serwer, 2014). Many women who have sat in board meetings, classrooms, workplace groups, juries, and governing bodies might relate to this anecdotal evidence that women's opinions are less influential when presented with emotion—while men harness this powerful persuasion tool successfully.

As American juries become more diverse, with women and ethnic minorities serving alongside White men, it becomes increasingly important to determine whether all jurors have the same opportunity to influence jury verdicts during deliberation. A diverse and *participatory* jury helps reinforce the ideals of fair treatment and equality within the American justice system (Cornell & Hans, 2011). Women might experience less

Don't miss the responses at the end of the article from Carol Bauss, Sonia Chopra, and Charlotte A. Morris

opportunity to exert social influence during deliberation given that the longstanding perception that they are less influential and competent than men (Carli, 1999; Wood & Karten, 1986). The difficulty women face in being perceived as competent and having influence during the discussion might be exacerbated when they express emotion. We will draw upon social psychological theory and our own experimental research, to discuss the implications of delivering one's opinion with emotions like anger and fear during jury deliberation, and how this strategy can have differing effects for women and men jurors.

Gender and Social Influence

Despite increased gender diversity on juries, women risk being relegated to mere token representation if they do not have an equal chance to contribute to the deliberation and exert social influence. Research dating back to the 1950s suggests that jurors of higher social status participate more in jury deliberation than jurors of lower social status (Cornwell & Hans, 2007).

For example, mock jury studies demonstrate that women, compared to men, participate less and are more likely to change their vote during deliberation—in other words, to yield to the social influence of male jurors (Golding, Bradshaw, Dunlap, & Hodell, 2007; Hastie et al., 1983; Kirchmeyer, 1993; Nemeth et al., 1976). In fact, jury scholars have identified a “White male dominance” effect, such that White males often exert the most influence over the jury’s final verdict (Bowers, Steiner, & Sandys, 2001; Lynch & Haney, 2009). Thus, it is important to determine how women gain or lose influence during group discussion, and whether powerful persuasion tools such as expressing emotion can backfire when utilized by women.

Anger Expression and Social Influence

Research has provided examples of how expressing an opinion with anger can both increase one’s social influence (e.g., Van Kleef et al., 2001), but also decrease social influence (e.g., van Doorn, van Kleef, & van der Pligt, 2014). It is likely that whether people perceive others’ anger as warranted and appropriate will determine whether anger expression makes one more or less persuasive and influential. If the anger is perceived as appropriate, it can make the expresser seem more competent and strongly convicted, which can increase their influence over others’ opinions. If anger is perceived as inappropriate, it can make the expresser seem overly emotional and less rational, which can decrease their influence over other’s opinions. A jurors’ gender might determine whether anger is seen as inappropriate, as well as that juror’s ability to exert social influence.

Anger is perceived as a stereotypically male emotion (Hess et al., 2007), which means that when a woman expresses anger, she violates people’s expectations. As a result, people might perceive anger as more appropriate when expressed by a man versus expressed by a woman. Experimental research has indeed demonstrated that men are perceived as more competent when they express anger (Brescoll & Uhlmann, 2008; Tiedens, 2001), while women are perceived as less competent when they express anger (Brescoll & Uhlmann, 2008). Women are also penalized for behaving in a dominant manner (Carli, 2001) or when they violate a gender stereotype (Heilman, Wallen, Fuchs, & Tamkins, 2004; Rudman & Fairchild, 2004). Because anger is both a dominant emotion, and one that violates female gender stereotypes, women might be socially penalized for expressing it. Further, women’s emotion expressions are often attributed it to an internal cause (i.e., they are overly emotional), while men’s emotion expressions are attributed to an external cause (i.e., aspects of the situation warrant an emotional response, Brescoll & Uhlmann, 2008; Barrett & Bliss-Moreau, 2009). Thus, there are several reasons to expect that the same anger expression will be interpreted differently when it comes from men versus women, which in turn, might determine whether that anger will increase or decrease their influence during group deliberation.

Although group decision-making occurs frequently in everyday life, we know very little about what happens when people

express anger in a decision-making group (Hareli & Rafaeli, 2008). Recently, Lynch and Haney (2015) analyzed mock jury deliberation transcripts and found that White male jurors effectively used emotion to influence jury decisions either by exerting their own emotion or by policing the emotions of others. This study highlights the need for an experimental test of the hypothesis that expressing anger will have a very different effect for men and women—more specifically that expressing anger will increase influence for men, but decrease influence for women even if they are expressing the exact same opinions and anger.

Present Research

We designed a mock jury experiment to test the hypothesis that when a man expresses an opinion with anger he will make people doubt their own opinion compared to when he expresses the same opinion without anger. In contrast, when a woman makes the exact same arguments, people will become *more* confident in their own opinion when she expresses anger compared to when she does not. We also tested how expressing fear would affect social influence during mock jury deliberations to see if these effects would be specific to anger or would happen whenever negative emotion was expressed.

