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Between Coddling and Contempt

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**Between Coddling and Contempt:
Managing and Mentoring Millennials
by [Douglas L. Keene](#) and [Rita R. Handrich](#)**

*"It ain't what you don't know that gets you into trouble.
It's what you know for sure that just ain't so."*

--Attributed to Mark Twain

Millennials. They are 30 years of age and younger. They are the hardest hit by the ongoing economic recession. And they are, if we are to believe [internet blogs and some articles](#), apparently lazy, narcissistic, clueless, stupid and incompetent. Wow.

They are also the youngest generation in the workforce and, as such, they are targeted for all manner of negativity, maligning, scape-goating, and criticism. It seems to be what we do over and over again.

For a review of attitudes toward Millennials, see our article, [Tattoos, Tolerance, Technology and TMI](#) in the July 2010 issue of *The Jury Expert* ([Keene & Handrich, 2010](#)).

If you think yourself familiar with the general attitudes toward the Millennials (aka Gen Y), we invite you to travel back in [Time](#) (Magazine) to a twenty-year-old article talking *about that* new generation in the workplace.

The similarities between what we tend to think of the Millennials and what we thought of Generation X are breath-taking on first review. We think it likely that articles on the Boomers as they entered the workplace would be similarly negative. We tend to forget our callow youth and focus instead on our accrued ‘wisdom’ and interpret differences between “us” and “them” with “them” being found wanting. We have thought this way (and written it down) for thousands of years.

Attorneys (despite first-hand observation of biases in the courtroom) are hardly immune from this sort of thinking and writing. For the sake of brevity, we’ll skip ahead a couple millennia and take a look at what attorneys are saying and writing about Millennial generation attorneys today.

The derogatory term ‘Slackoisie’ was (according to the [Urban Dictionary](#)) coined by attorney J. Daniel Hull who authors [What About Clients?](#) blog and popularized by attorney Scott H. Greenfield of [Simple Justice](#) blog. The definition for ‘slackoisie’ follows:

“It refers to: (1) a class of narcissistic young professionals, particularly attorneys (usually Gen Y/Millennials), who believe that having a job is an entitlement, rather than a privilege. They often complain about the work they have (if working), opine the lack of “real lawyer” jobs available in the market, and are critical of the long hours and inadequate pay found at most small firms. They believe they are entitled to work/life balance, that their opinions on any subject are inherently important and that whatever benefits they enjoy are inadequate. The Slackoisie are more interested in having a place to go in the morning and some spending money than committing themselves to their clients and the profession; or (2) a slacker with an exaggerated sense of self-importance and entitlement.

From the [UrbanDictionary.com](#) (with spelling/grammar errors corrected)

“I see no hope for the future of our people if they are dependent on frivolous youth of today, for certainly all youth are reckless beyond words... When I was young, we were taught to be discreet and respectful of elders, but the present youth are exceedingly wise [disrespectful] and impatient of restraint.”

(Hesiod, 8th century BC)

Hull and Greenfield have left an internet trail of concerns/complaints about young lawyers. (See Hull [here](#) and [here](#). See Greenfield [here](#) and [here](#).) While both of these men have many other posts documenting their informed thoughts on and reactions to other areas in the practice of law, they are curiously one-note writers when it comes to the Millennials—or as they call them, the Slackoisie. A fairly contained discussion (featuring both Hull and Greenfield) on the Millennials at work can also be found in the comments at Stephanie West Allen’s [idealawg](#). Stephanie includes multiple links to the ongoing debate around the web if you are interested in reviewing the breadth and depth of the controversy before reading further.

A tongue-in-cheek example of the differences between generations (presented from the Boomer's perspective) is given in a report on Millennials at Work published by DeLoitte ([Smith, 2008](#)).

- Baby boomers: *“Work, work, work. It’s what we’re about.”*
- Gen Xers: *“Work. Work more with flexibility. Work even more? Let’s talk!”*
- Millennials: *“Work flexibly anywhere, but I need complete access to information and the answer to ‘Why?’ Work anytime ... on my terms. Work even more? That is so lame. I’m texting all my friends to tell them how lame you are!”* (p. 8)

Some Millennial bloggers have struck back with their own thoughts about the Millennial workforce. You can see a law student perspective from [Fearfully Optimistic](#) blog; a young attorney’s thoughts at [Eiler Law Group](#) Blog; a young contributor at [The Awl](#) website responding to Boomer characterizations of Millennials as “lazy”; and an interesting reaction from a Millennial writer to an incident involving the [Today Show](#) intern as described by two morning show hosts. Even a wise Gen Xer weighs in with an [“open letter to young lawyers”](#) about entering the world of work while maintaining a true sense of self. (Must reading for any ‘young lawyer’ and the rest of us as well.)

So are the naysayers right in their assertions that the responses to Millennials at work are best characterized as either coddling (e.g., [“foot rubs”](#)) or contempt (e.g., they are [“worse than”](#) other generations)? Is this generation uniquely lazy, incompetent, “worse than” previous generations, only interested in being given rather than earning rewards, and in narcissistically tweeting their every thought? Let’s [‘separate the wheat from the chaff’](#) by looking at what we can really know based on research.

Exploring Evidence for Assumptions

Are Millennials lazy with bad attitudes? No.

According to an IOMA publication (2008), Millennials have a strong work ethic but crave flexibility. If we look historically at the generations, Deal, Altman & Rogelberg (2010) point out there is no difference in the number of hours worked by Millennials and by Generation X members at the same age. Further, Millennials work *more* hours than did Boomers at the same age, in 1977.

Staff & Schulenberg (2010) also report that Millennials did not work fewer hours in high school than did either X’rs or Boomers at the same age. Deal, Altman & Rogelberg (2010) conclude that while it’s an easy answer to say generation is the reason young people work less, it is an incorrect assumption. Level in the organization (as opposed to generation) is the primary determinant of hours worked.

The 2008 [National Study of the Changing Workforce](#) shows there is no indication that Millennials do not want to take on more responsibility in their jobs. Indeed, for the first time since 1992—both men and women are equal in their reports of wanting more responsibility in their work. The difference is that “long-term demographic changes are the driving force behind gender and generational trends at work and at home”. What that means is that we’re seeing more shared responsibilities at home, more two-income families, and more prioritization of family over work. Generation X began this trend and the Millennials have expanded on it.

And finally, there is no real empirical evidence that Millennials have a bad attitude. They, in fact, have a more positive attitude toward their employers than do Boomers or Generation X members. It is probable that the



negative attitudes directed toward Millennials today is the old guard's consistently predictable reaction to new generations (Kowske, Rasch & Wiley, 2010).

Do they believe they are entitled in the workplace? Maybe.

Millennials do want to have meaningful work, have fun at work, and be respected for their contributions (Kovarik, 2008). They optimistically expect success and tend to be impatient because they want immediate feedback (Wood, 2006). They expect organizational accommodation (Hershatter & Epstein, 2010). They dislike menial tasks, expect to move ahead quickly based on skills rather than experience, and are easily bored ([Eiser, 2009](#)).

While it's easiest to presume narcissism and entitlement as the roots for this expectation and behavior—it is important to consider the life experiences of the Millennial generation. Thanks to the [No Child Left Behind Act](#) and laws like the [Americans with Disabilities Act](#) (ADA), [IDEA](#), and [Section 504](#) of the 1973 Rehabilitation Act, Millennials have grown up in a world that accommodates them. Schools have modified education for them. They've been allowed to use tools that help them achieve at the highest level. They have always had this. They expect it. And that makes sense. It isn't necessarily entitlement (although it could be in some individual instances) when it's how your world has always been ([Erickson, 2008](#)).

Are they lacking in loyalty and appreciation? No.

Fernandez (2009) compared the work beliefs of Generation X and Generation Y and found that Generation Y (aka Millennials) had higher levels of work engagement, saw themselves as more loyal and more content with teamwork possibilities. This finding was echoed by Hershatter & Epstein (2010) who wrote about the greater institutional loyalty of the Millennials as compared to Generation X. Millennials actually want to be involved and want to help within your organization (IOMA, 2008) as compared to Gen X, who more often want to be left alone so they can do their jobs.

Millennials were raised with teams. Sports teams. Teams for school projects. They socialize in groups, and they are used to working in groups. They expect to be heard. They are non-hierarchical and as computer/tech experts, often have central roles on teams with older peers in the workplace ([Weston, 2006](#)). Technology is second nature to them but they are much more social than their predecessors (Generation X) in the workplace and they expect interaction (IOMA, 2008; Reisenwitz & Iyer, 2009).

Are they needy and immature? Probably (as were we all).

Millennials are often described as constantly seeking reassurance and managers report this is exhausting, overwhelming, and annoying. (Hershatter & Epstein, 2010). They expect easy and frequent access to authority figures and have high expectations for being listened to by colleagues and supervisors (Eiser, 2009).

It would likely help to remember that they are young, these are often their first jobs, and it's generally scary to enter the world of work. Millennials have been taught to share their worries and to expect to have the way smoothed for them once those worries are expressed. Hershatter & Epstein (2010) suggest we view new Millennial employees like kids learning to ride bikes. Start your teaching/orientation with training wheels (and helmets) and don't let them crash to the ground and be disheartened of trying again.

Why do they push Boomer's buttons? Because it's what they do.

One stereotype actually supported by the empirical research is that Baby Boomers are ambitious workaholics who are critical of anyone not sharing that perspective/value (Myers & Sadaghiani, 2010). Millennials violate Boomers' expectations with their apparent disrespect toward Boomers' tendency to prioritize work. [Expectancy theory](#) says that we judge other's ability to fit into the existing workgroup and

workplace culture. If they behave as we expect, we allow them in. If they do not, we do not accept them and sometimes, we demean and derogate them.

In brief, many Boomers *expect* Millennials will ‘pay their dues’, and ‘earn respect’. These are values Boomers adhered to in moving up in the workplace and they expect Millennials to behave in the same way. Generation X did not do this (they were the original ‘job-hoppers’) and Millennials will likely not do it either. And further, Millennials see the idea they should “pay their dues” as a disrespectful attitude toward them. They want to be respected and valued for what they contribute, not for their longevity ([Smith, 2008](#)).

Boomers are now at or near the age of the authority figures they so rebelled against in their youth. And as such, Boomers are in the awkward position of becoming the [grumpy old men and women](#) of today. The family of origin, social, economic and technological circumstances Boomers experienced as they grew up are gone and will not return again. The world has changed. Attitudes toward the place of work in our lives have changed. Boomers can embrace that change and adapt to new attitudes toward work, ambition and success, and or find themselves isolated. It is, therefore, wise to examine what Millennials might want from the workplace and what they might contribute to the workplace as they join it in ever-increasing numbers.

What Millennials Might Want from the Workplace	What Millennials Might Bring to the Workplace
Fewer work hours: as the centrality of work in personal identity declines—Millennials will likely want to work fewer hours. (Deal, Altman & Rogelberg, 2010).	Higher healthcare costs: their higher obesity will result in higher levels of disability and medical costs if it continues (Deal, Altman & Rogelberg, 2010).
Flexibility: Flexible work arrangements, telecommuting, international work, more social work time, meaningful relationships with clients and peers, flatter organizational structures, socially and environmentally conscious employers (Shaikh, 2010).	One world: Recognition of a globalized world with cultural and social consciousness a more active component of organizational awareness and focus (Shaikh, 2010). Community service orientation (Smith, 2008).
Communication: Memos in bullet points; short presentations and interactivity; small doses of information continually; webinars that entertain and educate; use of social media (Dorsey, 2010)	Balance: More awareness of and desire for work-life balance. As they demand flexibility, the rest of us may begin to see the benefit in having more work-life balance (Galinsky, Aumann & Bond, 2009 ; Myers & Sadaghiani, 2010; Smith, 2008).
Pats: Rewards commensurate with contribution. In addition to pay and perks for what they contribute, Millennials also want more “pats” than prior generations (IOMA, 2008).	Increased productivity: Millennials are proficient users of productivity software and may bring increased productivity to the workplace (Trunk, 2010).
Bosses who: care, are direct and honest, mentor and coach, help me learn, and are flexible (Meister & Willyerd, 2010).	Happiness: Increased optimism, idealism, traditional values, uniqueness (Reisenwitz & Iyer, 2009). Trunk says they’ll make the workplace “nicer”.
Smaller place: Millennials prefer a smaller organization—like perhaps a boutique or solo practice (Smith, 2008).	Loyalty: and longevity based on a positive relationship with employer or supervisor (Smith, 2008).
Redefinition: of how we see ambition and success to incorporate flexibility for family and personal life (Smith, 2008).	Change acceptance: Millennials demonstrate flexibility and persistence in the face of change (Smith, 2008).

Summary

There is no actual empirical evidence to show that Millennial employees as a group are lazy, entitled, disloyal, or unappreciative. They are, however, young and inexperienced and looking for reassurance (more reassurance than you might want to provide in the workplace). Millennials have been taught to question authority and they have much to learn. It is tiring. But answer those questions and they will learn and adapt and contribute. And, they may even make you think a bit if you consider their questions seriously. The voice of inexperience can also be a fresh perspective.

A growing body of empirical work suggests that beliefs about whichever younger generation is entering the workforce have remained stable over the past four decades (Deal, Altman & Rogelberg, 2010). In other words, what we believe about the work ethic and attitude of Millennials, is also what those already in the workforce believed about Generation X and yes, even the Baby Boomers when they entered the workforce.

So what can you do to become more effective and avoid repeating historical mistakes in working with this next generation of attorneys? The research has many ideas but all of them involve listening to what these new employees have to say rather than dismissing their ideas as ill-advised, immature, inexperienced or whiny.

Why should I bother?

First, you should bother because time continues to move forward whether we like it or not. Just as you've had to learn new ways of filing (electronically), doing research (online and not in the library stacks), interacting at work (thanks to civil rights laws and anti-discrimination laws), communicating (increasingly electronically or via teeny smart phones), choosing juries (considering how evolving rules, current events and attitudes play for your case), and countless other tasks—you also have to learn new ways of working with the next generation. It's what workplaces that thrive and adapt do. It's that simple.

Second, this is a question of simple demographics and the law of supply and demand. The Millennial generation starts out small and grows. They will enter the workforce more slowly than the Boomers did and this gives them more bargaining leverage ([Smith, 2008](#)). You may not like it. But it's a reality. There will be fewer choices so why not learn and train to retain now?

Third, the technology exists to allow Millennials to have the flexibility to work from anywhere (even Starbucks) rather than being tied to the office for 60+ hours a week. The only real reason to require they stay in the office is to exercise control over them. There are several issues we think are important for a law firm to consider as you hire, orient, train and attempt to retain Millennial attorneys:

- **Culture:** What is the culture of your firm? Is it a cranky principal who doesn't do technology and expects unwavering obedience? Be honest about that. If you have a more traditional principal who is genuinely interested in learning and teaching—tell them that. The important thing is that you are genuine as to who you are and what you want. What is the emotional and interpersonal tone of your office? You need to understand what you are offering, what you are expecting, and what a novice will experience as the pressure to perform climbs. It's tempting to 'sell' a position to a strong candidate, only to face their dissatisfaction when reality hits. If there is a mismatch of expectations and performance, it behooves both sides to consider where the miscommunication lies.
 - You may worry that this shows too much of your dirty laundry to a potential new hire. When would you like them to see it—before you hire them or after you invest hours in training and orienting? Be honest. Be genuine. You (and they) will be glad for your candor.

