



The Jury EXPERT

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The Art and Science of Litigation Advocacy

A BiMonthly E-Journal

Volume 23, Issue 1, January 2011

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It's Déjà Vu All Over Again: More Thoughts on Doing Effective Voir Dire

by Charlotte A. Morris

After all the articles, lectures and workshops I've read, seen, watched or personally written, delivered and conducted on the topic of jury selection I wonder if there is really room in the world for another?

Let's face it: we've covered the basics from theory to practical application and back again.

- Do reduce the social distance between you and the jury.
- Don't talk too much about yourself or ask personal questions before you have introduced a topic more generally.
- Do try to identify psychological aspects of jury decision-making.
- Don't make your questions so crafty that the average juror either can't understand them or resists your attempts to get inside his or her head in open court.

- Do rely on attitudes, opinions and beliefs more than basic demographic characteristics.
- Don't forget that simple questions – based on life experience – are the best way to begin.

- Do ask questions that are case-specific and relevant to jury decision-making.
- Don't draw objections by asking argumentative or loaded questions designed as thinly-veiled attempts to sell your case or secure commitments.

- Do rely on attitudes, opinions and beliefs more than basic demographic characteristics.
- Don't forget that simple questions – based on life experience – are the best way to begin.

Most lawyers have gotten lots of good advice and there seems to be very little disagreement about the need to prepare and practice doing more effective voir dire. But in the immortal words of Dr. Phil I am compelled to ask: “How's That Workin' For Ya?”

Common Jury Selection Mistakes

In the last year I've had the opportunity to conduct a number of post-trial interviews and I ask jurors to share their thoughts about their very first memories of the trial. I've compiled here a sample of verbatim comments that reflect some common mistakes made during jury selection.

Repetitive Questions

There's no doubt we want attorneys to do a thorough job of eliciting the information we need to work up cause challenges, make educated strikes and connect with our case facts. But that can't mean asking the same question repeatedly.

“I thought the attorney spent a little too much time on asking questions over and over.”

What every lawyer needs is a menu of questions worded different ways to approach the same topic. The follow-up questions absolutely depend on the answers you get, so you also have to listen closely.

Consider the following variety of ways we could ask about attitudes and opinions toward lawsuits:

- Raise your hand if you or someone close to you has any experience with lawsuits. Tell us about that.
- What have you read or heard lately about lawsuits? What do you think?
- When does it make sense to sue? Why do you think so?
- When does it *not* make sense to sue? What makes you feel that way?
- Mr. Kennedy: What's your reaction to what you've heard so far?
- What are the makings of a legitimate lawsuit?
- Which lawsuits are frivolous? Why?
- Mrs. Smith: Tell us where you stand on the issue.
- Ms. Taylor: What are your thoughts?
- Mr. Covington: What ideas do you have?

In short, unless you have some extremely compelling research that has identified a single question that determines whether you will keep or strike a juror there is no need to repeat yourself.

Superficial Questions

Jurors are listening to the questions you ask and looking for the meaning and relevance of them. We can't afford to squander that kind of juror interest or engagement by asking an important question without giving it context.

“One question I thought interesting was [the attorney] asking if we manage a group of people...I didn't really understand why that question was asked...[the attorney] never used that idea of managing individuals and expecting them to do their job...during the rest of the trial.”

Finding out if people have management experience is almost always on my list of voir dire questions, but usually what follows are questions on a theme in our case. If you don't follow up on the ideas that people have *about* management (whether they have the experience or not), you haven't done justice to a worthwhile topic and the question of experience alone can be pointless for you and for them. A few ideas about themes we might pursue in the follow-up include: managers have a responsibility to enforce workplace safety rules; or managers have a duty to maintain company records; or managers are allowed to deviate from company policy under some circumstances.



Here's how you could elicit the experience and test themes during voir dire:

Raise your hand if you have ever managed or supervised others on the job.

- Tell me a little about the company and your position in it.
- How many people did you supervise?
- What are/were your responsibilities?
- What did you like least about your position? What did you like most?

Whether you've held a position in management or not, I'd like to ask about your experience with a few work-related topics. I'd like you to think about all the jobs you've had even if this doesn't directly apply to what you are doing now:

- Tell me about the rules for safety on your job. How are they enforced? Who is most responsible for seeing that the rules are followed? If someone breaks the rules for safety, what are the consequences?
- Tell me about record-keeping in your business. What kind of records are kept? Who keeps them? Are there policies – written or otherwise – for how the records should be kept? How important is it to keep accurate records? How are the records maintained? What were the rules about document destruction?
- Are there ever times when a manager has the discretion to waive a company rule or deviate from a company policy? Can you give me an example? Raise your hand if you've ever waived a company policy or rule in favor of satisfying a customer request? Are there ever times when a

manager can accommodate a special employee request even if it isn't the rule: like giving an extra personal day or allowing someone to leave early? Tell me about your experience with that. Why is it important that managers have some flexibility on the job?

You can see that beyond following up on ideas that may be critical to the evidence in our case, we are also strategically using words and phrases (e.g. "accurate records," "document destruction" and "discretion" or "flexibility") that we intend to argue in the case. By using them in voir dire we have an opportunity to test whether jurors buy into the argument and to what degree.

Jurors Are Watching You Too

Many attorneys have become devoted students of non-verbal communication research and the courtroom has always been a place where even reluctant litigators are inspired to perform. Nevertheless, the experience described below is less rare than we'd like to think:

"The [plaintiff's] lawyer had a woman at the table with him during jury selection and she stared at everybody real hard. I thought to myself, 'I wonder what she's looking at' and when she stared at me I stared right back at her. All she wanted to know was our ages and I could tell they wanted women for sympathy. She kept turning to [the attorney] and saying things like, 'we'll keep her' but they never asked me any questions."

On one hand we might fault the lawyer's assistant for failing to appreciate that her behavior at counsel table was inappropriate. On the other hand, the juror's comment tells us that she believed the attorney and his sidekick had a strategy to ignore and overlook everything about her but gender.

The worst thing about this is that it was the very first and lasting impression the trial team made on someone who actually stayed on the jury. You might get away with making a bad impression by ignoring someone you think you will eventually strike, but it is nearly impossible to recover from doing so with a person who becomes your juror.

Focusing Too Narrowly On the Facts

A little background here will make the following juror comments most impressive. The underlying claim in the legal malpractice trial described by jurors below was a product liability suit (we'll call the product a "widget").

"The lawyers didn't ask that many questions. When I was on a rape case, they asked me about where I worked, my family and lots of things. They didn't ask me anything on this case. They never even asked us to tell a little about ourselves."

For this, there is no excuse. Nothing is simpler than asking everyone on the jury to "tell us a little about yourself."

"I thought the jury selection process was awful. I thought they did an awful job. They picked the jury in 30-45 minutes. They asked hardly any questions. Basically they wanted to know if we knew anything about widgets and, if so, you were dismissed."

There were no time limits or restrictions on attorney-conducted voir dire in this trial. But even if counsel was only permitted an hour, there is most certainly time to ask about more than widgets.

“They probably should have asked what I do [for work] because I felt like the plaintiff was basing [the case] on sympathy and I don’t have that in me. I’m a social worker. I’ve learned to separate my emotions from the facts at hand.”



Setting aside for now the idea that there are emotionless, unsympathetic social workers out there: aren’t we collectively wincing about the fact that the lawyer didn’t even ask this juror what she does for a living? Here’s still more from another juror on the case:

“We were very surprised that none of the attorneys asked us about what we did for a living. I recall them asking about widget experience and whether or not jurors knew anyone else in the [jury] pool, but that’s about it. We commented on that later, the fact that we weren’t asked very many questions.”

Really? **None** of the attorneys asked about the jurors’ work experience? It is hard to understand why neither side believed jurors’ occupations (past, present and future aspirations) would affect jury decision-making. In fact, an extremely influential juror in the same case also revealed to me that she was on her way to law school just weeks after the trial ended, but that too never came up during voir dire.

Unless you practice in a venue that restricts you to a half-hour or less, you should have a set of questions to use in every jury selection on at least three essential topics. These start as simple ice-breakers to get jurors talking about themselves, but they are limitless in terms of how far you can expand the topics to reach your case-specific goals for voir dire. You will learn a lot about decision-making from the way people describe their educational background, work and family life.

Work Life

Tell me about your work life.

- Can you describe a typical day or typical week of your work?
- What led you to this work?
- What do you like most about your work? Why?
- What do you like least? Why?
- If this wasn’t your work, what else might you do?
- Do you have any future plans for a change in your work life? Tell us about that.
- Tell us about other jobs you’ve had in the past.
- When you were a kid, what did you want to be when you grew up?

Educational Background

How far did you go in school?

- What was your major or what degree(s) do you hold?
- Describe the courses you have taken – even if they were not related to your degree(s)?
- Any technical or vocational classes?
- What do you like studying most? Least? Why?
- Are you taking any courses now or do you have any plans to take courses in the future?
- If you had the extra time or money to go back to school, what would you like to take and why?

Tell us some of the same things about your spouse or significant other.

Family Life

When you're not working, what do you do?

- Who do you spend the most time with and what do you like to do together?
- If you had more free time, how would you spend it?
- When it comes to family matters, what are the things that concern you the most?

Raise your hand if you spend at least part of your time caring for a family member (of any age)?

- Tell us about that.

None of these are case-specific but good voir dire is like good soup: if you start with good stock, the other things you add make it even better.

Not Focusing on the Facts Enough

And, finally, here is the opposite problem:

“They probably should have asked about standard of care: I just spent the last year of grad school working on standard of care [issues] and the other jurors were so confused about it. The standard of care, as I understand it, is any competent provider who is acting in good faith. It’s not really different from one professional to the next.”

You may be prosecuting or defending lawsuits today according to the popular “Rules of the Road” and “Reptile” models. If so, you need to develop a credible way of asking jurors about standards. You could start by asking people what they think “standards” are. It doesn’t have to be complicated or formulaic to work.

The comments shared above provide us with concrete examples for which there are readily available solutions. But we should also consider the bigger picture in our approach to jury selection.

Preparation, Purpose & Persuasion in Voir Dire

Voir dire must be purposeful and it can also be persuasive. We cannot wing it and expect to win. What gets lawyers in trouble most often is a simple lack of time and effort devoted specifically to preparing for jury selection.

While most experienced lawyers and trial consultants could quickly generate a host of questions based on case type alone, we cannot conduct meaningful and persuasive voir dire without clearly identifying your case strategy and thinking about how it can be manifest in the conversation you have with jurors from the start.

You don’t have to forego the potential for persuasion at this earliest phase of trial – when jurors’ attention and interest are at their highest levels – in favor of focusing exclusively on finding your strikes. The goal is to get jurors to articulate their own experience, beliefs, attitudes and opinions that are closely aligned with your case before they even know what your case is really about.

Start with Your Strategy

If you can clearly define your strategy for the case when you sit down to compose or compile a set of voir dire questions, your strategy for jury selection will follow. In the last few years of my practice, I've included in every set of voir dire questions a list of ideas that the attorney and I believe to be the most important to jury decision-making in the case. I also try to identify what we believe to be obvious about our strike strategy. The more pre-trial research we do on a case, the more specific these lists become.

Our over-arching goal is to find critical mass on a number of related thoughts or ideas that the majority of jurors come to trial already believing. Persuasion happens by degree, so it is essential to finish jury selection knowing where your seated jurors stand on key issues of decision-making in your case. The more they believe that your case is aligned with what they already think and feel, the easier it will be to persuade them.

Below is an example of the jury selection goals crafted for Plaintiff's counsel in a medical malpractice case. Notice that we focus on finding areas of agreement as much as on finding our unfavorable jurors. We want to empanel a jury of people who believe from the very beginning that *our case is just like their own experience*.

Plaintiff's Goals for Voir Dire

Ask questions to elicit **jurors' own answers** that closely **match plaintiff's themes**:

- **Surgery is a last resort**, and requires careful evaluation and thorough follow up.
- **Aches and pain get worse** with age, not better.
- **Exercise is a significant feature of a healthy life**; when an active person is restricted from exercise there are physical and emotional consequences.
- When a medical mistake is made, **responsible healthcare professionals admit the mistake and pay** for the harm/damage done.
- **Medical records are the best way for healthcare professionals to provide an honest account of a patient's care** and they are the only way to track the care of a patient from one provider to another.
- **Not all illness or injuries are alike**: People who have been hurt by the mistake/negligence of another deserve compensation; people who have naturally occurring conditions or who are injured in an accident (without fault) may not.
- **Even if a victim of a medical mistake is making the best of a bad situation**, she is entitled to be compensated for the harm that was done.

Identify and remove:

- Jurors who **believe they are smarter or more skeptical patients**, who may think Kate and/or her parents should have considered more carefully the decision to have the surgery and/or sought a second opinion.
- Jurors who are **reluctant to hold healthcare professionals responsible** for "honest mistakes."
- Jurors whose life experience tends to make them **think Kate has a stable and secure job that will provide lifetime salary and benefits** in spite of her physical limitations.
- Jurors who describe their own suffering (or that of someone close) as permanent and/or **intractable** and, as a result, aren't sympathetic to Kate.
- Younger jurors who may not appreciate that **Kate's condition will worsen over time**.

This might look something like a jury profile – a way to identify best and worst jurors – or a simple list of the themes within the case. Even if you believe these to be obvious, the act of writing them down and

committing to a jury selection process that will highlight your goals for selection and strikes is the important first step to conducting purposeful and persuasive voir dire.

Trim Your Topics

In most courtrooms there are constraints on the amount of time you have to conduct voir dire and natural limitations on the judge's and jurors' patience. Even if you have a complete database of voir dire questions to draw from, there should also be some strategic intention behind the topics you cover and in what order.

If you practice in a liberal setting for attorney-conducted voir dire you have time to start gradually and go wide. In the medical malpractice case example, you could cover all of the following topics:

- Work Experience
- Quality of Life / Family Life
- Medical Care – Experience
- Illness/Injury/Disability
- Lawsuits – Experience
- Lawsuits – Attitudes
- Medical Malpractice
- Compensatory Damages



On the other hand, if your time is extremely limited, pick two or three issues that are central to decision-making in your case and generate a discussion that will encourage jurors to talk among themselves so you can assess group dynamics while you listen for the important words and phrases in their answers.

When time is short it will be even more important to focus on themes and ideas that generate agreement with your case, because it will be a challenge to thoroughly work up cause challenges and identify your very best strikes. In this instance it is more important that you finish voir dire knowing there are critical areas of consensus among all jurors that you can link to your presentation of evidence and arguments.