The study took place in a computer laboratory on campus, where groups of students were presented with a comprehensive summary of evidence and testimony from the real trial of a man accused of killing his wife (*R v. Valevski*, 2000). After the evidence presentation and jury instructions, participants were told that they would be randomly assigned to groups of six to discuss the case online via computer chatting. They were told to discuss the case until the group agreed on a verdict. In reality, the interaction was a computer simulation—each participant “interacted” with fictitious jurors with pre-written scripted comments. The scripted comments made by the “other jurors” were from a previous study in which participants provided us with their reasons for their verdict choices. By scripting the comments, we were able to have control over what the other jurors said during the discussion.

Participants were invited to create a username for joining the group, and then saw a list of 6 “usernames” (including their own) on the computer screen – the people who ostensibly made up their group. The participants chose a verdict, rated how confident they were in that verdict (from 0 to 100% confident), and submitted comments and arguments to the group to explain their verdict choice, as well as any comments and questions directed at other jurors. During the first round of deliberation, all participants always learned that they were in the majority. Four jurors always agreed with the participant and there was always one dissenting holdout disagreeing with the group. The study was programmed to display different versions of the script depending on the participants’ initial verdict. In other words, if the participant voted guilty they saw a script with four others voting guilty and one holdout voting not guilty; if the participant voted not guilty they saw a script with

four others voting not guilty and one holdout voting guilty. We experimentally manipulated holdout gender: For half of the participants the holdout had a male username (JasonS), for the other half a female username (AliciaS). The other four usernames were gender neutral (e.g., “JJohnson,” “syoun96”).

After reading the first round of comments, participants again rated their confidence in their verdict and submitted another set of comments to the group. This procedure was repeated for 7 rounds of deliberation. Starting with Round 2, we experimentally manipulated whether the holdout expressed anger, fear, or no emotion in their comments to the group. For example, participants in the anger condition might read that the holdout starts his or her argument with “Seriously, this just makes me angry...” Thus, each participant was randomly assigned to interact with a male or female holdout, and to read comments expressing anger, fear, or no emotion. At the end of the deliberation, in addition to reporting how confident they were in their own verdict, mock jurors also rated the holdout juror’s emotionality and credibility.

We used the participants’ confidence in their initial verdict as a way to measure how much influence the holdout was exerting on their opinion. Because the male/female holdout always argued the opposite viewpoint, decreases in verdict confidence throughout deliberation can be attributed to the holdouts’ exerting some level of influence over their opinion.

Results. When holdouts presented their opinions with no emotion or with fear, participants’ confidence in their own opinion did not change over the course of deliberation. In other words, the holdouts did not have influence over their opinion. This is not surprising, given that it is very difficult for a minority opinion (i.e., a holdout) to convince a majority to change their mind. We found something very different, however, when the holdouts express the exact same opinions with anger statements inserted throughout their comments. When the male holdout expressed anger, participants became significantly less confident in their verdict decision over the course of deliberation. Although participants became more confident after learning they were in the majority, after the male holdout started expressing anger, participants’ confidence in their own opinion dropped significantly. Anger was therefore a powerful persuasion tool for men—they were able to make participants doubt their opinion even though they were part of a 5-to-1 majority.

The opposite was true for female holdouts: When a woman expressed the exact same dissenting opinion with anger, participants actually became *more* confident in their verdict over the course of deliberation. Despite anger being a powerful persuasion tool for men, when a woman expressed the same opinions and anger she lost social influence and actually made people more confident of their initial verdict. In other words, anger expression created a gender gap in social influence between men and women that was absent when opinions were expressed with no emotion or with fear. This is even more trou-

bling considering the fact that holdouts made the exact same comments with the exact same emotion indicators, regardless of gender. This effect of anger expression was the same for male and female participants and for participants voting guilty or not guilty.

What are the potential explanations for this gender gap in influence? We hypothesized that the inferences people make about *why* someone expresses anger are different when they are observing men versus women. We conducted a statistical analysis to find out whether perceptions of emotionality and/or credibility explain the gender discrepancy. We found that participants perceived the female holdout to be more emotional when she expressed anger (versus no emotion), and in turn became more confident in their own opinion. In other words, the woman’s opinion was discounted when she expressed anger due to perceptions of emotionality. In contrast, participants perceived the male holdout to be more credible when he expressed anger (versus no emotion), and in turn became less confident in their own opinion. Thus, even though the men and women were expressing the same emotion, anger was a cue for emotionality for women holdouts, but was a cue for credibility for men holdouts.

