



The Jury EXPERT

The Art and Science of Litigation Advocacy

A BiMonthly E-Journal

Volume 23, Issue 4, July 2011

- 1 *American Justice or American Idol?
Two Trials and Two Verdicts in the Casey Anthony Case*
- 8 *Blago 1: The Ultimate Mock Trial?*
- 10 *The Dangers of Disgust in the Courtroom*
- 24 *PowerPoint® Presentations Copmpatibility
Be Prepared for Surprises*
- 29 *In the Mood? Strategies for Working with Depressed and/or Anxious Witnesses*
- 36 *Putting a Face on the Corporate Defendant*
- 47 *Juror Race and Capital Sentencing*
- 50 *Jury Box: Post-It Replacement for Jury Consultants and Lawyers*

American Justice or American Idol? Two Trials and Two Verdicts in the Casey Anthony Case

BY RICHARD GABRIEL

Richard Gabriel is President of [Decision Analysis](#), a national trial consulting company in Los Angeles. He an author of [Jury Selection: Science and Strategy](#), columnist for [Lawyers USA](#), and President of the American Society of Trial Consultants Foundation. He has worked on the OJ Simpson, Enron, Whitewater, and other high profile trials.

In October 2008, I became the trial consultant for Casey Anthony. The media coverage was already vast, heated, and overwhelmingly negative. Over the last two and a half years, my primary concern was how the media's public trial of Casey Anthony, played out through hundreds of shows and headlines, would ultimately affect her real trial. These were the two juries in her case – one at home and one in a courtroom in Orlando, Florida.

When she was unanimously acquitted of the most serious charges, a USA Today/Gallup poll showed that nearly two out of three Americans believed Casey Anthony was guilty of murder¹. How could these two juries come to such starkly different verdicts? More importantly, what can we learn from this extraordinary trial about the influence that the media has on the trial process? How do we balance freedom of the press with the Constitutional rights of parties in the criminal justice system?

Every mother and father has experienced that moment of panic in a store or a park when you can't find your child. Those moments can seem like hours. When your child is found, an unbelievable wave of relief washes over you. With this universal experience, it becomes natural that most find Casey Anthony's behavior inexplicable after Caylee died: it does not match our expectation of a panicked mother looking for her missing child or our image of a grief stricken parent coping with her child's death. And often when we do not understand the behavior of others, we convert our confusion to fear and anger.

Having done jury research on civil cases involving the death of a child in the past, I have found that jurors almost always believe that a parent is somewhat responsible for that death, no matter how remote that parent was to the accident that took the child's life. This accountability is part of a natural instinct that makes us want to protect children. We simply do not want to believe that, in a just world², a senseless accident can take the life of an innocent child. If we can blame someone, we can make sense of it. Then we don't have to face the reality that the world can sometimes be random, dangerous, and incomprehensible.

It is with this mindset that many Americans convicted Casey Anthony of murder - before the trial even started - using a civil trial's standard of proof: more likely than not, she probably had something to do with the death of her child.

News coverage started almost immediately in the case, with hours of airtime spent on the searches for the missing child, the candlelight vigils, and resulting arrest of Casey. This was where the public's trial began. Florida has one of the most liberal media access laws in the nation. Dubbed "The Sunshine Law"³, this statute made all evidence exchanged between the prosecution and the defense a public document, accessible on any number of media sites for anyone to read and download into their own evidence collection folder on their computers. This obviously posed an extreme challenge for the defense. In most courts, any juror who has great familiarity with a case, the parties, and the specific facts would be excused for cause because they would not be deemed to be impartial. While many trial courts have said that exposure to news stories does not automatically disqualify a juror, the unique laws of Florida made actual evidence accessible to any prospective juror. Of course, contained in this published discovery were documents, photographs, and witnesses that a Judge would later rule were inadmissible, irrelevant, or prejudicial. Many documents also contained untested or erroneous information. Despite these flaws, these documents were posted on websites for public consumption with scores of commentators and bloggers, usually opining on Casey's guilt.

In an age where people get instant information from limitless Internet sites and 24/7 news cycles, producers and editors have hundreds of television hours and web pages to fill. Since the facts of a news story can often be limited, the required airtime and webpage acreage is often filled with commentary and debate. Producers and editors are keenly aware of what elements of a news story will pique the interest of a viewer or reader. Hence the old news adage, "If it bleeds, it leads." Scott Safon, the executive vice-president of HLN, gave an interview in March of this year discussing how important the Casey Anthony trial was to the network⁴. Its June ratings put it ahead of both CNN and MSNBC, almost doubling its viewers compared to June of last year. Nancy Grace, who dedicated hundreds of shows to the case, averaged 1.5 million viewers a night⁵. Since ratings equal advertising revenue, this prosecutorial perspective drove much of the coverage.

Many of the hosts and regular guests of the HLN have admitted that they believed Casey Anthony to be guilty either before or during the trial. And it was with this prejudgment that both the press

and the public became both police and prosecutors, poring over the evidence and forming theories about how and why Casey murdered her daughter. Not if, but how. The media also put the defense team, any potential witness for the defense, or anyone who spoke in favor of the defense on trial, even investigating aspects of their personal lives. As a result, the defense suffered from unfair hardships – potential witnesses were unwilling to testify on Casey’s behalf for fear of being denounced or humiliated in the press. Obviously, this impedes a high-profile defendant’s ability to put on a full defense, and thus his or her right to a fair trial. In fact, the vitriol on the Internet sites was so venomous and one sided, I purposely ignored the blogger’s posts and responses to news articles.

These obstacles create an advantage for prosecutors, who already have an edge in trying a case. In most urban jurisdictions in this country, prosecutors enjoy an 80% – 90% conviction rate⁶. They have more resources and a bigger budget than the average criminal defendant. (Most of the Casey Anthony defense team, including myself, contributed their time pro bono to the case.) In a high profile case, most of the information that is disseminated to the public tells the prosecution’s story, including pictures of the “perp walk”, specifically staged to give the news media pictures of the defendant in handcuffs. In the Anthony case, Florida State Attorney General Pam Bondi publicly proclaimed on a national news show before the trial that the “evidence was overwhelming” of Casey’s guilt⁷.

Because the defense is not obligated by law to present an alternative theory in the case, they usually wait until trial to disclose their theories and to question the validity of the prosecution’s case. This is unsatisfying for a media audience desiring an instant response to the prosecution’s allegations. So, in a high profile case, the public usually gets only one side of the story: the prosecution version. In the court of public opinion, the defense cannot merely say, “Wait for the trial.”

In looking at the negative media deluge in our case, I determined that there was simply no discernable gain from trying to turn the tide of public opinion in the press. Given the zeitgeist, any attempt to explain or persuade would have been met with skepticism or outright scorn. So, I felt it would be best to be patient and wait. If anything, I hoped the negative publicity would reach a tipping point. I believed that the saturation was so great and the hyperbole so charged, that the actual jury might experience a backlash effect. We saw this same phenomenon in OJ Simpson’s murder trial. In conducting a community attitude survey before that case, we saw a counterintuitive result: the more exposure a juror had to news stories in that case, the more suspicious jurors were of the actual evidence in the trial. We saw this same skepticism in a focus group we conducted prior to the Casey Anthony trial⁸. In that group, jurors criticized the media for inflaming the case, making it difficult to distinguish the real evidence from the media hype. Since press coverage often needs to create stories to satisfy the public’s hunger for a news item, I was also counting on the fact that the saturation would create an expectation that the prosecution would produce a “smoking gun” or new evidence in trial.

Two Juries, Two Verdicts

Casey Anthony’s trial was set to start in front of a jury of millions. The jurors at home felt it was their case. They had watched dozens of hours of coverage. They saw the videos of the beautiful Caylee. They saw the pictures of Casey dancing at the nightclub. They were ready to convict her. They just needed the formality of a trial and the decision of a jury to validate what they already knew: that she was guilty of murdering her daughter.

The problem is that those millions were not qualified as jurors in this case. They had already prejudged the defendant and had demonstrated a bias that would not allow them to sit on a case. They also had a familiarity with the evidence that would disqualify them as jurors. You see, the Sixth Amendment of the Constitution guarantees every defendant a right to an impartial jury, jurors who have not already viewed and judged the evidence.

And this is where the First Amendment creates a problem for the courts in the Digital Age. How could a potential juror – someone who had seen more than two years of news stories, discussed the case with friends and family, and come to conclusions about the actual evidence – be a fair and impartial juror? The courts typically respond by asking potential jurors the impossible question, “Can you set those opinions aside and judge this case based on the evidence from the witness stand?” Realistically, people who have invested that much time and emotion into a case cannot simply erase those impressions and disallow them to influence how they view the evidence. Psychologists call this confirmation bias – people actively seek out information that confirms what he or she already believe, while ignoring and dismissing information that does not conform to their belief.

Because of the community’s interest in the case and the overwhelmingly negative coverage, I had submitted an affidavit supporting a motion for a change of venue out of Orlando. The focus group we conducted in Orlando reaffirmed this by unequivocally stating that they believed Casey to be guilty because of the pre-trial publicity and that she could not get a fair trial in the county. Fortunately, the Judge agreed to move the case. However, rather than physically move the location of the trial, he decided to “import” a jury to Orlando. This meant picking a jury in another venue, moving them back to Orlando, and sequestering them in a hotel for the entire trial.

Since the coverage of the case was statewide, the Judge had difficulty finding a venue to import jurors from that did not have pervasive publicity. We were faced with a due process issue: if you are a defendant who is tried in a state where every venue is tainted by the publicity, where can you reasonably get a fair trial? WFTV, an Orlando television station, released polling on the eve of trial showing that in five venues all over the state, 70% - 90% of the Orlando, Jacksonville, Tampa, Palm Beach, and Pensacola communities were familiar with the case and already believed Casey to be guilty of murder⁹. Even more troubling (but unfortunately standard for defense lawyers who try death penalty cases) more than half of those polled supported the death penalty for all first-degree murder cases. This meant that, regardless of the circumstances of the alleged murder in a case, most jurors were preconditioned to believe that once a defendant was guilty of murder, he or she should automatically get the death penalty, obviating the need for a penalty phase of the trial.

In order to prepare for what we assumed to be a difficult jury selection, we requested two things of the Judge – a supplemental juror questionnaire and the location in which we would be picking a jury. The Judge refused both. He stated that the attorneys should be able to pick a jury in five days without a questionnaire. He also stated he did not want to tell us the venue where we would be picking a jury because he did not want the media to inundate that community and infect the pool. This was problematic for us as we wanted to be able to study his chosen venue to see whether there was sufficient bias to make another change of venue motion. In fact, Judge Perry would not reveal the location of the venue to the lawyers until the Friday before the Monday jury selection and, by his order, other members of their staff (including consultants) were not allowed to know the location until the Sunday before the selection would start. He stated repeatedly that he would be picking a jury in five days and that the opening statements would begin the following Monday. At one point, Judge Perry

even stated that, if we could NOT pick a jury in five days, he would rescind his change-of-venue order and assemble a jury from people in the Orlando jury pool. He further decided that the jury selection would be broadcast, although the jurors would not be shown, and be identified only by numbers. We faced three major challenges in getting full disclosure and candid responses from potential jurors: the lack of a jury questionnaire that would increase juror candor, the time limitation imposed by the Judge, and the potential juror's knowledge that their vocal responses in voir dire would be broadcast for the entire world.