- **Concrete expectations:** Clarify what you expect. Make it about work product and not hours per week or day. If expectations vary based on caseload, let them know. Spell out dress expectations. Identify resources available to them. Talk with them about flexibility—do you have it? What is flexible? What is not?
- **Salary:** The debate on the future of billable hours is obviously larger than we can address here. Think through where you are willing to go with salary. If someone wants to work part-time, is that an option?
- **Career path:** Give some thought to a career path. How does a new hire get ahead? Is this a dead-end job or is there mobility? What transferrable skills can you offer as a new hire progresses in knowledge and experience?

There are likely many more areas of import to you or your firm. Thinking about how you have done business, how you want to do business in the future, what your firm stands for/represents— are all important areas to define as you consider new hires. We often tend to simply ‘do’ without thinking about ‘why’ or ‘what’ or ‘how’. If you are hiring someone to bill hours and create output, you will not be building loyalty. You are employing a widget to produce a commodity. That isn’t a bad thing, and it was somewhat expected by previous generations. Among Millennials, the feeling of connection and commitment is essential to sustained loyalty. Hiring employees trained to ask ‘why, why, why’ from an early age is a good impetus to consider why you do that thing you do.

The following recommendations for effective management of Millennials are based on research and on our years of experience providing management consultation to managers in multi-generational workforces.

The Millennials may or may not be the “next great generation”, but they are the next generation and they are our future. Mentoring the Millennial has to be planned out and thought through—and for an example of mentoring gone right we turn to a somewhat surprising employer: the Central Intelligence Agency (CIA)! The CIA (now ranked #32 in [Top Places to Work by BusinessWeek](#)) boasts a retention rate of 94% of their Millennial employees (Hershatter & Epstein, 2010). They do this by incorporating mentoring and collegial communication across the organization. If the CIA (a huge and bureaucratic government entity) can find ways to employ and retain Millennials, so can you and so can your law firm!

Managing Millennials (and watching yourself)

1. **Lead:** Millennials are hungry for leadership and direction. So be a worthy leader. You want to lead as an experienced colleague helping them to avoid mistakes—not as an authoritarian boss with a “because I said so” attitude. Be respectful when you give them feedback. This is not a call to coddle them, but rather a challenge to mentorship. Tell them about your mistakes as you were learning (and the mistakes you make now). A recent law review article encourages professors to be a “guru”—a charismatic leader people want to follow. Guru’s are not perfect, but they are successful, and they have lessons to teach and accrued wisdom to share. Be a good teacher and you will be a good leader (Bohl, 2008).
2. **Communicate:** As you train employees, define the language of your law firm culture, such as idiomatic sayings (like “separate the wheat from the chaff”; or “[sour grapes](#)”). Older speakers (ahem... that would be those above 30) make assumptions that everyone knows what these cultural references/idiomatic sayings mean. They don’t. You are wise to [simply say what you mean](#), or at the least, make sure that your intent is understood (both to juries and to younger associates). And we would recommend you not make reference to “pearl necklaces” in training or in jury presentation.

- a. **Email revolutionized the workplace.** Some of us struggled against it fifteen years ago, but today we see it as an inescapable fact of life. Millennials bring changes in how communication is done. Their texting and instant messaging may replace email and phone calls over time. In the now, however, expectations of responding to voice mail, email and other traditional communication modes can be communicated and enforced.
3. **Respect:** Show respect by combining support and challenge, and asking for their input in their areas of expertise (Eiser, 2009). However, do not make the mistake of asking for input without seriously considering it. Millennials are quick to identify those who simply go through the motions without seriously considering suggestions.
- a. **Respect has to be mutual.** A common complaint about Millennial generation employees is that they find certain tasks beneath them and only want to do those tasks they find to be of interest (Hershatler & Epstein, 2010). The leadership task is to make clear why the assignments need to be done and why they are important. Make sure Millennials' tasks are not all unattractive ones, give them some variety—but help them understand that some jobs are simply not that much fun but still need to be completed. Should this be necessary? Baby Boomers will say “no” (or more likely, “hell no”), but the job of leadership in a multigenerational workplace goes beyond doing what you would require yourself, and to speak to what is important to your employees, too.
4. **Interact & Inform:** Provide opportunity for staff interaction and make sure this interaction is crossing age groups and level within the organization. Allow and promote the exchange of information by creating internal networks for communication and education. Keep employees informed about organizational activities, interests, and commitments.
5. **Informal Attire:** To the extent that formal attire is optional, allow it to be more relaxed. Communicate clear expectations about what “informal” means. If it means no cut-offs or flip-flops, say so. Even in relatively ‘relaxed’ firms, there are obviously meetings and events that would oblige formality. Make clear an expectation that complete traditional formal business attire be kept in the office for unexpected meetings (Messmer, 2008).



6. **Mentoring:** Millennials are more open to authority figures than either Boomers or Gen Xers were at the same age. They are very willing to be mentored. But let the mentoring work both ways!

- a. **Consider [reverse mentoring pairs](#):** Place tech-proficient Millennials with senior manager boomers who can learn while teaching. More than 75% of Millennials report they enjoy working with Baby Boomers and more than 58% say they ask Boomers (not Xers) for mentoring and advice (Hewlett, Sherbin & Sumberg, 2009; Ali, 2010).
- b. **Effective Millennial Mentoring:** Millennials thrive in a structured and supportive work environment where they can interact and do work that has meaning for them (Simons, 2010). Again, this does not mean you have to allow them to do only what they want to do. It simply means being aware of what brings meaning to them, explaining how some tasks are mindless but imperative, and be sure they have other tasks that resonate with them.
- c. **Structure it:** Millennials value structure so make sure your ‘mentoring’ is not solely informal. Schedule planned times for mentoring ‘sessions’ in addition to informal interactions.

- d. **Encourage longevity:** While there is much (not empirically supported) talk about Millennial job-hopping, we know that Millennials develop commitments to individual supervisors with whom they have meaningful relationships. Mentor, give feedback and praise, and you can have a long-term, loyal, committed and productive employee (Myers & Sadaghiani, 2010).
- e. **Show them a clear career path:** What is the path? What are the benchmarks? What is the general timeframe for reaching those benchmarks? Concrete and behavioral information (i.e., information they can ‘see’ and ‘hear’) will help your new associates understand both what is expected and how they can excel.
 - **A sense of control:** Knowing how to move ahead and what they can do to excel is a gift to the new hire. Give the gift of control! This does not create a cost for you. It’s actually an investment in the future of your firm. Clarity of career path promotes feelings of being valued and cared for—important for all of us, and especially for the Millennials.

7. **Common Sense:** Give them specific and detailed instructions. These are areas where Millennials may simply have ‘holes’ in their knowledge.

- a. **Dress:** Establish a dress code (clearly spelled out, not simply “professional attire” or “business casual”). Remember this is the “Why” Generation. Be prepared to explain ‘why’ you have the dress expectations you communicate to them.
- b. **Curb Resistance:** Explain the reasons for your expectations and they will be less likely to resist.
- c. **Examine yourself:** As you explain ‘why’ you would also benefit from asking yourself ‘why’ things are done in this way. Is tradition enough of an answer? Is it necessary or is it simply habit? Millennials expect flexibility and it doesn’t hurt you to embrace change yourself as you ask them to change how they are behaving.
- d. **Why can’t they sink or swim?** We often hear some variant of this question. Many of us in prior generations were trained by simply being thrown into the workplace and we either adapted and learned or we didn’t. That approach is simply so foreign to the Millennial that it sets them up for failure. We raised our Millennial generation to expect structure and clarity and clear expectations for performance. We told them to question authority. So they ask questions. And now we have to provide the answers.

Financial realities for Millennials

Millennials are being affected by the recession differently than other generations and we can expect these effects to linger for a decade or more (Deal, Altman & Rogelberg, 2010)

Their higher rates of obesity will limit life expectancy and make their medical bills higher (Deal, Altman & Rogelberg, 2010)

Almost 1/3 are uninsured and cannot pay their bills. 70% do not have enough saved to cover 2 months of living expenses ([Thurman, 2010](#))

For Millennial attorneys: there are 30,000 attorney positions opening per year with 45,000 new JDs every year. Fully 1/3 will not find jobs as attorneys ([The Jury Room, 2010](#)).

8. **Coaching:** Much is said about the importance of honest, useful, and timely coaching for Millennials and it's true. They benefit. But so do the rest of us. When you take the time to share feedback, others feel valued, empowered and engaged (Meister & Willyerd, 2010). Avoid a 'take it or leave it' attitude and see yourself as actually wanting to understand and 'grow' your firm as you help new employees professionally develop.
9. **Gender-neutral Policies:** Make sure you have the same policies and expectations for men and women. That sounds simple and likely routine, but among both male and female Millennials, it is a violation of personal values, not just the law. Employers have ended up in court for making women (but not men) cover their tattoos (Deal, Altman & Rogelberg, 2010).
 - a. **Discrimination policies:** We need to continue to define and understand what attitudes can get us in trouble. Tattoos are one handy source of bias for many of us who are over thirty ([The Jury Room blog on tattoos](#)). Pay attention to your automatic biases.
10. **Fill Educational Holes:** This is a generation who can gather data faster than you can think of a question. They do not tend to evaluate the data based on source credibility though, and tend to accept facts gathered at face-value. It is accepted that holes in the knowledge of the Millennial generation cause obstacles in the workplace (Deal, Altman & Rogelberg, 2010).
 - a. **Identifying holes:** Strong potential can be missed if you focus only on what new hires are *lacking*. Identify what they are missing, and use orientation, early career development and mentoring to remediate the inevitable holes young hires will have to fill (Deal, Altman & Rogelberg, 2010).
 - b. **Writing skills:** Even high-profile corporations are having to offer remedial writing courses to get new hires' business writing up to speed ([Smith, 2008](#)). You will likely need to assess writing skills and perhaps offer training in writing briefs and motions. This is a learned skill. Give them the training they need to succeed. Research and writing are not emphasized in all law school curricula as they have been in the past, so more on the job training may be required.
 - c. **Teaching Skills:** Work with them to not only gather data, but help them to question it, verify it and understand it in context. In essence, teach them to read between the lines so they not only know how to scan information but to understand source credibility, context and value of the information (Hershatter & Epstein, 2010).
 - d. **Teach comfort with ambiguity:** Millennials are used to lots of structure. The reality is they cannot be told what to do forever in the workplace. Teach them to follow lines of intellectual inquiry—now that they have this information, what does it mean? Is it credible? Does the speaker/writer have a bias? How does that bias slant the information? Teach them to run through a list of questions to ask themselves as they are gathering data so they can rank data gathered in terms of credibility and only gather that which is credible.

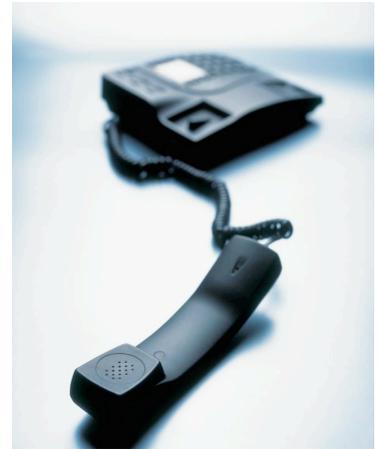
You may be thinking as you read this list of strategies for Millennial management—"Hey, I want that too!". The reality is that all of us benefit from simple and sound management techniques. And that's all these are. What's good for the Millennials, works for us all.

What Millennials can do to enter the workforce more successfully

This paper is not complete without a section on what Millennials themselves might benefit from doing as they enter the workforce. A healthy workplace encourages give and take—not just one or the other. Just as

partners and senior associates need to bend—so too do you as the new generation coming into its own. Here are some recommendations for Millennials as you enter the unfamiliar world of work.

1. **Listen:** You may well have good ideas. Listen first. Get a sense over time (at least a month!) of how things are done, who works on what, how communication happens, and so on. Then, your ideas are based in experience and awareness—not simply off-the-cuff commentary on how you think the world of work should be.
2. **Ask questions:** But not just ‘why?’. Inquire about what is expected in work product, schedule, demeanor, appearance, etc. Don’t just wonder and present negative reactions—be proactive.
 - a. **Why?** These questions inquire about specifics rather than potentially being seen as an affront to authority. You can ask ‘why’ questions later. In the beginning, seek information.
3. **Check your voicemail and email!** Get clear expectations as to how often you are expected to check your voicemail or email. Once a day? Three times a day? How often? And then do it.
 - a. Whether it is *your* preferred mode of communication or not—you are in a service industry. Part of learning is learning to communicate in all modes to provide optimal service to your clients.
 - b. As a team member you have to stay plugged into the team network. And in most offices, that team network is email and voicemail.
4. **Respect:** You want to be respected. So respect others. Observe to see how respect is communicated. Talk to a mentor about how you can communicate sincere respect and appreciation. And then do it.
 - a. **Some ideas:** Don’t text or email while in meetings or conversations. Come into the office when expected and if not, make a call to inform. Make eye contact when being spoken to or when speaking. Don’t roll your eyes. If texted by a colleague, respond to that text using complete words rather than text-speak.
 - b. **Remember context always:** Am I communicating professionally or personally? Professionally is anyone from work or a client or vendor. Personally is your friends and family who are not in your work environment. This rule will save you much grief.
5. **Dress professionally:** Learn what the dress expectations are immediately. Define ‘business casual’. It may mean something very different than you think. You want to be “the new associate” not “that kid in the flip-flops”. You do not have to over-dress. But as a new associate, your job is to impress with awareness, enthusiasm, and willingness to go the extra mile.
6. **Take advantage of mentoring programs:** And if your firm doesn’t offer them, ask for it through your human resources office or the partner to whom you report. It may be through a local Bar Association or Young/New Lawyers groups. This is the fastest way for you to learn the rules (written and, more importantly, unwritten) and understand not only how things work, but how your behavior is being perceived.



- a. **And remember:** The goal of mentoring or coaching is not to shame or belittle you. It is to give you honest feedback tailored to your needs and professional development. Anyone who tries to tell you that their blaming/shaming communication is meant as ‘mentoring’ is someone you do not need to have as a mentor. You may still need to successfully deal with them as a senior member of the firm, but seek your insight and support elsewhere.
7. **Be open to training:** Yes, you are bright and capable. Yet, what common sense and a lot of research tells us is that there are holes in your knowledge, as well as in your awareness. You may benefit from training on professional writing (e.g., memoranda, briefs, motions). You may benefit from trial advocacy training. If offered, take it. If not offered, seek it out and ask for it.
8. **Don’t set yourself up for failure:** Find a firm that fits what you know about yourself. You may not want to commit to 300+ billable hours per month. Do not spring that announcement after you are hired. Look for a good fit beforehand. And if you negotiate a lower number (or have the fortune of being hired by a firm that expects a lower number) do not take that as license to bill fewer hours than that amount. That amount is your baseline, not the ceiling to which you aspire.

Office environments have always been complicated. Multigenerational workplaces, or offices where authority is shared, are even more complex. The expectation that you can browbeat the junior associates into performance has never worked well, and it doesn’t work at all anymore. Likewise, expecting that the firm should simply change because the ways of the Millennial generation are more efficient and simpler is both questionable in accuracy and an absurd fantasy. The solution lies in both senior members and young associates working to establish the sense of teamwork and mutual respect that simply doesn’t come without direct effort.