Implications

Through our experiment we were able to demonstrate the differing effects of anger expression on social influence for men and women, with implications for juries and other group decision contexts in which women’s voices risk being discounted. These findings are compelling given that minority dissenters often have difficulty influencing the majority due to the belief that their opinions are less valid (Moskowitz & Chaiken, 2001). This deficit was overcome for men when they expressed anger because anger increased their credibility. The male holdout’s anger was such a powerful persuasion tool that it made people significantly doubt their own opinion even when they were in the overwhelming 5-to-1 majority.

In stark contrast, women who expressed anger actually lost social influence because they were viewed as too emotional. In fact, the only condition in which participants became more confident in their own opinion over the course of deliberation was when a woman expressed anger. Thus, expressing anger created a gender gap in influence that did not exist before the holdout started expressing anger or when the holdouts expressed fear or no emotion. Further, this effect was specific to anger and not fear expressions, which reveals that the current results are not due to women being penalized for being more emotional in general—only for expressing a counter-stereotypical, dominant emotion typically associated with men. Overall, our research demonstrates that social influence is determined, in part, by the interactive effect between *what* emotion is expressed and *by whom*, with different inferences underlying the influences of emotion expression.

American juries were originally composed exclusively of White

men. Women now serve on juries, but our results suggest that they might not have the same ability to exert influence over legal outcomes in our culture as do men when they express anger. Jury deliberation is a critical part of the trial process, and it is important that everyone has an equal voice in the verdict decision. We entrust very important decisions to juries and reaching consensus often breeds frustration and anger ex-

pression. Our findings suggest that, in the cases that women are most passionate about, women might have less influence than men. Our results lend scientific support to a frequent claim voiced by women, sometimes dismissed as paranoia: that people would have listened to her impassioned argument, had she been a man.

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Carol Bauss, J.D. responds:

Male and Female Jurors Are Not Equal in Social Influence

This study examining one aspect of the effect of gender on jury deliberations is an important area of research and provides valuable insight into how male jurors can have more social influence in jury deliberations than female jurors. While the online format of the research and the use of college student participants has limitations, this research is a good start in examining how persuasive anger expression can be in a group setting depending on the gender of the juror expressing the anger. The results of the research – men who express anger in jury deliberations are more persuasive than women who express anger – are consistent with a vast body of research on differing communication styles between men and women and the social influence exerted by each gender in a group setting. It was also en-

lightening (and depressing) to learn that a female juror's expression of anger had the opposite effect of persuasion, causing jurors with opposing views to become more confident in their opinions. The findings of this study should be carefully considered when preparing for case presentation and jury selection.

These findings are not surprising. Generally speaking, emotional women are seen as weak. We have all been told that demonstrating emotions undercuts a woman's credibility – in personal interactions, in the workplace, and now on a jury. Emotionality, linked more closely to women, is seen as the opposite of and inferior to rationality, linked more closely to men. The legal realm is also more closely associated with rationality. How many times have we heard jurors say, "We have to focus on the facts, it doesn't matter how we feel about X."

As a jury consultant who works on behalf of plaintiffs in personal injury cases, I am often looking for jurors who will be angered by the wrongdoing of the defendant. Research has shown that anger can be a motivating factor in increasing damage awards. In addition, jurors who are more emotional generally tend to be more sympathetic to an injured party. The goal is to harness those emotions in a productive way, and this study suggests what I have long known from anecdotal evidence, that *jurors who are traditionally more emotional may be better for the plaintiff but are often unable to make arguments in deliberations that will convince other jurors*.

Jury deliberations are about communication and persuasion within a group setting, and group dynamics play a critical role in the verdict. Having research participants interact online in writing only cannot fully replicate the complex face-

to-face dynamics that happen in jury deliberations. A significant part of face-to-face communication is non-verbal. Assessing verbal and non-verbal communication together is important in how emotion is perceived. Non-verbal cues can serve to temper an emotional display or increase credibility. Some women may inherently have more credibility and express anger in a way that communicates confidence and competence while others may express anger in a more stereotypically emotional way.

I can think of examples from my own practice where angry women were strong leaders in the jury room and persuaded other jurors to their side of the case. But I can also think of, probably more, examples where female jurors who were on our side in deliberations could not make headway in the deliberation room, and their social influence was likely diminished because of their gender, and their inability to effectively communicate with jurors of opposing viewpoints.

I frequently interview jurors after they have served on a jury and always ask for the juror's impression of how the other jurors saw the issues in dispute, the role they played in the group, and their leadership ability in deliberations. In my experience, male jurors are most apt to criticize female jurors' competence. Most often I hear, "She did not understand the issues," or "She did not seem to know what she was talking about." When male jurors criticize other male jurors they disagreed with, it is usually because, "He had an agenda." Most recently, a male juror discredited another female juror by saying, "She was outspoken, but I am not sure she was accurate." The female juror's anger expression may very well have factored into the male juror's assessment of her 'accuracy.' I have no doubt that the level of emotion exhibited by female jurors decreases their perceived competence and in turn their credibility and persuasiveness, and it is nice to have solid evidence to back that up.