Because of these challenges, I felt it was important to get a Florida trial consultant involved who knew the various venues in the state. I contacted Amy Singer of Trial Consultants, Inc. and she put together a team of consultants who, although not present in the courtroom during most of the jury selection, would monitor the broadcast voir dire. This innovation allowed all of us to listen and send follow-up questions and recommendations on cause and peremptory challenges to the team in court and at the end of the day.¹⁰

Needless to say, both the prosecution and defense faced significant challenges in seating a jury. We first had to find people who would be willing and able to leave their family and jobs for six to eight weeks, work six days a week, and stay holed up in a hotel room with limited television and internet access. Second, we had to eliminate all of those jurors who had already made up their mind about the case. Third, we had to eliminate those people who would automatically vote for or against the death penalty without hearing additional evidence in the "penalty phase". It is this last area that can be the most problematic issue for a defense team as research shows that the process of qualifying jurors for a death penalty case tends to seat a pro-prosecution jury¹¹. These three areas did not even include the voir dire we would ordinarily do in a criminal case, including the common expectation of jurors that the defendant should have to prove their own innocence and testify on their own behalf. All of these problems created the concern that the public consensus had shifted the burden to the defense to prove Casey's innocence, and the jury would feel enormous public pressure to convict her¹².

All of these challenges made jury selection truly jury de-selection. Our primary goal was eliminate all or most of those jurors who had pre-judged Casey as guilty and who would automatically give her the death penalty if they found her guilty of the first-degree murder charge. In our profile of a desirable jury, we were not looking for men or women, young or old, black or white jurors. We wanted smart, skeptical, independent, and self-aware jurors. Jurors who could separate their emotional responses from rational evaluations, who could follow the rule of law, and turn a keen probing eye to what we felt were the prosecution's "fantasy forensics" and facile motive. Most importantly, we wanted jurors who were strong enough to ask hard questions and resist the public's demand for a conviction unless they felt the prosecution had really proved their case.

After two weeks, the two juries were seated. Twelve jurors and five alternates in the courtroom, and millions of "jurors" at home in front of their computers or televisions. Each jury had a different set of rules. The jurors at home could talk about the case with each other, speculate, use evidence not allowed in court, freely use their emotions, and proclaim the defendant's guilt as often as they wanted. The jurors in court were instructed they could do none of those things. And there was one other enormous difference between these two juries: the one in the courtroom saw all of the evidence and witnesses. The one at home saw only an editorial selection of it.

In the end, the twelve jurors in the courtroom found Casey Anthony not guilty in the death of her daughter.

The Important Independence of Juries

Both the prosecution and the defense chose the jury in the courtroom. While others have not shown such restraint, prosecutor Jeff Ashton has graciously said he would not criticize this jury. He thought the jury would see it his way and accepts that they did not. All attorneys who try cases know the inescapable truths of absolutely every trial: you win some and you lose some. Often, you are surprised, winning cases you thought you would lose and losing cases you were sure you would win.

Independent juries are the cornerstones of the justice system. We trust that a group of 12 citizens, brave and true, working together to interpret the evidence and the law will use their independent judgment to arrive at a just verdict. There is no formula, no predictable result. Each jury has its own way of piecing together the evidence in the case and applying the law. We rely on that individuality and independence as the hallmark of citizen juries. We, as consultants, study the idiosyncratic process of how juries use their experiences and beliefs to interpret the evidence and the law. The American Society of Trial Consultants and the research that consultants and academics conduct can help the courts, attorneys, and the parties to better understand this dynamic process.

It is important to listen to those jurors in the Casey Anthony case who have been willing to speak. Their first vote was 10-2 for acquittal. After 11 hours, it was unanimous. The one alternate juror who has spoken, Russell Huekler, also saw the case in the same way as the jury¹³. They describe numerous questions they had about the prosecution's case and gaps they feel were not filled. This jury, nine of whom had university degrees and five who had Masters, also describe very specific reasoning on the legal instructions on "premeditation" and "abiding conviction of guilt"¹⁴. This tells us that the jury in the courtroom saw a very different case than those at home. And ultimately, they were the only true jury in the case. They were there, every minute, every day. American justice is not American Idol. It cannot and must not be subject to a popular vote.

Consider the sheer courage of these twelve citizens. They all knew the verdict that the public overwhelmingly wanted and even expected. Can anyone honestly say that this jury was eager to go back home and justify acquitting Casey Anthony to their family, friends, and co-workers? Of course not. They all knew that they would face scorn, derision, and possibly ostracism, but they stood up to that extraordinary pressure. They were conscientious of their instructions and duty. While many may not agree with their verdict, I hope we can appreciate and respect the difficult and sometimes brave job the jury does in these cases.

Real trials, like real life, are complicated, messy, sad, confusing, and sometimes inexplicable. They do not fit into an hour-long news show or detective drama. We must learn to balance the First Amendment demands of the press and the Sixth Amendment rights of a criminal defendant. While the Supreme Court has said that a jury does not have to be totally ignorant of the facts of a case¹⁵, press coverage now goes well beyond reading stories in a newspaper. The public, armed with iPhones, computers, and television sets participate in a trial, forever changing how we must think about the concept of impartiality. Without proper management, these new media trials put us closer to the "carnival atmosphere" the Supreme Court envisioned in their ruling overturning the Sam Shepard case¹⁶.

We can learn to understand the unique nature of these trials and manage them so that the public, the press, and, most importantly, the parties can better understand their individual roles. The media can better present a balanced picture of the developing case and the trial. The public can become educated about the dynamic nature of a trial, distinguishing between the legal criteria that judges and

juries use to decide cases and what they see at home. The prosecution and the defense can better manage case-related information and understand how publicity will affect the jury pool and their relative expectations in trial. The courts can better administer these trials, protecting the rights of all the parties, the press, and the jurors.

These trials push our criminal justice system to the breaking point. The jurors in this case have received hate mail and one has fled Florida, fearing for her safety. The Anthony family has received death threats. Casey will probably fear for her life for a long time. This is not to say that everyone will or should agree with the verdicts in these cases. There will always be cries of outrage and heated disagreement in these cases. We can, however, conduct these trials in a way that reduces the misperceptions, biases, and sometimes even violence that can accompany such cases. When we reduce these, we can better appreciate that our jury system is a remarkable foundation for democracy.

Endnotes

- ¹ Bello, Marisol. (2011, July 8). Casey Anthony verdict doesn't sit well with most Americans. *USA Today*. http://www.usatoday.com/news/nation/2011-07-07-casey-anthony-trial_n.htm
- ² For more information on the Just World Hypothesis, see Lerner, M. (1980) *The Belief in a Just World: A Fundamental Delusion*. New York: Plenum Press.
- ³ http://www.myfloridahouse.gov/FileStores/Web/Statutes/FS09/CH0286/Section_0286.011.HTM
- ⁴ (2011, March 9). Casey Anthony: Trial is 'gigantic deal' for HLN, boss says. *Orlando Sentinel*. http://blogs.orlandosentinel.com/entertainment_tv_toblog/2011/03/casey-anthony-trial-is-gigantic-deal-for-hln-boss-says.html
- ⁵ Hibbard, J. (2011, July 6). Casey Anthony verdict gives Nancy Grace her best ratings ever. *Entertainment Weekly*. <http://insidetv.ew.com/2011/07/06/casey-anthony-nancy-grace-ratings/>
- ⁶ Goudie, C. (2011, July 10). Blame prosecutors, not juries, for verdicts. *Daily Herald*. <http://www.dailyherald.com/article/20110710/news/707109865/>
- ⁷ Sutow, I., Leach, J., and Zimmerman, G. (2011, April 16). Can Casey Anthony get a fair trial? *CBS News*. <http://www.cbsnews.com/stories/2011/04/16/48hours/main20054402.shtml>
- ⁸ The focus group was conducted as part of a 48 Hours episode which can be viewed at <http://www.cbsnews.com/video/watch/?id=7362976n&tag=contentMain;contentBody>
- ⁹ The full results of the poll can be found at <http://www.wftv.com/download/2011/0506/27800480.pdf>
- ¹⁰ The live feed also allowed us to watch the trial and send observations and recommendations during the case.
- ¹¹ Cowen, C. et al. (1984). The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation. *Law and Human Behavior*, 8(53).
- ¹² Some of the very prominent on-air personalities who had proclaimed Casey's guilt would periodically show up in the courtroom to watch the trial.
- ¹³ (2011, July 6). Anthony juror: 'Sick to our stomach' over verdict. *MSNBC*. http://www.msnbc.msn.com/id/43651613/ns/us_news-crime_and_courts/t/anthony-juror-sick-our-stomach-over-verdict/
- ¹⁴ <http://www.tampabay.com/news/courts/criminal/casey-anthony-jurors-still-feeling-effects-of-public-backlash/1181900>
- ¹⁵ <http://laws.lp.findlaw.com/us/000/081394.html>
- ¹⁶ <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=384&invol=333>

Blago 1: The Ultimate Mock Trial?

BY ALAN TUERKHEIMER

Alan Tuerkheimer, M.A., J.D. brings his background in psychology and the law to his role as litigation consultant through [Zagnoli McEvoy Foley](#). He has extensive experience conducting jury research including focus groups, mock trials, and venue attitude surveys and has worked with trial teams across the country on voir dire and jury selection, trial observation, shadow juries and post-trial interviews. He earned his J.D. from the University of Wisconsin Law School and completed his graduate and undergraduate work in Psychology from Connecticut College and University of Wisconsin, respectively. He is a member of the State Bar of Wisconsin, the American Society of Trial Consultants (ASTC), Defense Research Institute (DRI), and the American Association of Public Opinion Research (AAPOR).

Did the prosecution benefit from the ultimate mock trial in the Rod Blagojevich prosecution? An experienced trial consultant offers observations on what they learned and how we can all pay attention to feedback from pretrial research.

While the first trial of former governor Rod Blagojevich ended with a conviction on one count of lying to the FBI, it was the defense that properly claimed victory as the jury could not reach unanimity on the 23 other counts against the ex governor. There was a major silver lining for the prosecution however - the first trial offered tremendous insights into how it could retool and strengthen its case for the second trial and that is exactly what it did. Remember, the defense did not present a case the first time around so juror comments were predominantly geared toward the prosecution's case. Any advantage the defense may have gained by having the government locked in its case was offset by the abundance of critiquing that took place on the prosecution's case against Rod Blagojevich. Jurors spoke and the government heeded what they had to say. In essence, the prosecution conducted the ultimate mock trial. The good news for litigators on the 99.9% of cases that are not high profile cases such as what occurred in Illinois, mock trials are every bit as beneficial and do not cost millions of dollars.

After the verdict in the first trial, the prosecution had to decide whether it would retry the ex governor. Had the jury been 11-1 in favor of "Not Guilty" on the 23 other counts, a retrial would not have occurred. However, based on what the foreperson of that jury had to say, as well as comments from other panelists, the group was only one juror away from convictions on multiple counts, mostly relating to the attempted sale of Obama's vacated senate seat, the marquee charge in this criminal indictment.

While the prosecution should have known this before the first trial, jurors felt the case was too

complex, and as one juror said, “it was like giving us the keys to the space shuttle and telling us to go fly it.” This happens all the time to litigators and that is why the smart ones conduct jury research. The prosecution was too immersed in the case: it forgot that to explain its case to a jury, it had to offer a persuasive case story supported by various themes, and it had to empower jurors to connect the dots without getting too technical and caught up in details that only someone living and breathing the case for years could understand. And this is what the prosecution did. It learned from the first jury that the case was too circuitous, complex, and bulky which means in jury terms it was unmanageable. Blago I jurors screamed out for a timeline. The first trial, according to jurors, had the prosecution bouncing back and forth between events and it was very hard to keep track of the key events. Keep in mind, confusion hampers the party with the burden so in this instance it hurt the prosecution.

Jurors complained about the length of the instructions and verdict form. Sure enough, the law was pared down, charges were dropped, and instead of a verdict form that looked more like a maze that took days to even figure out, they had more simple questions of guilty or not guilty in the second trial. Some Blago I jurors thought the prosecution “overcharged” and did not understand why the former governor’s brother was on trial. Not surprisingly, prior to the retrial charges against Robert Blagojevich were dropped. And of course Blago II jurors were accorded a succinct, jury-friendly timeline.