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Snips and Snails and Puppy Dog Tails

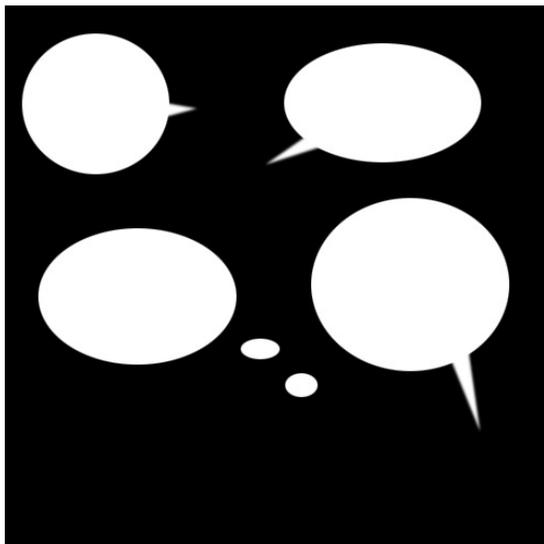
Does What We're Made of Make a Difference in the Courtroom?

by [Laura Dominic](#)

It's 2010. Why are we even talking about gender and the practice of law? Haven't we already "Come a long way, baby?" Hasn't the powerful female lawyer portrayed on the myriad TV legal dramas sent the message to the public that being a good lawyer has nothing to do with your gender? The answer to that is yes...and no. Whether you're a male or a female, in and of itself, doesn't make you any more or less competent as a lawyer. But your gender does play a role in what society has taught you about how you should and should not communicate, and how the public perceives your communication. And it's in that socialization process where we can find answers about how our gender impacts our communication and credibility in the courtroom.

Whether you win or lose, of course, depends on the facts, but how your message is received by the jury, judge, mediator, or the arbitrator plays a role. When it comes to communication behaviors, there are verbal and nonverbal elements that affect credibility, and there are general differences in the way men and women communicate. Some pose advantages for each gender, and some pose disadvantages. The good news is that there are teachable/learnable verbal and nonverbal elements of presentation that drive credibility, and a lawyer's credibility is a key component in persuasion.

This article addresses the intersection of effective communication and gender by analyzing those traits associated with gender that can increase credibility and make attorneys more effective advocates for their clients.



Where Do You Fall on the Communication Spectrum?

The differences in male and female speech patterns have long been researched. Very generally we can describe the typical male speech pattern or "masculine style" as having communication traits such as assertiveness, loud volume, and a strong upright body position. The typical female speech pattern includes traits such as a passiveness, softer voice, a tilted head, and lower volume.

While we would never argue that one style is better than the other (in fact this article will address how and when traits on both ends can be advantages or disadvantages for lawyers), many masculine communication traits have become associated, rightly or wrongly, with power and credibility because men have traditionally held positions of authority and played more dominant roles in society. However, it is important to keep in mind that not all men and women fall within their respective gender style. In fact, most female litigators adopt more masculine communication traits. An important exercise for any lawyer looking to hone their communication skills is to recognize what kinds of communication traits they employ. Knowing which traits increase your chances of connecting with the jury, landing a client, or persuading

a judge to rule in your favor can give you a competitive advantage over your opposition. Similarly, knowing which socially constructed traits decrease your credibility with the jury or send the wrong message to your business partners will alert you to what changes you should consider making in your communication style.

An important caveat needs to be made here. When we discuss “typical” communication patterns in this article, or talk about what women or men “tend to do,” these are generalizations and don’t necessarily apply to all men and all women. However many studies have found that more women tend to display the traits associated with the feminine style, while men tend to be low in these traits. In order to understand why this is true, we provide a quick review of how society has shaped the way we communicate.

Sugar and Spice and All That’s Nice

It is no surprise that boys and girls are biologically different from the moment their sex is defined. Nature has its well-defined parameters of what makes a boy a boy and a girl a girl. But it is not the natural differences that account for how we communicate; it’s how we are socialized that influences our communication patterns. We need to look no further than the schoolyard playground to see the differences between boys and girls. The boys are playing in large hierarchical groups with an obvious leader who is making up the rules. Their games are competitive and rule-based. Victory comes from winning, and losers are punished if they cry or fret over their loss. Contrast the boys with the girls, and you’ll see much smaller groups -- dyads or triads of “best friends.” Unlike the boys, the goal for girls is not to win; it’s to bond and be liked by their peers. For the girls, the discussion of what they are playing is much more important than the play itself, and when someone is upset, other girls offer sympathy and comfort.

As a result of this socialization, boys learn to be competitive and goal oriented; they learn to compete for a spot at the top without worrying about the feelings of those they climb over to get there. Girls learn to form relationships and promote egalitarianism within the group. They learn that getting along is important and that minimizing conflict is vital to belonging.

In this brief description, you should be able to see the roots of the *typical* adult male and female professional. The male professional got his start learning that it is more important to act than to talk, and that the endgame and the rules along the way are important. The female professional grew up learning that she gets ahead by reading a situation, and fostering and promoting relationships.

Great Expectations

A second important role that society plays in our communication centers on the expectations that others have of us when we talk. Because girls and boys tend to fall into roles described above, we expect that they will continue to have similar roles throughout adulthood. These expectations may occur at the subconscious level, and account for why women are often told to “smile” much more than men are. When expectations are not met, cognitive dissonance interferes with our processing of that information. So, when I subconsciously expect a woman (who, remember, is the promoter of group happiness) to smile, I’m confused when she doesn’t, and may negatively judge her message. This may explain why some of our clients complain that they have been unduly dubbed “a bitch” when they are overly aggressive in the courtroom or overly dominant in the boardroom.

To clarify the importance of societal expectations, one only needs to think about the power of stereotypes. Stereotypes can be characterized as the file cabinet in your brain. Very generally, stereotypes of men include assertive, rational, strong, direct and insensitive. Stereotypes of women include emotional, gentle, quiet, and sensitive. Couple the gender stereotypes with the stereotypes for lawyers (do I really need to fill those in for you?) and you have a recipe for what your audience expects from you before you even walk in the courtroom.

The intersection of gender and attorney stereotypes can begin to inform us about how society views attorneys and what they expect from them. For some people, their stereotype of an attorney is male. The fact that most people will associate the male pronoun with the lawyer indicates that as a female attorney, there is a built in expectation violation that occurs nearly every time you walk into a courtroom. But there is an upside (and a downside) to expectation violation, and this is where communication comes into play. Take, for example, when a female attorney walks into the courtroom, there will undoubtedly be one or two jurors who will think quite consciously, "Hmm? She's a woman," and some may expect her to be less competent than her male counterpart. But when she employs communication traits associated with high credibility, she violates those expectations and enjoys the benefit of jurors being pleasantly impressed with her ability. A converse scenario explains the downside – a male attorney who enjoys the initial benefit of a jury expecting excellence loses a lot of persuasive power when he uses low-credibility communication traits. The key to overcoming judgments based solely on societal expectations is to understand how you can use communication to enhance your credibility.

The remainder of this article focuses on the credibility ratings assigned to the verbal and nonverbal communication traits that are most commonly at play in a litigating setting, focusing on which traits are more typical of men and which are more typical of women, and when those traits become advantages and disadvantages.

The Words We Use

Communication traits generally and easily fit into one of two categories – verbal or nonverbal communication. Verbal communication refers specifically to the words we use and language choices we make. Nonverbal communication refers to how we look and sound when we say the things we say. In the courtroom we do both, and both categories contain traits that help and hurt credibility. We'll explore verbal communication first.

Maintenance Work v. Task Master

Consistent with our social gendering discussion above, we can generalize that women choose words that build rapport and maintain relationships with others. We hear words such as "I see," and "I know how you feel" more often from women than from men. Men tend to choose words that are task oriented and report the status of things – "The point is," "I need you to..." "Listen up." Using words that build rapport can be a strength when building trust with new clients, working with an upset witness, or fostering team spirit in the firm. In addition, attorneys who use communication to *continue* the conversation ("uh huh, tell me more," "interesting, what else happened,") learn more in voir dire and in cross-examination.

Questions v. Statements

Women ask more questions than men. After all, she wants to build relationships and get to know the other person, right? In contrast, the typical masculine speech style tends to make statements, and then ask for simple affirmation or denial. – *"And then you signed the contract. Correct?"* In the context of examinations, this is effective if you want to make sure a specific detail is included, but it can be ineffective if you are trying to get the witness to tell the story in their own words. Often in witness preparation sessions with male attorneys, a large part of our role is helping him ask the right questions to invite the witness to share information. Some very helpful stories have been unveiled this way.

While the advantage of asking questions favors women, there is one type of question that hurts credibility – tag questions. A tag question is a question that asks for confirmation (not affirmation) – *"We ought to oppose this motion, shouldn't we?"* *"The deposition is scheduled for 9 am, isn't it?"* Tagging-on a confirmation questions sends the message that we're not sure of ourselves.

Intensifiers, Hedges, and Hesitations

Among some of the least credible verbal communication traits are intensifiers, hedges, and hesitations. Studies have found that women, more than men, use these vocal fillers. Intensifiers include words such as "very," "really," and "so much." Intensifiers account for much of the stereotype of the "valley girl" and would not be part of a credible lawyers' speech. You wouldn't expect a lawyer's opening to begin, *"My client was really, really hurt by the very bad conduct of this totally awful defendant."*

The same is true for hedges, which qualify a statement, and hesitations, which signal insecurity. People who use words such as "well," "kind of," "sort of," "I think," and "maybe" are not as credible as those who do not. Consider the credibility difference between the two following opening statement lines:

Low credibility: *"I think probably you'll agree with me that what this case is about is a plaintiff who truly made very, very bad choices and well, I mean, caused his own demise."*

Higher Credibility: *"This is a case about a businessman who made poor business choices, which ultimately caused his own demise."*

Competition v. Consensus

Again generalizing about the differences between masculine and feminine speech styles, we see that the masculine style engages in verbal language that is more competitive than friendly. Boys are taught to be comfortable and non-stressed during confrontation, and tend to show less emotion in stressful situations. This style can be an advantage in mediation when



you don't want to show your cards. A down side to the competitive style is that men tend to dominate conversations and interrupt women in conversation more frequently than women dominate and control men in conversation, which can have a negative impact on the jury or clients who witness the interruption.

The use of polite forms of speech is a product of the consensus gaining style of feminine communication. Because more women employ the feminine style than men, women more frequently use the polite phrases such as, "I'm sorry," and "we." While saying "I'm sorry" is an important part of consoling and sympathy, in a professional setting this polite form can hurt credibility. Think about what "I'm sorry" means – it is accepting responsibility for something you have done. But when we apologize for something that is not our fault, you're taking on undue responsibility and potentially hurting your credibility. Take for example, "I'm sorry we can't have the meeting today; my partners cannot be there." While you may feel bad for not being able to hold the meeting, you do not need to own the responsibility for the reason why. Try instead simply removing the unnecessary apology – you accomplish the same goal without the risk of hurting credibility.

The use of the term "we" has advantages and disadvantages. Women are much more willing to include the group when praising a team than men are. "We accomplished a lot this quarter" v. "I want to thank you for assisting me in reaching my goals this quarter." Inclusion builds trust and rapport. However, the downside comes when a woman is inclusive when she really deserves the credit. Informing the senior partner that, "We have completed the Motion for Summary Judgment Memorandum and feel confident that it is a solid and persuasive brief," when *she* did all the work does not earn the same amount of credibility if you simply changed, "we" to "I." At the same time male partners run the risk of earning an unwanted label by not including the team. Simply replacing "I" with "we" can increase respect and morale in the firm.

Everything But the Words

Nonverbal communication encompasses everything besides the words you use. It's the tone of your voice, the gaze of your eyes, your body position and your facial expressions. The impact of nonverbal communication can be as great or even greater than the words you choose. An easy presumption to make is that because fact-based evidence is such a predominant part of litigation, the words we use must be more important than how we look and sound when we say them. Certainly words are important, but we cannot underestimate the importance of nonverbal communication. For example if the strength of the evidence you present is incongruent with the nonverbal delivery, the message sent through the nonverbal channel will usually win. Imagine if you said, "My client and I feel strongly that there was no wrongful conduct," with a quiet, sullen tone and your head hung low. The jury may believe the nonverbal cues over your words.

Men and women display very different nonverbal cues, some of which are controlled more by our biology (e.g., tone and pitch of our voice) than by our socialization. It is important to recognize the credibility assessments people make about you based on your nonverbal cues, and change those that invite low credibility ratings.



Eye contact

One of the best indicators of credibility is eye contact. When delivering an opening statement or closing argument, making eye contact with every member of the jury will enhance your credibility more dramatically than if you simply scanned the jury box. Typically, women anchor their gaze more on people's faces than men do, but women are also more likely to break eye contact when confronted. If your objective is to build rapport and credibility, the key is to look people in the eye, but not so long as to make them uncomfortable or to appear as if you are challenging them. If your objective is to inconspicuously make a witness uncomfortable, then you should make repeated and unwavering eye contact.

Voice

Obviously the tone and quality of our voices will be a part of any spoken message, and will impact perceptions of credibility. Generally, a relatively loud, low tone, and moderately fast pace is more credible than a quiet, high pitched, very fast or very slow pace. Men have the advantage of having voices that fill courtrooms. They also have lower pitch. When some women try to increase their volume their pitch becomes higher, and the rate becomes faster (which may explain why female attorneys feel as though they are interrupted by judges and opposing counsel more than men do). When working with younger female associates, pitch is one of the first nonverbal traits we address. We're not trying to make a female sound unnaturally like a man, or ask her to strain to lower her pitch. But listen carefully to a more seasoned female attorney, and almost invariably her pitch is lower than a younger attorney (and most likely lower than her own voice was 10 years earlier).

Along with the head tilt, a rising intonation is a nonverbal trait that belongs almost exclusively to women. A rising intonation is that questioning tone heard at the end of a sentence that is not in fact a question. The rising intonation reduces what should be a strong, decisive statement to a weak, indecisive question. This is particularly obvious with many female witnesses. The following is from a witness preparation session with a nurse. First, read the answer with a strong voice from beginning to end; then read it with a rising intonation at the end.

"Next, I checked the vital signs of the mother. Then I looked at the fetal heart monitoring strip to check on the baby. Then I documented the chart."

Clearly, the first reading signals to a jury a nurse who knew what she was doing and it makes a much stronger impression on a jury. Stating it as a question only makes the jury question her credibility as they wonder about how much of a patient advocate she may have been.

Body Position

Your body position sends a lot of messages to your audience while you are communicating. Generally, an open body position (arms comfortably at your side or outwardly extended, shoulders relaxed and back, and legs in a shoulder wide stance) is more credible than a closed position (arms crossed or close to the body, hands clenched, shoulders hunched, and legs crossed at the ankles when standing.) Interestingly, men and women typically use the open body positions in different situations. Women show a closed body position in

uncomfortable settings whereas men are more relaxed, often leaning back in chair totally wide open. These contrasting body positions are often seen in boardroom meetings or cocktail party settings (particularly when comparing younger associates with older partners). Think about making a subtle adjustment in your body position next time you want to send a message that you are comfortable and confident.

In contrast to uncomfortable settings, women, more than men, tend to engage in nonverbal communication behaviors that show interest – head nodding, forward leans, and mirroring postures. These body positions are particularly effective when examining witnesses. While jurors expect to see some assertiveness when examining a witness, they also expect attorneys to be polite. To a jury, a body position that shows interest translates into the politeness they expect to see. During more assertive cross-examinations, female attorneys may avoid some of the negative feedback we hear from jurors about the unnecessarily aggressive male attorney.