In the limited format you could narrow it down to the following three topics from above (and you might find a way to sneak questions from the other topics into these wherever possible):

- Quality of Life / Family Life
- Medical Care – Experience (throw in Illness/Injury/Disability questions here)
- Medical Malpractice (include lawsuits and damages here)

A judge is much more likely to cut you some slack if you can say clearly that you intend to cover just three topics that are essential to your case.

Craft the Questions

I've been writing and rewriting voir dire questions on topics ranging from A (Alcohol Use & Abuse) to not-quite-Z (Workplace Safety) for almost 20 years. Like many of you, I now have hundreds of questions that can be used to create the first draft of voir dire in any case. But to prepare for each case we need to craft questions that are specific and strategic.

Every jury expert will tell you that good voir dire begins with open-ended questions. In fact, for the beginning lawyer, mastering this one skill alone may be the only goal you set for yourself in the next trial.

To be more strategic in your approach you want and need to guide prospective jurors through a set of questions that go from the general to the specific. For example, the vast majority of people agree with us every time we ask if they think "there are too many lawsuits" and "people are getting too much money they don't deserve." But attitudes like this are a mile wide and an inch deep when you start to ask jurors to tell you specifically what they think on the issues of lawsuits and damages.

In the first place many people have no first-hand experience with lawsuits and when pressed they can rarely point to a specific reason for why they agree. But people can and do find exceptions to the rule if they hear credible evidence and arguments, which is good news for plaintiffs and bad news for the defense.

Those who can clearly articulate the reasons for their position on the issues usually give you the kind of answers that make good material for cause challenges (e.g., "I think the entire court system is broken and needs overhauling"), or readily identify themselves as a strike for one side or the other (e.g., "I think people should pick themselves up and dust themselves off," or "I think big companies hurt people all the time and lawsuits are the only way to punish them").

So within each and every topic – on every new idea we want to test – craft the questions to go from general to specific with your strategy for the case in mind. We'll use a few from the medical malpractice example. Think about the plaintiff's goals we set out above as you consider how these questions can create consensus and identify strikes.

Quality of Life / Impact of Injury

Raise your hand if you've ever heard the phrase "quality of life?"

- What does it mean?
- What are the things that contribute to your quality of life?
- What are your top three, if you had to choose?
- Do you think most people agree with at least some of the things you mention?
- Is there anyone who has a really different idea about the things that contribute to your quality of life? If so, what are they for you?

For all of you who mentioned some form of activity or exercise – running, biking, hunting, camping, etc. – how difficult would it be for you to give those things up?

- If you had to find some alternative to your [running] habit, what would it be?
- Why do you consider those things to be a significant contribution to your quality of life?
- Has there ever been a time in your life when you couldn't do those things and you came to appreciate how important they were to you? Tell us about that.

Surgery Experience / Quality of Care / Surgery as Last Resort / Second Opinions

Raise your hand if you – or anyone close to you – has any experience with surgery.

- Tell us about that experience and how things turned out?
- Would you characterize the surgery as “minor” or “major?” Why?
- How did you know you/he/she needed the surgery?
- How long did the doctor spend treating you/him/her before recommending surgery? How many visits? What type of tests?
- What kind of information did the doctor give you/him/her before the surgery?
- What about after the surgery: did the doctor give you/him/her the details of what happened during surgery or how it went?
- Tell me about the follow-up care and treatment after surgery? Did you/he/she see the doctor again after surgery? Why or why not?
- Were you/he/she satisfied with the outcome of the surgery? Why or why not?
- Was surgery the first or only option for you/him/her, or was it more like a last resort?
- How many of you would agree that – in general – surgery is probably a last resort for most medical conditions or problems? What are the exceptions? Who doesn’t agree?
- Did you – or the person close to you – seek a second opinion before having the surgery? Why or why not?
- Raise your hand if you think a patient must always get a second opinion before having surgery of any kind? If “it depends,” what factors would you consider?
- Raise your hand if you – or anyone you know – has ignored or refused to have surgery even though a doctor recommended it. Tell us about that.
- Raise your hand if you – or anyone you know – has had a bad experience with surgery? Tell us about that. Was that a case of the doctor botching the surgery or was it some other natural complication?

There are so many good ways to ask open-ended and follow up questions so be sure to incorporate all the possibilities in your voir dire. Here are a few templates:

Open-Ended

- Raise your hand if you or someone close to you has ever...
- On a scale of 1 to 10 how [insert adjective here] is...
- Tell me about your experience with...
- What have you read or heard about...

Follow-Up

- Tell us about that.
- What happened?
- How did things turn out?
- Were you satisfied with the outcome?
- Why do you think/feel/believe so?
- If you had it to do over, what would you do differently?
- What did your experience teach you?



Create Connections with Every Juror

For so many years – when we focused exclusively on exercising strikes instead of finding areas of agreement – it felt like we never had enough strikes to go around. And at the end of the jury selection process – when both sides had effectively eliminated their least favorable jurors – we would sometimes look up at the panel only to realize that we knew very little about all those people who landed in the “middle.” We’d congratulate ourselves on getting rid of our “worst,” talk about how much we missed those awesome people that the

other side struck, and hope that we could make the best with who we had left.

Now – when we marry our strategy for the case with our best evidence and arguments to jurors’ pre-existing experience, attitudes and beliefs – we more often end up with strikes to spare. We incorporate the words and phrases jurors used during voir dire into our opening statement, so that what we tell them about our case sounds more than vaguely familiar. Throughout the trial we are mindful that our conversation at the start has set the stage for everything that follows. And in closing argument we are permitted to argue directly to jurors by reminding them of their own pre-existing ideas and beliefs that they shared with us during jury selection.

That said, it is essential that you are also comfortable opening the door to the attitudes and opinions that are harmful to your case and there are separate strategies and skills for doing this effectively. We could devote an entire article to the art of generating effective cause challenges and there are great resources – such as [Jurywork: Systematic Techniques](#) – to help you make the case for getting additional peremptory strikes and creating the optimal conditions for voir dire.

When you purposely create a connection with every juror on the panel during jury selection – on one or more important issues in your case – you are quickly on your way to being more persuasive as a result. You are also much less likely to be on the receiving end of a bad review in my next post-verdict project. And if any of the jurors’ comments could have been made about your last jury selection, you can learn more about crafting meaningful and persuasive voir dire [here](#).

Charli Morris is a trial consultant living in Raleigh, North Carolina and working in venues across the country. She has taught extensively on jury decision-making and all aspects of trial preparation. The second printing of her book, *The Persuasive Edge*, will soon be available in paperback. You can reach her at cmorris35@nc.rr.com and find out more by visiting www.trial-prep.com.

Citation for this article: *The Jury Expert*, 2011, 23(1), 1-11.

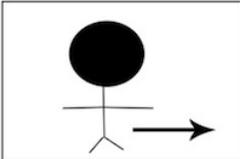
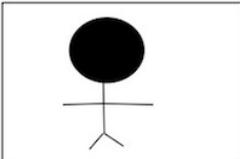
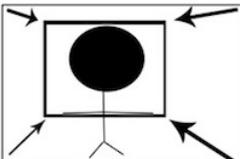
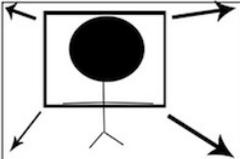
Trial Graphics on the Cheap – 8 Useful Tips

By Laura Stanford Rochelois

When I first started in this business, I used to hear, “I really can’t have any graphics for my presentation because I’m afraid I’ll look too glitzy.” I don’t hear that anymore, thankfully. Now we hear that most of the people in the jury box expect visuals since they have been raised in the post-democratization of production tools era. That is, many things that once required investment and training (like publishing, film production, and graphic design, to name a few) can now be done by pretty much anyone who has a little time and energy to give it a try. Want to self-publish? Blog. Movies? Capture on your phone, edit on your Mac and broadcast yourself. We’ve all seen what David Byrne can do with PowerPoint, and so can we. Mostly, this gets summed up as ‘social media.’ The majority of jurors are writing, producing, starring in and distributing their own media-rich content all day every day. The ubiquity of visual messages in their lives (both as recipients and creators) means they score high on the visual intelligence-o-meter.

Fact finders with these kinds of life experiences expect you to keep them interested. None of this is news to you. What you want to know is – how am I going to cost-effectively make media-rich presentations for these fact finders? This article provides you with some DIY tips based on research and experience.

STORYBOARD

Title	Date	
Producer(s)	Page of	
Video	Time	Audio
	_____	When story Boarding Arrows in the frame denote movement of a person or object.
	_____	An arrow outside the frame shows Movement of the Camera
	_____	A frame inside of a frame Can show a push or zoom in
	_____	Like wise it can show a push or zoom out.

DIY Tip #1 – Plan!

Truth is, visuals are time-consuming to make, so start the process by planning. Map out what you are going to say and list out where you’d like to have a visual to accompany your narrative. On your visuals list, separate the ‘would like to have visuals’ from the ‘must have visuals.’ Begin brainstorming possible solutions for the ‘must haves.’ Decide which solutions you want to develop and then put these into production. Once production is underway for those you can’t live without, brainstorm and produce the rest.

Resist the urge to produce in order of the presentation. The goal is to allocate resources wisely, so that the important items get the time and effort they deserve. Some visuals are filler, and should have fewer resources devoted to them.

DIY Tip #2 – If your trial is going to last more than two days, use a trial presentation system.

The main reason to use a digital evidence retrieval system is that you must create the impression that you would never, ever waste even a second of the jury's time. Jurors expect you to be prepared and to respect their service. Plus, once you have everything loaded, it's a super cheap way to pop something up on screen any time you see the need.

Please note that even though they are social media hogs, Gen Y is still subject to bandwidth issues for learning. If you want them to learn something (so they can be persuaded by it and persuade others with it), you can't overload their cognitive capacities. Distinguish between what you show to meet their expectations for a media-rich presentation ("fillers") and what you show to win your case.

DIY Tip #3 – Use Visuals Produced in Discovery

These rate high on the likely to be admitted scale, and they don't cost more than the price of a scan. Police report diagrams, photographs, org charts, flow charts, graphs, magazine covers, anything in color, etc. If production documents are few, assign someone to quickly flip through every page (without reading a single word) and flag items with visual interest. If production documents are many, maybe have someone quickly scan the documents on the trial exhibit list for visuals contenders. The goal is to mine the evidence you've already got for ready-made visuals. Once you've found it, crop it, put a title on it, colorize it, annotate it, or simply use it as is. Voila, you've made a visual.

Note that there doesn't have to be 100% overlap between the voiceover and the visual. It can just be on-screen while you're talking; you don't necessarily need to explain/describe/'talk to' everything that shows up on the screen.

DIY Tip #4 – Don't Forget Title and Bumper Pages

I *love* User Interface. Out there on the world-wide-web, you have to figure out where you are all by yourself (and with the help of the much under-appreciated UI designers). But in your presentation, you can tell them you're going somewhere else by signposting. If you don't have to exchange visuals in advance, you can type in your section headings to slides. If you do have to exchange, you can just write the section header on the whiteboard or butcher paper.

Note that I'm not suggesting you make bullet point slides. While I never say never, I will say that you should avoid bullet lists. I am suggesting that you make a one word slide (okay, maybe a couple of words) as a cheap way to get something on-screen. Sort of a visual pause, that can also help transition into a new section of your presentation. Or if you want to draw emphasis to something in closing, a few well-chosen words on-screen are a fast and inexpensive 'visual.'

Use theme phrases, or even more instructional phrases to set up the role of the jury. For example: INSPECT THE EVIDENCE, or depending on your message, CONSIDER ALL THE EVIDENCE. Or one word, CREDIBLE?, up on screen while you skewer (gently, of course) their witnesses in closing. Eyes are still on you, but the screen is something other than black or document scans the whole time.

DIY Tip #5 – Troll the Web

I feel kind of silly for having this as a “Tip,” but I need a place to share a couple of URLs and ideas.

5.1. Logos: Companies spend a fortune on branding so that their logo has lots of associative meaning. Leverage this at brandsoftheworld.com, where you can download native versions of logo files for free.

5.2. Aerial photographs: Before there was Google earth/maps, there were aerial photography outfits, that would take pictures from low-flying planes every couple of years and then sell you prints or jpegs for a nominal fee. If you are looking for something that [your favorite online map site goes here] doesn't have, you can probably find the old school aerial outfits online.

5.3. Stock photography/clip art: My favorite stock photo sites are corbisimages.com and gettyimages.com. Stock photo sites are useful both when you already know you're looking for a photo, and when you're hunting around for visual ideas. Bing and Google images can also be helpful in the brainstorming phase (both offer a blend of clip art and photography). Beware that image research can be very time consuming (I'd say worse than Facebook, but I have no idea how much time you spend on Facebook every day). Note: If you do wind up getting stock images from the web (from Getty for example), please pay for the image so that it doesn't have the watermark. It is very bad form to display an unlicensed copy of stock imagery in court.

5.4. Figures, etc: I do a fair amount of work on technology cases, and am often asked to ramp up quickly (albeit superficially) on the technology-in-suit, and help explain the technology to juries. Like everyone else tasked with learning something they know little to nothing about, I turn to the Internet. Wikipedia, of course, and howstuffworks are trusted resources for explanations that are accompanied by figures and illustrations. If I use the figure/illustration to help me ramp up quickly on the technology, I am likely to flag it as something that will help a layperson. I might redraw it, or use it as is (as time and budgets are often tight). In some situations, existing figures and illustrations serve as inspiration for original artwork. Industry-specific websites can also be a good place to find helpful figures, or the sites of the parties in suit. I worked on an options trading case recently, and found wonderful explanations in the 'investing basics' section at schwab.com. Given that Schwab is a discount/DIY brokerage, it makes sense that their site has helpful figures and explanations. Keep an eye out for sites like this during your case/visuals research.



DIY Tip #6 – Repeat, With a Twist

Messages need reinforcing, but jurors who move at the speed of Twitter may not like to see the exact same thing on-screen more than once or twice. And so my suggestion is to duplicate and slightly revise (make 'derivatives,' if you're into jargon), as a cheap way to get something 'newer' on screen. We're all familiar with zooming in on documents, but why not zoom-out on a photograph, to show more context? Toggling between arms-length and detail view can be visually interesting, and not at all costly. Annotations are another good trick, especially once the underlying item has been moved into evidence. Overlay color blocks on a map to show wetland areas. Overlay icons on a graphic the other side created to show that their theories are full of holes. Put arrows on diagrams; you get the idea.

Modifying motion can also be a good derivative trick. The second time you show the animation, you might not need as much set-up, so you can condense that part. Or you might just show the end-frame. Or you might decide to expand the version you use with the expert, where you used the shortest possible summary version in your opening. Variations on a theme can make your material go farther and with better effect.