What Do These Findings Say About Trial Presentation and Jury Selection?

First, emotionality is an important com-

ponent of leadership and the ability to persuade others and should be considered when rating prospective jurors in jury selection. This is not to say that women jurors who appear to have a propensity to express their anger with more emotion should be struck because they will be unpersuasive. Rather, an assessment of each jurors' competence, confidence, knowledge that may be relevant to the subject matter of the litigation, and likability, should be evaluated as they all play a role in credibility. A female juror with more credibility may be more persuasive even when angry. Also consider the other prospective jurors who will be on the jury and how they may respond to a female who may passionately express her opinions. In a recent jury selection, a male juror complained in open court about a female juror who had difficulty explaining her thoughts in English, her second language. He said he did not feel comfortable being on a jury with someone who could not communicate clearly in English. Given that our strongest jurors in that panel were women who were likely to be very angry with the defendant, that juror would have come under scrutiny when making our strike list. He was less likely to pay attention to a strong woman who exhibited anger—since, for him, it was not a persuasive form of communication when uttered by a woman.

I agree with the authors when they say, "Jury deliberation is a critical part of the trial process, and it is important that everyone has an equal voice in the verdict decision." Attorneys have to empower women jurors to make their voices heard in the deliberations room. One way to do that is to translate the emotion behind their positions into measured, reasoned arguments that will appeal to everyone on the jury and can be used by their advocates to persuade others.

Attorneys can also remind jurors in closing arguments that it is their responsibility to participate in the process of deliberations and to voice their opinions, and it is also their responsibility to listen carefully to the opinions of others and to give them full consideration.

I have seen the suggestion that juror edu-

cation videos tackle the topic of group participation with the goal of ensuring that all jurors have a voice. Such an effort may be used to encourage jurors to be more mindful of considering everyone's opinions no matter how it is expressed.

Likewise, judges could also read a jury instruction that all jurors are expected to participate, and it is each juror's job to listen respectfully to the opinions of others and to give full consideration to everyone's viewpoint. Calling attention to the issue of giving full consideration to all viewpoints may cause some jurors to pause before attempting to dismiss the arguments of a woman they think is arguing from the stereotypical male domain of anger.

The truth is, though, that woman's voices can carry less weight in the deliberation room where the nature of the issues in dispute and the nature of the process of deliberating with fellow jurors calls for impassioned rhetoric. We have to be aware that social influence is not equal among men and women jurors.

Carol Bauss, J.D. is a Senior Litigation Consultant at NJP Litigation Consulting/West, currently serves on the Board of Directors of the American Society for Trial Consultants, and has been a trial consultant since 1992—working on cases around the country (ranging from personal injury, employment discrimination, and civil rights, to white collar criminal and commercial cases). Her deep knowledge of juror attitudes and jury decision-making is drawn from her years of experience conducting focus groups, mock trials and post-verdict juror interviews and she draws on her expertise in juror attitudes to help legal teams find the human story and universal themes within complex legal disputes.

Sonia Chopra, Ph.D. responds:

The authors should be commended for devising a clever study with a unique experimental design. While the results of the research will be disheartening to most if not all readers, the outcome is not entirely surprising. Women are

judged differently from men in every arena of social interaction, as the current presidential campaign has borne out. In the employment realm, women who are exacting bosses are denigrated by their subordinates and called “the b word” while men are considered authoritative and assertive. Women attorneys report that they have to work twice as hard to get the same respect as their male counterparts, from clients, judges, opposing counsel and coworkers alike.^[1] Unfortunately, in much of our human interactions, this disparate treatment is the way of the world.

But that does not mean that there are not steps that women can take to be perceived as more competent, credible and persuasive. This study has implications reaching beyond jury selection. The finding that women who display anger not only were not persuasive but in fact solidified positions in the opposite direction is something that must be shared with female witnesses when preparing them for deposition and trial. Advising witnesses to avoid becoming angry on the stand is good advice for almost everyone who testifies, but it is likely to be even more detrimental for women to lose their temper or argue with opposing counsel while testifying.

Most women attorneys I meet are already cognizant of the tendency for them to be judged by a double standard compared to their male counterparts, and many already modify their public persona to reflect that reality. Women advocates worry about coming across as too emotional in terms of being perceived as “soft.” They also express concerns about the opposite end of the spectrum, being labeled the “b word” when they take on a more aggressive style. This research suggests that becoming angry or indignant in front of the judge or jury may not be an effective strategy for women litigators. Instead, women should strive to adopt a “powerful” speech style, which is characterized by a lack of modifiers, intensifiers, hesitations and hedges; all of which are present in powerless speech.^[2] How you speak can also influence whether or not your message will be well received. Use of a rising intonation when making a de-

clarative statement, making everything sound like a question, also lessens the persuasive power of a message. Women in any profession can benefit from evaluating the spoken and written words with an eye towards cultivating a more powerful speech style.