On several occasions, we've had particularly assertive male attorneys ask us what they can do to capitalize on their assertiveness on cross-examination while not coming across as unnecessarily aggressive. Our advice usually entails slight changes in body position, while maintaining a stern voice -- standing in front of a witness with arms slightly extended rather than pointing a finger, dropping one arm to the side rather than gripping the podium with both hands, or nodding in response to some answers rather than maintaining a constant gaze. Softening the nonverbal tone will pair well with the assertiveness jurors expect and want.

Head Position

Mentioned earlier, the head tilt is a behavior that is almost uniquely characteristic of women. Women often sit and speak with their head titled to one side, while men rarely do. What is important is that the head tilt is commonly associated with low credibility as it is a sign of perpetual curiosity or bewilderment. Women, next time you are in large group setting, see if you can see this trait in others. You'll become more conscious of this behavior and change it while sitting at counsel table or delivering your opening statement.

Conclusion

While this is but a short and brief analysis into a much-researched topic, the bottom line is that men and women alike can enhance their communication effectiveness by adopting the traits and behaviors associated with higher credibility. Though the communication continuum labels certain traits as masculine and feminine, it is inaccurate to focus on whether men or women are more effective speakers. Instead, we should focus on the communication behaviors that increase perceptions of credibility. Each of us can benefit by identifying those traits that hinder our credibility, and focusing on changing behaviors that will increase our effectiveness. When we understand the messages that our



verbal and nonverbal communication cues send, we can begin to hone the traits that negatively impact our credibility and refine those that capitalize on our strengths. This is not a perfect prescription for success. Because each of us finds our self using different styles—understanding what needs be changed, and what should be embraced will vary from person to person. Additionally, consider who is receiving the message (client, judge, jury, opposing counsel, or colleagues) and the context of the message (deposition, settlement negotiations, voir dire, examination, etc.) to understand if there is a masculine or feminine trait that could increase effectiveness.

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Out of the Shadows, Into the Jury Box

by [Alexandra Rudolph](#) and [Tara Trask](#)

In today's world of high stakes litigation, we have one question: Why wouldn't you use a shadow jury? It's very likely that your opponent is using one. What once was limited to the pages of a John Grisham novel is becoming more common in the courtroom. A shadow jury reduces the guesswork by providing real-time feedback on elements that can make or break a case. Knowing what is working, what isn't working and why gives you an undeniable edge.



"So helpful it feels like cheatin'"

Experienced trial lawyers are recognizing the tremendous value of using a shadow jury. In fact, we have both experienced dueling shadow juries on several occasions. One of our clients goes so far as to call the advantage he gets from a shadow jury, "so helpful it feels like cheatin'".

Even the most seasoned trial teams, consultants and experts cannot provide the same feedback that a small group of laypeople who are completely new to the case can provide. It is simply a different

perspective. At the end of the trial day, shadow jurors are debriefed by a professional facilitator. They provide their unvarnished views on the presentation style of the lawyers, the content of the testimony, what they heard (and often more importantly what they didn't hear), their thoughts and feelings about what they are hearing, the credibility of the witnesses, the influence of the judge on the case and a general perspective on what they think the case is even about.

It is important to understand what shadow juries can do and what they cannot do. Shadow juries are not a crystal ball that allows you to see into the minds of the actual jury. In fact, the name "shadow jury" is unfortunate and has likely caused confusion over time as to the role of the participants. Shadow juries are not meant to predict the outcome of the trial. There are simply too many variables to replicate for any predictive validity to be measured and any social scientist worth their salt will tell you that. Instead, shadow juries are used to provide

another vantage point, one that may indeed be more closely aligned with that of the actual jury, than anyone else on the trial team. In fact, it's best to think of shadow jurors as "lay translators" providing feedback to the team.

Historically in our practices, the shadow jury has usually been aligned with the views and decisions of the actual jury, the variation being mostly in degree. Every moment spent in front of the jury should be accomplishing some goal. Are you achieving the goals you are hoping to achieve each day? Did the points your witness was trying to make get through? Did they understand that concept that your expert explained that is central to your case? Are you beating a dead horse? These are the kinds of questions that the shadow jury can answer for you every day. With a shadow jury in place, these problems can be measured and adjustments can be made. Frequently, some of the best arguments, analogies and general trial strategies can come from suggestions of the shadow jury.

With thirty years of collective experience, we've heard all the criticisms about shadow juries. Of course, not every case warrants the use of one. However, with the exception of cost, and we agree shadow juries only make sense when big damages are on the line, the question isn't why should you invest in a shadow jury, but why *wouldn't* you?

"My instincts are good enough"

As a trial lawyer your instincts are better than most, but if you are very experienced, you have probably lost a trial you thought you were going to win. It's a sobering experience.

Perception is Reality

Being technically right is nice but does not mean you will win the case. Verdicts are driven by the jury's understanding of the facts, not necessarily the facts themselves. Lawyers often look at a case from a legal perspective. Jurors don't. They see it completely differently, relying on their personal experiences and common sense, not case law.

On countless occasions, we've had counsel return from the trial day, high-fiving one another, the entire team convinced that the day's cross was a homerun. And then the shadow jury report comes in and the consensus of the shadow is that you didn't lay a glove on that expert, or worse yet; they loved him and thought you were nitpicking. These are the moments when a shadow jury can prove most valuable.

Leave it to the Professionals

When the shadow jury is reporting information that is different or at odds from most of the trial team, this can be disorienting, and it is understandable that counsel may find this distracting. This is why it is so important that you have confidence that the shadow jury is



being run correctly. When you retain a consultant, ensure that their recruiting and debriefing methods are sound. For example, shadow jurors should always be debriefed separately, rather than in a group. Does the facilitator have the experience and training to spot subtle biases and entrenchment of jurors over time? If you have satisfied yourself that the shadow is being run professionally, can you really disregard the views of six independent individuals who thought your cross was ineffective?

“Shadow juries can be disruptive”

There was the Ernst & Young trial in 2009 that was nearly derailed when an impaneled juror spoke to a member of the shadow jury. Apparently, they were friends (Mishory, 2009). Things like this should never happen. Regardless of the fevered pitch of the morning of openings, it is imperative that the shadow jurors be screened for their knowledge of the actual jury. Again, retaining a consultant that has extensive experience with shadow juries is absolutely crucial. The research is being conducted real time at the trial and control of the shadow jury and an understanding of what processes need to be in place to ensure that the shadow jury does not impact the actual trial process in any way is imperative.

Recruitment Is Critical

Facilitating a shadow jury is both a science and an art. Take for example the angry shadow juror who protested his being fired by holding up flyers and telling his story of woe to anyone who would listen (Richardson, 2010). A renegade shadow juror is the nightmare of the consultant and counsel alike, but while there is no way to completely avoid a crazy episode such as this, there are ways to minimize the possibility. Spending time with the prospective shadow panel is important. Quirky or crazy tendencies can usually be identified and an

intuitive consultant will always err on the side of getting rid of any wild cards early.

Shadow juries should be composed of five or six jury-eligible people who have been carefully screened prior to the trial. Less than that is not recommended. Social scientists look for trends in data. There is no value in hiring one or two people to watch the trial. Not only does it compromise the validity of the data, but can actually be harmful. Without a significant group to compare, it is impossible to know if a single person’s feedback is consistent with general perceptions or is an outlier. Trials can last several weeks therefore it is important to allow for the possibility of losing a participant for any number of reasons during the course of the case.



Typically, a pool of prospective shadow jurors is recruited, much like the panel that is called down for jury duty. This group needs to understand in advance, that they may or may not be chosen for the project. Clear communication up front is key. Prospective shadow jurors must

be paid fairly for their time even if they are not chosen. Further, all shadow jurors must understand their role, the rules and the temporary nature of the engagement. Any problems or potential problems with this arrangement should be dealt with quickly.

It is imperative that the shadow coordinator have no contact with the trial team during the trial day. The shadow jury cannot know who has retained them and maintaining anonymity in the courtroom while being in constant communication with the trial team is challenging for the facilitator. Consultants are trained for this and used to it. Often, trial counsel is not. If you believe six people hired to watch the case didn't notice you giving the consultant a meaningful look at a critical moment or slightly nodding your head, you are underestimating them and, chances are, also underestimating what the real jury observes. They see everything. You are *always* on stage.

Don't Leave the Court In The Dark

In this day and age, we do not conduct shadow juries in the shadows. Opposing counsel should be apprised that you are planning to conduct a shadow jury. You should file a motion in limine with the court not only about the mention of a shadow jury, but the mention of a trial consultant as well. It has been our experience that shadow juries run most smoothly when everyone is aware of what's going on, including the Court.

"Shadow juries can throw you off track"

There is no substitute for the sound, strategic decision making of an experienced trial team. Blindly following anything a shadow jury suggests defies common sense. All information gleaned from a shadow jury must be considered, filtered and contemplated. It is simply another tool. More often than not, if the information is surprising, there is an "ah-ha" moment in the trial team or a realization that the goals of the day might not have been accomplished as planned.

How can you know if you can trust your shadow jury? Again, how it's run and who is facilitating it matters a great deal. It's easy to be lulled into thinking that shadow juries are simple to run. They are not. Ensuring that the shadow does not know which side retained them, ensuring that they are not talking to anyone about the case, investigating the case, or in any way gleaning outside information takes constant vigilance on the part of the facilitator. Also, it is important for the facilitator to be on the lookout for hints that the shadow jurors are becoming entrenched, or that they are not paying attention. All these factors must be taken into consideration when weighting their input.



“Shadow juries are too expensive”

Shadow juries are expensive, and they are not for every case. It is also important if you choose to run a shadow jury not to skimp. In order to have participants who not only provide valuable feedback, but are a close match to the actual jury in demographics, background and value and belief systems, going down to the local employment agency will not work. Instead, you must retain a reputable consulting firm with broad experience in shadow juries to ensure a solid recruit, good attendance, extensive pre-screening and most importantly, professional facilitation and control of the shadow jury at all times.

Serial litigation can especially benefit from shadow jury research. Often, the same experts from both sides are called for multiple cases. Shadow juries provide a collection of data on experts or key witnesses including perception of credibility, their strengths and weaknesses. That information alone is a gold mine. How can your witness improve? What do they think about opposing counsel’s expert? If he or she is especially compelling, why? What can you do differently next time? What about your experts? How well are they received by jurors and how can they improve?

Whether or not to deliberate a shadow jury is a decision that should be made by the consultant and lead counsel. Sometimes, its best not to deliberate the shadow jury but rather to have each shadow juror fill out the verdict forms individually. If the team chooses to have the shadow jury deliberate, its important to remember that the result is in *no* way predictive, but rather that the thematic information gleaned can be of use. Knowing what evidence drives their decisions, the counterarguments, examples they use to explain unclear concepts and their final decision is invaluable for crafting closing arguments. Similar to a mock trial, watching the process and what drives their decisions allows the trial team to craft a compelling closing that clarifies any misinformation and utilizes the most powerful parts of the case instead of spending time on arguments they largely reject, is simply good strategy. Yes, shadow juries are expensive, but with tens or hundreds of millions on the line, the value of a shadow jury is comparatively huge.

Consider taking shadow juries out of the shadows. Shadow juries can be one of the most useful tools in the trial lawyer’s arsenal when the case warrants it. A partner at a high-stakes litigation boutique has a simple answer to the question of which cases are appropriate for shadow juries – “All the ones I want to win.”

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Alexandra Rudolph, M.S., launched her private practice this summer. She craved a niche consulting for an international law firm, several Fortune 500 Corporations and lawyers across the country on a wide range of litigation. After working at premier trial consulting firms for nearly a decade, Ms. Rudolph has experience in all aspects of litigation research & witness preparation and often teams up with large trial consulting firms. Her synergetic approach allows clients the best of both worlds, providing individual attention and/or the tremendous benefits a team provides, depending on case needs. She can be contacted at Alexandra@alexandrarudolph.com or visit www.alexandrarudolph.com for additional information.

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Case Strategy for the Civil Defendant:

The Effects of Injury Severity and Rebuttals on Liability and Damages

by [Matt Groebe](#)

The concurrent presentation of liability and damages evidence in a unitary trial poses a challenge for the defense attorney: how much attention should be paid to each component? The defense attorney can either counter the plaintiff's damages recommendation with one of her own (lower in size), or she can refuse to offer a rebuttal by claiming her client is not liable and should not be assessed any damages. The problem with using the former strategy is that jurors may view it as the defendant's assumption she will be found liable and she may be found liable when she otherwise might not have been. However, if the latter strategy is used and the defendant is found liable anyway, no counter-anchor to the plaintiff's *ad damnum* has been offered and the resulting damages award may be higher than it could otherwise have been. This issue can get even more complicated when one considers the severity of the plaintiff's injury. Research finds that more severe injuries generally lead to more liability verdicts (Bornstein, 1998). The phenomenon termed "fusion" - when jurors allow damages-related evidence (i.e. the severity of the plaintiff's injury) to impact their liability decision - explains this research finding. The present research attempted to find the best case strategy for a civil defense attorney to take when the plaintiff was mildly injured and when the plaintiff was severely injured.

The study employed eight possible scenarios by varying two variables: the plaintiff's injury severity (mild or severe) and the defendant's damages rebuttal amount (none, low, moderate, or high). The defendant's damages rebuttal, if any, was always lower than the plaintiff's *ad damnum*, which was kept constant throughout. I hypothesized that due to jurors' inappropriate fusion of the evidence, a severe injury would be detrimental to the defense in terms of liability, so its best recourse would be to focus on keeping damage awards low since it would be fairly likely they would be found liable. Therefore, the best option would likely be to give a moderate rebuttal since a high rebuttal would set the floor too high and jurors might perceive a low rebuttal as callous and cold-hearted. Conversely, with a mildly injured plaintiff, I hypothesized that the best strategy for the defense would be to focus all of their energy on contesting liability. A mild injury is generally less likely to lead to a liability verdict against the defendant than when the plaintiff is severely injured, so if the defense has the opportunity of winning on liability and avoiding damages altogether, then they should take it and avoid giving a specific rebuttal.



The findings were somewhat unexpected, and were in line with Jeri Kagel's (2010) conclusions in *The Jury Expert*. First, there was a remarkable lack of fusion, at least in terms of liability verdicts. While jurors reported that they considered liability-related items to some extent when making damages decisions and vice-versa, they self-reported that they considered the appropriate items (i.e. damages-related items when making their damages decision) to a greater degree. This proper division extended to liability verdicts, in which the jurors were no more likely to find against the defendant when the plaintiff was severely injured than when he was mildly injured.

Second, the only bad strategy to take when the plaintiff was mildly injured appeared to be providing a high rebuttal. The best strategy to take when the plaintiff was severely injured was providing a low or moderate rebuttal. We can draw a few conclusions from these findings. The first is that the defendant's damages rebuttal heavily anchored jurors' awards and the higher she set the rebuttal, the higher the damages awards tended to be. The second is that a providing a specific rebuttal did not hurt the defendant, especially when the plaintiff was severely injured. Perhaps, as Kagel (2010) mentioned, the jurors felt grateful that the defense eased them with their discomfort of awarding high damages by offering them a lower damages amount to consider. Also, when asked how they perceived the defendant, those who had been exposed to a specific rebuttal rated the defendant more positively than jurors who read about the defense attorney contesting liability and refusing to discuss damages. While these findings are surprising and offer good news for defense attorneys, there is perhaps a caveat. In all of the specific rebuttal conditions, the defense attorney said that she did not believe her client was liable and therefore she did not want to discuss damages, but she said that she could not always predict how jurors may decide and therefore she was going to discuss damages to avoid any disservice to her client. She then went on to say that the plaintiff's *ad damnum* was far too high before providing a lower recommendation of her own. It is likely this line of reasoning that the jurors responded to that convinced them that by discussing damages, she was not implicitly admitting liability. And by giving that lower counter-anchor to the plaintiff's *ad damnum*, the jurors had another (and likely more reasonable) figure to guide them in their judgments. As a result, many of the damage awards of those who ended up finding for the plaintiff were anchored by the defendant's rebuttal instead of the plaintiff's *ad damnum*.