DIY Tip #7 – Display Wisely

Now that you've made your visuals, what kind of display will you use? Print or projection? If you are displaying video or any kind of motion graphic, you'll need to project. The most important thing if you're going to project is to make sure you're using a very bright projector (4,000+ lumens). Projection is also much more forgiving when it comes to lower image resolution, and it's more flexible if you need to make real-time changes to your visuals. Print, on the other hand, is less immediate and less forgiving resolution-wise. BUT, if you have just a few display images, and your image resolution is high enough (300 dpi), then printing at your local Kinko's the day before is a good way to go (many offer low-cost oversize inkjet printing + foam core mounting). I usually don't think visuals are board-worthy unless (1) they are in color, (2) they function as a mood piece and/or (3) they are fill-ins (where you print some of the information, and write on the board to fill in remaining information). In general, documents should not be printed as boards. I saw yesterday that my local Costco photo will do a 20x30" un-mounted color print for \$8.99 while I wait (promising 1 hour turnaround)! They aren't open 24 hours a day, so you'd need to factor that into your planning, but my god it's cheap to print these days.

DIY Tip #8 – Pause Before You Make a Timeline

My kids watch a very entertaining TV show called 'Mythbusters,' where some science-geek hosts put together experiments to test various myths. Are bananas really slippery (yes!); does drinking alcohol really keep you warm? (sadly, it does not). In my next life, when I come back as a Mythbuster science-geek TV host, I will test the validity of a trial myth that I hear a lot in this life – "Every case needs a timeline." I guess I don't disagree entirely. Yes, every case needs a timeline, but I'm far from convinced that every trier of fact needs to *see* a timeline. Every case needs to have a chronology developed for planning purposes, but consider pausing before you proceed to producing the timeline. Ask whether the timeline is primarily being produced as presenter-notes, or primarily as a visual communication tool. Proceed with production if it's the latter. For bonus points, articulate what you want your timeline to communicate visually, and brainstorm whether another graphic could meet the visual communication objective.



I'm not suggesting you shouldn't make timelines, but I am advocating for some ROI analysis up front. They are expensive to produce and frequently not very visually compelling. Before you make a timeline, be sure it's the best solution.

Parting Thought

The goal of courtroom presentation is as it always has been – to persuade the jury. The catch is that we seem to have less and less time to prepare for presentations that need to be increasingly media-rich. Not an easy task fellow Iron Chefs! But, use some of the above tips and you will be on your way.

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Citation for this article: *The Jury Expert*, 2011, 23(1), 12-16.

Does Bifurcation Eliminate the Problem? A Closer Look at Hindsight Bias in the Courtroom

By Matt Groebe

Hindsight bias is a widespread and often unavoidable human fallacy. Relative to foresight observers, those with knowledge of the outcome of an action (e.g. in hindsight) believe that the given outcome has a much higher likelihood of happening. Hindsight bias plays a crucial role in civil trials, in which the defendant is often disadvantaged because jurors know the negative outcome of the defendant's behavior and are thus more likely to think he should have known about the risks associated with his behavior. Bifurcation (separate liability and damages phases) is proposed as a way to reduce or eliminate hindsight bias in the courtroom. The question though, is does bifurcation eliminate or reduce hindsight bias? This article presents a quick overview on hindsight bias and some detail on how hindsight bias applies to jurors in the courtroom. Finally, I discuss two empirical studies that tested the effectiveness of bifurcation as a tool in reducing hindsight bias in jurors.

Hindsight Bias

Fischhoff (1975) identified a phenomenon in which individuals who were asked to make a judgment in hindsight differed markedly in their judgments than other individuals asked to make the same judgment in foresight. Specifically, he observed that individuals with outcome knowledge tended to exaggerate their ability to predict the inevitability of an event's outcome, such that they overestimated both the likelihood of the known outcome occurring and the ability to foresee the outcome (Stallard & Worthington, 1998). Fischhoff coined the term "hindsight bias" to explain this human fallacy. He concluded that despite continually falling into the trap of hindsight bias, individuals are largely unaware of the effect that the outcome knowledge has on their perceptions. And even when they are told that they have this outcome knowledge and that they should try to ignore it, individuals are unable to avoid hindsight bias. Perhaps even more disheartening, both novices and experts alike (e.g. judges in court cases, surgeons in medical malpractice hearings) fall prey to hindsight bias (Harley, 2007). In addition, Fischhoff (1975) found that we are more likely to remember event information that is consistent with the outcome and minimize, distort, or even forget information that is inconsistent with the outcome. Therefore, people pay much more attention to information that fits with the reported outcome, and marginalize information that is inconsistent with the reported outcome.

Hindsight Bias in the Courtroom

Jurors typically face the classic hindsight task. Jurors are put in a situation in which they know the outcome of some event, but are asked to judge whether the defendant's behavior at the time leading up to the accident was negligent. Jurors' duty is to assess whether the damage or injury caused by the defendant was foreseeable, and whether the defendant was aware or should have been aware of the risk (Harley, 2007). Put another way, when judging negligence the law asks jurors to attempt to recover a naïve, ex ante view of once future events and to judge the defendant's conduct in light of what he should have known in the past (Hastie, Schkade, & Payne, 1999). Given what has been documented about hindsight bias, this should prove to be a much more difficult task than intended. Jurors are aware of the outcome when they make their determinations of negligence for the defendant. Jurors know how bad the injuries to the plaintiff are. Even in a bifurcated trial the jurors know that some sort of negative outcome occurred or there would be no trial.

So the fact that jurors know the plaintiff has suffered an injury and that the plaintiff believes the defendant caused that injury makes it difficult for jurors to set aside that damaging information when judging whether the defendant's actions were negligent.

Hastie and colleagues (1999) examined the effect of hindsight bias in the courtroom. They put some participants in a foresight condition in which a railroad company was given a ban and told to stop operations, and it was up to the participants to decide whether the company should proceed anyway despite the ban. The rest of the participants were put in a hindsight condition in which the railroad company decided to continue operations despite the ban. A train crashed and spilled toxins into the surrounding ecosystem, causing extensive damage. Sixty-seven percent of hindsight participants said that the railroad company's actions were negligent, whereas only 33% of foresight participants said the railroad should not be allowed to operate. Thus, most foresight participants thought the company should continue operations, even though most hindsight participants thought that those actions were negligent. Hindsight participants were exposed to a negative outcome which made the defendant's behavior seem more negligent than it appears in foresight. In addition, foresight participants on average predicted a .34 probability of an accident, whereas hindsight participants on average predicted a .59 probability of an accident. Thus, the negative outcome information given to hindsight participants made it seem likely that an accident would happen, whereas those foresight participants who had not read about an accident were not prone to think that an accident was imminent. In this study, the authors found hindsight effects, even though hindsight participants were not exposed to any new ex post information regarding the defendant's negligence that foresight participants were not given.

This finding by Hastie and his colleagues is not an uncommon finding. The authors found that the hindsight participants, who are akin to jurors, were not good at setting aside their outcome information when asked to make negligence decisions and estimates of probabilities, even when they were instructed to do so. This is a prime example of a phenomenon known as “fusion”, which is when jurors use legally inappropriate information (e.g. outcome information such as the extent of the damage) when making an unrelated legal decision (e.g. negligence) (Ellis, 2002). Thus the courtroom is perhaps a flawed venue for making determinations of negligence because jurors are put in the privileged spot of knowing outcome information that the defendant could not possibly take into account at the time of the accident. But there is no feasible or practical way to eliminate this problem. Bifurcation has been one of the primary methods proposed to attempt to lessen, if not entirely eliminate, hindsight bias in the courtroom.

Bifurcation



The typical civil trial is presented to the jury in a unitary format, in which the jury hears liability-related evidence (e.g. the defendant's conduct) and damages-related evidence (e.g. the outcome of the accident including the plaintiff's injuries) all at once. The jury then makes its decision regarding liability. If the jury finds the defendant liable, jury members then discuss appropriate damages amounts. The criticism often raised with unitary trials is that they bias the liability verdict towards the plaintiff and away from the defendant. This is because the damages-related evidence in a unitary trial is likely to be strongly pro-plaintiff. It is the presence of this evidence that often helps the plaintiff win on liability (Horowitz & Bordens, 1990).

In contrast to the unitary format, in a bifurcated format the jury first hears only liability-related evidence (e.g. the defendant's conduct) and then makes its decision on liability. Only if they find the defendant liable do they then hear damages-related evidence (e.g. the extent of the negative outcome). Advocates of bifurcation claim that it reduces the probability that jurors will utilize damages-related evidence

when deciding liability (Horowitz & Bordens, 1990). In addition, bifurcation helps by separating the two components of the case to facilitate independent liability and damages decisions by reducing confusion about which evidence is to be used for which decision and by minimizing the biasing effect of evidence regarding one component on the decision regarding the other (Wissler, Rector, & Saks, 2001). Hence, it reduces fusion, which may be due to hindsight bias. So the empirical question is then, do bifurcated trials reduce hindsight bias and help defendants prevail on liability?

Both Horowitz and Bordens (1990) as well as Smith and Greene (2005) found that defendants were more likely to prevail in bifurcated than in unitary trials. So it certainly seems possible then that bifurcation is an effective tool to reduce hindsight bias. While it is a worthy goal to reduce hindsight bias, it would be a much better goal to eliminate it entirely. In explaining how bifurcation helps the defendant win on liability, Smith and Greene (2005) conclude that bifurcation eliminates the possibility of hindsight bias because it removes from jurors' consideration the very information that biases their decisions in the first place (e.g. outcome-related information).

But is the above assertion premature? In a bifurcated trial, jurors are aware that some negative outcome has occurred, even if they do not know the full extent of it. Why else would they be called to serve on a jury? They know that the defendant's actions allegedly led to some sort of negative outcome. Since they know that a negative outcome occurred, hindsight bias might not be eliminated but instead merely reduced in a bifurcated trial. In order to test whether bifurcation actually eliminates hindsight bias, a bifurcated trial condition must actually be compared to a foresight condition, which would be a true baseline condition because foresight individuals do not have any outcome knowledge and hence no propensity to be affected by hindsight bias.

Does Bifurcation Actually Work?

Two studies were conducted to test whether bifurcation *reduces* or *eliminates* hindsight bias. The study materials were adapted from Kamin and Rachlinski (1995). In the first study, college students read one of three versions of a civil trial transcript. In the foresight condition, participants acted as a town council member and read about a town council administrative hearing in which the town was deciding whether or not to enact a law to require the employment of a bridge operator during the winter months. Specifically, the participants were asked about the probability of a preventable flood in any given year as well as whether they would vote to enact the law. In the hindsight bifurcated condition, participants acted as mock jurors in a civil trial and read a transcript in which the town was sued by a bakery owner for not hiring the bridge operator, and as a result the river overflowed and destroyed his bakery. Jurors in the bifurcated condition only read about liability-related information and were not exposed to any information about how severe the outcome of the flood was. In the hindsight unitary condition, participants again acted as mock jurors in the same civil trial. The only difference was that these jurors were exposed to outcome-related information, and thus learned about the full extent of the outcome. Jurors in the two hindsight conditions were asked about the probability of a preventable flood in any given year as well as whether they found the city liable.

Although there were no significant differences for the probability of a preventable flood between the three different conditions, there were interesting differences in the dichotomous liability question – the question that would determine liability in a civil trial. Mock jurors in the hindsight unitary condition almost uniformly (95%) found the city to be liable. Mock town council members in the foresight condition were much more lenient on the city. Only 41% thought that the city should enact the law to require the employment of a bridge operator. Thus, the majority of foresight participants did not agree to hire the bridge operator, something that most hindsight unitary participants found negligent. The critical question is, what did the hindsight bifurcated participants think?

While there was a significant difference between the hindsight unitary and hindsight bifurcated conditions, there was not a significant difference between the hindsight bifurcated and foresight conditions. Only 54% of hindsight bifurcated participants found the city to be liable for not hiring a bridge operator. Since there was a statistically significant difference between the hindsight unitary and the hindsight bifurcated conditions but not between the hindsight bifurcated and the foresight conditions, these results suggest that bifurcation actually *eliminated* hindsight bias. Mock jurors in the hindsight bifurcated condition were not as influenced by the outcome information (since they did not learn the full extent of it as hindsight unitary mock jurors did), and consequently they were less inclined to find the defendant liable.

	Foresight Condition	Hindsight Bifurcated Condition	Hindsight Unitary Condition
Decisions Finding the City Liable (%)	41% ^a	54% ^a	95% ^b

Table 1. Percentage of participants across conditions finding the defendant liable. Note that the difference between the first two conditions is not statistically significant, whereas the third condition is statistically significantly different from the first two conditions.

After finding that bifurcation effectively eliminated hindsight bias, the next question is what is the mechanism or process through which bifurcation reduces the bias? Several researchers have found that more severe injuries to the plaintiff (e.g. more severe outcomes) lead to a higher likelihood of liability verdicts against the defendant (Bornstein, 1998; Greene, Johns, & Bowman, 1999). In order for a case to actually go to trial, the injury to the plaintiff or the damage to a property is likely to be pretty severe. So in a unitary trial the outcome that jurors hear about has the potential to be bad. And since severe injuries exacerbate hindsight bias compared to milder injuries, a unitary trial is likely to lead to greater hindsight effects and hence a higher percentage of verdicts against the defendant. In a bifurcated trial, on the other hand, jurors know nothing about the severity of the outcome. If jurors are imagining a less severe outcome in a bifurcated trial, then it follows that outcome knowledge would have less of a detrimental effect on liability verdicts, leading to smaller hindsight effects and hence fewer liability verdicts against the defendant.

A second study was conducted to test this assumption. The goal was to manipulate the severity of a flood in the minds of the mock jurors. Mock jurors were placed in one of two conditions. In the “typical” condition, mock jurors first read a short cover story about a flood that resulted in minimal damage. They then read the bifurcated trial transcript from the first study. Before making their liability verdicts, they were asked to write about the “most likely” outcome that would have happened to the plaintiff's store as a result of the flood. In the “severe” condition, mock jurors first read a short cover story about the recent Nashville floods and the detrimental impact they have had on that city. They then read the bifurcated trial transcript from the first study. Before making their liability verdicts, they were asked to write about the “most severe” outcome that would have happened to the plaintiff's store as a result of the flood in the transcript.

Significant differences were found between the “typical” and the “severe” conditions. Whereas only 52% of mock jurors in the “typical” condition found the city liable, 76% of mock jurors in the “severe” condition found the city to be liable for failing to hire the bridge operator. Therefore, it appears that when jurors are imagining a milder outcome, they are less inclined to find for the plaintiff on liability than when they are imagining a more severe outcome. This implies that bifurcation may be effective in reducing hindsight bias and hence leveling the field between the plaintiff and the defendant because jurors may not be imagining as grave of an outcome as the one they may hear about in a unitary trial. But when jurors are

induced to imagine a severe outcome in a bifurcated trial, verdict rates rise to more closely resemble those from a unitary trial.