During a mock trial, lawyers are able to present their case, offer evidence, present witness testimony, and show competing case narratives. Mock jurors provide invaluable feedback that arms the lawyers for the actual trial. Far more often than not, attorney reaction to mock juror feedback is, “I never thought of that,” and changes in trial strategy are then made which strengthen the case. This learning process was demonstrable in the Blagojevich case as the prosecution benefited from the changes it made based on what it learned from the first jury.

The Dangers of Disgust in the Courtroom

BY PASCALE SOPHIE RUSSELL AND ROGER GINER-SOROLLA

[Pascale Sophie Russell, PhD](#) is a Lecturer in Psychology at the University of Kent at Canterbury, UK. Her research interests include morality and emotions, especially the differences between anger and disgust. She is also interested in the effects that anger and disgust can have on legal judgments, particularly in the realm of sexual crimes. You can find Dr. Russell's research interests, publications and contact information on her [webpage](#).

[Dr. Roger Giner-Sorolla](#) is a Reader (Associate Professor) in Social Psychology at the University of Kent in Canterbury, United Kingdom. His research interests cover those emotions that inform judgment and behavior in the areas of moral judgment, self-control and intergroup morality. In particular, anger, disgust, guilt and shame are the focus of his research (but not, he hastens to add, of his life in general). Dr. Giner-Sorolla's latest research and contact information can be found on his [webpage](#).

Are emotions useful within the courtroom? This is a question that has attracted research interest in recent years (see Maroney, 2006 for a review). Our research cumulatively shows that it depends on which specific emotions you are talking about. Across a series of social psychological experiments we have found support for the unreasoning disgust hypothesis: that disgust, more so, than anger can have an irrational and inflexible influence on our moral judgments. Our research shows that if people feel disgust they are less likely to take into account mitigating circumstances, and even consider why they felt disgust in the first place; thus, it is a hard emotion to argue against, in comparison to anger. Because disgust can lead to negative moral judgments, but doesn't seem sensitive to reasoning and mitigation, we believe it will tend to impede fair and just legal judgments. So, if it is desirable for judges and jurors to consider the current circumstances (e.g., extenuating circumstances) then appeals to moral disgust within the courtroom should be avoided.

Supporting Research

Previous research supports the distinction that we make between anger and disgust as potential courtroom influences. Even though both anger and disgust are other-condemning emotions (Haidt, 2003), meaning they are often used to express moral disapproval, there are key differences between them. Research has shown that anger depends on numerous contextual factors: whether harmful

actions have occurred, whether justice has been served, and who is to blame (Gutierrez & Giner-Sorolla, 2007; Goldberg, Lerner, & Tetlock, 1999). These cues can influence whether or not anger is experienced in the first place, its intensity and likely behavioral responses. On the other hand, disgust is less concerned with current circumstances. In fact, researchers have struggled to define any rational or situation-specific appraisals which trigger disgust; disgust seems to be learned as a way to evaluate certain kinds of things or sensations (Ortony, Clore & Collins, 1988). Therefore, disgust is activated by the simple detection of a disgusting object, such as the categorical judgment of whether or not a sex act is taboo.

Disgustingness can also spread by contagion from a thing considered to be disgusting, whether or not harm is probable (Rozin, Millman, & Nemeroff, 1986). Rozin and colleagues' line of research found that disgustingness can spread by mere association through the laws of contact and similarity, and that it is difficult if not impossible to reverse these disgust-based judgments with rational considerations. For example, people will avoid eating chocolate in the shape of feces despite knowing what the object actually is. Similarly, research on consumer behavior has shown that a disgusting object, such as a packaged sanitary pad, can lead to objects that are placed in the same shopping basket to be less valued, despite there being no direct contact (Moralez & Fitzsimons, 2007). Other research has also shown that disgust can operate without one's awareness (Schnall, Haidt, Clore & Jordan 2008; Wheatley & Haidt, 2005); for example, Schnall et al. (2008) have shown that a subtle disgust influence, such as exposure to a disgusting smell, can make individuals' moral judgments more severe. Based on these findings, we had reasons to believe that disgust is an irrational emotion that is unconcerned with the current context.

Findings for Unreasoning Disgust Hypothesis

Our research to date, comparing anger and disgust, has focused on two parts of the experiences of these emotions. First, why people feel anger or disgust and how these emotions can be modified; and second, whether people can justify why they feel anger versus disgust in the first place.

Circumstantial cues. We have found that feelings of anger, but not disgust, respond to the important and legally relevant cues of harm and intentionality (Russell & Giner-Sorolla, 2011a). Within this experiment participants first read a vignette that described a scientist who cloned meat, in which we manipulated 1) whether or not the meat was from human cells, constituting cannibalism (taboo), 2) whether or not someone else ate the meat without knowing what it was (harm others), and 3) whether the scientist knew the true nature of the meat, or believed it was beef due to someone else's error (intent). Participants then filled out measures that assessed their emotions and evaluations of the vignette, such as whether they thought the action was actually harmful. We found that the intensity of anger was influenced by our manipulations of harm and intent, while the intensity of disgust was only influenced by whether or not the act violated the taboo of cannibalism. Additionally, we found that relevant evaluations of the situation could fully account for the relationship between the influencing factors (harm, intent) and anger, but evaluations could not fully account for the relationship between disgust and the taboo manipulation. This suggests that disgust is more likely to follow from a categorical judgment rather than from evaluations of legally relevant circumstances.

Flexibility. Extending this initial experiment, we have found that disgust is less responsive to any changes in circumstance than anger, demonstrating its inflexibility (Russell & Giner-Sorolla, 2011b). We carried out this additional research because we wanted to give individuals the best opportunity to come up with potential mitigating factors, instead of manipulating theoretically relevant variables within a vignette. Also, we wanted to measure judgments at multiple time points, to see if people could actually change their opinions when considering their own most powerful mitigating circumstances.

Within this experiment participants first read a scenario that either described a harm/fairness-based or taboo-based moral violation, which occurred in two types of settings. We used these types of violations because past research has shown that harm and fairness are more likely to elicit anger, while purity norms are more likely to elicit disgust (e.g., Gutierrez & Giner-Sorolla, 2007; Horberg, Oveis, Keltner & Cohen, 2009; Rozin, Lowery, Imada, & Haidt, 1999). Therefore, participants were randomly assigned to one of four scenarios in which an individual did one of the following acts: kick a dog, eat a dog, rights-based sexual violation (in an exploitive relationship), or norm-based sexual violation (in a relationship with large age difference, 20 versus 76 years old). After reading one of the four scenarios participants filled in measures of whether or not they thought the act was wrong and the emotions they felt in response to the act. Participants were then asked to list things that they thought could change their opinion of the act and were given the opportunity to fill in the original measures again imagining that the changes had come about.

We found that levels of disgust did not change after participants generated potential circumstances, but anger did. Importantly, there were no significant differences in the amount or type of things that participants thought could change their mind between the different stories. Thus, the difference in the change of anger and disgust could not be attributed to differences in the things that individuals listed within the conditions. We also found that feelings of anger, not disgust, predicted any change in evaluations of the wrongness of the act. Thus, anger is likely to change whether or not someone thinks an act is right or wrong. In conclusion, this experiment indicates that first impressions are likely to stick when they are based on feelings of disgust. On the other hand, anger is more likely to be a facilitating force in changing opinions, and it seems to be more responsive to the current context.

We think that our findings regarding the potential flexibility of anger versus disgust are especially relevant for the courtroom because individuals that are present within a courtroom setting are first informed of the nature of the charges and are then asked to consider mitigating circumstances surrounding the case. Our research shows that disgust more so than anger is likely to hinder this process. For example, in cases in which someone is accused of sexually abusing a minor we would suspect that people would find it difficult to overcome the influences of disgust, ignoring mitigating circumstances, because disgust is so often associated with this sexual behavior. In comparison, if someone is accused of verbal abuse it is more likely that anger but not disgust will be influential, which may elicit the desire to focus on the current case and to respond to appropriate mitigating circumstances. Thus, based on this finding it may be important to inform jurors and judges prior to a case about this potential influence of disgust, and to consider evidence or argumentation based on physical and moral disgust as especially potentially prejudicial, if it is desirable to avoid this influence.

Justifiability. Finally, we have found that people struggle to justify why they feel disgust in the first place, in particular in reaction to non-normative sexual behaviors, such as pedophilia and prostitution (Russell & Giner-Sorolla, 2011c.) When justifying disgust persons are more likely to give

statements like “They are just gross,” instead of giving external reasons that go beyond their subjective feeling. Thus, people do not normally feel the need to justify why they feel disgust, probably because they feel that others agree with them. It is only when reasons for moral disgust are made available – for example, “because they violate rules of society” – that people endorse them in support of this emotion. These studies suggest another potential danger of disgust being elicited in the courtroom: people find it difficult to access reasons for why they feel disgust. This is likely to make disgust difficult to argue against and unlikely to motivate open discussions. For example, if someone feels disgust toward a sexual crime, they are likely to focus on their disgust and use this emotion as a basis for their judgment, which also elicits the assumption that others must agree with them. It is easy to see the role that this finding can have in the context of jury deliberations; if one or more individuals feel disgust it will be hard to get them to justify why they feel disgust in a way that is useful to facilitating open discussions. This may create unnecessary divisions amongst members of the jury.

So, how can the potential negative influences of disgust be avoided?

Our research paints a pretty bleak picture for disgust as a moral emotion in legal contexts. We have shown that disgust is not likely to support the open-mindedness that the legal process demands, due to its inflexibility. We have also demonstrated that disgust does not respond to specific principles that should be currently important to law and justice, such as blameworthiness, intentionality, and harm. Instead, it responds to principles that modern-day jurisprudence considers less important, such as sexual chastity and abnormality. For example, in most Western societies, age of sexual consent laws were originally used to protect female chastity, focusing on the importance of purity and withdrawing their protection from girls who had prior sexual experience (Oberman, 1994). However, more modern rationales for sexual consent legislation aim to protect young individuals of any gender from harm (Horvath & Giner-Sorolla, 2007).

In order to avoid the negative influences of disgust, we would suggest not triggering disgust in the first place whenever possible. Once disgust is present it is very difficult to reverse. In fact, research suggests that disgust must go through a lengthy unlearning process (Rozin, 2008) because unlike anger it does not respond to situational cues. This suggests a prejudicial influence of anything that triggers disgust within the courtroom. Salerno and Bottoms (2009) highlight a distinction that is made between probative and prejudicial influences within the courtroom, in which probative evidence provides unique information about harm, and does not have an irrelevant influence on individuals’ emotions (e.g., jurors, judges, etc.). Factors that arouse disgust are more likely to be extra-judicial and trigger a prejudicial influence, while anger is more likely to follow from the determination of harm and injustice (Alicke, 2000); thus, being more likely to be probative. Previous research has focused on the influence that emotions such as anger, empathy and sympathy can have on judges and jurors (see Kerr, 2009; Salerno & Bottoms, 2009 for a review), but little attention has been paid to the separate role of disgust, as distinct from other emotions. With the recent surge in research that focuses on the influence that emotions can have in legal contexts, we believe it is essential that more attention be paid to the prejudicial influence that disgust can have.

To avoid prejudicial impact, we would advise steering clear of descriptions that can elicit

disgust, such as graphic details about sexual behavior, including pictures and verbal descriptions. For example, Kerr's study (as cited in Kerr, 2009) has shown that including a detailed account and gruesome pictures of a heinous crime directly influenced mock jurors' emotions. It was found that males were directly influenced by these pictures due to heightened anger, in that the additional details led to higher conviction rates, while women were less influenced. Interestingly, anecdotal evidence within this research suggested that some participants were more likely to show avoidance behaviors, such as looking away from the photos, which suggests that they may have experienced disgust. Previous research has also shown that women are more disgust sensitive than men (Haidt, McCauley & Rozin, 1994), and the gore pictures used are also likely to trigger disgust (Rozin, Haidt & McCauley 2000). Thus, even though disgust was not directly measured, this research provides initial evidence that anger versus disgust differentially influences our ability to process gruesome evidence.