Desire to compensate the plaintiff and sympathy for the plaintiff were each measured and were found to influence the effect of injury severity on damage awards. It was those specific feelings that led jurors to return higher damage awards to the more severely injured plaintiff. Thus, with the severely injured plaintiff compared to the mildly injured plaintiff, jurors felt more sympathy for the severely injured plaintiff and a stronger desire to compensate him. These positive feelings are what drove the higher damage awards for the severely injured plaintiff than the mildly injured plaintiff. Bornstein (1998) came to similar conclusions. Also, male jurors were more likely to find for the defendant on liability, whereas female jurors were more likely to find for the plaintiff. Although gender and other demographic characteristics are usually poor predictors of how a juror will decide (Greene & Bornstein, 2003), male jurors in this study appeared to be better for the defendant. This is

puzzling since the transcript involved a slip-and-fall case, which should be much more gender-neutral than a rape case or some other sexual assault case. Nonetheless, desire to compensate the plaintiff and general positive feelings towards the plaintiff mediated the effect of gender on liability verdicts.

From this study, a few recommendations can be offered to civil defense attorneys. First and foremost, jurors will not necessarily perceive a specific rebuttal as an admission of liability. In fact, providing a specific rebuttal tended to help the defendant, both in terms of how the jurors perceived the defendant and in keeping damage awards low, especially with the severely injured plaintiff when jurors were more accepting of the plaintiff's high *ad damnum*. But it is likely essential that the defense attorney offer her rationale for entertaining the idea of damages and providing a specific rebuttal. This would involve a discussion of how her client is not liable, but she would not be doing her job if she did not at least discuss damages. By doing this, it conveys to jurors that the defendant is not liable, but it also gives uncertain jurors a lower damages figure to consider opposite the plaintiff's higher recommendation.



The second conclusion is that the actual recommendation that the defendant provides is crucial in determining final damage awards. Since jurors generally lack confidence in their ability to come up with an appropriate damages award, they will often look to the attorneys for guidance. If (as in this study) the jurors do not feel comfortable adopting the high figure proposed by the plaintiff's attorney, they will be desperate for another figure to guide them in their decision. By providing a lower damages recommendation, the defense attorney can help guide jurors in their decision, ultimately resulting in a better outcome for the defense.

The third main conclusion from these results is that defense attorneys can engage certain mechanisms to affect liability verdicts and/or damage awards. Since desire to compensate the plaintiff and sympathy for the plaintiff tend to be factors driving pro-plaintiff verdicts and high damage awards, defense attorneys can do their best to curb these juror sentiments. Obviously, this must be done tactfully to avoid appearing ruthless, but drawing attention to the plaintiff's carelessness leading up to the accident, depersonalizing the plaintiff, or minimizing the accident's impact on the plaintiff's life all could reduce these pro-plaintiff sentiments.

The take-home message is quite similar to Jeri Kagel's (2010) recent conclusion. Do not be afraid to argue damages. Jurors will probably not view a discussion on damages by the defense as an implicit admission of liability, as long as it is done correctly. Instead of taking a defense rebuttal as an admission of liability, jurors may be grateful that the defense attorney has provided them with an alternative to the plaintiff's higher recommendation. If the jurors trust the defense attorney on her damage recommendation, then perhaps they will also trust her on her liability argument.

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Our Favorite Thing for September 2010!

This month's Favorite Thing provided by [Wendy Saxon](#) who specializes in defense of public entities in Los Angeles.

"When I get the jury names, I go on the county website and locate public access to civil and criminal cases. Each search costs \$1. Since this is public access, it is fair game to present to a judge. For example, I once found a felon, the judge excused him and we saved a peremptory. I was working for Department of Transportation. On the same case, I was able to pinpoint which jurors had multiple moving violations."

So search for the county website specific to your case and see what you can find!

"I Hate That #@*%!": Overcoming the He-Said She-Said Battle in Family Law Cases

by [Andrea Blount](#) and [Paula Pratt](#)

Divorce is one of life's most stressful events, rated by some as more stressful than being fired, having a major personal injury or illness, or even going to jail. On top of the many life changes and uncertainties that come with divorce is the divorce process itself, multiplying stress with every attorney visit, court hearing, deposition and mediation. The pressure is magnified considerably when custody of the children is also at stake.

Across all types of litigation, the side that is better able to tell its story has the advantage. This is true whether the decider of fact is a jury or a judge, as is nearly always the case in family law. Preparing witnesses to enhance clear communication is important in any case, but family law matters have some additional unique challenges: (1) managing the emotional drama, (2) enhancing credibility in a he-said she-said environment and (3) cutting through the noise and telling the story. These three areas are addressed below, including specific case examples and practical strategies.



Enhancing Credibility in a He-Said She-Said World

Almost all evidence in family law boils down to what "he-said" or what "she-said." For obvious reasons, the one who says it the best, and with the most credibility, has the advantage. The goal of preparing witnesses is always to help them communicate the truth in a more clear and effective manner so that the audience actually hears, and believes, the intended message. Often when we communicate, our message is clouded by noise that has nothing

to do with what we are trying to say and as a result the truth is not heard. Let us consider Mark's story:

Mark's Story¹

After 32 years of marriage Mark separated from his wife, Jennifer. Their children were grown so child custody or support was not at issue, but the case centered on a family business that had been in Mark's family for three generations. Mark was outraged that Jennifer claimed she was entitled to half the value of the family business. Further complicating matters was Mark's history of substance abuse and an old DUI arrest. He had since gone through treatment and had been sober for four and a half years, but he remained embarrassed about his history and avoided talking about it. Mark's attorney met with him before his deposition and went over what questions he could expect. Repeatedly during this pre-deposition meeting, Mark insisted he knew what he was doing and that he knew exactly what to say. At the deposition, however,

it was as if the attorney never talked with him at all. Mark's responses were all over the place. He stammered, rambled, argued and refused to answer questions about his substance abuse history.

With a disastrous deposition behind him, Mark's only chance to tell his story was going to be in 60-90 minutes of trial testimony (including cross examination). In preparation for his testimony, the attorney and a trial consultant worked with Mark for several hours to accomplish three main goals: (1) help Mark talk about his substance abuse in clear and matter-of-fact terms, (2) identify the most important elements about the family business that the court needed to know and (3) separate his anger at Jennifer from the story he needed to tell the court. After preparation focusing on these goals, Mark was able to express himself clearly before the judge without being overcome by embarrassment or anger. By learning how to keep his cool as he testified, Mark was able to explain why the family business should not be considered marital property. The judge agreed.

Pause and Breathe

This is the simplest of all the tips and possibly the most important. Advise witnesses to take a complete breath (inhale and exhale) before answering questions. It takes only a second or two but accomplishes several goals. A pause and a complete breath:

- (1) Gives the witness a moment to think about the question being asked;
- (2) Allows the witness to think about what the response should be before opening his or her mouth;
- (3) Provides time for the attorney to object to the question if necessary; and
- (4) Helps control the pace of the question-and-answer volley.

As with many witnesses, learning to take a deep breath before responding was critical for Mark to control his embarrassment and anger during his testimony. Getting used to the breathing pause takes some time because it is not how people normally talk, so it feels unnatural. In testimony, however, it does not come across that way. As long as the pause is not too long, it generally gives the impression that the witness is taking this testimony seriously.

Talking about the "Bad" Stuff

In contested family law cases, little remains private. Sexual details, drug use, violence, health issues, and criminal pasts are often discovered and must be discussed. Refusing to talk about it or attempting to hide from it will not work. The best option is to practice talking about it openly, directly and matter-of-factly. Whenever opposing attorneys sense discomfort when the witness talks about the "bad stuff," it is simply an invitation to keep poking and digging at the issue to see if they can gain an advantage. If, however, the witness responds to the questions with a "yes, that happened to me and I've moved on" attitude, the opposing attorney is likely to move on as well.

This is exactly what happened in Mark's situation. At his deposition, he let his embarrassment get the better of him when asked about his DUI and substance abuse, giving the opposing

attorney the impression that was his weak spot. During trial, the opposing attorney expected to get the same type of response so he started his cross-exam poking at the same issues.

Because Mark was prepared for it, however, the strategy backfired and instead of looking like a raging substance-abusing fool, Mark wound up coming across as humble, remorseful and strong. Since he was not getting what he wanted, the opposing attorney quickly moved on to other topics.

Managing the Emotional Drama

It is surprising there have not been more television shows based on family law, because there is no shortage of drama in a family law practice. Many litigants take their cases personally, but it does not get any more personal than someone saying they no longer love you or they think you are an unfit parent. This very personal element of family law creates a tremendous amount of emotional drama and background noise that is difficult to break through and really hear what is going on; Lisa's story gives us an example of this.

Lisa's Story

Lisa¹ was a 27-year-old petite and beautiful luxury car saleswoman who married John, a 45-year-old wealthy business entrepreneur who was well-known and respected in the community. Days after their only child turned 18 months old, the couple had a terrible fight, ending with John telling Lisa to take the baby and move out of the house. He announced he was through with the marriage and had a new girlfriend. Through her anguish, Lisa did what he demanded and left.

At the first hearing for temporary custody and financial matters, Lisa felt so victimized that she could hardly control her emotions. The more she complained about how John had treated her since the separation, and the more John glared at her in the courtroom, the more overwhelmed Lisa became. She crumbled and began talking in a rapid, high-pitched voice without thinking about the words leaving her mouth. The result was Lisa wound up sounding like a whiney and annoying adolescent. The judge was not moved to listen to Lisa's position; in fact the judge acted as if he wanted her to stop talking as soon as possible and delayed his decisions until a second hearing a few weeks later.



Before that next hearing, Lisa worked with her attorney and a consultant to help prepare her for her testimony. Lisa had an important story to tell but she needed help doing so in a way that invited people (especially the judge) to listen to her and respect her position. Even though it was a very emotional situation, tears were counterproductive and Lisa's fears of not being able to support her child overwhelmed her ability to communicate effectively. Just two hours of working with Lisa taught her how to manage the anxiety she felt in the court and to find the focus she needed to tell the most important aspects of her story in clear, concise and descriptive language.

The next time she was in court, Lisa was able to give her testimony with such a strong voice that she commanded respect from everyone in the courtroom. The judge wound up giving Lisa everything she asked for in temporary matters. More importantly, however, John and his attorney no longer saw Lisa as someone who could be easily intimidated to back down and go away quietly. John suddenly was motivated to avoid the courtroom and settle matters quickly so Lisa wound up with a much more favorable settlement and custody arrangement than she would have had otherwise.

Setting Expectations

Family law parties typically find themselves living through situations they never imagined would happen to them and they are recreating expectations for their lives. In addition to having a former loved one as an adversary, family law parties are rarely experienced in the world of litigation. Typically all they know about testifying is what they have seen on *The Practice* or *Law and Order*; neither of which adequately educates them on what to expect.

The worldviews and experiences of the attorney and witness are so different that it can be easy to skip over the basic introduction about what to expect during a deposition, hearing, mediation or trial. A witness will feel more in control if he or she knows exactly what to expect, who will be there, what the rules are and how things will unfold. Sometimes, witnesses have such skewed expectations that it prevents them from focusing on what really matters.

For example, in Lisa's preparation session she confided that John told her he would be able to take the baby away from her because she smoked marijuana in college. She believed his threats and her unrealistic fear clouded everything else in her mind. Once the attorney calmed her underlying anxieties, Lisa was able to concentrate on the specific questions she had to address in her testimony.

Taking Back Power

Some witnesses are afraid of being bullied or intimidated as they are testifying, either by their soon-to-be ex spouse or by the opposing attorney. There are several ways you can help clients overcome this fear and feel more empowered as they are testifying. One way is to control at whom the witness looks.

This simple strategy was very important for Lisa who was easily intimidated by her husband. It was very helpful for her to learn that if he made her anxious, she did not have to look at him in the courtroom. Instead, she could focus her attention on the judge, her attorney, or a spot on the wall. The same advice holds true if a witness is intimidated by the opposing attorney – advise the witness to look at the attorney's forehead instead of making direct eye contact.

Another, and very effective, way of taking back some power is to alter the pace of the questions. Many attorneys ask questions in quick succession to throw off the witness. Have the witness practice turning this strategy around by slowing down his or her rate of speech and using the pause before answering to break up the questioner's rhythm.

A third strategy that works for some creatively-minded witnesses in feeling more empowered during their testimony is using imagery. Some witnesses benefit from imagining themselves in a protective bubble or imagining themselves as having characteristics of someone they know who is strong, confident and a good communicator. Others benefit more from focusing imagery on others in the room, such as imagining the intimidating opposing attorney as a yapping Chihuahua.

Attending to Nonverbals

Family law litigants have a long and intimate history that does not go away simply because there is a judge, mediator or court reporter in the room. Beyond supplementing testimony with unintended messages, nonverbal signals also influence the level of stress in the room.

Help your client become aware of the nonverbal messages he or she is unwittingly sending out, but also prepare them for the nonverbals from the opposing party. If your clients know what to anticipate from the other side, they will be less likely to respond in turn and escalate the situation. Family law judges often have difficult dockets; your client's attitude and demeanor can increase or decrease the tension in the room. Which do you think would be most beneficial?

Cutting through the Noise and Telling the Story

Parties in family law cases often have very long stories to tell and a very short amount of time to tell it. Hearings are brief, depositions are short (often two hours or less), and trials are typically completed inside one day. Parties may have just an hour to say everything they need to about a relationship that took years to develop and fall apart. The party who credibly tells their side of the story in the most efficient way usually wins.

Beth's Story¹

Beth and Tony had a traumatic marriage and were in the middle of an equally traumatic divorce and child custody battle. At one point in the three-year marriage, Beth had called the police and obtained a restraining order against Tony stating she was afraid of him. After several months of working with her divorce attorney, Beth finally confided that their two-year-old child was conceived through forced and unwanted sex with Tony. Like many victims of sexual assault, Beth was struggling with how to understand what happened between her and Tony, what language to use to describe it and whether she was to blame. She loved and was devoted to their son and was terrified of leaving him alone with his father but she could not clearly explain why.

In order to secure primary custody of her son, it was crucial that Beth find the right words to explain what happened and why she feared for their son's safety. She had a therapist who was helping her deal with the trauma of the marriage and divorce, but she needed her attorney and a trial consultant to help her share her story with the judge. Across two half-day witness prep sessions, Beth learned to describe specific events in which she felt afraid of Tony, including the night he forced her to have sex against her will. It was not enough for Beth to say Tony was abusive or threatening, she had to be able to explain what happened, when, where and how.



Beth told her story clearly and with a compelling voice at her deposition. Opposing counsel had hoped that asking about these issues would make Beth crumble and decide not to fight. Instead, Beth was able to hold her own and it was Tony who ultimately decided to back down. The case was settled shortly after Beth's deposition with a child custody time-sharing plan Beth believed would keep her children safe. Beth's credibility centered on her ability to use concrete descriptive terms to explain what happened and give detailed examples of why she was afraid.