Closing Remarks and Recommendations

Despite its potential for reducing the amount of liability verdicts against the defendant, not much empirical research has focused on the effectiveness of bifurcation at meeting its intended goal. The aim of bifurcation is to reduce hindsight bias, which is what often hurts defendants. The research reviewed above demonstrates that bifurcation essentially eliminates hindsight bias so that liability verdicts were not statistically significantly different from a foresight baseline. Also, the mechanism through which bifurcation works is potentially through the less severe outcomes that jurors are imagining in a bifurcated trial.

The advice for attorneys is quite simple. A civil defense attorney should advocate for a bifurcated trial, unless of course if liability evidence is very strong against the defendant in which case the defendant will likely lose on liability no matter which trial format is used. Bifurcation will reduce, or even eliminate, jurors' hindsight bias and thus lead to less liability verdicts. Furthermore, during the bifurcated trial the defense attorney should carefully attempt to create expectations of mild outcomes that could have happened as a result of the accident. On the flip side, the plaintiff's attorney should advocate for a unitary trial. It will exacerbate hindsight bias and thus lead to more liability verdicts against the defendant. During the bifurcated trial the plaintiff's attorney should carefully attempt to create expectations of severe or extreme outcomes that could have happened as a result of the accident.



Matt Groebe, M.A. is a graduate doctoral student in social psychology at Miami (OH) University in Oxford, Ohio. His research interests are in the areas of juror and jury decision-making, small groups research, and other legal applications of social sciences research. He hopes to enter the field of trial consulting after obtaining his doctorate degree. In his spare time, he likes working out, playing with his dog Wrigley, and watching his beloved Chicago sports teams.

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Citation for this article: *The Jury Expert*, 2011, 23(1), 17-22.



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The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict

by Steve M. Wood, Lorie L. Sicafuse, Monica K. Miller, and Julianna C. Chomos

Abstract

The purpose of the present research is to examine whether jurors' perceptions of attorneys and their performance influences verdicts. Five hundred seventy-two jurors (365 criminal, 205 civil, and 2 unidentified trial types) completed surveys rating Prosecution/Plaintiff and Defense attorneys on seven aspects of the attorneys and their performance—opening statements, evidence presentation, closing statements, courtroom demeanor, sincerity, competence, and preparedness—that may influence verdicts. In general, jurors' perceptions were related to their verdicts. First, positive perceptions of the attorneys' evidence presentation and preparedness predicted favorable outcomes for both attorneys; though these relationships were stronger for the Prosecution/Plaintiff than the Defense attorneys. Second, while the Prosecution/Plaintiff's opening statements did not influence verdicts, Defense attorneys whose opening statements were perceived more favorably were less likely to win their case. Conversely, Defense attorneys' closing statements did not influence verdicts, but Prosecution/Plaintiff attorneys whose closing statements were perceived more favorably were more likely to win their case. Finally, perceptions of Prosecution/Plaintiff attorneys' sincerity were negatively related to a favorable verdict. These findings have implications for attorneys. Those who are attuned to the way they are being perceived by jurors can make changes to improve their chances of receiving a verdict in their (or their client's) favor.

The authors would like to thank Judge Robert Pratt, Judge Celeste Bremer, and Melanie Ritchie for their assistance in this project.

The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict

Many factors influence jurors' verdicts. Law-Psychology researchers have produced countless articles about how jurors' decisions and perceptions can be influenced by the group process (Miller, Maskaly, Green, & Peoples, in press), jurors' biases (Miller et al.), characteristics of the juror (Miller & Hayward, 2008), characteristics of the defendant (Abwender, & Hough, 2001), characteristics of the victim (Newcombe & Bransgrove, 2007), and other similar factors. One relatively neglected area of study is the influence attorneys have on verdicts. The purpose of this study is to investigate how jurors' perceptions of attorneys (i.e., courtroom demeanor, sincerity, competence, and preparedness) and attorneys' performance (e.g., in opening and closing arguments, evidence presentation) are related to verdicts. Using data from 572 jurors from a Federal Court in Iowa, this research will reveal whether these aspects influence trial outcomes. What

is interesting about this area of research, as will be seen, is that the findings suggest that aspects of attorneys and their performances do indeed influence verdicts, but sometimes in unexpected ways. However, prior to examining the previous and current findings, it is important to discuss why attorneys must understand juror perceptions.

Importance of Understanding Juror Perceptions

According to Linz, Penrod, and McDonald (1986), prosecutors and defense attorneys differ from one another with regard to their self-perceptions of their courtroom performance. These authors found that, while the self-perceptions of the prosecuting attorneys' performance did not differ from jurors' perceptions, defense attorneys often rated their own performance more favorably than jurors. Linz et al. suggest that such an outcome may occur because prosecutors receive more frequent, accurate feedback from credible sources, while defense attorneys may receive more inaccurate, ambiguous feedback. Attorneys who are unaware of how jurors perceive them or receive inaccurate feedback about jurors' perceptions of their behavior may be placing themselves at a strategic disadvantage in the courtroom; specifically, they may be giving jurors negative perceptions, which will negatively influence verdict. If jurors' perceptions of attorneys and their performance actually do affect verdicts, it would be imperative that attorneys seek out feedback and make changes accordingly. A small body of research, discussed next, suggests that attorneys can influence verdicts.



Influence of Attorney on Verdicts

When attorneys appear in court, jurors are evaluating their dress, demeanor, and personality, along with the case evidence (Hobbs, 2003). Several researchers have examined uncontrollable characteristics of an attorney such as courtroom expertise (e.g., Abrams & Yoon, 2007; Haire, Lindquist, & Hartley, 1999; Szmer, Johnson, & Sarver, 2007) and uncontrollable aspects of attorneys' performance such as speech patterns (Silverman & Paynter, 1990), gender (Hahn & Clayton, 1996; Nelson, 2004), and race (Abrams & Yoon, 2007; Espinoza & Willis-Esqueda, 2008) that influence verdicts. However, the current discussion is more interested in those aspects of attorneys' performance they can control.

According to social influence theory, it is not only the message, but also the presentation of the message and the messenger that affects the decision-making process (Petty & Wegener, 1998). A small number of past studies (e.g., Linz, Penrod, & McDonald, 1986; Silverman & Paynter, 1990) have indicated that attorneys' communication (e.g., stuttering, aggressiveness), trial presentation (e.g., persuasive tactics), and delivery (e.g., location in the courtroom) may influence jurors. In addition, researchers have examined opening (e.g., Hobbs, 2003; Linz et al., 1986; Weld & Danzig, 1940) and closing statements (e.g., Hobbs; Linz et al.; Spiecker & Worthington, 2003), persuasion tactics (Dolnik, Case, & Williams, 2003; Hobbs), impression formation (Hobbs), attorney presentation style (i.e., passive, aggressive, or assertive) (Hahn & Clayton; Sigal, Braden-Maquire, Mosley, & Hayden, 1985), and language strategies (Schmid & Fiedler, 1998; Smith, Siltanen, & Hosman, 1998).

In their seminal work on the influence of opening statements on civil verdicts, Weld and Danzig (1940) found that plaintiff attorneys' opening statements created a framework for the belief that the defendant was liable in the same way a witness for the plaintiff would have done. In addition, jurors reached a definitive decision early in the trial and the remaining testimony merely served to change the degree of

certainty of their decision. Similarly, a later study by Pyszczynski and Wrightsman (1981) found that extensive opening statements from a criminal prosecutor caused participants to give a relatively strong guilty verdict early in the trial. Moreover, jurors maintained this initial belief throughout the duration of the proceedings.

Other research examining the influence of an attorney's presentation on verdict has focused on presentation style. In a study by Hahn and Clayton (1996), participants read a brief summary of an assault-and-robbery trial (including transcripts of defendant and witness interrogations) and watched a videotaped interrogation involving the defense attorney and a witness. The aggressiveness of the defense attorney during the interrogation was varied by condition between "aggressive" and "passive." Aggressive defense attorneys were more successful than passive defense attorneys at receiving verdicts in their favor. Overall, while these studies may have found that an attorney's performance can affect verdicts, others (e.g., Hobbs; Smith et al.) fail to provide direct, empirical evaluations of factors relating to an attorney's performance and courtroom outcome.

Overview of Study

Several past studies have investigated the role of jurors' perceptions on trial outcomes (e.g., Spiecker & Worthington, 2003), however, little data exists that can help attorneys promote their own interests through changing their behavior and performance. In addition, many studies are limited in a number of ways. For instance, some past studies have used real jurors (e.g., Linz et al., 1986), but many others have only used students acting as mock jurors (e.g., Hahn & Clayton, 1996; Schmid & Fiedler, 1998). Some have focused only on certain types of trials (e.g., Linz et al.), and others have focused only on a few attorney characteristics (e.g., Hahn & Clayton). In order to address some of these limitations, the current study surveyed real jurors, from both criminal and civil trials, and measured a variety of perceptions about the attorney and the attorney's performance. The general research question to be answered in this study is, "Do jurors' perceptions of attorneys (e.g., sincerity) and attorneys' performance (e.g., opening arguments) influence verdicts?"

Method

Federal court jurors from the U.S. District Court for the Southern District of Iowa who served between the years of 1997 and 2009 were recruited to participate in the current study. The total sample consisted of information from 572 jurors. Upon conclusion of their service, jurors received a paper and pencil questionnaire asking them to rate the Prosecution/Plaintiff and Defense attorneys' on their opening statements, evidence presentation, closing arguments, courtroom demeanor, sincerity, competence, and preparedness on a 5-point Likert scale ranging from 1 = very poor to 5 = excellent. In addition, court staff consulted the court records and noted whether the final trial verdict was in favor of the Defense or Prosecution/Plaintiff.

Results and Discussion

Using jurors' perceptions of the Prosecution/Plaintiff and Defense attorneys and their performance as predictor variables, analyses focused on 492 (404 pro-Prosecution/Plaintiff and 88 pro-Defense) participant responses rating the Prosecution/Plaintiff attorneys and 435 (332 pro-Prosecution/Plaintiff and 103 pro-Defense) participant responses rating the Defense attorneys¹. Separate analyses were performed for ratings of Prosecution/Plaintiff attorneys and for ratings of Defense attorneys. Verdicts were obtained from criminal and civil trials held from 1997 to 2009. See Table 1 for a yearly breakdown of the number of each trial type and Table 2 for the mean (and standard deviation) perception scores for each predictor variable. Overall, verdicts from 336 criminal and 155 civil jurors were recorded for the Prosecution/Plaintiff attorneys and 292

criminal and 141 civil jurors for the Defense attorneys. There were three surveys (one Prosecution/Plaintiff and two Defense) that were omitted because the jurors' status (i.e., criminal or civil) was unknown.

Two logistic regression analyses—one for the Defense and one for the Prosecution/Plaintiff—were conducted in order to determine whether jurors' perceptions of attorneys and their performance influence verdict. Separate analyses were conducted based upon prior research (viz., Linz et al., 1986) using a similar technique. Court-recorded verdicts were coded 0 = Defense and 1 = Prosecution/Plaintiff. That is, if the verdict came back with Defense (pro-Defense), a "0" was coded. If the verdict came back as Prosecution/Plaintiff (pro-Prosecution/Plaintiff), a "1" was coded. Participants' perceptions of the Prosecution/Plaintiff and Defense attorneys' opening statements, evidence presentation, closing arguments, courtroom demeanor, sincerity, competence, and preparedness were used as predictor variables for both analyses.



Prosecution/Plaintiff

The complete model containing the perceptions of the Prosecution/Plaintiff attorneys' opening statements, evidence presentation, closing arguments, courtroom demeanor, sincerity, competence, and preparedness provided a significant improvement over the null model, Nagelkerke $R^2 = .54$, Hosmer and Lemeshow = .06, $p < .001$. However, the contributions of each individual predictor to the model varied considerably. Results regarding these individual predictors of trial success and their implications are discussed below in further detail. See Table 3 for a summary of all regression coefficients.

Opening statements. Surprisingly, jurors' ratings of the Prosecution/Plaintiff attorneys' opening statements failed to significantly predict verdicts. This contradicts earlier findings that suggest prosecution/plaintiff attorneys' opening statements heighten initial impressions of defendants' guilt and that these impressions persist throughout the trial (Weld & Danzig, 1940; Pyszczynski & Wrightsman, 1981). Further, trial practice experts have long contended that well-organized and informative opening statements provide jurors with a cognitive framework to help them interpret case evidence and testimony, and thus are a crucial component of attorney success (Haddad, 1979, Mauet, 1980).

The influence (or lack thereof) of prosecution/plaintiffs' attorneys opening statements on case verdicts may depend on a variety of factors, such as juror characteristics, strength of case evidence, or whether attorneys "follow through" on initial promises to present crucial facts and evidence to prove their case (Pyszczynski, Greenberg, Mack, & Wrightsman, 1981). Importantly, early legal scholars may have overestimated the potential for jurors to arrive at a quick decision (see Kalven & Zeisel, 1967). The lack of relationship between perceptions of the Prosecution/Plaintiff attorneys' opening statements and verdicts in the current study may be explained by jurors' efforts to consider subsequent evidence and testimony prior to forming judgments about the case. Indeed, a survey of over 3,500 jurors revealed that only 6% began favoring a side following the prosecutors' opening statement, and judgments were most affected following testimony from both sides and during deliberations (Hannaford-Agor, Hans, Mott, & Munsterman, 2002). In addition, Linz and colleagues (1986) found no effects of the quality of prosecuting attorneys' opening statements on verdicts, even though jurors judged prosecutors' opening statements as more organized and legally informative than defense attorneys' opening statements. Thus, jurors in the current study may have simply refrained from making judgments about the Prosecution/Plaintiff's case until later in the trial. The fact that the burden of proof rests with the prosecution/plaintiff may have compounded this inclination, making

jurors especially likely to consider subsequent aspects of the Prosecution/Plaintiff's case before forming stronger opinions. The present findings should not undermine the recommendation that prosecution/plaintiff attorneys construct well-organized and powerful opening statements, but they do suggest that the influence of opening statements on jurors' final case judgments may be weaker than often assumed.