While arguments about a crime's harmfulness, intentionality or unjustness appeal to the emotion of moral anger, the relatively reasonable nature of moral anger means that it can at least respond to counterarguments; disgust, however, seems not to heed contrary evidence. For example, as shown by the literature on contagion effects, even purification tactics cannot reverse disgust intuitions, it has been found that people are unwilling to drink juice that has come in to contact with a sterilized cockroach, and refuse to wear a sweater that has been worn by someone evil, despite being cleaned by various means (e.g. boiling, burning, deodorizing, etc). Additionally, people admitted that they could not explain their behaviors (Rozin, Millman & Nemeroff, 1986; Nemeroff & Rozin, 1994). Related to this topic, these findings stress just how important it is that jury members avoid media influences during a trial because disgust is often elicited through this information. For example, when newspapers report on sexual crimes cases there are normally a fair amount of comments from individuals expressing their shock and disgust. After all, disgust grabs attention and sells newspapers (or increasingly these days, page clicks).

If there is a situation in which anger and disgust are likely to co-occur, or anger is likely to be the primary emotion, we would recommend focusing on aspects of the case that relate to anger, such as blameworthiness and intent. For instance, in a rape case it would be best to focus on presenting evidence that shows concretely whether or not the sexual behavior was consensual because anger is more likely to focus people's attention on blame and harm. Additionally, it may be beneficial to inform jurors of the potential influence of disgust before the case begins and take them through appropriate training to avoid disgust. So far, we do not have empirical evidence of whether or not this is effective, and what kind of training is necessary, but this is a point for future investigation, since research has shown that highlighting the potential influence of emotions can sometimes backfire depending on how this influence is described (Kerr, 2009). Another option that may be more suitable is to inform judges of the prejudicial influences of disgust, since research has suggested that judges are capable of overriding the prejudicial influences of emotions, showing a form of desensitization to them (Salerno & Bottoms, 2009).

Our overall recommendation based on our findings, and initial research on the role of emotions in legal contexts generally would be that individuals should take care in ensuring that disgust does not slip into the courtroom unnecessarily because once it is present it is likely to hinder fair and just legal judgments.

References

Alicke, M. D. (2000). Culpable Control and the Psychology of Blame. *Psychological Bulletin*, 126, 556-574.

Goldberg, J.H., Lerner, J.S., & Tetlock, P.E. (1999). Rage and reason: the psychology of the intuitive prosecutor. *European Journal of Social Psychology*, 29, 781-795.

Gutierrez, R. & Giner-Sorolla, R. (2007). Anger, disgust, and presumption of harm as reactions to taboo-breaking behaviors. *Emotion*, 7, 853-868.

Haidt, J. (2003). The moral emotions. In R.J Davidson, K.R. Scherer, & H. H Goldsmith, *Handbook of affective sciences* (pp. 852-870). Oxford: Oxford University Press.

Haidt, J., McCauley, C., & Rozin, P. (1994). Individual differences in sensitivity to disgust: A scale sampling seven domains of disgust elicitors. *Personality and Individual Differences*, 16, 701-713.

Horberg, E.J., Oveis, C., Keltner, D. & Cohen, A.B. (2009). Disgust and the moralization of purity. *Journal of Personality and Social Psychology*, 97, 963-976.

Horvath, M. A. H., & Giner-Sorolla, R. (2007). Below the age of consent: Influences on moral and legal judgements of adult-adolescent sexual relationships. *Journal of Applied Social Psychology*, 37, 2980-3009.

Kerr. (2009). Explorations in juror emotion and juror judgment. In B.H. Bornstein & R.L. Wiener (eds.). *Emotion and the Law: Psychological Perspectives. 56th Nebraska Symposium on Motivation* (pp. 97-132). Nebraska: University of Nebraska Press.

Maroney, T. A. (2006). Law and emotion: A proposed taxonomy of an emerging field. *Law and Human Behavior*, 30, 119-142.

Nemeroff, C. & Rozin, P. (1994). The contagion concept in adult thinking in the United States: Transmission of germs and interpersonal influence. *Ethos*, 22, 158-186.

Oberman, M. (1994). Turning girls into women: Re-evaluating modern statutory rape law. *The Journal of Criminal Law & Criminology*, 85, 15-79.

Ortony, A., Clore, G. L., & Collins, A. (1988). *The cognitive structure of emotions*. Cambridge: Cambridge University Press.

Rozin, P. (2008). Hedonic adaptation: Specific habituation to disgust/ death elicitors as a result of dissecting a cadaver. *Judgment and Decision Making*, 3, 191-194.

Rozin, P., Haidt, J., & McCauley, C. R. (2000). Disgust. In M. Lewis & J. Haviland (eds.). *Handbook of emotions, second edition* (pp. 637-653). New York: Guilford.

Rozin, P., Lowery, L., Imada, S., & Haidt, J. (1999). The CAD hypothesis: A mapping between three moral emotions (contempt, anger, disgust) and three moral codes (community, autonomy, divinity). *Journal of Personality and Social Psychology*, 76, 574-586.

Rozin, P., Millman, L. & Nemeroff, C. (1986). Operation of the laws of sympathetic magic in disgust and other domains. *Journal of Personality and Social Psychology*, 50, 703-712.

Russell, P.S., & Giner-Sorolla, R. (2011a). Moral anger, but not moral disgust, responds to intentionality. *Emotion*, 11, 233-240 .

Russell, P.S., & Giner-Sorolla, R. (2011b). Moral anger is more flexible than moral disgust. *Social Psychological and Personality Science*, 2, 360-364.

Russell, P.S., & Giner-Sorolla, R. (2011c). Social justifications for moral emotions: When reasons for disgust are less elaborated than for anger. *Emotion*, 11, 637-640.

Salerno, J.M., & Bottoms, B.L. (2009). Emotional evidence and jurors' judgments: the promise of neuroscience for informing psychology and law. *Behavioral Sciences and the Law*, 27, 273-296.

Schnall, S., Haidt, J., Clore, G.L., & Jordan, A.H. (2008). Disgust as embodied moral judgment. *Personality and Social Psychology Bulletin*, 34, 1096-1109.

Wheatley, T., & Haidt, J. (2005). Hypnotic disgust makes moral judgments more severe. *Psychological Science*, 16, 780-784.

We asked three trial consultants to comment on this article. On the following pages, Pete Rowland, Tara Trask and Dennis Elias offer their thoughts.

Disgust and Anger: Applicable trial strategy or wishful thinking? Response to Russell and Giner-Sorolla

BY PETE ROWLAND

Pete Rowland, Ph.D. is Chairman of Litigation Insights based in Kansas City. He has worked on high-exposure civil cases since 1986.

The authors draw a potentially useful distinction between two concepts – disgust and anger – that are often used interchangeably. As explained by the authors, this distinction is potentially important in the litigation settings for two reasons.

First, unlike anger, disgust is impervious to rational, evidence-based argument, which makes it much more dangerous to the litigant at whom it is directed. This characteristic is, of course, important to keep in mind when we are evaluating the prospects for some criminal defendants or the potential exposure of a civil defendant.

Second, based on the numerous examples given by the authors – e.g., cannibalism – disgust typically derives from deeply ingrained, widely shared social norms that may be so pervasive as to sometimes make their presence in the jury box unavoidable. Indeed, as the authors point out, many targets of disgust relate to social norms that define a behavior as disgusting *ipso facto* and render the disgusted juror unable to explain *why* the act in question – e.g., incest – is disgusting. (Socrates had great fun with this in Plato's Republic.)

As is often the case with academic research, the weaknesses of the piece relate to external validity in the context of U.S. jury trials. To some degree, external validity problems are inevitable when pen and ink experiments emphasizing internal validity (usually with student subjects) are applied to real-world jury settings. However, they are potentially serious and practitioners must be mindful of them. One need look no further than the Casey Anthony trial for an example of a jury trial in which real-world advocacy and adherence to instructions (that to my knowledge included no reference or caution regarding “disgust”) seem to have overcome disgust-evoking behavior on the part of the defendant.

I believe the most serious external validity problems here can be organized under one of two overlapping limitations – *scope of applicability and applicability of recommendations*.

Scope. To my mind (with the caveat that the vast majority of my experience is in civil cases) the least serious limitation has to do with reminding ourselves that, while many high-profile cases may include disgust-evoking behaviors, most cases, especially civil cases, in the US do not include disgusting behaviors as defined by the authors. By contrast, many cases, civil and criminal, evoke anger and blame as defined by the authors and others. Thus, as practitioners we must be careful not

to confuse the exception with the rule and frame a dispute as a “disgust” case inappropriately.

Recommendations. A second, more serious limitation, has to do with application of the authors’ recommendations to US jury trial settings. An easy example has to do with the authors’ advice that appeals to disgust – e.g., pictures that may trigger disgust – should be avoided. This advice is consistent with their finding that disgust is impervious to rational appeals related to, for example, mitigating circumstances. However, this recommendation has extremely limited applicability in our adversarial setting where one party wants the disgust-evoking material admitted for precisely the same reasons the authors advise us to avoid it. For example, it is hard to imagine a judge excluding evidence of defendant’s disgust-evoking behavior in the Anthony trial. Thus, this recommendation may be more akin to wistful thinking than a realistic trial strategy. And in rare civil disputes with disgust-evoking behaviors at issue, the disgusting behavior is typically at the core of the case and unlikely to be excluded, especially in a case that includes claims for punitive damages.

These external-validity limitations notwithstanding, the authors’ distinctions and findings are important, with immediate applicability for some cases. Moreover and more importantly, as this research program expands it may refine the concept in ways that expand the current boundaries of applicability.

Tort Reform: Morality, Frivolity, Anger and Disgust Response to Russell and Giner-Sorolla

BY TARA TRASK

Tara Trask, CEO of Tara Trask and Associates taratrask.com is a trial consultant based in San Francisco with a second office in Dallas and she is also President of the American Society of Trial Consultants. Her practice focuses on complex commercial litigation including intellectual property, products, oil and gas and securities.

I read with great interest “The Dangers of Disgust in the Courtroom” by Pascale Sophie Russell and Roger Giner-Sorolla. As trial consultants, it is our job to do the best we can with the facts we have in any given case. It is always useful – and also a bit disturbing – to learn about particular issues over which we may have little or no influence even employing our best psychological and communication based skills. Facing disgust in the courtroom, according to the authors is one of those areas.

Determining pre-conceived notions and strongly entrenched biases is part of our job in jury selection. Ferreting out biases that may be difficult if not impossible to change is certainly important. The authors make a strong argument for their *unreasoning disgust hypothesis* that “disgust, more so than anger can have an irrational and inflexible influence on our moral judgments”. Additionally, the fact that “disgust is less concerned with current circumstances” and more likely to be activated as a “categorical judgment rather than from evaluations of legally relevant circumstances” is instructive to us as practitioners in the courtroom.

As a consultant who does mostly civil work, I find this research relevant to my everyday practice in a unique way when I consider the places where I have seen “disgust” in play. The issue of what actually constitutes disgust is one of interest to me, as I see potential jurors displaying disgust in interesting arenas, most notably, disgust toward a plaintiff for bringing a “frivolous lawsuit”. I have witnessed many jurors indicating not merely a moral anger at a plaintiff for bringing suit, but moral disgust. The authors’ research is useful. As a practitioner, if I can distinguish between moral anger and moral disgust (and I have seen both on this topic), that is helpful to me. Clearly the authors’ research indicates that one juror might be swayed by reasonable arguments and specifics to a particular case. A juror who demonstrates moral disgust cannot be swayed by reasonable arguments or circumstances specific to that case. That juror will make categorical arguments along the lines of plaintiff morally bankrupt and never move from there.

I think the shifting of the tort reform argument in the media to one of morality is important here and I have seen so many prospective and mock jurors frame the issue of bringing a lawsuit as one of a moral issue that I cannot ignore it as a practitioner. The research undertaken by the authors is important and should be considered not just literally, but also in other contexts.