Credibility is in the Details

Factual discrepancies in family law cases often come down to he-said and she-said disputes. The prevailing party will be the one that can explain the situation in the most credible terms. The natural tendency is for individuals to use the same type of over-generalizations they do when arguing with their ex. For example, they might testify that "She always belittles me in front of the children" or "He never picks the kids up when he is supposed to." Neither of these statements carry the specificity needed to convince the listener.

To enhance the credibility, (1) eliminate the qualifying or over-generalizing terms and (2) include specific details to back up the statement. Instead of the two statements above, it would be much more powerful if the witness said:

"She frequently belittles me in front of the children. For example, last Sunday when I dropped the children off, Michelle told our son that she hopes he does not grow up to be selfish, rude and lazy like his father."

or

"On Friday evening, little Tommy was packed and ready to go but he sat there waiting 90 minutes for his Dad to arrive. He never called to let us know he would be late. This has happened at least two or three times a month for the past six months."

Role-playing

Talking about how to handle testimony is quite different from actually doing it. Every attorney, whether family law or not, has likely experienced the frustration of having a client adamantly tell them, "I've got it, I know exactly what to say." Then, the witness cracks under the pressure of the event and provides disastrous testimony at deposition or trial. The best way to prevent witnesses from crumbling during their testimony is to practice through a question and answer role-play. Depending on resources and the strength of the attorney-client relationship, the role-play questioning can be done by either the primary case attorney or a colleague.



Additionally, during the preparation session, it is often helpful to use a video camera so witnesses can see and hear how they are coming across to others. Most of us actually have no idea how others perceive us. We rarely recognize our own communication problems, we do not hear the pitch of our voice, see the rolls of our eyes or attend to our slumped shoulders – but all of these nonverbal signals communicate a message, and probably not the one we want to express. Playing back a segment of video to a witness can give them the “ah-ha” moment they would not have had otherwise.

Addressing Discoverability Issues

Because trial consultants are considered non-testifying experts or agents of the attorney, their involvement in a case is generally not discoverable because it is attorney work product done in anticipation of litigation. In family law matters, however, use of a consultant’s services could be discovered at the conclusion of the matter if your client asks the other side to pay attorney’s fees. This should not be a reason to avoid working with a consultant, but be prepared for this possibility. By this point, the case would be settled so it is too late to make a difference, but now that attorney may be clued in to ask about it in future cases.

Some simple strategies can help protect the privileged and confidential communications in a witness preparation session. First, to protect attorney-client privilege, the attorney should always be present in the room. Second, discuss the importance of maintaining confidentiality of the preparation session with the witness – things get messy in divorce and in the heat of an argument, one party might be tempted disclose to another that they are ready for trial because his attorney brought in a trial consultant.

Finally, prepare witnesses how to respond if they are asked how they prepared for their testimony. Usually saying “I met with my attorney” is sufficient but if the opposing attorney presses the issue and the witness must respond, he or she should state clearly and matter-of-factly that “of course” they had help making sure they communicated effectively. Because they were nervous and wanted to make sure they were as clear as possible when giving their testimony. Let your witness know that there is nothing wrong in working with counsel before testifying; effective preparation is not only legal, it is necessary.

The Bottom Line

Lawyers communicate in court and under stressful situations nearly every day. For family law clients, not only is testifying a foreign experience, their testimony may be an event of singular importance with consequences that will shape the future for their entire family. Some individuals are naturally gifted communicators and it is the lucky family law attorney who has one of these as their client. If your client is not the most effective communicator, however,

bringing in a consultant can help give the extra perspective and strategies needed to make a difference. By helping them communicate effectively, you can give your clients the confidence and tools they need to tell their story.

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Endnote

¹ All witness and party names and identifying information have been changed to protect confidentiality.

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Could The iPad Pick Your Next Jury? A Review of the *iJuror* App

by [Ken Broda-Bahm](#)

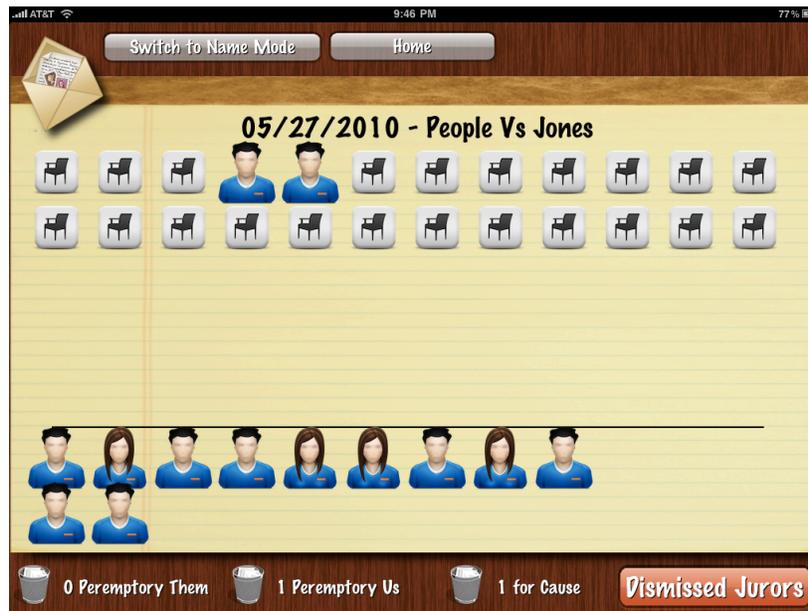
Few electronic devices have inspired the levels of techno-lust witnessed with Apple's iPad tablet. Selling nearly three and a half million of the devices in just the first quarter after its launch, the Apple iPad has also inspired a wave of applications ("apps") seeking to take advantage of the iPad's unique features. You may well be in that "let's wait and see" group that wants to know that the benefits go beyond its sleek and sexy look and feel. As an active litigator or trial consultant, the news that there is actually a jury selection app garnering media attention¹ might just be enough to push you over the edge to the point of saying, "I need this....for, you know, my work!" But does *iJuror* live up to its promise to replace the paper grid and Post-it note? Based on my review, and some comparable experience with PC-based applications, the answer is 'not yet.' While the app has some noteworthy features, in the realistic conditions of oral voir dire, the app's functionality is not yet up to its potential.

Scott Falbo, an Amherst Massachusetts software designer, and spouse of Freid and Klawon attorney Renee Root, developed *iJuror* in response to his wife's complaints about the ad hoc nature of pen and paper tracking of juror information during voir dire. *iJuror* aims to solve that by placing all your notes on prospective jurors in an adaptable touch-screen environment. After installing the app, the user opens a new trial and is able to identify the number of jurors and alternates needed. At that point, the user sees a seating chart that can be altered to reflect the number of rows and columns in your courtroom layout. Selecting a given venire member (represented as empty chairs, until you enter their information), you are able to use a few finger flicks (Apple's "spinning wheel" style of selecting from a range of possible answers) to input ten basic demographic facts about your potential juror: age, gender, ethnicity, marital status, number of children, education, whether there are police

officers in the family, prior arrest experience, prior victim experience, and prior jury experience. Then, using the on-screen keyboard, the user enters the venire-member's name, occupation, hometown and any other specific notes on the potential juror.



As information for each potential juror is entered, an avatar (aka cartoon image) of the juror appears, based on their gender. As voir dire proceeds, the user can add notes, provide an overall evaluation ('like,' 'maybe,' 'dislike') which adds a colored background to the juror (green, yellow, and red respectively), and can drag the avatars into categories for cause challenges and peremptory challenges.



What the app does well is to create a simple, visually-appealing layout for jury selection. At the same time, the limits of the app in its current version are many. The most important limit is that you cannot create your own variables to input and track the information that is of greatest value to you. The few built-in items reflect a clear bias toward the kind of information that you might have in a criminal trial where there is little to no oral voir dire, and it is easy to see that in most other situations, you will want to create numerous additional question and answer sets reflecting the needs of your case, the focus of oral voir dire, and any information from completed juror questionnaires. While that information can certainly be entered into the "notes" field, doing that just reduces the app to the same functionality as an unstructured Post-it.

The second limitation is an inability to score jurors on any worst-to-best scale that could be used to guide strikes and cause challenges. This is the true advantage of computer-aided voir dire note-tracking: the ability to systematically weight the data in a way that would be difficult or impossible using pencil and paper alone. Beyond the "like," "maybe," and "dislike" categories that *iJuror* offers, it would be useful to assign to each answer a valence ('helps them,' or 'helps us') and a value (1= 'a little,' and 10= 'a lot'). Doing that would produce a rough ranking that would at least direct the user's attention to the most strike-worthy members on the panel and truly provide a function that paper notes by themselves cannot provide.

The third limitation is more a feature of the iPad itself - the speed of data entry. While the "spinning wheel" method of entry is potentially faster than keyboard entry for items that fall in categories, users will inevitably need to key in a lot of information using a keyboard. For me, the iPad's on-screen keyboard is slow compared to a physical keyboard, and even compared to a Blackberry thumb-pad, making it hard to see how all the information could be entered in the small window of time permitted in many voir dire settings. Using the iPad's keyboard dock could alleviate that concern. There are also many other little things that could

be changed in the app's execution, for example, the inability to 'undo' many actions, and the cartoonish look of the jurors themselves.

This is not to say, however, that there isn't a bright future for on-screen tracking of data during voir dire. When compared to current methods involving messy paper notes, offering minimal space for comments and only basic options for scoring, the task of keeping track of information during voir dire seems to belong on the screen. And the iPad, with its ability to turn-on instantly (instead of 'booting up'), a battery-life to last the full court day, and an intuitive user-interface, seems the perfect device. But as everyone who has prepared for and participated in jury selection knows, the task is very complex, and the development of an app that accounts for that complexity may take some time.

I expect that many consultants who frequently help to pick juries have explored options for keeping track of that information by computer. Based on *Persuasion Strategies'* own experience in working toward ways to use the PC during jury selection, I offer the following as a punch-list of what the ideal jury selection app should be able to do before it can justifiably replace pencil and paper methods:

- Allow users to create any number of variables, including both customizable fixed or open-ended responses on each.
- Maximize the number of questions that can be answered without the need for keyboard input.
- Enable users to create a preliminary score for jurors based on their answers by supplying both a valence ('helps them,' or 'helps us') and a value (1= 'a little,' and 10= 'a lot') for each question.
- Produce printed or email-able reports by juror and by question as well as an overall ranking of jurors, worst to best.
- Allow reseating and movement of any number of jurors during selection in response to the judge's process.
- Allow the user to 'flag' jurors for a possible strike or a hardship challenge.
- Allow a 'reserve pool' of jurors to be created (e.g., all of those who mailed in the questionnaire), and then allow individuals to be drawn from that pool to reflect those who show up, or those who are randomly selected to be pulled into the box for questioning.
- Take advantage of the iPad's wireless Bluetooth functionality by allowing multiple users to add information to the same file (e.g., 'you enter data for the first twenty-five panelists, I'll do the rest')

Over the past few years, the Persuasion Strategies group has been able to find our own solutions on the PC to meet all of those needs while providing reasonably fast data entry time permitting our proprietary program (we call it "JuryNotes") to be used in court, and it seems likely that other groups have their own tools as well. But touch-screen technology like the iPad's promises to make those solutions more effective, more elegant, and yes, more cool. For example, when members of a panel of thirty raise their hands to say "yes," to a given voir dire question, it would be natural to simply use your finger to touch the names for each potential juror raising their hand on a layout that matches where they are sitting in the box. For the task of voir dire, at least, it seems axiomatic that if it can be done on a PC, then it can be done better on an iPad.

But with *iJuror*, we aren't there yet. The ability to provide just ten fixed data points, and add some additional notes will just not be enough to replace the current Post-it and pencil approach, or to replace the PC systems that others are using. That said, for the price -- \$14.99 at the time of writing -- it is well worth it for any attorney or consultant with an iPad to install *iJuror*, if only to play around with it... and to possibly see how we will track jury selection in the future.

Endnote

¹ e.g., see Weiss, D.C. (2010, August 2nd) Avatars Help Litigators Select Juries in New iPad App. ABA Journal (Online); and Chandler, M. (2010, July 5th) Tech Tool Streamlines Jury-Selection Process. Buffalo Law Journal (Online).

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Holy War: Juror Questionnaires for Cases with Middle Eastern, Arab, Muslim or Anyone-Who-Might-Be-One-of-the-Above Parties

by [Diane Wiley](#)

I remember the first time it happened – we were in a pretty big city in the Midwest, federal court, well before 9-11. Some of the jurors were from outside the city. The defendant was Pakistani and there was a question from the judge (no attorney questioning allowed) about whether anyone would have any trouble being fair to someone who was Pakistani. The juror proceeded to talk about Pakistanis she had known who ran stores in another city where she had lived. I think she was actually talking about Palestinians. And I remember thinking, her problem is with Palestinians, but does it matter? I don't think it did.

In the years since 9-11 we at the National Jury Project have had numerous cases involving criminal defendants and civil and commercial parties who are Middle Eastern, Arab, Muslim or whose names and appearance cause jurors to think that they are one or all of the above. Some of them have been defendants in terrorism cases, others criminal defendants in ordinary crimes, some charged with white collar crimes. Others have been involved in civil or commercial cases which have little or nothing to do with their ethnicity. But we have found that anti-Muslim and anti-Arab prejudice is rife regardless of the case. In many of those cases we have been able to persuade the judge to use a juror questionnaire. It has often made a huge difference in our ability to identify bias and prejudice and get cause challenges.

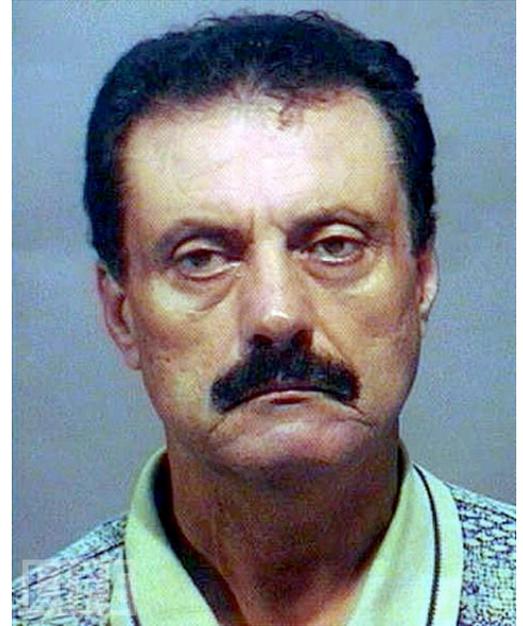


We've found that anti-Arab/Muslim prejudice comes in a variety of forms. Some of it stems from perceptions that all Arabs and Muslims are terrorists. Some it comes from personal experiences that jurors have had with Arabs or Muslims at work or in stores owned by Arabs or Muslims. Other jurors believe that Christianity is in a Holy War with Muslims. One juror told us he had problems with Muslims because "Christianity has been at war with the Muslims for 500 years". This in a commercial case involving construction!

We've had clients of Arab ancestry who have said, but I'm not Muslim, I'm Christian. It's hard to explain to them that that probably won't matter in terms of prejudice. In the questionnaire you can construct a question such as, "Ms. _____ is of Arab ancestry, although she and her family are Christians. Is there any reason why you would have a problem with someone who is of Arab ancestry who is also Christian?" Believe me, there are Christian fundamentalists who either won't believe it or won't like it - and if they're in your jury pool, you better figure it out.