Lastly, what does this study mean for jury selection? I would hate to think that as a result of this research, some attorneys and consultants will start to believe that they don’t want women on their juries because they will not be persuasive. That has absolutely not been the case in my experience. What struck me while reading the article is that the majority of the participants were likely college students in their early 20’s. This is of course not unusual in the world of social science research, but there could be a modifying effect of age and social status that would make the authors’ statement that, “... our results suggest that [women jurors] might not have the same ability to exert influence over legal outcomes in our culture as do men when they express anger” be less dire than it seems. An older professional female may be deemed more persuasive than a young male student regardless of the expression of anger, based simply on perceptions of each jurors’ relative life experiences. I look forward to further research which manipulates other socio-demographic variables in order to test the generalizability of these results.

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Footnotes

[1]: Deborah Chang and Sonia Chopra, “Where are all the Women Lawyers? Diversity in the Legal Profession in California,” 2015 *FORUM* (September/October 2015) p.18-25.

[2]: Erickson, B., E.A. Lind, B.C. Johnson, and W.M. O’Barr 1978 “Speech Style and Impression Formation in a Court Setting: The Effects of “Powerful” and “Powerless” Speech. *Journal of Experimental and Social Psychology* 14:266-279.

By Charlotte A. Morris, M.A. responds:

Gender Bias in Jury Deliberations: What’s a Girl to Do?

In the wake of Justice Scalia’s death and the controversy over nominating someone to fill the vacancy, I saw more than one social media post quoting Justice Ginsberg on how she responds when asked about when there will be enough women on the Supreme Court: “And my answer is when there are nine.” Imagine if the same could be said for juries someday: would we all be anticipating the sequel called, “Twelve Angry Women?”

This is Madness!

Before I could get to the experiment itself, I confess I was more than a little distracted by the ideas about gender, emotion and communication that are laid out by the authors in their review of prior research. They begin the article with a reference to criticism leveled at Justice Sotomayor for expressing emotion in her dissenting opinion on a case about affirmative action.^[1] From there, the researchers zero in on just two very specific emotions: fear and anger.

So I was curious: was Sotomayor expressing anger or fear in her written dissenting opinion? Was there even anything emotional about it at all?

I skimmed the **dissent** (closely, but quickly) to see if I could tell why this example may serve as a logical leap from expressing emotion to expressing anger and the difference between genders. I have to say I find nothing angry or especially emotional about the opinion. Sotomayor is firm. She is direct. She systematically takes Justice Scalia and the concurring majority to task for their legal conclusions. She backs that up with case law, and quotes prior Supreme Court opinions to support her dissent. She addresses accusations about her made by Justice Scalia in the majority opinion. And then she ends with a *scathing*, “I respectfully dissent.”

So is it possible that anger – like beauty – is in the eye of the beholder? Is it just an unfortunate shortcut when describing a

woman on the Supreme Court expressing her emotion generally, to go directly to research about women expressing “anger?” The authors have brought to light the serious bias that sometimes occurs when strong women express their opposing viewpoints (with or without any emotion at all) and then are too often perceived by others as being angry. And to make matters worse, once women are perceived as angry (whether they are or not), they also lose their ability to influence the debate.

First and foremost, we must be careful in our research and in the conclusions we draw to define what we mean by “expressing emotion” and “expressing anger.” In their experiment the authors take a direct approach by having the holdouts express their emotions clearly and succinctly. But in real-life conversations, jury deliberations and even in Supreme Court decisions, it isn’t always so easy to know exactly what we see and hear.

We’re Not Angry, We’re Just Disappointed

Any time I am working with attorneys and witnesses to overcome their emotional expressions of anger we spend time looking behind the anger to identify what fuels it. Are they frustrated? Insulted? Outraged? Disappointed? Insecure, scared, nervous, or worried? If so, we talk about how that feels and why, because there are more effective ways to express these underlying emotions. Frankly, the act of identifying the reasons behind expressions of anger changes for the better both language and delivery, which changes how others receive them. Given how potentially off-putting anger can truly be for all of us, this process of naming and claiming the source of one’s anger is an effective communication strategy for both genders, and may be the best recommendation that flows from the research reported by Peter-Hagene, et al.

In the present study, researchers manipulate the simulated deliberations by having the holdout juror (a male or female computer surrogate) express his/her emotion by way of pre-scripted typed phrases such as, “Seriously, this just makes me angry...” As an experiment this is im-

portant because it leaves no uncertainty about what emotion is being expressed for the purpose of measuring participant responses and finding the gender bias in the results.