Evidence presentation and preparedness. Perceptions of the Prosecution/Plaintiff attorneys' evidence presentation was a significant predictor of verdict, $B = .72$, $SE = .26$, $Wald = 7.39$, $p < .01$. As the perceived quality of the evidence presentation increased by 1 unit (in reference to the 5-point Likert scale), the odds an individual sided with the Prosecution/Plaintiff increased by a factor of 2.05. Importantly, juror ratings may not only have reflected the manner of evidence presentation (e.g., organization, clarity), but also the amount or credibility of evidence. Thus, this expected finding is encouraging considering that jurors are instructed to base their decision on case facts and evidence presented at trial, as opposed to extraneous factors such as pre-existing beliefs and intuition (Feigenson, 2000).

Similarly, the perceived amount of preparedness of the Prosecution/Plaintiff attorneys was a significant predictor of verdict, $B = 1.17$, $SE = .26$, $Wald = 20.22$, $p < .001$. As the perceptions of the Prosecution/Plaintiff attorneys' preparedness increased by 1 unit, the odds an individual sided with the Prosecution/Plaintiff increased by a factor of 3.23. Again, this finding is not surprising considering that well-prepared cases are often characterized by the presentation of well-organized, clear, and convincing evidence. However, it should be noted that prosecutors and plaintiff attorneys are more likely to pursue strong cases, which may partially account for the positive relationship observed in the current study between jurors' perceptions of the Prosecution/Plaintiff attorneys' evidence presentation and trial success.

Closing arguments. Perceptions of the Prosecution/Plaintiff attorneys' closing arguments was a significant predictor of verdict, $B = 1.66$, $SE = .30$, $Wald = 29.94$, $p < .001$. As the perceived quality of the closing arguments increased by 1 unit, the odds an individual sided with the Prosecution/Plaintiff increased by a factor of 5.27. Though expected, the contrast between this finding and the lack of effects of perceptions of Prosecution/Plaintiff attorneys' opening statements on verdicts is intriguing. As previously discussed, jurors may have been reluctant to incorporate the Prosecution/Plaintiff attorney's opening statements into their final judgments prior to hearing case evidence and testimony. Toward the end of trial, it is conceivable that jurors were more susceptible to closing arguments, particularly if the attorneys presented cohesive summaries of well-prepared, strongly supported cases.

The relatively strong influence of jurors' perceptions of closing arguments on verdicts also may be attributable to a recency effect, or the tendency for individuals to be persuaded by a message presented last in a series (Miller & Campbell, 1959). There is some disagreement in the persuasion literature regarding the circumstances under which a primacy (i.e., greater influence of the first message presented in a series) or recency effect prevails (see Eagly & Chaiken, 1993; Gass & Seiter, 2007). However, evidence suggests that individuals may be more susceptible to recency effects when they must make a decision shortly after the presentation of the last message (Miller & Campbell). This corresponds closely to instances where jurors cast an initial ballot following closing arguments. More generally, jurors may have had better recall of the Prosecution/Plaintiff's closing statements and were able to report their perceptions more accurately; thereby accounting for the strong relationship between this criterion and trial outcomes. Regardless of their explanations, the current findings suggest that prosecution/plaintiff's attorneys who deliver high-quality closing arguments may maximize their chances of success at trial.

Sincerity and demeanor. Jurors' perceptions of the Prosecution/Plaintiff attorneys' overall demeanor did not significantly influence verdicts. However, the perceived sincerity of the Prosecution/Plaintiff attorneys was a significant predictor of verdict, $B = -1.37$, $SE = .35$, $Wald = 15.27$, $p < .001$, but in the unexpected direction. As the perceptions of Prosecution/Plaintiff attorneys' sincerity decreased by 1 unit, the odds an individual sided with the Prosecution/Plaintiff increased by a factor of .25. Though this effect is small, Prosecution/Plaintiff attorneys who were rated as more sincere were less likely to prevail.

An extrapolation from Hahn and Clayton's (1996) research may help partially explain this puzzling finding regarding attorney sincerity. Specifically, Hahn and Clayton found that mock jurors are more likely to acquit a defendant with an aggressive, rather than passive, attorney. Mock jurors also perceived aggressive attorneys as more competent, but less friendly than their counterparts (Hahn & Clayton). Though the Hahn and Clayton study only investigated perceptions of defense attorneys, their findings may apply to prosecution/plaintiff attorneys as well. Perhaps the Prosecution/Plaintiff attorneys in the current study who were perceived as sincere may have exhibited low aggression or confidence, which negatively influenced trial outcomes. Though some trial experts may place undue emphasis on attorney personality and overall demeanor, prosecution/plaintiff attorneys may benefit from striking a balance between honesty and confidence in the courtroom.



Defense

The overall model containing the perceptions of the Defense's opening statements, evidence presentation, closing arguments, courtroom demeanor, sincerity, competence, and preparedness provided a significant improvement over the null model, Nagelkerke $R^2 = .38$, Hosmer and Lemeshow = .15, $p < .001$. An examination of the individual predictors in the model revealed some unexpected findings, and there were important differences between the predictors of trial success for Defense and Prosecution/Plaintiff attorneys.

Opening statements. Unlike jurors' perceptions of the Prosecution/Plaintiff attorneys' opening statements, perceptions of the Defense attorneys' opening statements was a significant predictor of verdict, $B = 1.95$, $SE = .35$, $Wald = 31.90$, $p < .001$. However, this result is in the opposite direction of what one might expect: Defense attorneys whose opening statements were evaluated more positively were less likely to win their case. As the perceived quality of the Defense attorneys' opening statements increased by 1 unit, the odds an individual sided with the Defense decreased by a factor of 7.05.

There are several potential explanations for this surprising effect. Some legal experts have questioned the overall utility of opening statements for the defense, noting that such statements nearly always favor the prosecution (see Greenberg & Ruback, 1982). As prosecuting attorneys must prove their cases beyond a reasonable doubt, they may come to trial better equipped with case-related information. Rather than presenting an elaborate alternative account of a crime, defense attorneys should concentrate on refuting prosecutors' arguments and undermining their credibility (Greenberg & Ruback).

Though present results showed no effects of perceptions of the Prosecution/Plaintiff attorneys' opening statements on verdicts, tactics commonly utilized by defense attorneys during opening statements may have caused jurors to form impressions more rapidly. In the current study, defense attorneys may have been particularly disadvantaged by focusing their energy on opening statements if they advanced new or extreme theories. Defense attorneys also may have undermined their trial strategies during opening statements by inadvertently expressing a strong intent to persuade their audience or by promising, but failing to deliver, evidence that would exonerate their client. Attitude change and persuasion research indicates that either of these missteps may undermine attorneys' credibility and decrease acceptance of a message (see Eagly & Chaiken, 1993). Although data that would confirm these notions are unavailable, these current findings suggest that well-received opening arguments may not always translate into favorable outcomes and could in fact have the opposite effect.

Evidence presentation and preparedness. Perceptions of Defense attorneys' evidence presentation was a significant predictor of verdict, $B = -1.60$, $SE = .28$, $Wald = 32.61$, $p < .001$. As the perceived quality of the Defense attorneys' evidence presentation decreased by 1 unit, the odds an individual sided with the Defense decreased by a factor of .20. In addition, the Defense attorney's perceived level of preparedness was a significant predictor of verdict, $B = -1.23$, $SE = .33$, $Wald = 14.06$, $p < .001$. As the perceptions of the Defense attorneys' preparedness decreased by 1 unit, the odds that an individual sided with the Defense decreased by a factor of .29.

As with similar results regarding the Prosecution/Plaintiff attorneys, these findings are intuitive in the sense that case facts and evidence are the strongest predictors of jury verdicts (Feigenson, 2000). Jurors' ratings of "preparedness" may considerably overlap with ratings of evidence presentation, as an attorney who presents a strong and logical case is typically perceived as well-prepared. However, the influence of juror perceptions of evidence presentation and preparedness on verdicts was noticeably stronger for the Prosecution/Plaintiff than the Defense attorney. As previously noted, jurors may have assigned more weight to the Plaintiff/Prosecution attorneys' evidence presentation because the burden of proof rests with this side. Similarly, jurors may have been more likely to consider how well prepared the Prosecution/Plaintiff attorneys were in presenting their case. Conversely, because the Defense is not required to present any evidence, Defense attorneys' evidence presentation and preparedness may have been less important factors in jurors' decisions.

Sincerity and demeanor. Jurors' perceptions of the Defense attorneys' sincerity failed to significantly predict verdicts, as did jurors' perceptions of the Defense attorneys' demeanor. This is seemingly inconsistent with Hahn and Clayton's (1996) finding that aggressive defense attorneys were more likely to win their case. Further, the present findings revealed that Prosecution/Plaintiff attorneys rated as more sincere were less likely to prevail, possibly because they were correspondingly perceived as less confident and assertive. This discrepancy may be attributable to methodology: Hahn and Clayton manipulated the characteristics of defense attorneys in their study so that they were either perceived as highly passive or aggressive. In real-world settings, however, defense attorneys may sometimes be characterized as highly aggressive and less sincere than prosecution/plaintiff attorneys. In the current study, jurors may have been less influenced by perceptions that confirmed their expectations of prototypical defense attorney behavior. On the other hand, jurors may have been particularly impressed with a confident or aggressive Prosecution/Plaintiff attorney and subsequently allowed these characteristics to influence their decisions.

Conclusion

Taken together, these findings have implications for attorneys. Attorneys should generally focus on improving specific elements of their performance during trial and overall preparation, which predicted positive outcomes for both sides. General behavior and demeanor (with the potential exception of sincerity for the Prosecution/Plaintiff attorneys) are likely less important than performance in determining trial outcomes. However, attorneys also should recognize that certain elements of their performance (e.g., opening statements, closing arguments) may be more critical to their case than others, depending on which side they represent. The influence of attorney performance and behavior on trial outcomes may also be contingent on several other factors, such as case type, jury composition, and individual differences among jurors. Unfortunately, the current sample does not allow for intricate comparisons due to the low number of certain types of trials and limited juror information.

Ultimately, attorneys must be aware of how they are perceived by jurors in order to modify their behaviors and performance to promote success at trial. As previously discussed, Linz et al. (1986) found that mock jurors' evaluations of prosecuting attorneys tended to cohere with these attorneys' own self-evaluations, but that defense attorneys rated several aspects of their performance significantly higher than

did jurors. This discrepancy may be attributable to the solidarity of defense lawyering; defense attorneys may receive less feedback than prosecutors, leading to overestimations of the quality of their performance (Linz et al., 1986). All attorneys, but perhaps defense attorneys in particular, should consider more proactive means of soliciting feedback that will help them make favorable impressions on jurors. In addition to seeking the opinions of partners and trial participants, attorneys could also use “shadow jurors” to increase the accuracy of their self-perceptions. Shadow jurors may be community members or excused members of the venire who attend the trial and are instructed to consider all aspects of the case as if they were actual jurors (Zeisel & Diamond, 1978). Not only may shadow jurors provide feedback that is likely similar to the perceptions of the actual jurors, but they can also point out unfavorable aspects of attorneys’ behaviors and performance during trial so that they may be addressed early on. Though attorneys may lack the resources to employ shadow jurors in many cases, doing so periodically may significantly increase their current and future litigation success.

In sum, though case facts and evidence are the strongest predictors of trial verdicts (Feigenson, 2000), attorneys should not discount the influence of their behaviors and performance on jurors’ decisions. As described above, there are numerous ways in which attorneys can increase their awareness of how they are perceived by jurors, which may help maximize the likelihood of success at trial.

Author Bios

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Monica K. Miller [mkmiller@unr.edu] is an Associate Professor with a split appointment between the Criminal Justice Department and the Interdisciplinary Ph.D. Program in Social Psychology at the University of Nevada, Reno. She is also an adjunct faculty at the Grant Sawyer Center for Justice Studies and a faculty associate in Women’s studies. She received her J.D. from the University of Nebraska College of Law in 2002 and her Ph.D. in Social Psychology from the University of Nebraska-Lincoln in 2004. Her interests involve the application of psychological theories and justice principles to laws and policies. Specifically, she is interested in the role of religion in the legal system (e.g., jury decisions); how the law regulates sexual behavior, pregnancy, and family issues; jury decisions in death penalty, medical malpractice and insanity cases; community attitudes/sentiment and the law; courtroom innovations; emotion and the law.

Julianna C. Chomos [jchomos@unr.edu] is a doctoral student at the University of Nevada, Reno and a Research Assistant at the Grant Sawyer Center for Justice Studies. Her professional interests are in the areas of jury decision-making; eyewitness testimony; deviance; and justice principles.

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Table 1

Trial Type by Year

Year	Trial Type	
	Criminal	Civil
1997	3	2
1998	2	1
1999	3	1
2000	3	10
2001	3	4
2002	5	5
2003	5	2
2004	4	4
2005	5	3
2006	7	2
2007	6	3
2008	7	0
2009	6	2

Note: N = 576. The number of criminal and civil trials was calculated prior to eliminating multivariate outliers or jurors that did not answer the survey.

Table 2

Mean and Standard Deviation Scores for Opening Statements, Evidence Presentation, Closing Statements, Courtroom Demeanor, Sincerity, Competence, and Preparedness by Attorney

	Prosecution/Plaintiff		Defense	
	M	SD	M	SD
Opening Statements	4.08	.68	4.07	.73
Evidence Presentation	3.94	.87	3.62	1.00
Closing Statements	4.15	.78	3.99	.89
Courtroom Demeanor	4.28	.76	4.11	.83
Sincerity	4.31	.70	4.04	.85
Competence	4.22	.80	4.15	.85
Preparedness	4.08	.92	4.00	.99

Table 3

Logistic Regression of Jurors’ Perceptions of Prosecution/Plaintiff and Defense Opening Statements, Evidence Presentation, Closing Statements, Courtroom Demeanor, Sincerity, Competence, and Preparedness on Verdict

	Prosecution/Plaintiff			Defense		
	B	SE	p	B	SE	p
Opening Statements	-.09	.29		1.95	.35	**
Evidence Presentation	.72	.26	*	-1.60	.28	**
Closing Statements	1.66	.30	**	-.14	.27	
Courtroom Demeanor	.10	.28		.06	.28	
Sincerity	-1.37	.35	**	-.07	.29	
Competence	.12	.33		-.21	.36	
Preparedness	1.17	.26	**	-1.23	.33	**

* p < .01; ** p < .001

Endnote

¹ 53 (9% of total sample) multivariate outliers from the Prosecution/Plaintiff model and 18 (4% of total sample) multivariate outliers from the Defense model were removed using a conventional process of removing cases with studentized residuals of ± 2 standard deviations above or below the mean (Cohen, Cohen, West, & Aiken, 2003). By removing these outliers, the Nagelkerke R² (a pseudo indication of how much variance in the dependent variable is accounted for by the independent variable) in the Prosecution/Plaintiff model increased from 21% in the original model (Model 1) to 54% in the adjusted model (Model 2). Similarly, removal of outliers in the Defense model increased the Nagelkerke R² from 25% in Model 1 to 38% in Model 2. Researchers believed that such increases in the Nagelkerke R² warranted the adoption of Model 2. Overall, the significance levels between Model 1 and 2 for both analyses did not significantly differ on any of the predictor variables, nor did any insignificant predictor variables become significant.