Of course, any jury questionnaire has to be tailored to the case and the jurisdiction. Trial consultants should do a search of local news stories and talk to the attorneys and the clients

about controversial issues involving Arabs or Muslims that have come up in the community - even those going back years, because community memory can be long. Prejudice can be based on perceptions that Arabs have "taken over the old such and such neighborhood". You can ask jurors if they ever go to that part of town. In one case, there was community resentment because of misbehavior of some wealthy Arabs at local hotels. We've found jurors who are resentful that Arabs have been hired to work in certain departments at their job or that Muslims are allowed to take the time to pray - it's seen as special treatment. Often there is resentment in the inner city on the part of other people of color who feel they have been "cheated" in Arab-owned stores. In an employment case we worked on, attitudes of the Muslim plaintiff towards women subordinates was an issue. If there have been local controversies, news articles can be attached to the motion for a juror questionnaire, along with any polls about anti-Arab or anti-Muslim attitudes in general, to persuade the judge to grant the questionnaire.



There are some questions that will elicit the biases we see against anyone who is or will be perceived as being Middle Eastern and/or Muslim regardless of the case. Following are some of the questions that have worked the best in our questionnaires, many of them general, some more specific.

1. What kind of contact have you had with Muslims, Arabs, Middle Eastern immigrants or people with Arab ancestry?
2. **IF YOU ARE NOT ARAB OR MUSLIM:** Please describe any contact you have had with Arab or Muslim people:

	Past	Present
Neighborhood		
Work		
Social		
Family		

3. Have your experiences with people from the Middle East generally been:

- positive negative mixed

Please explain:

4. Have you or anyone you know ever had any negative experiences with Muslims, Middle Eastern immigrants or people with Arab ancestry? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain:

5. There were accusations of misconduct a few years ago regarding Middle Eastern men in a local hotel. Do you remember or hearing anything at all about this situation?

_____ Yes No _____

IF YES, what do you remember and what were your impressions about the situation:

6. What effect do you think the influx of Muslims, Arabs and Middle Eastern immigrants has had on (the City or Area)?

7. Are there ethnic, racial or religious groups of people which you do not care to associate with? _____ Yes No _____

IF YES, which groups and why?

8. Have you ever traveled outside the United States?

_____ Yes No _____

What Country?	When?	Business or Pleasure?	What Country?	When?	Business or Pleasure?

9. Have you ever known anyone from another country who worked in the U.S. and had to have a green card or permit to continue working here? Yes No

IF YES, please explain:



10. Have you ever traveled in the Middle East?

Yes No

Please explain:

11. How did the events of September 11, 2001 affect your feelings about Arab and Muslim people?

12. How significant a problem do you think prejudice against Arab or Muslim people is in _____ County today?

13. How significant a problem do you think prejudice against Arabs and Muslims is in this country today?

14. Were you or anyone you know affected personally by the attacks on the World Trade Center and the Pentagon?

Yes No

IF YES, please explain:

15. Are you still feeling any direct or indirect effects from September 11th?

Yes No

Please explain:

16. Do you know anyone who is or has been involved in the war in Afghanistan or Iraq?

Yes No

IF YES, please explain, including how this might affect you in a case where the defendant is of Arab ancestry:

17. Since the attacks on the World Trade Center and the Pentagon on September 11th, some people have negative feelings about Arabs, Muslims and people from the Middle East. Please tell us what your feelings are about Arabs, Muslims and people from the Middle East at this time:

18. Some people believe that Arabs and Muslims are more likely to offer or take bribes than other racial or ethnic groups. What do you think about this?

19. How do you feel about companies from the Middle East owning stores, hotels, and other businesses in (your state or city)?

20. Some people believe that Arab people are more likely to try to cheat in business. What do you think about this?

21. Some people believe that Arab nationals or immigrants are more likely to break the law than other racial or ethnic groups. What do you think about this?

22. Do you tend to think that Arab people are less honest than U.S. citizens are?

_____ Yes No _____

Please explain your feelings:

23. Some people believe that Arab men are more likely to treat women as second class citizens. What do you think about this?

24. Is there anything about your religious beliefs that would make it difficult for you to fairly and impartially sit in judgment of a person of the Muslim faith?

_____ Yes No _____

IF YES, please explain:



25. Have you ever contributed money to an organization that opposes immigration or opposes certain rights for immigrants or proposes changes to the immigration laws?
_____ Yes No _____

IF YES, please explain:

26. The defendant, Mr. _____ is a citizen of India who came to US as a student in 1995, and after graduating received a work visa and has been working here for 10 years. Some people are opposed to non-citizens working in the US, others think it is okay. What are your feelings about non-citizens working in the US?

Given recent developments with the opposition to the Muslim Community Center in New York City and the threat by the pastor in Florida to burn a number of Qur'ans, I will most likely include the following questions in my next questionnaire.

27. Do you think that a Mosque or Muslim Community Center should be built two blocks from Ground Zero in New York City?
_____ Yes No _____

Please explain your thinking about this:

28. What did you think about the controversy where a pastor in Florida was threatening to burn the Muslim Holy Book, the Qur'an or Koran?

Please explain your thinking about this:

For more information about juror questionnaires in general, including jurisdictions where they have been used, sample questionnaires and motions, see [JURYWORK: Systematic Techniques](#) (Krauss, Elissa, West Group, 2d Ed., 1978, updated annually).

Diane Wiley is a pioneer in the field of trial consulting, founder of the National Jury Project and President of the Midwest Office in Minneapolis. She has extensive experience and prides herself on making her work available to attorneys on cases both big and small all across the country. She has written numerous articles and chapters for legal publications and teaches at seminars. Diane's email address is dwiley@njp.com and the National Jury Project's website is www.njp.com.

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Working for Justice in Neshoba County, Mississippi:

Andy Sheldon and Beth Bonora discuss trial consulting in this landmark case

by Beth Foley

"[*Neshoba: The Price of Freedom*](#)," is a newly released documentary by Micki Dickoff and Tony Pagano that focuses on one of the most notorious crimes of the Civil Rights Era and the long road to justice that followed. The case of [*Mississippi v. Edgar Ray Killen*](#) is about three young men murdered in Mississippi in 1964

James Chaney, a 20-year-old black Mississippian, and Andrew Goodman and Michael Schwerner, two white New Yorkers, also in their early 20s disappeared in Neshoba County, Mississippi. The young men were spending their summer working to register African Americans to vote.



Six long weeks later their bodies were found in a mud dam on the property of Olen Burrage. Goodman and Schwerner had been shot. Chaney, the young black man, was also shot, but only after he was beaten, tortured and mutilated.

Although the F.B.I. and the Justice Department won a handful of convictions, and light sentences, on federal civil rights charges a few years later against some of the men involved with the murders, no state charges, for murder or anything else, were brought until 2005. Finally, in 2005 Edgar Ray Killen, the 80-year-old preacher and sawmill operator long believed to have been one of the main organizers of the killings was brought to justice and convicted of manslaughter and sentenced to prison.

The documentary tells the story of these murders, from black and white members of the Philadelphia Coalition, a dedicated group of citizens who push to make sure the truth about that fateful night is told and pressure Mississippi state officials to bring the murderers to justice.

The documentary also interviews other residents of Neshoba County, white and black, old and young, about the 1964 murders and the 2005 trial of Edgar Ray Killen. The film exposes an ambiance of resentment, racism and fear that still plagues this small Mississippi town. Footage of interviews with Killen himself and testimony from Ku Klux Klan members is chilling.

Although the film is not exclusively about the jury trial of Killen, the conviction and how it happened is the final chapter of the documentary. Two jury consultants who worked with the

prosecutors on this landmark case, [Beth Bonora of Bonora D'Andrea](#) in San Francisco and [Andy Sheldon of SheldonSinrich](#) in Atlanta are prominently featured in the documentary. Bonora and Sheldon, both past presidents of the American Society of Trial Consultants (ASTC), took time to share their experiences on the *Killen* case with ASTC president Beth Foley.

Beth Foley: What motivated each of you to commit your skills and your time to this case?

Beth Bonora: I started my career as a trial consultant working on the Attica Prison uprising case in New York State in the '70s. That really immersed me in an understanding of racial conflict and oppression and the inequalities in our society, the problems with our legal system, and the unfairness of justice. I don't think that work has left me. The opportunity to work on something like this seemed so important. You can't change what happened but you can at least try to contribute in some way to the historical record and to helping people feel like the changes have been real.



Andy Sheldon: For me, part of it's evolutionary – having already been involved in seven of these civil rights cases. But also, American justice is "for all." However, in the minds of African Americans, courtrooms had been closed to them. As soon as this violence happened and nothing was done, there was no justice. So there was mistrust of the system. I felt as a lawyer I had an obligation to help change that.

I knew that the case against Edgar Ray Killen was about to be tried because of Jerry Mitchell's involvement. He is the *Clarion-Ledger* reporter from Jackson, Mississippi, who had been working on trying to bring this case back and bringing all these civil rights cases back. We talked from time to time and he mentioned that he had asked Mississippi Attorney General Jim Hood about it and I think I made some inquiries and finally got a call from Jim Hood, and so that's how it happened. I ended up just showing up at his office one day and inserted myself into the case. I called

Beth Bonora and asked her to get involved. We had worked on previous civil rights cases including the Medgar Evers case and the 1963 Birmingham church bombing case.

Beth Foley: Can you give us a little more background on the civil rights cases you just referenced?

Andy Sheldon: There have been seven cases similar to the Neshoba County case and I was fortunate to have worked on each of them. Beth Bonora worked on three of these.

- **1994 State of Mississippi v. Byron de la Beckwith** This was the original case. Several trial consulting colleagues assisted. (The film "Ghosts of Mississippi" in which Alec Baldwin plays the prosecutor may bring this case to mind for younger people.) Being the first case brought after so many years of inaction, this case probably stirred the most controversy and emotion and fear in the community. The guilty verdict was an historic breakthrough and gave others the motivation to act on other unsolved "cold cases."

- **1996 State of Mississippi v. Sam Bowers** As the head of the most violent KKK chapter in Mississippi, Bowers issued kill and burn orders to other Klansmen. In fact, it was Bowers who told Beckwith to kill Medgar Evers. This Hattiesburg case finally brought the "Imperial Wizard" to justice for his role in the death of Vernon Dahmer and the firebombing of the Dahmer home. Mr. Dahmer was thought by Bowers to be guilty of helping African Americans register to vote. Bowers wore a large Mickey Mouse belt buckle to court every day. My partner, DeAnn Sinrich, was instrumental in advising the local district attorney about trial strategy in this case.
- **1997 State of Mississippi v. Charles Noble (mistrial)** The Noble case mistried after jury selection. The mistrial occurred when one of the state's primary witnesses who had come in out of the cold, so to speak, and was pretty scared, at the end of a day with a break in his testimony, was sitting in a local café (in Hattiesburg) having dinner. He was being watched by someone he thought was KKK and he called the prosecutor for help. "The Klan has spotted me. Get me outta here." When he took the stand the next morning, this contact between him and the DA came up and, since that kind of contact is illegal in the middle of testimony, the judge declared a mistrial.
- **2001 State of Alabama v. Thomas Blanton** This and the next case are prosecutions of two of the four Klansmen responsible for bombing the Sixteenth Street Baptist Church in Birmingham, Alabama. The prosecutor, the U.S. Attorney at the time, moved to be appointed as a special state prosecutor for these cases. Much of the support for this prosecution came from U.S. Attorney General Janet Reno. The Spike Lee movie "Four Little Girls" memorializes the families of the victims and helped move this prosecution along.
- **2002 State of Alabama v. Bobby Frank Cherry** (also in Birmingham)
- **2003 United States v. Ernest Avants** Avants and two cohorts wanting to lure Dr. King into Mississippi in order to kill him, lured a dirt poor sharecropper into their car, shot him and left his body where it could be discovered. Connie Chung and her ABC crew discovered that the body was dumped on U.S. government land, making this a federal crime, the first to be formally prosecuted by the United States.



- **2005 State of Mississippi v. Edgar Ray Killen** (Philadelphia, Mississippi, Neshoba County. The documentary covers this case.) Edgar Ray Killen, the 80-year-old preacher and sawmill operator long believed to have been one of the main organizers of the killings is brought to justice and convicted of manslaughter and sentenced to prison for the deaths of 3 young civil rights workers in 1964.
- **2007 United States v. James Ford Seale** The last of the so-called Civil Rights cold cases to be prosecuted, this one also by the federal government, the first under an African American judge, Seale and his Klan cronies had tied two young African Americans to engine blocks after beating them and dumped them, still breathing, into the river.

With the exception of the Noble case, there were convictions in all the cases.

Beth Foley: When I watched the documentary about the Philadelphia, Mississippi murders, I had a sense of fear. There was a cloud of trepidation in the community. Did you sense that and were you ever afraid for your own safety?

Beth Bonora: I came into this and didn't really quite know what to expect and didn't have trepidation about it. But then you get in town and the marshals are escorting you in court and there are Klan members in court passing out their cards. And, there is obviously a lot of very strong feeling, pro and con, in the community about what's going on. So you begin to understand in your bones about the depth of the feelings.

Andy Sheldon: People in Neshoba County have been dealing with this for decades, so you can imagine that feelings have evolved over that time. There had been, as recently as three months prior to the trial, open meetings at which people expressed strong feelings. At every level of society there was dissension about "bringing up old issues," "stirring things up," and concern about the fallout of the prosecution. Would it rejuvenate the segregationists? And plenty of fear, particularly among the Choctaw who had tried to steer very clear of getting involved, but who now had to possibly serve on the jury.

Beth Foley: It was pretty clear in the documentary that the odds of convicting Killen in this county were not good, so, how did you go about tackling this challenge?

Beth Bonora: We got the judge to allow a supplemental juror questionnaire (SJQ) to be filled out by prospective jurors, but before that Andy put in a lot of time, ahead of time, talking to people in the community and making connections.

Andy Sheldon: With the help of a Zagnoli McEvoy Foley associate, we went out into the community and talked to some relatives of the victims and local folks. I had talked to people in the community numerous times because I had been in the area for the 40th anniversary of the church burning in Philadelphia. I knew some of the folks already.



Beth Bonora reviews supplemental jury questionnaires at 3 a.m.
(Photo by Andy Sheldon)

Beth Foley: Tell me more about the preliminary research.

Andy Sheldon: Community interviewing is more in the nature of sociological work or journalistic investigative work but it is crucial to a deeper understanding of the feelings, the attitudes, the prejudices, the covert messages that might motivate a juror.

Beth Bonora: It's one of the interesting things about a case like this. When you are in a smaller venue and you have an issue that has been this important for such a long time, there's a lot to be gained by developing those community connections and understanding what it is that people who have lived there think about how people in the community are going to react and what to watch out for.

People in the community had a lot of advice about where the trouble would be in picking this jury, and the kinds of things to watch out for, the kinds of attitudes that might be particularly troublesome. There were parts of the community that had been most opposed to bringing the prosecution.

I think that the community analysis in this case also helped us think about the language to be on the lookout for, sort of the code words, which were often pretty transparent, but the kind of language that people used to describe whether or not they thought it was okay to bring this prosecution.

Beth Foley: What kinds of information did you uncover in your community analysis and in the supplemental jurors questionnaires for this particular case?

Andy Sheldon: We used the same questionnaire we used in the previous cases. I was getting a pretty good sense of what information was helpful. And, interestingly, two of the cases were federal cases, and even in those cases we got the same questionnaire. We knew which of the open-ended questions were going to be helpful and which were going to take us toward a conservative, conspiratorial person who hated the federal government, or thought Bill Clinton was worse than Osama Bin Laden.

It was not simply black-white, young-old, and male-female. It was also Native American. This was a state case which included residents from the Choctaw Indian Reservation and that proved to be an interesting dynamic during jury selection.