Br'er Rabbit and Tar Baby Response to Russell and Giner-Sorolla

BY DENNIS ELIAS

Dennis Elias, Ph.D. is senior trial consultant at [Litigation Strategies, Inc.](#) based in Scottsdale, AZ. He works on both civil and criminal cases nationwide.

“ Br'er Fox went ter wuk en got 'im some tar, en mix it wid some turkentime, en fix up a contrapshun w'at he call a Tar-Baby, en he tuck dish yer Tar-Baby en he sot 'er in de big road, en den he lay off in de bushes fer to see what de news wuz gwine ter be....

“Brer Rabbit keep on axin' 'im, en de Tar-Baby, she keep on sayin' nothin', twel present'y Brer Rabbit draw back wid his fis', he did, en blip he tuck 'er side er de head. Right dar's whar he broke his merlasses jug. His fis' stuck, en he can't pull loose. De tar hilt 'im. But Tar-Baby, she stay still, en Brer Fox, he lay low...

‘Howdy, Br'er Rabbit,’ sez Br'er Fox, sezee. ‘You look sorter stuck up dis mawnin’,’ sezee, en den he rolled on de groun', en laft en laft twel he couldn't laff no mo'. ‘I speck you'll take dinner wid me dis time, Br'er Rabbit. I done laid in some calamus root, en I ain't gwineter take no skuse,’ sez Br'er Fox, sezee.”

From the Tales of Uncle Remus

Disgust is one hot sticky mess. Whether you are Br'er Rabbit or Br'er Fox, should this “tar baby” characterize the emotional moralization response of the jurors to your case, once they swing; you are stuck. Disgust short-circuits reasoning and the mitigating influences of context or situation. You can't argue with revulsion. Disgust is an emotion made to stick. You might like that; it might not depending upon the way disgust splashes on your case facts and theories.

Prior researchers thought that moral judgments were based on higher order cognitive thought processes. This newer view of moral judgment highlights how certain emotions feed into intuitions or predetermined readiness regarding what's right and what's wrong that figure prominently in a moral judgment. Distinct emotions such as anger and disgust, can amplify the importance of different moral domains during moral judgment. This process is known as a moralization.

Russell and Giner-Sorolla, among others, find essential differences between the “other condemning” emotions of anger and disgust as they are expressive of moral disapproval. Anger is driven by contextual factors and environmental cues which influence felt intensity and effects upon behavior and judgment. Conversely, disgust seems devoid of rational or situation specific cognitions which trigger the affect. Like the famed Supreme Court Justice who quipped about pornography, “We (jurors) know what's disgusting when we see/smell/hear/feel it”.

For instance, if an individual appraises a negative event (e.g., child abuse) to be controlled by

other individuals (e.g., parents), she will experience disgust. If, however, she appraises the event to be controlled by the situation (e.g., drug addicted parents), she will still experience revulsion. There are no appraisals that mitigate the revulsion, even if it is understood rationally that this is a deranged situation. There are no reasoned mitigations. Yuck is yuck; it's visceral rather than rational. You can't talk someone out of being revolted.

"The Foundations of Morality": The theory was first developed from a review of thinking about morality and cross-cultural research on virtues (reported in Haidt & Joseph, 2004) and then later defined by Jonathan Haidt and Jesse Graham of the University of Virginia (Social Justice Research, 2007). They suggest that human beings have five natural tendencies, or intuitions, through which they instinctively develop moral values that drive judgments. These intuitions are the same always and everywhere. However people don't necessarily possess them in equal doses. What's more, cultural and other circumstances influence just what kinds of moral values may develop within each of five areas for a given individual.

The Five Foundations:

1. *Harm/care, related to our long evolution as mammals with attachment systems and an ability to feel (and dislike) the pain of others. This foundation underlies virtues of kindness, gentleness, and nurturance.*
2. *Fairness/reciprocity, related to the evolutionary process of reciprocal altruism. This foundation generates ideas of justice, rights, and autonomy.*
3. *In-group/loyalty, related to our long history as tribal creatures able to form shifting coalitions. This foundation underlies virtues of patriotism and self-sacrifice for the group. It is active anytime people feel that it's "one for all, and all for one."*
4. *Authority/respect, shaped by our long primate history of hierarchical social interactions. This foundation underlies virtues of leadership and followership, including deference to legitimate authority and respect for traditions.*
5. *Purity/sanctity, shaped by the psychology of disgust and contamination. This foundation underlies religious notions of striving to live in an elevated, less carnal, nobler way. It underlies the widespread idea that the body is a temple which can be desecrated by immoral activities and contaminants (an idea not unique to religious traditions).*

Link to YourMorals.org for a self rating on the Five Foundations

Cultural and genetic traits have some impact on an individual's expression of the Five Foundations. For example, having a Liberal or Conservative bent seems to determine which of the moral tools are emphasized and how they are applied. People who identified themselves as liberals attached great weight to the two moral systems protective of individuals – those of Harm and Justice. But liberals assigned much less importance to the three moral systems that protect the group, Loyalty, Authority and Purity. Conservatives typically place value on all five moral systems but they assigned less weight than liberals to the moralities protective of individuals.

For a revealing discussion of the moral reasoning difference between Liberals and Conservatives useful for case conception as well as voir dire/jury selection see: Haidt, J., & Graham, J. (2007) "*When morality opposes justice: Conservatives have moral intuitions that liberals may not recognize.*" See also: [TED video, Haidt](#).

Disgust arises as a specific visceral moral evaluation that indicates a violation of Purity, the fifth of the Five Foundations. The kinds of things that arouse disgust are appraisals of contamination, impurity, or potential degradation. Emerging from an ancient protective distaste for the eating or touching things likely to make you sick or die; disgust evolved into an emotion that functions to guard

the body and soul from contamination, impurity and degradation. Disgust is extremely easy to elicit. All you really have to do is to show a picture of a pool of vomit or a zombie eating fresh human flesh and you will see and hear a full-blown disgust reaction from the audience. Just like the flight or flight syndrome (see a wolf and run like hell), the ability to make an adaptive and immediate non-cognitive determination that that something could contaminate you has a lot going for it.

Lakoff has written about embodied cognition and embodied mind theory (Lakoff & Johnson (1980), Lakoff (1987), Lakoff & Turner (1989), Lakoff & Johnson (1999), Lakoff & Nunez 2000), and that the nature of the human mind is largely determined by the form/function of the human body; that all aspects of cognition, such as ideas, thoughts, concepts and categories are shaped by aspects of the body. Visceral aversion evolves to visceral moralization.

Core disgust is revulsion elicited by noxious objects, such as soft body products or offensive odors. Characterized predominantly by unpleasant sensory experiences, core disgust elicitors bear a minimal explicit association with conceptions of morality (good versus bad).

Animal nature disgust is triggered by activities that remind people of their animal origins, such as certain sexual or eating habits. Interpersonal disgust is elicited by the prospect of contact with strangers, evildoers, or diseased persons. Finally, socio-moral disgust is revulsion evoked by people who commit vulgar violations against others, such as child abuse or incest. However elicited, disgust motivates people to reject anything perceived as likely to contaminate the self physically or spiritually or to threaten their status as civilized human beings. In this way, disgust signals the “badness” of impurity and, by extension, the “goodness” of purity.

Implications of Moral Disgust in the Courtroom

Pretrial Jury Research

1. Test the case elements, narrative, facts, relationships, character descriptions of the parties and witnesses for mock juror reactions and characterization consistent with disgust.
2. Listen for metaphors and analogies describing violation of norms of purity. Observe to see if there's any consistency the demographic or values based trends among the jurors in expressing disgust.
3. Experiment with sequencing of disgust features within your case for optimal outcome. Prime disgust by the use of suggestion, metaphors, analogies and framing prior to carrying out the required moral judgment. Olfactory language, metaphors or analogies are particularly powerful. Mitigate the effects of disgust by emphasizing the similarities between the plaintiff/defendant in the jurors.
4. Assess how “same as” or “different from” your client or witnesses are perceived from the prevalent cultural group.
5. Assess whether a behavior was seen as morally right or wrong by looking at the characterizations of the actor's intentions.
6. Assess compensation/punishment by noting the mock jurors' interest in and characterization of outcomes, even if an outcome was accidental. Outcome drives compensation and punishment.
7. Explore with mock jurors, after their verdict and deliberation, which scenarios they imagine may assist them in mitigating the effects of disgust.

Voir Dire/Jury Selection

1. Use a short juror questionnaire to assess disgust sensitivity. If you can't do that then at least apply the variables below.

2. Demographic variables may be used, as conservatives are, on average, more disgust sensitive as are lower income individuals. The demographic predictions are statistically reliable but caution should be used when inferring disgust sensitivity from any demographics.
3. Listen for language, analogies and metaphors as well as facial expression and nonverbal behavior consistent with disgust.
4. Ask open-ended questions regarding social issues of the day, e.g., illegal immigration, abortion, same-sex marriage, taxes, social programs, labor unions, the U.S. debt limit, etc. depending on the side of your advocacy you may want or not want people who are particularly prone to disgust.
5. Listen for people who claim to be disgusted with lawyers, the legal system, defendants, criminals, or plaintiffs in general, such as implications of greediness or being somehow immoral simply for filing a lawsuit.

Witness Preparation

1. For the plaintiff or criminal defendant: Emphasize the similarities between the individual, their personal, family and cultural practices and values and the members of the jury and their American culture and values.
2. For the civil defendant or prosecution: Emphasize the risk of contagion, chaos and calamity should this foreign, exotic, norm violating, greedy, grasping, dirty, wild, outlaw behavior or individual prevail or profit.

In Trial

1. If you want jurors to judge innocuous actions harshly or you want to drive home the point about 'bad' behavior – use subtly disgusting analogies, metaphors or expressions. You want to tie 'disgust' to the other side. Quietly. Subtly. Let jurors think it was their own reaction.
2. Disgust may not be where you want your jurors to land. An angry juror is more likely to take action to fix the situation.
3. Maybe you do want them to be disgusted. A disgusted juror/jury is more likely to entrench and stay stuck. A disgusted juror is less likely to consider context or circumstances that could mitigate. Consider the quality of the mitigating circumstances.
4. Once disgusted you are not prone to become tolerant. If, on the other hand, your disgust morphs into anger over that disgusting behavior – you are likely primed to act in the deliberation room.
5. Show the jurors that the harm caused was unavoidable or even better was brought on by the irresponsibility of the plaintiff. On the other hand, show the jurors that the pain inflicted on your client was 'intentional', jurors may have a stronger moralizing response to it.
6. Your goal may be to simply light the fire of moral indignation in the minds of the jurors.
 - i. For the plaintiff, you want to answer both aspects of the common juror refrain "it may be legal but it sure isn't right". Show them it isn't right. Show them it isn't legal. Lead them beyond contempt... to disgust.
 - ii. For the defendant, you want to answer both aspects of the common juror refrain "it may be legal but it sure isn't right". Show them that you follow the rules and that this at worst was an accident, but you shouldn't be held responsible for the unforeseeable consequences of what happened to this strange person who was irresponsible themselves. Suits like this hurt everyone, cost everyone money and are part of the defiled and broken system. Anyone who would do something like this is gaming the system and wants to be unjustly enriched. They should never prevail. Help them beyond contempt... to disgust.