Unfortunately, such an explicit expression of anger is unlike most conversations or deliberations I’ve seen. It treats anger as an emotion that is independent, separate or different from all of the other emotions that we can discover behind it. The research also cannot measure the importance of human interaction where anger can be shaped, changed and mitigated until it has little to no influence – for men or women – on deliberation outcomes or the perceptions of others². Future research would do well to feature live deliberations where the verbal and non-verbal clues for anger are more layered and nuanced, as others’ reactions to it would also surely be.

Not Just Gender Differences

In the section called “Gender and Social Influence,” I have trouble making sense of the authors’ discussion of concepts from prior research including social influence, social status, and race.

For example, the authors comment on research findings that “women participate less [than men]” and findings that “jurors of higher social status participate more.” I think the connection they make between these studies would suggest – by some transitive law of juries – that because women participate less they must also be of lower social status than men. But I can’t be sure that is a conclusion the research would support. It also leaves me with questions about how status is defined.

Likewise, the authors point to the difference between white males and all other jurors, citing research on the “White male dominance effect” which suggests – contrary to the section heading – gender alone cannot account for differences in social influence.

In my experience watching live mock jury deliberations and conducting post-verdict interviews, there are multiple factors not identified in the article that

may also account for differences in social influence during deliberations such as age, case-related life experience, education, occupation, personality and others. It would be hard for most jurors to self-report which one of these many factors – present in any of their peers on a jury – made anyone more or less influential. In short, there are serious limitations on the conclusions we might draw about the effect of gender on jury deliberations from a body of research that may or may not control for the variety of factors at play.

And what none of the prior or current research on this topic has yet addressed are the relatively new questions about what happens when jurors self-identify as transgender or choose not to identify with gender at all. In a recent focus group of my own, all the talk during the breaks by participants was about whether one of our participants was male or female. Bets were made both ways. I knew only that the participant had been recruited as female, but not whether he or she had a preference for being regarded as one or the other. I also saw how difficult other jurors found it to navigate around this in deliberations. So how will a person’s expression of emotion be evaluated when he or she does not claim gender? And what happens to negotiations when jurors struggle with their own perceptions of others because gender norms and stereotypes cannot apply?

Which Comes First?

In the section called “Anger Expression and Social Influence” the authors cite research on the question of whether a juror’s expression of anger is “warranted and appropriate” and link it to research findings that there is also gender bias at play when people are asked about their perceptions of a male or female person’s reasons for - and expressions of - anger.

Just as the authors ultimately conclude that “we know very little about what happens when people express anger in a decision-making group,” I would also like to see more research that measures the relationship between fear and anger – expressed by men and women in jury deliberations – and the messages delivered during trial that are designed and in-

tended to provoke these very responses^[3].

Fear and anger have certainly been effective as political persuasion devices, and I suspect there are times when fear and anger are entirely appropriate juror emotions (whether a juror is male or female) because that's precisely what the attorneys wanted to evoke. I would be interested to know if we see the same or similar gender differences in results when the emotional expressions by male and female jurors are consistent with the evidence and arguments they receive.

How Can Women Overcome This Kind of Gender Gap?

The results of Peter-Hagene, et al.'s study don't surprise me. It turns out that hold-out men in this study were effective at using anger as a powerful persuasion tool and hold-out women who tried to do the same had the completely opposite effect. Men were perceived to be more competent because of their anger while women were perceived to be merely more emotional. Sadly, it seems that anger in its purest form is off-limits for women when it comes to persuasion. We women may be getting cheated out of one of our most cathartic emotions. (For the record: I'm not mad, but I *am* disappointed.)

For encouragement I look to all the other good research on gender differences in communication that highlights the best of what women have to offer – empathy, collaboration, nurturing, supportive speech habits, and more.^[4] While men may have more influence when expressing anger, ultimately woman may have more tricks up their sleeves that help make them more effective, more persuasive and more influential.

Likewise, women jurors armed with the results of this research might also dismantle and diffuse the anger of a man who is exerting more influence on deliberations by unpacking it a bit, just as we do during witness prep. Consider what may happen to the confidence of an angry male juror when a compassionate female juror helps him (and others) see that the emotions behind his anger are jealousy, insecurity or disappointment. He may no longer be perceived as more competent or influential than his female peers once his angry expression is revealed to be nothing more (or less) than a collection of the very real emotions we all share.

What Does the Future Hold?

And finally, here's what might be another next best question for research to address: the influence of age on questions of gender and emotion. I spent a week recently with my niece who is a sophomore at college in upstate New York. I noticed how often she muttered or exclaimed – in reaction to what she saw or heard, in conversation or on TV – “Don't Gender That!” I started to notice all the little things our family said or did that caught her attention and provoked her response.

When she heard me say I didn't like “those *women's* sunglasses on that *guy*” she called me out. A day later, I was still mulling it over and we talked about it. I believed those were women's sunglasses because glasses like those have been marketed by advertisers exclusively to women for decades. She is more acutely aware that those lines are getting blurry. And we both care deeply about doing away with the problem of labels and the assumptions that tend to come with them.