Beth Foley: Did you expect that the Native American attitudes would play a significant role before you got started?

Andy Sheldon: We just didn't know. Many of their questionnaires had numerous "I don't know," "Don't want to be involved," "Never heard of this," responses. We had heard Native Americans tended to be standoffish, but recently they had so much wealth come into the tribe from the casinos that we really didn't know how, if at all, attitudes were affected. It turned out that when we were interviewing Native American jurors, there was a significant amount of anger and fear that bubbled over into the judge's chambers when they were in sequestered *voir dire*.



A symbol of the current Choctaw presence in Neshoba County – and this is only half of the Pearl River Casino, the other half being on the other side of the new highway that was built largely to service this massive casino. (Photo by Andy Sheldon)

Beth Bonora: I will never forget that Native American woman who came into court with a couple other jurors from the tribe. And if I recall, they drove in early together. This particular woman cried and trembled during sequestered *voir dire*, and said they were intimidated by guys in trucks as they drove into town. It scared her a lot and it made her not want to serve. We heard stories from others about Klan activities against the tribe back in earlier decades.

Andy Sheldon: The amount of fear that you are talking about while you were viewing the movie, Beth, is interesting to me because the fear that existed in Neshoba County and all over the South in that era must have been huge and pervasive. It's really interesting that the movie would bring that to you for a flash or 10 minutes because I sometimes wonder what it was like to live during that time when at any particular moment of the day it could happen. I don't have any concept of what it would be like to live like that.

Beth Foley: Can you give me an idea of what kinds of characters came to observe this trial?

Andy Sheldon: The trial attracted all kinds of interesting people. You had everybody from an older woman in a wheelchair who had written a book, golly I think probably 35 years ago, about what it was like to grow up in Philadelphia, Mississippi at the time. Then as Beth mentioned, there were Klan members across the courtroom passing out cards. There was a man and his nephew who had traveled there from Nevada or California because they wanted to witness this event. The Attorney General was there and there was all kinds of security everywhere. There were students who had come from various places to see what had happened. So there was just, a real cross-section of I guess all kinds of people. Then there was the media with their tents and cameras set up all over the courthouse square. That made it resemble a movie set. Very surreal.

Beth Foley: What were the logistics of jury selection? You had the juror questionnaire but was there also sequestered *voir dire*? I assume you wanted to provide an environment where people would speak openly, right?

Andy Sheldon: We pushed hard for that. We went through the lawyers who then communicated with the judge.

Beth Bonora: In part, I think it's because not everybody is all that comfortable in this kind of tense situation where there is a lot of community controversy on both sides. It's not reasonable to expect that everybody's going to feel comfortable airing their views and saying what they really think in a large audience. We all know enough about the things that make people more reserved in *voir dire*, and a case like this is just a prime candidate for individual sequestered *voir dire* so people can speak their minds with less trepidation.

I recall the judge being pretty good about it. He made room for both Andy and me. He could have easily said we don't need any of you in here or we only need one of you in here. He made us feel pretty at home I thought.

Assistant Attorney General Lee Martin
waiting for the verdict to come in
(Photo by Andy Sheldon)

Beth Foley: Now, a lot of times as trial consultants we experience reluctance on the part of judges to accept challenges for cause, or reluctance to dismiss jurors and sometimes they try to rehabilitate the jurors. Did you experience these kinds of obstacles?

Beth Bonora: I remember there were people we really thought should go for cause but would say, "I can put that aside." Looking back at my notes I can see that we had some difficult decisions to make because there were people like that who were left in the panel and we didn't have enough challenges for them all. So, some of them had to stay and it was a question of which ones.



Beth Foley: I think everyone is interested to know what kinds of comments you heard during the jury selection process. Did you hear anything that shocked you? Did you hear blatant racist comments?

Beth Bonora: We didn't hear the "n" word, but I recall a woman saying, "Why are the charges being brought? To satisfy the black people and the negro lovers." Another woman said, "This will cause more trouble between us white people and the other coloreds involved, and make a few lawyers rich for the rest of their life." This was a 39-year-old woman and she also talked about the defendant's age and that that is a problem to bring him to trial so long afterwards. And then she wrote, "This County has had enough trouble between coloreds so leave it alone because if he did it or not, he will face God one day for his sins." We did see a lot of references to religion, I remember that.

On the other side of it someone says, "God has allowed us the chance, I feel we should always pray and ask what direction we should go." This person is saying it's a good thing that the charges are being brought again.

Beth Foley: So, it sounds like religion is an integral part of decision making, or at least how the jurors talk about their decision-making process?

Andy Sheldon: Religion was key to attitudes that were going to be important in jury selection. In the Blanton case, the jury "prayed for discernment," and that was a totally religious jury that prayed every morning before trial and prayed for the ability to tell if somebody was telling the truth or not so that they could tell the difference between right and wrong and that is what discernment related to. My awakening there was that these people were not "religious," they *are* religion. They live it; it is in their pores and not something they are separate from in any way.

Beth Foley: Did you feel jurors were being candid? I'm sure you were worried about lack of candor and that one juror who was laying in wait to sabotage the verdict.

Beth Bonora: I was surprised at the amount of candor, actually. In the cases that I work on, people are often pretty circumspect. They don't want to appear opinionated.

Andy Sheldon: Generally we are much more capable of being deceived as human beings than we think we are. The issue of deception came up for the first time in the Cherry case. A young African American woman came in for an individual *voir dire* and she was asked if she had any relatives who've been involved in any important issues in the community and she said "no." Then on the following Monday the defense brought her back and asked, "Was your mother actively involved in civil rights in the Civil Rights Era?" A big smile went across her face and she said "yes." Her mother was the first black woman to be admitted to the University of Alabama. She clearly wanted to be on that jury and she was answering the part of the question that would allow her to shade the truth and get on the jury.

Beth Foley: Was there anyone in the jury pool that said "I'm too afraid" and how was that handled?

Andy Sheldon: The American Indian woman. The judge said "I'm sorry that happened and I'm sorry you are frightened, and I am not going to ask you to serve on this jury."

We asked in the sequestered *voir dire* what would it be like for you to vote *against* conviction or *for* conviction and have to go to Sunday School on Sunday after the trial. I remember mostly people were okay with it. It was designed as a question to get people off.

Beth Foley: Andy, that is often a question that's considered a good way to identify jurors who would defer to peer pressure especially in a case like this. Good to know it wasn't the most reliable question.

Beth Foley: Did a *Batson* challenge ever come up in the jury selection process?

Beth Bonora: We were thinking seriously about that. I remember us discussing this. There were a number of African Americans who were clear that they had a strong opinion about the case and said it was about time it got tried again. I suspect that their record was clear enough that the prosecutor could justify their challenges by strong opinions on the case. There were others who were much more closemouthed. One of the African American alternates said, "I think he had something to do with it, but I don't really know. We need justice!"

Beth Foley: The final jury was predominantly white and about split on gender, split on high school grads and college graduates and the ages equally distributed from 20s to 50s. The oldest juror was 72. How long did it take to pick this jury?

Andy Sheldon: As I recall, when we had reviewed the questionnaires and actually got down to individual *voir dire*, it took us the better part of a day, day and half.

Beth Foley: Beth, I know you have notes from jury selection in front of you now. Can you give me some quotes that help describe these decision makers?**Questionnaire: What is your opinion about these charges being brought against Edgar Ray Killen at this time?**

"I think it should be left alone."

"I have no opinion."

"Bull. Been too long time."

"In one respect I feel justice if found guilty, should prevail. But on the other hand I don't think that one man should be held accountable for a crime held by a group."

"The man is 89 years old. He is too old to be brought to trial. According to nature his mind is not sound enough to go back to 40 years ago and remember everything. This County has had enough trouble between coloreds so leave it alone. Because if he did it or not he will face God one day for his sins."

"My opinion is that, if he done the crime, justice should be served. Every man, woman and child is innocent til proven guilty, but justice should be served."

"Something should have been done a long time ago. There is not enough justice in Neshoba County..."

"I am very happy to see Edgar Ray Killen come to trial. I feel whatever is done in the dark will come to light. If Edgar Ray Killen had anything to do with the murder he should have to pay. I don't care how old he is."

"I think it is a shame for a man of Mr. Killen's age to stand trial for murder; however if he is found to be responsible for this crime no matter how long ago it happened, he should be held accountable."

Questionnaire: What is your opinion about why these charges are being brought against Edgar Ray Killen at this time?

"To cause more trouble between us white people and the other coloreds involved and to make a few lawyers rich for the rest of their life."

"I really don't have one. I just have time to read at the paper most of the time."

"I am not sure of the reasoning for all of this being brought up over and over. I am not sure what people are hoping to accomplish. I keep hearing people say that Philadelphia needs to heal, but I don't believe these people will allow that to happen as long as they keep bringing it up."

"Political."

"To serve justice."

"There has not been enough evidence to file charges before now."

"I believe we now live in a time when justice could truly be served."

"I feel Edgar Ray Killen had something to do with the murder. If he did not actual kill them he knows who did it."

Beth Foley: Let's talk about the verdict. We know now the verdict was manslaughter, not murder. In the documentary, this verdict is portrayed as being a letdown to the families of the three civil rights workers killed in 1964. Tell me about the verdict from your perspective?

Andy Sheldon: The word circulated that there was disagreement in the jury. There was a conference and the attorney general and the district attorney proposed that the judge give an instruction on manslaughter as a lesser included offense. The suggestion was made to the judge and the defense resisted it, strenuously. The judge overruled their objection and called everybody back and gave them that instruction after which they came to a pretty speedy conclusion.

The big shocker was at sentencing. He had a manslaughter conviction and a range up to 20 years on each count and he had three counts. He gave the maximum sentence on every count. Even though it was a manslaughter charge, he made it into a murder penalty.

An example of the media crowd in Neshoba. The AG is in the middle of it all. (Photo by Andy Sheldon)



Beth Foley: Was there a time you worried you might not get a conviction?

Andy Sheldon: In each of these cases, the odds are hugely high. I look at each one of these cases and I think they are all legal miracles. I never have heard of cases with 40-year-old evidence where the prosecution succeeds. Yet, here were seven 40-year-old civil rights cases and in all of them, the prosecution succeeds. I had serious doubts, in every one.

Beth Foley: Did you get to talk to the jurors after the verdict and do you have any sense as to how they reached their decision?

Andy Sheldon: We didn't get to talk to these jurors at all. But we did hear via the court grapevine that several jurors had serious misgivings about the strength of the evidence and were unwilling to convict. When the manslaughter option became available to them, their issues disappeared.

Beth Foley: Can you give a sense for the evidence in the case?

Andy Sheldon: That's hard. The live witnesses for the prosecution were the mothers of the deceased and the wife of one of the victims. Extremely sad, intense emotional testimony. Then there was the testimony of the former mayor who basically said the Klan was good and was helping society, taking baskets of food around to those in need. He was interviewed and it appeared on CNN and caused a furor around the country. The guy had been Mayor of Philadelphia and was testifying as a character witness for Killen. Then there was a former sheriff who testified, but not a lot of live testimony to put Killen on the spot.

Beth Bonora: The theory was that there was evidence that Killen was directing the actions from various places. So, he's trying to claim 'I didn't know, I didn't say, I didn't do,' but there was strong evidence from other people that way back from an earlier time that he had in fact orchestrated it.

Beth Foley: The documentary portrayed that either Killen called or someone at the police station called the Klan when they were released from jail that night. That was presented as the conclusive evidence in the documentary. I guess it wasn't quite as conclusive in the trial?

Beth Bonora: You can get a sense of why some people who may have been reluctant to convict might want to say I'm not sure they have proven murder. It's not surprising that they could settle on manslaughter but harder on the murder.

Andy Sheldon: Beth Foley, I'd love to know how the documentary hit you.

Beth Foley: Killen is a complex character. To actually observe Killen's psychology and how he managed his hatred was unsettling. And, like you both said earlier, religion was a big part of Killen's presentation of himself. I'll never forget the scene at the end of the documentary: after the verdict Killen is being wheeled out of the courthouse, the cameras are on him and he strikes out at a reporter. At this moment you see his unedited rage.

Beth Foley: Andy and Beth, what advice do you have for trial consultants who might be interested in getting involved in civil rights cases or any kind of pro bono work?

Beth Bonora: I don't know how many more civil rights cases there will be. There is a big need for people to do pro bono work on issues related to civil rights. You don't have to leave your own community to find injustices.

Andy Sheldon: If you look, you don't have to look very far. What was blatant then is not so blatant now. It may involve a different minority or a different kind of violence. It happens everyday. We have hate crimes and hate crime laws. You can talk to anybody who handles civil rights cases and they will tell you about the array of civil rights cases.

Beth Foley: Do you believe members of the ASTC have something to bring to these cases?

Andy Sheldon: Absolutely. I think we have such good skills and all cases need us. These cases bring a sense of meaning to a person that you never forget.

Beth Bonora: We all have different kinds of work that we do. When you work on something like this, it works on you at a deep emotional level. It sticks with you and it changes you. And, it encourages you to do more. All three cases I've worked on have given me inspiration.

Conclusion

Thank you Beth and Andy for sharing this story with me and the readers. One of the many things that the documentary speaks to is that people in the community just wanted the Killen case to go away, but The Philadelphia Coalition drove this case to trial. What people may not

realize is that there were not a lot of people in the Coalition. Their meetings were in school gyms and church basements. This was not a big, powerful or well-funded group, yet their perseverance is what got the case to a jury. The audience is reminded of what a few dedicated people can accomplish.

If you are interested in the role trial consultants can play in pro bono cases contact [Ed Schwartz](#), Chairman of the American Society of Trial Consultants Pro Bono Committee.

Elizabeth Foley [BFoley@ZMF.com] is President of the American Society of Trial Consultants and a founding partner of Zagnoli McEvoy Foley, LLC with more than 18 years of experience in trial consulting and studying and teaching communication. She conducts jury research in a variety of case types including environmental & toxic torts, product liability, personal injury and commercial litigation. Read more at www.zmf.com.

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Editor's Note

As you page through this issue, you'll see content on shadow juries, managing and mentoring Millennials, a review of the iJuror application for the iPad, recommendations on family law disputes, some research on damages presentation, thoughts on communication and gender of attorney, supplemental jury questionnaire items for Arab or Muslim parties in cases, and an interview with the trial consultants involved in the civil rights retrials featured in the new movie *Neshoba*. As always, our goal is to educate and inform and cause you to think. We do that through a combination of articles and a sprinkling of original research and technical pieces aimed at helping you keep up with the latest in trial advocacy and thought. We have two departures from trial advocacy in this issue--the interview elicited by the *Neshoba* movie release and the article on *Managing and Mentoring Millennials*.

We are proud of our history with civil rights and proud of our ASTC members who have worked to bring justice (albeit delayed). We're bringing you this interview with Andy Sheldon and Beth Bonora to show that pride and to highlight the contributions of these consultants. (And to encourage you to see the movie!) The Millennial piece is a follow-up to our piece in the July issue on what we really know about the Millennial generation. There has been a tremendous debate in the online community on the work ethic of the Millennial attorney. We are publishing this review of research on the Millennials at work and offering management/mentoring tactics to firms struggling with welcoming and retaining Millennial attorneys.

Read. Comment. Enjoy. Tell your friends and colleagues about The Jury Expert! And (ta-da!) watch for our very cool and way current web redesign coming at some point during the next month!

[Rita R. Handrich, Ph.D., Editor](#)

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