PowerPoint® Presentations Compatibility Be Prepared for Surprises

Basic Rules for Presenting Yesterday's PowerPoint Presentations With Today's Software

BY ROBERT FEATHERLY, ADAM WIRTZFELD & ADAM BLOOMBERG



Robert Featherly is a visual communications director based in St. Paul, Minnesota. He has spent 25 years developing research based demonstrative exhibits for trial teams, corporations and municipalities across the country. He has written several articles and conducted multiple CLE presentations on effective visual communications. You can read more about Mr. Featherly at www.litigationinsights.com

Adam Wirtzfeld is a legal graphics production manager based in St. Paul Minnesota. Adam has spent 13 years as a graphics consultant, helping trial teams translate their themes into effective visual presentations. He has also authored and provided multiple CLE PowerPoint® workshops for attorneys. You can read more about Mr. Wirtzfeld at www.litigationinsights.com

Adam Bloomberg is a trial technology director based in Dallas, Texas. With 17 years of in-court trial support experience, Adam has developed and led trial and war room technology efforts for major litigation coast-to-coast. A frequent speaker at legal professional meetings and seminars he has also provides hands-on PowerPoint® and TrialDirector training seminars for attorneys and legal support staff. You can read more about Mr. Bloomberg at www.litigationinsights.com

Microsoft's PowerPoint® (PPT) has become the ubiquitous legal presentation software over the years due to its flexibility, reliability and ease of use by nearly everyone in this profession. And, with millions of presentations residing on millions of computers around the world, it will continue to be the top presentation program for the foreseeable future. Over the years this software has been updated and in general, improved. However, in the updating process, some compatibility issues have surfaced that can surprise and disappoint, if we are unaware.

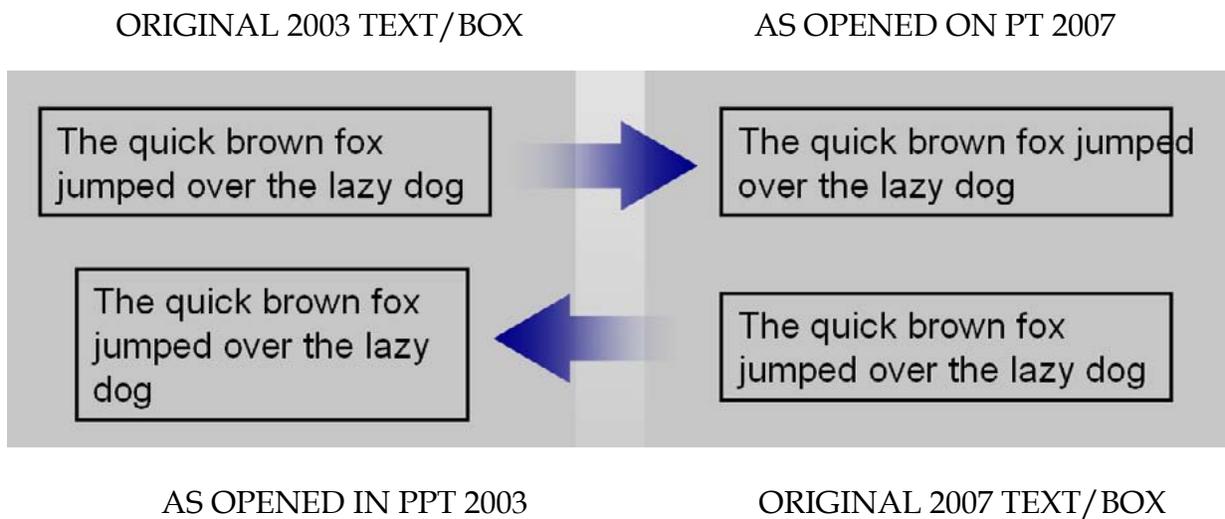
One fine thing about Microsoft software, particularly the MS Office package, has been its backward and forward compatibility between various versions. Files could be reliably updated, saved, and presented from the various versions of the software. Well, that party's over, for PowerPoint presentations at least.

As the newer versions of MS Office (2007 & 2010) have been released with their expanded and updated features, incompatibility issues with archived files produced on different Office versions have arisen. PowerPoint has been particularly afflicted. Today, it is very important to become aware of your presentation's native PPT production version.

The vast majority of today's presentations have been created in PowerPoint version 2003, 2007 or 2010. If your presentation will be edited on or transferred to another computer, it is most important to learn in advance, what PPT version is resident on that machine. If that PPT version is different from the native version of your presentation... you may be in for some surprises.

More and more these days we hear from clients who when reviewing an old PPT presentation on a new computer, are surprised to suddenly discover...

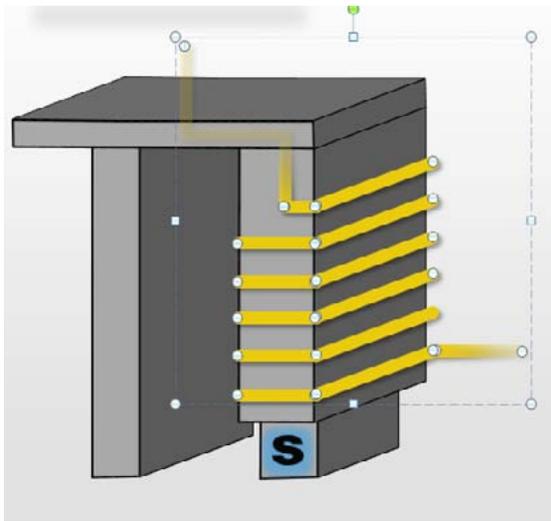
Text inside text boxes wrapping differently in different versions



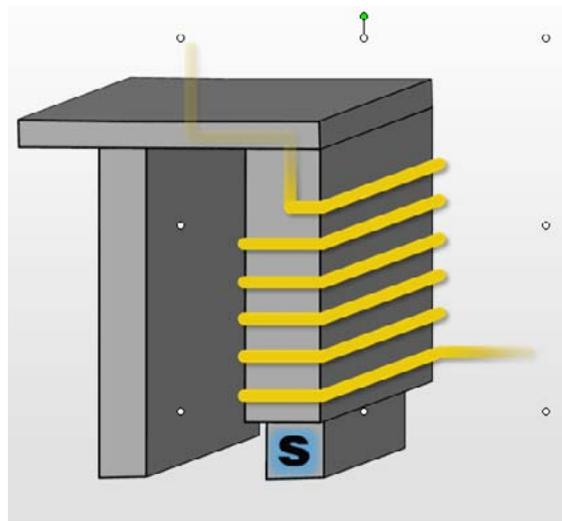
Text shadows appearing on a slide long before that bullet point copy is revealed...



- That certain objects have suddenly become un-editable...



Editable image (note blue dots)



Un-editable image

...along with several other presentation surprises you have probably never before encountered. Also, newer media file formats, image effects, Smart Art and some formatting capabilities may not translate when launched in earlier PPT versions.

These problems were relatively rare until this past year, when people began their 3-5 year cycles of purchasing new computers with, of course, updated software. Suddenly 2003/2007 PPT incompatibilities began piling up. Now, MS Office 2010 is providing more surprises.

Employing the Microsoft Compatibility Mode does a decent job of trying to smooth over these issues between program versions. There are, however, limitations to what it can accomplish.

Here are some Basic Rules to avoid these presentation problems:

1 - **Know What PPT Version Produced your Presentation... 2003, 2007 or 2010?** If you don't know, ask. Or check your file name, looking for one of these icons:



PowerPoint 2003



PowerPoint 2007



PowerPoint 2010

Remember: The file creation date only indicates the date the file was saved, not the PPT version it was created in.

2 - **Don't Switch Horses. Attempt to show the presentation from a computer loaded with the presentation's native PPT software version.** Again, know whether your presentation was produced on PPT '03, 07, or '10.

- **Apple Computers and iPads for Presentations.** More compatibility problems can surface when Apple computers are involved. Fortunately, 95+% of our clients are using PC based computers.

However, with the current popularity of the iPhones and iPads, these cross-platform presentation problems are becoming more common. If your presentation includes Adobe Flash® graphics and animations, they will not run at all on some Apple devices, including iPads. Solution: Test well in advance of your presentation.

3 – Don’t Switch Horses II. Avoid editing a presentation with different versions of PPT software. Although patches in the last 6 months have improved this a bit, editing a presentation in multiple versions of PowerPoint is a gamble. This is probably the riskiest road to a reliable presentation and one that can keep you up into the late hours, waking your IT people and inventing new names for Microsoft, Bill Gates and anything produced in Seattle.

4 – Load PPT 2003, 2007 and 2010 on Your Laptop. This may sound silly, but your IT department probably has these software disks and can easily install them on your laptop. If you frequently use old presentations or import them for other sources, THIS IS THE BEST INSURANCE AGAINST SURPRISES. And remember, to saddle the correct presentation horse before each presentation.

5 – ALWAYS PROOF A PRESENTATION on the presentation computer. Simply handing that jump drive or disk of your presentation to the program chairman can produce big surprises during your show... along with more appropriate gestures to Microsoft.

So, what can you do when cornered?

If you must edit and/or present a PPT with different software, here are some things to look for and solutions to get you by:

- On text shadows, make sure and use “text effects” rather than “shape effects”. This may sound obvious, but especially in earlier version of PowerPoint, the distinction between the two was unclear and there were no real problems with using them interchangeably.
- Avoid using gradients (blends from one color to another) – if you need to use them, be aware you may have to rebuild them if the presentation finds its way into another version of PowerPoint.
- Be wary of text boxes where word flow is really important. If you can, keep text shapes as transparent shapes with no fill or outline, just text. If you want to put text within a shape or on a callout box or something, make that a separate object and group them. It’s not guaranteed to work, but will lessen the likelihood of surprises.

SOME GOOD PRESENTATION TIPS (for all PPT Versions ☺)

1 - Windows Key + P = Shortcut to Projector Linking: Pushing the **Windows** key along with the **P** key will open the options (below) for linking to a projector or external monitor.



2 - **F5 Shortcut to Presentation Mode:** Simply hitting



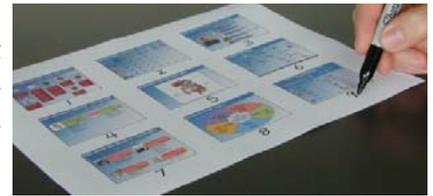
while in the PPT Edit Mode will

instantly launch the Slide Show mode from Slide #1.

3 - **Shift + F5 Shortcut to Presentation Mode:** From any slide within the presentation... holding down the Shift key and pressing F5 will launch the Show Mode from any slide you have highlighted in the Edit Mode.



4 - **Instantly Select any Slide While in Slide Show Mode:** First, create and print a set of thumbnail images of your slides. To do so, select Handouts in your print menu. Then select 9 Slides per Page. Print the images out and then with a wide felt tip pen, mark the correct slide number under each image.



When someone asks about a previous slide... first note your current slide number (circle it?) Then locate the desired slide, select that number on your keyboard and hit ENTER.

EXAMPLE: To recall slide #24:



5 - **To Temporarily Turn Off the Projected Image:** Simply hit the B



key and the screen will go black. This is a great tool to move the attention from the slide back to you. Hit B again and the same slide will instantly reappear. This tip can be used any time while in the Slide Show mode.

Conclusions and Thinking Ahead

We will continue to use PowerPoint in support of our litigation, business development and internal communications for many years to come. But we can no longer assume these presentations will be successfully showcased on other computers. To be safe, **always proof your presentation** on the presenting computer. Try to learn in advance what PPT version might be used to offer your presentation. And when sending a presentation off to a client or colleague, state the native PPT version clearly in cover memos...or on that jump drive or CD.

Happy Presenting!

In the Mood? Strategies for Working with Depressed and/or Anxious Witnesses

BY KACY MILLER

Kacy Miller is the founder of CourtroomLogic Consulting, recognized by Texas Lawyer newspaper as one of the "Texas Best Jury Consultants" of 2010. Ms. Miller assists law firms with trial strategy (including theme development, mock trials and focus groups), witness preparation, jury selection and specific services designed to maximize settlement strategy and jury perception. Her national practice is based in Dallas, Texas and focuses on complex civil litigation. You can read more about Kacy Miller and her expertise at www.CourtroomLogic.com and follow her on Twitter [[@CourtroomLogic](#)].

Which of the following have you felt at some point in time?

- I'm in a funk.
- I'm so stressed out.
- I'm not sleeping very well.
- Work is overwhelming right now.
- I can't concentrate.
- I'm feeling a bit testy and short-tempered.
- I don't have the energy to make it through the day.