We asked three people to respond. Two are trial consultants (Leslie Ellis and Ellen Finlay). And for the first time in the pages of *The Jury Expert*--we asked a trial lawyer to respond as well. Mark Bennett shows us how it’s done.

Leslie Ellis responds to “The influence of jurors’ perceptions of attorneys and their performance on verdict” by Wood, Sicafuse, Miller and Chomos.

Leslie Ellis is a Jury Consultant at TrialGraphix. She has been studying jury and judge decision making for over 15 years, and consults on complex civil and white collar criminal matters.

The article by Wood, et al. addresses an issue that concerns many of our clients – that jurors will be overly influenced by their or opposing counsel’s personality, presentation style, etc. They are mostly concerned that whether the jurors like them or opposing counsel will have a significant impact on the verdict. In order to suss out the extent of that impact, attorney and/or corporate clients occasionally want us to ask jurors (real and mock) about their impressions of the lawyers. However, asking jurors which attorney or presentation style they liked better is almost a trick question, for the reasons outlined in the article. We often find that it’s not that they like an attorney and therefore they like that attorney’s case. Rather, jurors tend to prefer the attorney who presented the case they thought was more credible. It’s almost a halo effect. Further, jurors will find for an attorney they don’t like, if she has the better case. Alternatively, they may want to go get a beer with you, but it doesn’t mean they’ll find for you.

The exception to this general rule is when there is something about the attorney’s demeanor or personality that undermines the credibility of the case. If jurors decide an attorney isn’t trustworthy, that will bleed into their perceptions of the case. The motives and veracity of the whole case will be called into question. In one extreme example, we once worked on a case where the judge had to repeatedly remind jurors that the opposing counsel’s questions to witnesses were not evidence, because they often referred to information or events that just didn’t exist. Jurors quickly figured out that the attorney was misrepresenting events, and if they couldn’t believe everything he said, they couldn’t believe anything he said.

Another way in which an attorney’s demeanor can undermine his or her case is to show disrespect to the trial participants. We ask jurors to make an important decision, and they take that responsibility very seriously. They also know that the parties are adversaries. However, they also expect everyone to treat everyone else with respect, including opposing counsel and the other party. They also expect the litigants and counsel to take each other’s case just as seriously as we want the jurors to take them.

I don’t mean to undermine concerns about presentation style – the researchers did find that preparedness had a significant impact on verdict, and we’ve seen that over and over again. A more prepared attorney appears more competent and will present a more organized case. And a more organized case is usually the more understandable and persuasive case. Occam’s Razor (the law of economy) applies – jurors will lean toward the simpler explanation, until the simple explanation is deemed insufficient. I’m often asked questions like, “Should we have Attorney A or Attorney B handle this witness?” or “Should we have Expert X or Expert Z testify?” My response is always, “Who knows the material better, and is going to be more prepared and organized in how they present it?” The top three criteria in court are to be prepared, prepared and prepared.



As the authors noted, their study, and numerous others, show that evidence (and jurors' perceptions of the evidence) is the largest predictor of verdict, which is what we want to see. Their finding that the Plaintiff/ Prosecution's closing argument was predictive of verdict is connected to the importance of the evidence needed to meet the burden of proof, and highlights the importance of the closing argument. While the plaintiff/prosecution's opening statement is merely a promise of what the evidence will show, the closing argument is when the party with the burden of proof gets to tell the jurors what the evidence did show, and what that evidence means for their verdict. Effective summations not only summarize the evidence, but tell jurors how to apply the evidence to their verdict forms. Remember, they don't know the rules of the game until the game is over. The closing argument is when you get to tell them how to keep score.

Ellen Finlay responds:

Ellen Finlay, JD, [juryfocus@yahoo.com] a recovering trial attorney, has practiced as a trial consultant throughout the U.S. since 1998. Her company, Jury Focus, is based in Houston, Texas. (info@juryfocus.com).

As someone who spent the first twelve years of my career trying cases in state and federal court in Texas and the last twelve plus years working as a trial consultant, I was keen to read the results of the research presented in this article. Frankly, I knew before reading it that I would have strong opinions about the topic based on my personal experiences. My initial reaction to the publication was to simply discount the findings based on concerns I had with the structure of the research. But, as someone wiser pointed out, criticism unaccompanied by constructive advice accomplishes nothing. So here goes.

I believe it would be helpful if someone with actual, real world experience in the courtroom helped design this type of research in the future. I say this because I believe many of my concerns over the design of this research project and the resulting analysis would have been anticipated by lawyers who have tried cases to a verdict or trial consultants who have suffered through those trials with them. Preferably more than a few cases.

First, I am skeptical of the results of any research on attorney performance that combines both criminal and civil jurors and verdicts in one study. Anyone who has spent any time dealing with these two areas of the law knows that everything about the two systems is different. This is especially true in cases involving allegations of violent crimes. I also question the results of any study based solely on federal court cases and federal court jurors. While I cannot speak for every jurisdiction, I can tell you that most federal court cases differ dramatically from state court cases in Texas. I cannot think of two worlds less alike when it comes to the practice of law. It would take hours to identify all of the ways these two worlds differ. And these differences impact not only the way the attorneys act (including their choice of language and style) but also what they are allowed to do and say. Most attorneys practice in state court where they are often afforded more latitude to, shall we say, "express themselves" and present their case as they see fit. Federal judges are far more likely to keep a tight rein on their courtroom and the attorneys' openings, closings and presentation of evidence.

It would also be helpful if the research were designed to tease out the possible differences and motivations of those jurors who agreed with the verdict rendered in their cases versus those who disagreed with the verdict. If someone is pro-prosecution before walking into the courtroom, are they more likely to approve of the prosecutor's opening argument? I suspect they are. I am not sure that a paper questionnaire filled out after a verdict is rendered is up to the task of digging deeply enough into the minds and motivations of the jurors. While trial attorneys are always looking for helpful ideas and strategies to increase their effectiveness at trial, I suspect the finding on page 12 that a defense attorney may be better off if he or she

presents a less than stellar opening will strike most practicing attorneys as a red flag and indication that there may be subtleties that are being missed as a result of the limitations of the questionnaires utilized for this research.

Let me address a few of the findings and comments that I know will not sit well with my colleagues. First, the researchers suggest that defense attorneys may overrate their own performance. Maybe this is true. We are trial lawyers after all and we have notoriously big egos. But, maybe the attorneys accurately assessed the quality of their overall performance but the jurors had a mind set to disagree with their case and this bled over to their retrospective assessment of the defense attorney's performance. A great attorney who gives a fine opening will not be able to convince the average juror that insurance companies are the good guys or that Bin Laden is just misunderstood. And the jurors' preexisting views of the defendants may well affect how the juror rates the attorney's performance. It is obvious that teasing out these factors in a controlled fashion may be impractical if not impossible. But, if the research cannot be designed to factor in this reality, then it is doubtful most attorneys will find the results terribly helpful or credible.

Second, the suggestion that jurors are more susceptible to closing arguments at the conclusion of trial and that their retrospective opinions about the quality of the closing arguments are significant predictors of the actual verdict will likely cause most attorneys to roll their eyes. The researchers attempt to explain this finding through considerations of recency and primacy effects. While such effects may play some role in the dynamics observed, it will be hard for most attorneys to ignore the obvious notion that a juror is more likely to applaud the closing of the attorney who voices their views about the case. As in "I totally agree with you Mr. Prosecutor. The defendant is a scumbag. And by the way, you rock." Again, which came first? The juror's opinion about the facts of the case or the juror's opinion about the attorney's performance? And how can you know this if you question someone about their views after the trial is over?

But the statements that will probably raise the most eyebrows of experienced attorneys are the multiple references to the possibility that a specific finding may be attributable in some way to a juror's application of the burden of proof. I want to meet those jurors. I want the opportunity to keep those jurors on one of my panels! I don't mean to be flip, but someone with years in the trenches will know that most jurors pay minimal attention to burden of proof.

Here's my bottom line. Jurors are complicated beings and all trials are not created equal. Therefore, this type of questionnaire administered to this combination of jurors AFTER they've reached a verdict is not calculated to provide data that will be meaningful to most attorneys.

Response to

The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict

By Mark Bennett

Mark Bennett is a criminal defense lawyer in Houston, Texas, where he practices with his wife Jennifer, two brilliant beautiful children and two loyal Rhodesian Ridgebacks. Mark also writes the [Defending People blog](#), in which he explores, among other things, the incorporation of other technologies into trial practice.

As a criminal-defense trial lawyer, I have long said that talking to a jury after a verdict is a great way to be lied to. Go back in the jury room and listen to a jury, and one of two things happens: if your client was convicted, you did a terrific job ("I'd hire you myself!"), but the State just had too much evidence; if your client

was acquitted, your carefully crafted defense was something that the jurors thought of themselves, but it really wasn't important because the State just didn't have enough evidence.

Jurors' verdict motivations are elusive. "Lied to" is probably neither fair nor accurate. Jurors are untruthful not because they are dishonest, but because they aren't very self-aware—which is just fine with me. The best trial lawyering is transparent: jurors don't realize they've been persuaded, played, entranced, or otherwise hoodooed, and I prefer it that way (unless it's my adversary trying to do the hoodooing).



Here's my practical explanation of post-verdict feedback: jurors are given a rigid and sometimes complex set of rules for how they should make up their minds—the jury instructions—after they have made up their minds but before they are asked how they made up their minds. So when they are debriefed after reaching a verdict, they give an explanation that fits those rules, even if their decision-making process did not.

So we have *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*; might it be vice versa? Do juror perceptions affect their verdicts, or do jurors' verdicts affect their reported perceptions? Chickens, eggs, and social-desirability responding.

If, instead of the article's unspoken premise that jurors are truthful when rating their perceptions of lawyers, we start with the premise that they are not; if, instead of asking how jurors' perceptions affect their verdicts, we ask how jurors' verdicts affect the stories they tell about their perceptions, the research still provides some interesting data.

After verdict, jurors tell a story in which the plaintiff's opening statement did not predict the verdict because they know that they're not supposed to have decided the case based on the opening statement. In this story, the plaintiff's evidence presentation and preparedness (measures reflecting the quality of the proof) correlate somewhat with the verdict because jurors know that they're supposed to have based their verdict on the evidence. The strength of the plaintiff's closing argument strongly predicted the verdict because the jurors know that they were supposed to have waited until after closing arguments to make up their minds. And so forth.

Jurors' recognition of their duties is not the only factor that might lead them to skew their story. Jurors might rate the defense attorney's opening statement better after a defense loss just to do something nice for her—as a sort of condolence prize. (A jury once told me after a guilty verdict that I had told my client's story so well in opening that they didn't believe him when he told the same story.)

It's not hard to explain jurors' responses as post-verdict satisficing. Are jurors actually telling a socially desirable story with their survey responses? If the research excludes the possibility of satisficing, the article doesn't tell us.

Assuming that the article's cause-and-effect assumption is correct, though, what is the lesson for the practitioner? I think the authors say it best: "Taken together, these findings have implications for attorneys." What implications? Well ... er ... um. Work on preparation and closing argument? I doubt that anyone needs this article to tell them that; beyond that, I hope that defense lawyers won't, based on the research, try to make worse opening statements and plaintiff's lawyers won't, after reading the article, try to be less sincere.

Aside from the cause-and-effect assumption, I have one quibble with the article. Wood and his colleagues lump personal-injury lawyers with prosecutors. I had to ask a Professional Jury Consultant, after reading it, whether the conventional wisdom is that criminal-defense lawyers are more like insurance-defense lawyers

than they are like personal-injury lawyers. Maybe the grouping makes sense (because, for example, both have the burden of proof), and maybe it is supported by the research in a way that is not revealed in the article.

But the tone of criminal-defense practice—representing the little guy against the institution—is more like that of plaintiffs’ PI practice than anything else. I would like to see the numbers reworked, with “lawyers for people” (criminal-defense and plaintiffs’ PI) grouped together, and “lawyers for institutions” (prosecutors and insurance-defense lawyers) grouped together, and see if any different or other interesting patterns emerge.

a reply from the authors...

The Influence of Jurors’ Perceptions of Attorneys and Their Performance on Verdict **Steve M. Wood, Lorie L. Sicafuse, Monica K. Miller, and Julianna C. Chomos**

The following discussion is our response to the comments and concerns of Mark Bennett, Leslie Ellis, and Ellen Finlay. We have four goals for this response. First, we aim to address some of the major concerns offered by the experts. Second, we look to clarify some of the results and implications in the manuscript. Third, we will elaborate on some of the discussion points raised by the experts. Finally, we offer areas and suggestions for future research studies examining the relationship between attorney performance and verdicts.

Concerns

The main concern of two of the experts was that we analyzed the criminal and civil trials together. Bennett suggests, “...I have one quibble with the article. Wood and his colleagues lump personal-injury lawyers with prosecutors... Maybe the grouping makes sense (because, for example, both have the burden of proof), and maybe it is supported by the research in a way that is not revealed in the article.” Additionally, Finlay states, “First, I am skeptical of the results of any research on attorney performance that combines both criminal and civil jurors and verdicts in one study. Anyone who has spent any time dealing with these two areas of the law knows that everything about the two systems is different.” These are astute observations and we agree that differences do exist between all aspects (e.g., attorneys, cases, judges) of criminal and civil proceedings.

However, we based our analysis on the procedures of prior research (e.g., Johnson, Wahlbeck, & Spriggs, 2006; Szmer, Johnson, & Sarver, 2007) containing information for both criminal and civil verdicts. We would be open to the possibility of re-analyzing the data with this suggestion in a future article in *The Jury Expert*.

Associated with the concern of combining criminal and civil trials, Bennett suggests, “I would like to see the numbers reworked, with “lawyers for people” (criminal-defense and plaintiffs’ PI) grouped together, and “lawyers for institutions” (prosecutors and insurance-defense lawyers) grouped together, and see if any different or other interesting patterns emerge.” Once again, this is a great suggestion and, if invited to do so, we will use this suggestion for a future article in *The Jury Expert*.

Another concern raised by the experts was that “jurors might rate the defense attorney’s opening statement better after a defense loss just to do something nice for her—as a sort of condolence prize.” While we agree that this may be an issue in post-trial interviews conducted by attorneys and trial consultants, the current study attempted to avoid satisfaction by giving the jurors the questionnaires away from the attorneys, not collecting personal juror information, and allowing only the courts and researchers access to the responses. However, as Bennett points out, the possibility of socially desirable responses is always present.