As our youngest of today's jurors comes of age in a world that is more enlightened and better informed on a wide variety of gender issues, they are also becoming increasingly aware of the role that gender plays in their everyday lives and increasingly resistant to letting it dictate the results. For the most socially conscious of next-generation jurors, there may be fewer barriers for women to express emotions that have previously been more effective for men. And vice versa.

Do we want more angry jurors? Maybe not. But as with all differences that have the potential to diminish one sex while elevating another: the first step is acknowledging that we may have a problem. Good research like this is a great start.

Charlotte A. (Charli) Morris, M.A. has nearly 25 years of experience listening to mock jury deliberations and debriefing jurors after real trials. You can learn more about her practice as a trial consultant at www.trial-prep.com.

Footnotes

[1]: Note that Sotomayor was joined in her dissent by another woman, Justice Ginsburg.

[2]: The experiment did not allow the research participants to shape or influence the expressions of anger of male/female computer jurors.

[3]: Ball, D. and Keenan, D. *Reptile: The 2009 Manual of the Plaintiff's Revolution*, 2009.

[4]: Tannen, Deborah. *You Just Don't Understand: Women and Men in Conversation*, 2007.

The Top 10 Most Accessed Articles of 2015

Every year we identify the top 10 articles chosen by our readers as most interesting in the calendar year. This year these articles are our top ten. Have you missed any of them? This is your chance to catch up!

Does Deposition Video Camera Angle Affect Witness Credibility?

By Chris Dominic, Jeffrey Jarman and Jonathan Lytle of Tsongas Consulting

Some time ago, we (a group of jury consultants) were debating whether or not it increased a witness's credibility to have the video camera used in the deposition aimed directly at the witness or to the side at an angle. After all, this was a question we got from clients from time to time. The argument for putting the camera directly on the witness was that the viewer got direct eye contact and the look and feel was similar to something you would see on a television news program. Newscasters look straight ahead and speak to their audience by looking directly at the camera. The concern about this strategy was that it seemed too intentional. The witness would appear to be an advocate, thus decreasing their credibility. The argument for putting the camera off to the side was that it appeared more natural, and thus, it would bolster the witness's credibility. Unfortunately, the diagonal angle did not have the benefit of the perceived eye contact between the witness and the viewer. This left us wondering, where should the camera be positioned to maximize witness credibility in a videotaped deposition?

[Does Deposition Video Camera Angle Affect Witness Credibility?](#)

Who Is the Ideal Juror to Look for during Voir Dire?

By Jill Leibold of Litigation Insights

As jury consultants, one of the questions we hear most often is, "What kinds of jurors do I want on my jury?" Related to that, we're frequently asked, "Do I want men or women on my jury?" "Do you think older jurors will be better for me than younger jurors?" The better question to ask is: "Which jurors pose the greatest danger to my case?"

[Who Is the Ideal Juror to Look for during Voir Dire?](#)

The Collapse of Civil Jury Trial and What To Do About It

By Renée Lettow Lerner of George Washington University Law School

I was delighted to receive this invitation to write about the civil jury for the Jury Expert. We academics often are concerned about reaching a relevant audience—or, indeed, any audience at all. In this forum, I have no such worries. I am looking forward to comments from persons working in and with the civil litigation system as a career.

I will come to the point: The civil jury is dying, and should be abolished. I propose an alternative system of adjudication, one that draws on practices that have proven to be effective.

[The Collapse of Civil Jury Trial and What To Do About It](#)

The Psychology of a Persuasive Settlement

By Ken Broda-Bahm of Persuasion Strategies

We all have an image in our heads of the way we expect cases to end: passionate presentations, gripping witness testimony, then a

tense wait followed by the dramatic verdict. In the great majority of cases, however, the dispute will end not in a courtroom but in a conference room. After some awkward moments and handshakes, it will settle. Despite this, however, we all know that there are many cases that should settle but don't, and an even greater proportion of cases that only settle after far too much has been spent in time, patience, and money. Talking to the trial teams, it is clear that there is one common barrier to the timely settlement of those cases: the other side. Now, it may be that I'm just more likely to work for the side that is fair, reasonable, and realistic (and for any clients reading, let's assume that is the case). Or it may be that there is a large class of cases where both sides are saying in effect, "Believe me, we would settle this case if we could – if the other side would just see reason."

[The Psychology of a Persuasive Settlement](#)

"Mea Culpa" in the Courtroom: Apology as a Trial Strategy

By Kevin Bouilly of Persuasion Strategies

In April of 2006, notable media mogul Hugh Hefner apologized to Jessica Alba for the unauthorized use of her photo, prompting the actress to halt pending legal action against Playboy magazine. Just a few years earlier a woman paralyzed in an accident associated with faulty tires on a well-known SUV settled her case for about one third of the \$100 million she originally sought. The shift occurred after defense attorneys offered the woman a bedside apology. Similar examples in legal as well as popular news abound, and the legal community has taken notice. Yet, many remain skeptical of apology's utility, partly because anecdotal evidence like the two stories above have been more available than sound research and evidence supporting apology's effectiveness, particularly its effectiveness in trial. Can apology really improve trial outcomes?