I'd be willing to bet a dollar to every single reader that you identified with at least one of the statements above. If not, you are superhuman and I want to know your secret.

Witnesses experience these emotions too and their moods can affect their ability to testify effectively. Scientific research shows that moods like anxiety and depression actually impair brain function, communication, and the ability to access memory. Couple this with the added pressure of testifying, and the seemingly simple act of processing a question, retrieving the answer from memory and articulating the answer in a coherent, confident manner becomes a daunting task.

Today's world is stressful: the economy is unstable, the job market is poor, and workloads have increased while free time has decreased. A 2008 Pew Research study reported that 28% of adult Internet users looked online for information related to depression, stress, anxiety, or other mental health issues. Based on the upward trend from 2002 to 2008, it's not unreasonable to opine that the percentage is even higher today.

The latest statistics from the Centers for Disease Control and Prevention (CDC) indicate that 15.1% of the U.S. population has been *clinically diagnosed* with depression, and 13% clinically diagnosed with anxiety. This amounts to more than *80 million people* who are struggling with one or the other, and millions who are dealing with both.

But let's not forget about the folks who don't talk to their doctors about their symptoms, who don't seek treatment, or who – for reasons we all know too well – are simply dealing with situational issues that cause some of the symptoms to appear on a temporary basis.

So how does depression or anxiety impact my witness?

Some people might say depressive and anxious moods are like in-laws: they come in many shapes and sizes, they stay for different lengths of time, and they impair our day-to-day routine to varying degrees. Like pain or hunger, our threshold for what we are willing to tolerate varies when it comes to feeling blue or stressed, as does our ability to cope and work through the issues.

Brain science and research indicate that strong feelings cause the neural activity in the sympathetic nervous system and parasympathetic nervous system to get out of whack. Hormones keep these two systems in a balance, but when select hormones remain active in the brain for too long, it causes injury (or even death) to brain cells in the area of the brain needed for memory and learning. When these systems are out of whack, our ability to think clearly and rationally is diminished.

Physiologically, anxiety and depression can wreak havoc on our bodies: upset stomach, headache, disturbed sleep patterns, a change in weight, increased blood pressure, decreased energy level, muscle tension... the list goes on. The world also becomes a little duller. There is recent research from Germany to suggest our ability to detect weak smells is diminished and our retina's response rate is reduced.

Cognitively, these moods not only interfere with our ability to absorb new information, but also to retain it. Researchers have known for years that long-term exposure to stress impairs learning and memory functions, but recent research shows that exposure to short-term stress for just a few hours can also have a negative impact.

The kicker? As a witness struggles to comprehend the information, he begins to feel more confused, which in turn increases anxiety levels. And guess what? Increased anxiety interferes with his ability to comprehend, think rationally and actively engage in deductive reasoning. It's a vicious cycle.

What's really fascinating is that positive feelings – such as feeling appreciated, understood, accepted, valued – can actually help the brain functioning get back in sync, which helps our cognitive functioning return to normal. This is a very important factor to consider when working with witnesses.

Consider these scenarios:

Case Study #1: Jane

Not too long ago, I was retained to help prepare a witness for deposition testimony. The witness was a young woman who had been individually named in a wrongful death lawsuit. She was, at the time in question, a pre-school teacher who had a student die while in her classroom. Jane would obviously need to testify about the event in question, her experience in working with pre-school children, her credentials and education. Most importantly, she would have to defend herself against implications that she was negligent in her care and was personally responsible for causing the death of the child. When I first met Jane, she could not look me in the eye or say the child's name without a

quivering, barely audible voice and a river of tears rolling down her cheeks. She was riddled with self-doubt, loathing, feelings of worthlessness and shame. How on earth would she survive a videotaped deposition?

Case Study #2: John

I've also worked with a number of witnesses in the medical profession. Not too long ago, a labor and delivery nurse was facing a tough video deposition in a heart-wrenching matter involving the birth of a mother's first child, during which the child died. These L&D med-mal cases are always tough – no matter which side you're on. Every aspect of this nurse's care was going to be scrutinized during the deposition, including his charting, communications with the doctors, chain of command, policies and procedures, quality of care, his interpretations of the fetal heart rate monitoring, and what interventions he did when. John's anxiety level was so high he almost seemed manic: his speech pattern was too fast, his body was constantly moving, and his ability to slow down, think carefully about the question and state a concise truthful answer was seriously impaired.

How could I effectively prepare these witnesses for their upcoming testimony without exacerbating the very manifestations that were causing the challenge to begin with? How could I help "quite the noise" and empower them to embrace the truth and to testify with confidence?

The key is working with the moods, not against them. You can tell someone a million times to stop fidgeting, but until that person can channel the anxiety elsewhere, the fidgeting is bound to return. And telling someone to "cheer up" or "get over it" is futile. You can't "fix" or "cure" the emotions that another person is experiencing. However, if you acknowledge them and work with them, it is possible to minimize their negative effects.

In my 14+ years of trial consulting, I have found that the following strategies work well for almost every witness, but they are on my short-list of strategies when working with someone who exhibits a depressed mood, high levels of stress or excess manifestations of anxiety.

Tips from the Trenches:

1. Don't Cram.

It is absolutely critical to begin preparing the witness weeks ahead of the scheduled date of testimony – weeks, not days. Does it make scheduling more difficult? Absolutely. But the pay-off is well worth the inconvenience or added expense. By breaking the prep sessions into multiple sessions, you not only enable the witness to tackle difficult subject matter over a period of time, but you provide yourself ample opportunity to identify strengths and weaknesses and to work through the kinks. Last minute surprises are difficult under the best conditions, but last minute surprises could be the death of your case when working with a witness whose mood can hinder cognitive functioning. Schedule multiple sessions over a period of weeks with at least a few days rest between the sessions to allow the witness time for reflection and relaxation.

Even if you conduct multiple prep sessions, keep them short and break up the tasks into manageable pieces. Shorter is better. It minimizes the chance of cognitive or emotional overload for the witness and allows the witness to focus more effectively on the task at hand. Marathon sessions may exacerbate the witness's mood, so limit the first session to less than a few hours, including breaks. Assess whether the witness has the capacity for lengthier sessions and re-adjust accordingly for follow-up sessions.

2. Keep It Small.

If your case is multi-party or involves a number of attorneys, resist the temptation to involve the entire team during witness preparation. Keep the session small and intimate. If at all possible, limit the preparation session to just the presenting/defending attorney, the witness, and the jury consultant (if you're using one). The small group minimizes potential conflict, having "too many cooks in the kitchen" and it has the added benefit of creating a less intimidating, safer environment for the witness.

3. Build Confidence.

Many witnesses struggle with confidence when faced with giving testimony under oath. I find this to be especially true when working with witnesses accused of personal wrongdoing, negligence, or who are in some way "in the hot seat" for personal or professional choices. While everyone occasionally second-guesses their decisions, the jury will likely view the witness who does so as lacking credibility and conviction in his actions. Moreover, the witness who lacks confidence becomes more vulnerable to attack by opposing counsel.

- ***Define the Role of A Witness.*** Unless a witness has testified in the past, most believe their role is to win the case and tell every detail of the story. In my experience, this perception seems to be magnified in those witnesses with acute anxiety. The need for perfection creates an unnecessary burden, and often causes witnesses to overcompensate, over-equivocate or attempt to win every exchange with opposing counsel. It's important to teach witnesses about their limited role, the topics that are home base or out of bounds, and the importance of knowing their boundaries. Without boundaries and a clear role, a witness can easily go rogue – not because he consciously intends to, but because his cognitive processing is burdened.
- ***Tools to Regain Control.*** Witnesses are typically surprised when I tell them they are, in some ways, in the "driver's seat" and not the "hot seat" when testifying. I find that witnesses who are exhibiting a depressed or anxious mood are often less willing to assert themselves or to correct a mischaracterization because they are struggling with self-esteem issues, fear of the unknown or have extra "noise" in their head. They often accept what opposing counsel states as fact and answer questions assuming the attorney knows best. Witnesses are empowered by the realization that they can, to some degree, control the process. They can help control the pace by slowing down their speech; they can help control the tone by answering with a calm, even voice; they can even help control the content by listening carefully to the question and answering only the question and of course, knowing the boundaries. These instructions are basic, but to many witnesses, embracing these strategies not as rules, but as tools for maintaining some semblance of control during a difficult process can do wonders for their confidence.
- ***Self-Affirmation.*** Jane, our first subject, had zero confidence: her depressed mood and fear overshadowed her strengths and caused her to question her decisions. In an effort to shift her thinking from negative to positive, we each wrote down a list of words that

described her strengths and successes. The list had nothing to do with the lawsuit or the allegations, but was personal in nature. We then posted the descriptors on a white board and talked about why they were strengths. I realize this seems like an elementary task, and it's certainly not one I would do with every witness, but because research supports the act of reinforcing the positive to help minimize impaired brain function, it's a task worth considering. Before Jane left for the day, we wrote the list on a sheet of paper and she said she would hang it on her bathroom mirror and read it every day. By the time Jane gave her deposition testimony, her confidence had notably improved... along with her ability to properly assert herself and correct mischaracterizations. Self-affirmation is a powerful thing.

4. Practice Telling the Story.

When working with witnesses who have a difficult time talking about the events in question, use repetition to your advantage. Assuming you meet with the witness over multiple sessions, have the witness tell the story during each session. Just listen. If you have to prompt the witness to tell more or to expand on an issue do so with as few words as possible, but let the witness tell the story with minimal interruption. It does not need to be a perfect story. It does not need to be testimony-worthy. It just needs to be accurately told. Repeatedly practicing the story of events not only acclimates the witness to the process, but it also minimizes the raw nature of the associated emotion. Over time, the act of repetition teaches the witness that she can, in fact, tell the story and tell it well.

When Jane was asked to tell the story in our first session, her emotions hijacked her thought process. She struggled with fact recall and communicating the story she had to tell. Because she could not complete the entire story, we used a modified form of "chaining": a process where a portion of the story is told and built upon over time. Each session, Jane was able to tell more of her story; and each session, we worked on skills and strategies for telling it with conviction, confidence and clarity. By the time we had our last session, Jane could not only tell the story from beginning to end, but she could do so with her head up, eyes forward, a strong voice and no tears.

5. Acknowledge the Feeling.

Empathize with your witness and make an effort to acknowledge their feelings and emotions. Whether you like the feeling or not, you cannot change how a witness feels; you can, however, foster a safer environment for the witness and potentially quell the nerves and tears by merely recognizing the elephant in the room. Rather than labeling the emotion, consider providing supportive statements instead. "I can only imagine how difficult this is for you." "It can be really stressful to testify in front of a jury." "I get nervous when I have a video camera in front of my face too." "Your story is a heartbreaking story; it's okay to feel sad."

If you accept the emotion, you not only build rapport with the witness, but the simple act of acknowledging the feeling actually helps get the brain back in sync, thereby resulting in improved cognitive processing. Sure, this might seem a little touchy-feely, but the potential benefit is worth it.

6. Channel the Anxiety Elsewhere.

Anxiety is a funny creature and manifests itself in a variety of ways. The witness might twist and turn in his chair; she might constantly move her hands; he might shake his foot so violently his entire body moves; she might mindlessly twist the ends of her hair; he might take a sip of water before answering the difficult questions; he might chew the end of his glasses (which, I might add, jurors hate!).

It is unlikely that the anxiety will disappear altogether, but it is possible minimize its impact. Channel the anxiety elsewhere or remove the item that is making the anxiety more noticeable. For example: replace the chair with one that does not swivel; remove the water; ask the witness to wear her hair in a clip or ponytail; consider wearing contacts rather than glasses.