A final concern of the experts was that we collected the responses after the trial ended. Unfortunately for us (or fortunately because it added to the realism), we were not afforded the opportunity to gather these

responses at any other time. In a controlled environment, such as a university campus, we could have varied when we gave the jurors the questionnaires. Some jurors could have gotten them before deliberation and some after deliberation. However, the only way to achieve this manipulation would be for us to use *mock jurors* in a *mock jury* setting. As an aside, Mr. Wood has conducted a prior study in which he was able to vary when mock jurors rated the attorneys and gave their verdicts. In this mock trial, it did not matter (i.e., was not statistically significant) if participants filled out the questionnaires before or after they rendered their verdicts—the verdicts and attorney ratings were the same.

Clarifications

In addition to alleviating statistical and design concerns, there are two implications of our manuscript that we would like to clarify. First, there was a concern that our article was suggesting that defense attorneys make worse opening statements. We apologize if this is how the results came across, as this was not our intended message. This was an unexpected finding and we were attempting to explain why this might have occurred. A more general conclusion may be for defense attorneys to be cognizant of the fact that aspects of their opening statements may be related to final verdicts—a concept that researchers have been debating for some time. As Finlay correctly points out, “I suspect the finding on page 12 that a defense attorney may be better off if he or she presents a less than stellar opening will strike most practicing attorneys as a red flag and indication that there may be subtleties that are being missed as a result of the limitations of the questionnaires utilized for this research.” We agree that there are probably subtleties at work that we were unable to evaluate due to the secondary nature of the data set. Future research would benefit from attempting to parse out these subtleties.

There was also a concern that our article was suggesting plaintiff’s lawyers try to be less sincere. Once again, this was not our intended message. Rather, we would suggest that an attorney strike a balance between being sincere and assertive in the courtroom. As Ellis aptly puts it, “they may want to go get a beer with you, but it doesn’t mean they’ll find for you.”

Elaboration of Discussion Points

In their responses to our manuscript, the experts took the opportunity to expand on our discussion and offer their own commentary. These were very astute observations and we would like to expand on their points further.

Toward the beginning of his response, Bennett points out, “So we have *The Influence of Jurors’ Perceptions of Attorneys and Their Performance on Verdict*; might it be vice versa? Do juror perceptions affect their verdicts, or do jurors’ verdicts affect their reported perceptions? Chickens, eggs, and social-desirability responding.” Finlay supports this contention by stating, “Again, which came first? The juror’s opinion about the facts of the case or the juror’s opinion about the attorney’s performance? And how can you know this if you question someone about their views after the trial is over?” These are both very good points. The possibility exists that it could be a situation in which jurors change their stories in order for it to fit within a preferred cognitive framework. Past social cognition research has found that individuals will often make biased searches through their memories in order to find information that fits with their preferred outcome. For example, a juror that has voted in favor of the defense may search their memory for instances to support the contention that the defense attorney was strong, while omitting contradictory information.

Ellis makes several points that are supported by our research. For example, she states, “We often find that it’s not that they like an attorney and therefore they like that attorney’s case. Rather, jurors tend to prefer the attorney who presented the case they thought was more credible... The exception to this general rule is when there is something about the attorney’s demeanor or personality that undermines the credibility of the case...Jurors quickly figured out that the attorney was misrepresenting events, and if they couldn’t believe everything he said, they couldn’t believe anything he said.” We could not agree more with these statements

and believe that they represent the crux of the current research. That is, when attorneys present themselves in front of a jury, the jurors are paying attention to more than the case evidence. They are evaluating the attorney also. Do I like his or her demeanor? Do I believe he or she is well prepared? Ultimately, do I believe that he or she is credible as an attorney? These questions are being asked and answered in the minds of the jurors as they simultaneously attempt to process the case information. As our research and past research has shown, the answers to these questions may lead jurors to process the case information differently.

Future Research

To further address some of the concerns of the experts, we propose future research directions. First, to address Finlay's assertion that significant differences exist between federal and state courts, future research should examine verdicts from state courts as a comparison sample. Second, Finlay suggests that, "If someone is pro-prosecution before walking into the courtroom, are they more likely to approve of the prosecutor's opening argument?" This is a great suggestion and future studies should administer pre-trial questionnaires to assess pre-existing biases and how they may influence verdicts. There is some literature to attest to pre-existing beliefs and verdicts, but more research is needed regarding how these beliefs may influence perceptions of attorney performance. Finally, we previously discussed that there was a concern that we collected responses after the trial had concluded. This creates a situation of "the chicken or the egg." Future studies should vary the administering of questionnaires by requiring some jurors to rate the attorneys' performance before deliberation and some jurors to rate the attorneys' performance after deliberation.

As Finlay properly sums up, "Jurors are complicated beings and all trials are not created equal." Absolutely, the field of psychology has tried for decades to explain decision-making, and thousands of studies pieced together have not even come close to explaining it fully, because of the complicated nature of humans.

Therefore, as researchers, we face the same challenge when we study jurors. Several studies are needed to create a bigger picture and explain all the caveats. Thus, this study (as with all studies) has some limitations, and future studies and analyses can fill in the gaps to help us really tell what is going on.

Citation for this article: *The Jury Expert*, 2011, 23(1), 23-41.

January 2011: Our Favorite Thing

It's a New Year. And with that come the obligatory resolutions. I will do this good thing. I will. I will. I will. What we know from the research is that if you make a public commitment to do something—you are more likely to maintain that new behavior.

And this January—although it's cold and brisk in many parts of the country—our Favorite Thing will warm your heart. Because it's really a gift for you. From us. We know. We should have. And we did.



THE RED WELL

A Blog Aggregator For Views On Litigation Persuasion

[Ken Broda-Bahm](#) and [Erik Brown](#) have spear-headed a new blog aggregator called [The Red Well](#). What's it for? It compiles blogs from some of the nation's leading litigation consultants into one easy to keep track of website that you can stick in your favorite reader or simply bookmark to check often.

“The Red Well provides a one-stop opportunity to browse opinion and analysis on the subjects of litigation communication, persuasion, advocacy, and psychology relating to trial and pre-trial settings.”

So, thanks Ken and thanks to all of you out there who read our collective ideas and let us know when we do good work! [And who keep us making good on our resolutions to share our ideas and experiences through active and regular blogging.]

Eat the Rich: Juror Questionnaires for White Collar Cases

by Diane Wiley

There have been many cries to “eat the rich” over recent years in relation to white collar crime. We all know the culprits – Bernie Madoff and the rest. This article will focus on questions which defense counsel may want to use in white collar cases, whether high profile or not.

In white collar cases where the case and the defendant(s) are not likely to be known to many of the jurors, the problem is often in convincing the judge to use a juror questionnaire. Since many of these cases are tried in federal court where there is little jury selection, it's very important to make a strong case for the questionnaire. Many potential jurors will have biases and prejudices against the defendant(s) based simply on the kind of crime they are charged with and their general resentment of “rich” or “powerful” people who are accused of abusing their privileges. Don't make the mistake of thinking that since your client “simply” makes less than a million a year or is “only” charged with embezzling \$100,000, they won't be subject to this type of prejudice. The average wage in the US is around \$50,000 a year and that means that half the population makes considerably less than that. Many jurors will undoubtedly believe what we might consider a “small” amount of money to be significant.

In the white collar crime cases that do not receive a high profile in the press, the issues are a little different and it's often harder to persuade the judge to use a juror questionnaire. This isn't as big a problem if you are in a state court where there is a decent amount of time to conduct voir dire, but in federal court or a limited state court, the questionnaire can be the difference between actually knowing something about the jurors or not.

The biggest problem for the defense in high profile cases is that “everybody” does in fact “know” about them. But most of the time, they don't know the details. They know there are charges, they know that there is a lot of money involved and they know about the often excessive, sometimes obscene, lifestyles of the defendants.

The oldsters at the National Jury Project started out working on high profile criminal cases, with political and/or racial issues in the early 1970's. We quickly found ourselves working on high profile criminal cases of all stripes. What is interesting is that the vehemence, and sometimes glee, with which communities (and thus our jurors) turn on those in power who are charged with crimes has not changed. What has changed is the amount of media available and the extent to which jurors, if they so choose, can read from numerous sources and in any amount of detail they want about the defendants. They can look up the indictment, they can find out everything from where the defendant went to grade school to the make and color of his numerous cars. And some of our jurors do this. They become obsessed with the case. They discuss the details with friends and relatives. But most of our jurors don't care to know that much. They see the headlines, the images on TV and file their reactions away under, “This REALLY makes me mad,” or “Another disgusting rich guy fraud,” or “I don't care, it doesn't affect me”. It is generally pretty easy to get a take on the potential jurors who have read a lot and are really opinionated about a high profile case. The hard part is reading those who haven't read that much but are opinionated anyway.

Most judges are now willing to grant juror questionnaires in high profile criminal cases. The issue then becomes, what is the most useful way to construct a questionnaire for white collar, high profile cases. We've all seen 75 page juror questionnaires, but most judges aren't interested in producing that amount of paper. I've found that, on the whole, the amount of time you have to analyze the data and the structure of the jury selection should control how many questions you ask. It doesn't do you much good to have 75

pages of questions for 100 jurors that you receive on the weekend before the selection because you won't have time to analyze them. And if the judge is not used to using questionnaires, submitting an extremely lengthy questionnaire is not likely to convince him or her it's necessary.

If you're in a jurisdiction where juror questionnaires are not typically granted, it's best to file an extensive motion along with the questionnaire. Many judges remain resistant to juror questionnaires and it's best to assume they will have to be persuaded. It's important to outline how a questionnaire can help and what the rationale is for using a questionnaire as opposed to just asking questions in open court. Any impact on jobs or local institutions that have occurred as fall-out from the alleged fraud or other crime should be identified as a possible source of prejudice against the defendant(s). News articles can be attached to the motion, highlighting negative editorial or reader comments about the defendant(s), whether on the web or in the written press, or if you can find it, on television or radio, to persuade the judge to grant the questionnaire. Keep in mind that sometimes comment sections in papers on the internet are discontinued after a period of time, so begin to collect negative news coverage immediately. You should also identify issues relating to the case which jurors might prefer not to discuss in open court. You may want to append lists of questionnaires granted in similar cases or jurisdictions.

The purpose of the questionnaire from our standpoint is to help us identify bias and prejudice, get cause challenges and intelligently exercise our peremptories. In any case, when looking at jurors, we are trying to identify their (1) experiences, (2) assumptions, (3) attitudes and (4) ideology. The questionnaire, in conjunction with voir dire questions, should be constructed to try to address each of these areas as they relate to the specific facts of the case.

Of course, any jury questionnaire has to be tailored to the case and the jurisdiction. In order to prepare a good questionnaire for any case, trial consultants should do a search of local and national news stories that jurors could have read, with attention to the language used to describe the alleged crime(s) and the defendant(s). In many high profile cases, we will have mock trial data which can give us clues about what types of opinions and specific knowledge about the case seem to lead to prejudice. If the case does not have the resources for a mock trial, consultants and attorneys should talk to non-attorney friends about their reactions to the general case facts to identify possible reactions.

There are some questions that will elicit the biases we see against anyone who is or will be perceived as being "rich" or of the "scoundrel" class, regardless of the case. In addition, there are general questions about the industry or business involved and other experiences jurors may have had which will affect how they approach the case and their ability to understand the issues.

Following are some of the questions that have worked well in our questionnaires, many of them general, some more specific. Remember, as always, that there is rarely one question by itself that will tell you whether to strike a particular juror or not. I have left out extra lines for many of the questions. In general, if you are asking for an explanation, you will need two to three full lines for answers.



It's important to identify people who have worked in any of the fields that might be discussed in the case. In one case, the defendants were charged with securities fraud based on how inventory was represented in the books of a company they owned. Thus it was important to identify potential jurors who had knowledge or training that would give them a specialized understanding of the fields involved.

1. Have you ever had any training or work experience in any of the following? Please check all that apply and explain below:

	No Experience	Training	Work Experience
Manufacturing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sales	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Inventory Monitoring	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Accounting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Bookkeeping	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Auditing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Banking/Finance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Financial Planning	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Investment Banking	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Business Management	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stock analyst/trader/broker	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Securities analyst/trader/broker	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If training or experience in any of the above areas, please explain what your duties are/were and where you work(ed):

Cases involving government contracts have their own separate issues and it's important to identify who in the panel would have worked for a government contractor. Depending on what the potential juror's job duties were, they might become an "expert" in the jury room as to what a company should or shouldn't do as a government contractor.

2. Have you or any member of your family ever worked for a government contractor?

_____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain: _____

Jurors with a general interest in or knowledge of business will often have different takes on the facts in white collar cases.

3. Do you read publications that focus on business news or watch business shows on television or listen to them on radio or the internet? _____ Yes No _____

IF YES:

Business publications or news sections: _____

Business television shows: _____

Business radio shows: _____

Internet business sites: _____

4. Have you or anyone in your immediate family ever been self-employed or owned a business? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

- a. Are you/they still operating the business? _____ Yes No _____

IF NO, why not? _____

b. Please describe the business: _____

c. Was this experience positive _____, negative _____, or mixed _____?

Please explain: _____

In white collar cases which involve alleged frauds against stockholders, it is important to understand the experience, level of understanding and knowledge potential jurors have about investing.

5. Have your experiences with investing generally been:
- positive negative mixed I have no experience

Please explain: _____

6. Have you or anyone you know ever had any negative experiences with an investment counselor or advisor? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain: _____

7. Have you or someone close to you ever lost money on an investment where you thought the loss was caused by someone else's wrongdoing, fraud or dishonesty? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain: _____

8. Have you or has anyone close to you ever lost what you considered to be a significant amount of money on a business or other investment that did **not** involve fraud? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please describe what happened and the outcome: _____

9. With regard to investments, which of the following statements apply to you or your spouse/partner (Check all that apply.)

- I/We have no investments
- A financial planner or stockbroker **advises** me/us.
- A financial planner or stockbroker **manages** my/our investments
- My/his/her employer handles the investment decision making.
- I take the lead in household investment decisions.
- My spouse/partner takes the lead in household investment decisions.

10. Do you or your spouse/partner own, or have either of you ever owned, any of the following types of investments:

	No	Yes	Currently	In the Past
Money Market Account	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
U.S. government bonds	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Mutual Funds	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Real estate (other than your home)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Stock(s) in a <u>publicly</u> owned company	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Stock(s) in a <u>privately</u> owned company	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Stock Options	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>
Other (please describe):	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse	<input type="checkbox"/>	<input type="checkbox"/>

Case specific questions related to biases which jurors might have which would preclude them from accepting the defense should be included. For example, if the defense is that the cooperating witness is the person who perpetuated the fraud, you may want to ask the following.