["Mea Culpa" in the Courtroom: Apology as a Trial Strategy](#)

Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings

By Sam Sommers and Satia Marotta of Tufts University

Early in the evening of February 26, 2012, Trayvon Martin, an African American 17-year-old, was shot and killed in a gated community in Florida. The shooter, 28-year-old George Zimmerman, a neighborhood watch coordinator, was taken into custody but soon released upon persuading police that he killed the teenager in self-defense. The details of the criminal investigation and trial that followed are well known; Martin's death and Zimmerman's ultimate acquittal dominated cable news television, print media, and the blogosphere throughout 2012 and the first half of 2013.

This article focuses on what behavioral science research can tell us about the general relationship between race and legal outcomes, and its potential policy implications. Specifically, we will consider three domains, reviewing the influence of race on (a) policing, (b) charging decisions, and (c) criminal trial outcomes. We open with the shooting of Trayvon Martin because the facts surrounding Martin's violent death and its legal aftermath illustrate important questions for all three domains.

[Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings](#)

Loyalty, Longevity and Leadership: A Multigenerational Workforce Update

By Doug Keene and Rita Handrich of Keene Trial Consulting

We've written a lot about generations and how generations in the workforce create unique challenges for managers and organizations. Recently, we were asked to do some work on sorting out if (and how) the generations respond differently to fact patterns in litigation. And, as part of preparing for that research, we took a look at research published since we last wrote a literature review on generations at work. As we prepared for the mock trial research with mock jurors of varying generations, our client said, "50 year old GenXers?"

[Loyalty, Longevity and Leadership: A Multigenerational Workforce Update](#)

“Soft” vs. “Hard” Psychological Science in the Courtroom

By Geoffrey Munro of Towson University and Cynthia Munro of Johns Hopkins University School of Medicine

The terms “soft science” and “hard science” are commonly applied to different scientific disciplines, and scientists have investigated and theorized about features that apply when placing scientific disciplines on a soft-hard continuum (e.g., Simonton, 2004, 2006, 2009). In the minds of laypeople, however, the difference may lie in the more simple perceptions of different scientific disciplines. The very words themselves, “soft” and “hard”, may hint at different reputations. Soft sciences are fuzzy and less rigid, suggesting lower reliability, validity, and rigor than hard sciences possess.

[“Soft” vs. “Hard” Psychological Science in the Courtroom](#)

Looks Like Science, Must be True! Graphs and the Halo of Scientific Truth

By Aner Tal of Cornell University’s Food and Brand Lab

Imagine you’re a juror at a gruesome murder trial. Make it a particularly gruesome trial, the kind that makes it to the 9 o’clock news, just to raise the stakes of our hypothetical example. Yes, that might be unpleasant, but work with me here. In any case, imagine that over the past days you’ve seen compelling evidence for the horrors that occurred. The link between those and the man standing accused appear fairly incontestable. To make things worse, you don’t really like the way the guy looks. There’s just something about him that makes you uncomfortable, he feels like the sort of person who would be guilty.

[Looks Like Science, Must be True! Graphs and the Halo of Scientific Truth](#)

Thank and Excuse: Five Steps Toward Improving Jury Selection

By Richard Gabriel of Decision Analysis

Periodically over the years there have been calls to eliminate peremptory challenges, the challenges that attorneys use to strike jurors they believe will be unfavorable toward their cases. The main arguments given for removing the peremptory challenge are that the challenges can be used to discriminate against a particular protected class (e.g., minorities, women) or that they can unfairly stack a jury in favor of one side over the other.

The elimination of peremptory challenges would, in fact, harm the rights of the parties to obtain a fair and impartial jury and is a wrong-headed solution to a very real problem that does exist in today’s jury selections across the country.

[Thank and Excuse: Five Steps Toward Improving Jury Selection](#)

Favorite Thing: The Civil Jury Project



While we have had discussion of the decline of civil jury trials for some time now, did you know someone is actually doing something about it? In addition to the article we have on their latest meeting (a [conversation](#) between project founder Steve Susman and Supreme Court Justice Sonia Sotomayor), in this issue, our favorite thing is the [NYU Civil Jury Project](#).

“In 1962, juries resolved 5.5% of federal civil cases; since 2005, the rate has been below 1%. The Civil Jury Project at NYU School of Law examines how the civil jury trial became a vanishing feature of the American legal landscape and looks at the consequence for the legal system and society more broadly.”

You can read more about the Civil Jury Project [here](#). This is an opportunity to understand the issues and participate in strategies for resolution.