11. Do you think that fraud can occur at a corporation without the knowledge of its CEO? _____ Yes No _____

Please explain your answer: _____

If the defense is challenging the results of a government or other audit of a company, jurors who have experience with an audit will have specific attitudes about them.

12. Have you ever been involved with an audit of financial records for a company you worked for? (This could include an IRS audit or an audit by internal or external accountants.) _____ Yes No _____

IF YES, please explain: _____

13. Have you ever been involved in an audit of your personal finances? _____ Yes No _____

IF YES, please explain: _____

If the case relates to the collapse of a business or stock where others in the community were affected, it's essential to ask about that.

14. Were you or anyone you know affected personally by the (bankruptcy of the _____ company)? _____ Yes No _____

IF YES, is this: Yourself Spouse Child Family Friend

Please explain: _____



Besides asking about connections to law enforcement and the courts, it's always a good idea to ask about any connections potential jurors have to other governmental agencies which have any enforcement or regulatory responsibilities.

15. Have you or anyone you know ever worked in any of the following agencies or departments:

Agency	No	Yes	Explain
United States Attorney's Office	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
District Attorney or Prosecutor's Office	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
U.S. Department of Justice	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
State Supreme Court	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Courts/Judicial System (local, state, or federal)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Federal Bureau of Investigation (FBI)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Sheriffs Department	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Police Department	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
State Police/State Troopers	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Securities and Exchange Commission (SEC)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Drug Enforcement Administration (DEA)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Immigration and Naturalization Service (INS)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
United States Postal Inspection Service	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
_____ State Department of Taxation & Finance	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Department of Homeland Security	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	
Internal Revenue Service (IRS)	<input type="checkbox"/>	<input type="checkbox"/> Self <input type="checkbox"/> Spouse <input type="checkbox"/> Family <input type="checkbox"/> Friend	

16. Have you or anyone close to you worked for a company where there have been allegations of wrongdoing by corporate executives? _____ Yes No _____

IF YES, please explain: _____

Whether or not the defendant(s) is well known, it's important to find out what, if anything the jurors know and think about him or her.

17. Have you read or heard anything about (the defendant) ? _____ Yes No _____

IF YES, please describe what you remember reading or hearing about him:

What is your impression of Mr. _____ from what you have read or heard?

18. Mr. _____ is a very wealthy man who led a lavish lifestyle. Do you have any negative feelings or resentments of very wealthy people that might interfere with your ability to be fair and impartial to Mr. _____ in this case? _____ Yes No _____

When asking whether potential jurors know about the case, it is important to include enough detail that jurors who have only seen some information about the case can identify it.

19. In this case, _____ and _____ are charged with a number of counts of conspiracy to commit fraud and to defraud _____ in connection with _____. In addition, they are charged with a number of counts of wire fraud. Mr. _____ and Mr. _____ each deny the charges and have pled not guilty. Have you heard anything about this case or the people involved or did you see or hear any news reports about it or do you know anyone with any connection to the situation? _____ Yes No _____

IF YES: What have you heard or read about this case or the people involved, where did you hear or read about it and what stands out in your mind about the situation?

20. The government alleges that the defendants defrauded the shareholders of _____ of millions of dollars. Do you believe you might have difficulty being impartial and objective in a case involving such allegations? _____ Yes No _____

IF YES, please explain: _____

21. Is there any reason why you think you might have difficulty being completely impartial in this particular case or is there any other reason why you feel you couldn't or shouldn't sit as a juror in this kind of case? _____ Yes No _____

IF YES, please explain: _____

Judges will sometimes allow the following question which gives you insight into jurors' values.

22. Please name the famous person you admire most and explain why. (Please name an individual whom others would be likely to know).

Any questionnaire for a criminal case should include basic questions about attitudes towards the criminal justice system.

23. Do you have any problem with the legal proposition that the prosecutor must prove that a defendant is guilty beyond a reasonable doubt or he or she must be found not guilty? _____ Yes No _____

Please explain: _____

24. Do you have any problem with the legal proposition that a defendant must be presumed innocent unless and until the prosecution can prove he or she is guilty? _____ Yes No _____

Please explain: _____

25. Do you have any difficulty presuming that Mr. _____ is innocent right now? _____ Yes No _____

IF YES, please explain: _____

26. Under the law, every defendant has the constitutional right to not testify in his or her own defense. If a defendant does not testify, the jury may not consider that fact in any way in reaching a decision as to whether the defendant is guilty or not guilty.

Would you be able to find a defendant not guilty who did not testify, even if the government did not prove beyond a reasonable doubt that the person was guilty?

_____ Yes No _____

IF YES, please explain: _____



Some jurors will not want to talk about some of the issues in the questionnaire in front of other jurors if there is a need for follow-up questions. The length of many of these cases will preclude some jurors from serving. We generally end our questionnaires with the following questions.

27. Is there any subject covered in this questionnaire that you would prefer to discuss in private instead of in front of the other jurors in open court?
 _____ Yes No _____

What question or questions are those? _____

28. The Court and the parties estimate that the trial in this case will last approximately ___ weeks. Every effort will be made to accommodate special needs of individual jurors. Jurors will be paid an attendance fee of \$___ per day (for the first 30 days of trial, and \$___ per day thereafter.)

Jury service is one of the highest duties and privileges of a citizen. The participation of people like you is essential to the proper administration of justice. The Court recognizes that not everyone can serve on a case of this length. However, mere inconvenience or the usual financial hardships of jury service will not be enough to excuse you. You must show that service in this case would cause an unacceptable amount of personal hardship.

Would you have a serious hardship if chosen for this case?

_____ **YES**, I would have a serious hardship if chosen for this case.

_____ **NO**, I would have not have a serious hardship if chosen for this case.

IF YES, please explain your hardship in detail: _____

29. I affirm, under penalty of perjury, that I have given complete and honest answers to all of the questions above.

 Signature Date

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, a founder of the National Jury Project and President of the Midwest Office in Minneapolis. Diane has extensive experience in assisting attorneys and prides herself on making her work available to attorneys on cases both big and small across the country since 1973. 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.

Citation for this article: *The Jury Expert*, 2011, 23(1), 43-52.

How to Pack Like a Pro

By Tara Trask

“If you can pack a suitcase well, it means you have balanced your life.”

Diane von Furstenberg

I’m not sure if Ms. von Furstenberg’s observation is true, but to me there is something incredibly satisfying about traveling light and yet always feeling that I have what I need to look good, and, more importantly for business travel, to look appropriate for the situation. After 17 years and over a million and a half miles in the air, I’ve come up with some tried and true tips for packing that incorporate speed, efficiency and style to maximize preparedness and minimize headaches and back strain.

After 9-11, when TSA instituted the 3-1-1 rule (3 oz. bottles of liquid or gels, to fit in 1 quart size clear plastic zipper bag, 1 per traveler), I started checking my suitcase because my toiletry bag was certainly larger than a flimsy quart size Ziploc. For several months I endured the grind of checking and retrieving my bag. Because I was checking anyway, I took a larger bag and more stuff. At the end of the day, I came to a few revelations about this new process.

First, I started to do the math. I fly roughly 5 trips a month, sometimes more, sometimes less, and I often skip from city to city. Figuring conservatively, let’s say that’s 45 round trips per year. That is 45 luggage check-ins, and 45 luggage retrievals per year. Even with elite status on my airline of choice and thus quicker lines, I was spending at least 10 minutes checking and 30 minutes retrieving my bag on each trip. The results of this were frightening. I was spending over 30 hours per year dealing with luggage. Life is too short to spend it waiting on luggage!

Also, more “stuff” did not equate to better preparation once I arrived at my destination. My packing was inefficient, and I often arrived with more than I needed. Also, more stuff just meant more to pack on both ends of the trip – more wasted time. And, there was always the risk of the worst nightmare - the airline losing my luggage. I decided to make a change.

3-1-1

Initially, my biggest challenge was how to pare down my toiletries. What can I say? I’m a girl. I need my potions. Once I started looking hard at the contents of my bag, I realized that (of course) not everything in my toiletry bag is a liquid or gel. I found that there are some things that come in liquid or gel form that also come in solid form (deodorant, sunscreen, perfume, etc.). If you aren’t picky about brands, you can order small versions of almost anything at: <http://www.alltravelsizes.com/00-z-00-z.html>.

I came to realize that I didn’t need large quantities of my toiletries (eye cream for example) because they could be squeezed into tiny little bottles and tubs. I found a great bag at my local drugstore. It’s a tougher plastic than a Ziploc with a real zipper that won’t pop open when stuffed. It comes with a slew of little bottles (even spray bottles) in different sizes. I don’t mind filling the little bottles, because it doesn’t take long and then I have exactly what I need. I have a drawer in my bathroom containing travel sizes of items

that I can't easily refill like hairspray and toothpaste. Speaking of toothpaste, those tiny tubes for travel are only about an ounce and a half and last maybe three days. Luckily, Colgate is now making a full 3 oz. version and it lasts almost a week. My second bag is also clear plastic and contains all my toiletries that aren't liquids and gels, things like makeup brushes, Q-tips, hair bands, eye shadow, etc.



Now this is the part that is going to sound a little bit crazy, but I swear by it. I've found over the years that I spend a huge amount of time trying to make sure I have all the toiletries I need. You know the drill, you stand in the bathroom, basically walking through your morning routine to make sure you have everything . . . ok, shampoo, conditioner, comb, hairdryer . . . no, oops, I need my volumizing spray," that kind of thing. I started to realize that it was taking me an extra 10 minutes to pack my two small toiletry bags just because I was trying to keep a rather large list in my head. So, I made two small lists, one for each bag, put them in a small font, printed them off on the computer and laminated them. They live in my bags and I can easily cruise down the lists when I'm refilling bottles and packing my toiletry bags, easy and much faster.

Less stuff

I now travel almost exclusively with a carry-on roll aboard suitcase. I also carry a large satchel that operates as a briefcase. I keep a small handbag in the satchel so as not to violate the airlines' two carry-on limit. On lots of trips, only one of everything is necessary. This is not the case if you plan to be at one destination for many days. However, if you are jumping from city to city over many days, the one-per rule works, meaning one suit, one (or two) blouses, one sweater, one set of workout clothes, one pair of each kind of the following shoes: heels, flats, athletic. I've done many nine day trips with this system. Lots of things can be hand washed in the sink, or sent to the cleaners at the hotel.

What stuff

It's imperative to think in separates, rather than complete outfits. I never take anything that doesn't go with everything else. When you are trying to pack light, always pick one base color. I can base color with grey, black or navy. I supplement these base pieces (suit, slacks, jeans, heels and flats) with more colorful pieces, patterned blouses and a colorful sweater or jacket, but it's still important that everything go with everything else. If you want to have boots or a large coat with you, wear them.

Architecture of the pack

My system for how objects are packed never changes. All shoes go in the bottom, but I also take into consideration that the bag will spend a lot of time upright (handle up, being rolled), so I put my athletic shoes on the bottom (or to the right if the bag is open and I'm packing it), and I load shoes heavy to light from there. I usually travel in boots or flats depending on the season, so I normally only carry two other pairs of shoes: one pair of heels and one pair of athletic shoes. I almost always carry a pair of flip-flops regardless of season. They are great in the summer and perfect in the hotel when you need to run down to the vending machine or the front desk.

From here I start to stuff in everything that doesn't need to stay unwrinkled. I stuff socks, underwear, workout gear and hosiery around the nooks and crannies created by the shoes. Casual t-shirts, workout gear and a ball cap usually round out this layer. This is my base layer. On top of that goes jeans or slacks,

tops and sweaters. Toiletries and a hairdryer round out the main compartment. I know what you are thinking . . . “A hairdryer? Every hotel has a hairdryer.” Right, but not one that is ionic. My hair dries twice as fast with that thing . . . it is worth its weight in gold.

The suiting compartment in the lid of the case houses my suits, one or two at most, blouses and maybe an extra skirt or slacks. I pack everything individually in dry cleaning bags. This works. No wrinkles. None.

I can pack a suitcase well. Does it mean I have a balanced life, as Diane von Furstenberg notes? I’m not sure you can have a balanced life when you fly over a hundred thousand miles a year, but there is something about being prepared, feeling appropriately dressed for any occasion, and not wasting time that at least makes me feel like I’m moving in the right direction.



[Tara Trask](http://www.taratrask.com) is CEO of Tara Trask and Associates, a full service litigation strategy, jury research and trial consulting firm with offices in San Francisco and Dallas. She does work all over the country with a focus on intellectual property, products, mass torts and other complex commercial litigation. Ms. Trask is a sought after author and speaker on trial science topics and she serves as President-Elect of the American Society of Trial Consultants. You can read more about Ms. Trask at her webpage www.taratrask.com.

Citation for this article: *The Jury Expert*, 2011, 23(1), 53-55.

Editor's Note

2011. That happened fast! But we're ready (more or less). We're doing new things here at *The Jury Expert* in 2011. And we are excited about them. In our next issue, we'll have professional layout so you won't have to put up with my amateurish efforts any longer. (You are no more relieved than I!) And. Also in our next issue, we expect to have a new web design that will just amaze you. It will be beautiful. Trust me.

Also in 2011--we are introducing a new sort of respondent to the articles we publish from academics. So far, we have always had trial consultants respond to those pieces with thoughts on how they would (or would not) use the research findings in court. Now--we are adding in trial lawyers. Have you wished you could have your [tactful] say? Now you can. Just send me an email (rhandrich@keenetrial.com) and let me know you would like to respond to a *Jury Expert* article. You can see a how-to from Mark Bennett (a Houston criminal defense lawyer) in this issue. We thought it would be interesting to see how the thoughts of trial lawyers diverged and/or converged with the thoughts of trial consultants. So line up, oh gentle readers. Show us what you've got.

So in this issue of *The Jury Expert* you will find ways to do what you do better, smarter, and more efficiently. You will find ways to keep up with what's new, pack your bag (lightly), craft a SJQ for white collar crime cases, do better voir dire, consider how bifurcation interacts with hindsight bias, and get practical and useful tips for cheap DIY trial graphics. Just our effort to help you maintain your resolutions to do what you do better, smarter, and more efficiently.

Welcome to 2011. Welcome to another year of terrific content and thought-provoking commentary from *TJE*.

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

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

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

The *Jury Expert* logo was designed in 2008 by:
Vince Plunkett of [Persuasion Consulting](#)

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