When I'm working with a "mover-and-a-shaker", I often provide the witness with a small item to occupy his hands: a rubber band; a tennis ball; a stress ball; Silly Putty. The challenge is choosing an item that does not make noise, and one that is malleable enough to allow the witness to pull, twist, knead, etc. Attorneys always ask me, "What if the jury sees the witness playing with the stress ball?" "What if opposing counsel asks him about the rubber band on video during the deposition?" My answer: address it early on and have the witness explain that the object helps quell his nerves and helps him focus on the questions. Jurors really won't care, and if opposing counsel makes a stink about it, he could lose favor in the eyes of the jury. As long as the item does not interfere with the witness's ability to answer truthfully, cause issues with noise or distract others, I think it's a reasonable strategy.

Remember John the fast-talking-agitated L&D nurse? We gave him a gel-filled stress ball during our preparation sessions. The transformation was amazing. His speech slowed down. He focused on the questions with more purpose. His answers were shorter. He was visibly calmer. And his confidence increased. Underneath the table, his hands were busy playing with the stress ball; but above the table, he looked calm, attentive and confident.

7. Address the "What-Ifs."

How many times have we heard the following: "What if I get the answer wrong?" "What if I didn't get to tell the whole story?" "What if I can't remember the dates?" "What if I'm so nervous I can't remember anything?"

The best way to address these questions is to provide the witness with a strategy for regaining control and a tool for managing the issue. Don't simply dismiss the question; provide the witness with a workable solution should the what-if scenario play out.

- "If you tell the truth, there are no wrong answers."
- "If you misstate something or get confused, you can correct it later."
- "If you don't get to tell the whole story and it's an important issue, trust me to ask about it later. If it's not that big of a deal, I won't bother with it."
- "If you can't remember the dates, a general range is okay or a description of the time of year (i.e., fall, summer, holidays, etc.)."

Another strategy is to take that “what-if” question and turn it into a positive. Teach the witness to view the situation in a different way. For example, instead of “What if I get the answer wrong,” encourage the witness to say, “What if I just tell the truth?” “What if I don’t get confused?” “What if I just answer the question and trust my attorney to make sure the story gets told?” “What if I can remember more than I think I can?” “What if I feel calmer on the witness stand than I do right now?” It’s a small thing, but positive self-talk can work wonders.

8. Create a Fear List.

One constant in every witness preparation: I ask the witness to create a “fear list.” In the case of witnesses who are more prone to anxiety or mood fluctuations, a fear list can give them yet another outlet for channeling the noise in their heads. A fear list is just what it sounds like: a list, created independently by the witness, containing issues that scare him: questions he hopes nobody asks; questions he feels uncertain answering; questions that give him heartburn. If the witness creates a fear list, he can then share it with counsel who can then help address the fears. It has the added benefit of giving some semblance of control to the witness, establishing trust, fostering communication and addressing strategies for handling the very issues that raise the witness’s anxiety.

9. Sleep. Eat. Play.

If the witness’s most basic needs are not met and satisfied, he will almost certainly feel more anxious and his ability to engage in higher-level thought will be even more impaired.

The two most basic needs, according to Abraham Maslow, are physiological needs and a feeling of safety. We’ve already addressed a number of strategies that can promote a safe environment. The instructions below will help your witness meet basic physiological needs, and consequently, prepare the body and mind for the task ahead.

- Get a solid, restful night’s sleep before testifying. Avoid the temptation to “cram” or to review notes or to stay up late watching a movie on HBO. Sleep, and sleep well.
- Eat breakfast! Yes, Mom was right and research shows that kids who eat breakfast perform better in school. We need food to nourish our bodies to keep our brain sharp and focused. We all know what it’s like to work through hunger. Fuel the body and fuel the brain.
- Play. Do something you really enjoy as your testimony date approaches. Go see a movie. Go to yoga. Catch a baseball game. Sneak out without the kids for “date night.” Run. Golf. Read. Take a bath. Enjoy yourself and relax. It’s good for the soul and the mind.

Testifying is draining under the best circumstances, but when someone is struggling with mood-related issues such as anxiety or depression, it can be even more daunting than usual. By implementing the suggested strategies, you can work with the mood and foster a safe environment for the witness to work through their challenges, develop confidence and learn strategies for becoming a better storyteller.

The truth is all that matters. Help your witness tell it effectively.

Putting a Face on the Corporate Defendant

BY SARAH THIMSEN, E. KIERNAN MCGORTY, & BRIAN H. BORNSTEIN¹

[Sarah Thimsen, MA, MLS](#) is a Doctoral Candidate in the Law-Psychology program at the University of Nebraska-Lincoln. Sarah earned her MA in Forensic Psychology from Castleton State College and her Master's of Legal Studies from the University of Nebraska-Lincoln. Sarah is currently working on her dissertation, which focuses on perceptions of apologies in a medical malpractice case.

[E. Kiernan McGorty, JD, PhD](#) is a Senior Program Evaluator in the North Carolina General Assembly's Program Evaluation Division. She earned her law degree and doctorate in cognitive psychology from the University of Nebraska-Lincoln. She currently evaluates whether public services in North Carolina are delivered in an effective and efficient manner and in accordance with the law. You can learn more about Dr. McGorty's work at www.ncleg.net/ped.

*[Brian H. Bornstein, PhD, MLS](#) is Professor of Psychology and Courtesy Professor of Law at the University of Nebraska-Lincoln. His major research interests are in the areas of legal decision making; eyewitness testimony; and procedural and distributive justice. Dr. Bornstein's latest book is the *Handbook of Trial Consulting* (2010, Springer Publishing), co-edited with Richard Wiener. You can learn more about Dr. Bornstein's research on his webpage at <http://psych.unl.edu/faculty/faculty.asp?id=13>*

University of Nebraska-Lincoln

When Ford Explorers exhibited a disturbing tendency to roll over due to tire blowouts in the 1990s, neither Henry Ford nor any of his direct descendants appeared in court for the resulting civil litigation. Similarly, when plaintiffs have sued McDonald's for serving overheated coffee or causing obesity, neither the McDonald brothers, Ray Kroc, nor any of their descendants made a court appearance. Individual defendants have a face; corporate defendants do not.² Although corporate employees, even ones with high status such as CFOs, COOs and CEOs, may be present and testify in litigation involving their companies, the corporation itself cannot and does not. A corporation, as a legal entity, has no body and cannot testify. This raises the question of how to put a face on the corporation at trial, and whether different ways of representing the corporation will produce different outcomes.³

The past couple decades have seen an increase in business litigation (Hans, 1989, 2000). Litigation work, for example, increased 4.1% from the same quarter (i.e., first quarter) a year ago (O'Connell, 2011). Cronin Fisk (2011) also noted an increase in cases involving defective products. A number of possible reasons exist for the increase, including an increase in corporate accountability for wrongdoing and an increase in businesses taking each other to court to resolve disputes (Hans, 1989). With this increase

in litigation involving businesses as defendants, it is important to understand how jurors perceive corporate defendants.

Corporations as defendants face unique obstacles. First, as Hans (1989) discussed, it can often be difficult for jurors to determine liability. Instead of a clear path to liability, such as holding George accountable after he runs a stop sign and hits Ben's car, when a corporation is a defendant, jurors must determine whether--and if so, how--to hold an intangible entity to the same standard as a flesh-and-blood individual. Even in cases where an individual within a corporation is responsible, the corporation itself might still be the one named in a lawsuit, making it difficult for jurors to determine liability (Hans, 1989).

Another issue facing corporations at trial relates to its embodiment in the courtroom. The corporation itself, as an intangible entity, cannot physically be present at trial. The interested parties (e.g., defense attorneys, CEOs, and so forth) must decide how to embody the corporation at trial if they choose to embody it at all. They may choose to have no representative present or they may choose a person from the corporation to act as a representative at trial. To date, relatively little research has been done on jurors' perceptions of corporate representation at trial. With the increase in business litigation, however, this is likely to become an important area for researchers and consultants alike.

Testimony

While little research has been done directly on point, research does exist on areas that bear on the topic. One area of relevance relates to perceptions of defendants who testify versus defendants who do not testify. As the Fifth Amendment guarantees, a defendant cannot be compelled to testify against him- or herself, and a number of defendants choose to exercise this right. The result of this decision can significantly influence how jurors view a defendant.

When defendants choose not to testify, judges often instruct juries not to infer anything (e.g., guilt) from a defendant's choice not to testify. Research suggests, however, that this choice not to testify, despite judicial instructions, has implications for how jurors perceive defendants. Antonio and Arone (2006), for example, researched capital cases in which defendants did or did not testify. When defendants chose not to testify, many of the jurors interviewed (27.4% of the sample) reported that they believed the failure to testify "was an obvious admission of guilt" (p. 62). Other jurors reportedly inferred that the defendant was not sorry or lacked remorse for his crime. Further, Antonio and Arone reported that jurors expected a defendant to testify on his or her own behalf and were confused and curious as to why a defendant might stay silent, often inferring that the defendant was trying to hide something.

Interestingly, according to Antonio and Arone's (2006) research, a defendant who testified fared little better than one who did not. In their interviews with jurors, they uncovered that a majority of jurors reacted just as negatively to defendants who testified. In this situation jurors most often believed the defendant was lying or showed no remorse for the crime.⁴

Juries' reactions to (lack of) testimony might have serious implications for corporate clients. When a corporation is on trial, for example, it is unlikely that one individual bears the entire responsibility for the harm. Therefore, if a corporation has a representative at trial, he or she might be just a mouthpiece for the corporation, and not the responsible party, per se. An important question to ask, then, is whether jurors react as negatively to testimony (or lack thereof) when the person testifying is simply a corporate functionary.

Defendant Characteristics

Hans (1989) has noted that several factors unique to corporations might influence jurors' perceptions. She posited that a corporation's reputation, along with the utility of its product and its size, can all affect how jurors view it. Others (e.g., Hans, 1994; MacCoun, 1996) have suggested the activity of corporations can also influence jurors' perceptions; for example, commercial, non-commercial, and non-profit activity can all affect how juries view corporations.

One factor affecting jurors' perceptions of corporate defendants relates to the (perceived) wealth of such defendants. The "deep-pocket effect" suggests that jurors will award higher damage awards when the defendant is perceived as wealthy. Indeed, Hans (1989) noted that critics often posit that "civil juries penalize corporations for their ample resources, treating them as deep pockets..." (p. 177). While an interesting prospect, research has failed to provide evidence for such an effect. Bornstein (1994), for example, reported that a defendant's status affected jurors' perceptions (see below), but no deep-pocket effect emerged. Although mock jurors expected high-status defendants to pay more, those expectations arose from punitive motivations and were mediated by sympathy. Similarly, Hans and Ermann (1989) found that higher awards functioned more to punish bad behavior than as a response to a defendant's wealth. MacCoun (1996) reported similar results. In his research, MacCoun (Experiment 1) found that individuals found corporations liable more often and awarded higher damages when the defendant was a corporation rather than a relatively wealthy individual or a relatively poor individual. Thus, although jurors do appear to show an anti-corporate bias, the bias is driven more by corporate defendants' status as corporations rather than their actual or perceived wealth.

Standards of Responsibility

Perhaps one of the most influential factors jurors consider in corporate litigation is the standard of accountability. As Hans (2000) has noted, establishing a standard causes debate among scholars. Some (e.g., Nader & Smith, 1996), for example, argue that corporations, due to their size and the nature of being a corporation, owe more to the public and therefore should be held to a higher standard of responsibility. At the other end of the spectrum, some (e.g., Hovencamp, 1991) argue that courts should actually hold corporations to lower standards. Finally, others (e.g., the United States Supreme Court) argue that courts should treat corporations the same way they treat individuals. In this instance, the corporation is no different from an individual on trial. The U.S. Supreme Court supported the "corporation = person" view in *Santa Clara County v. Southern Pacific Railroad Company* (1886), noting tersely that a private corporation is entitled to all of the rights and protections individuals enjoy. Indeed, Hans noted that jurisdictions across the United States have adopted pattern instructions charging jurors with treating corporations the same as individuals. (For a more thorough discussion of this issue, see Hans, 2000).

Despite a legal basis for treating a corporation as an individual, research has shown that jurors hold corporations and individuals to quite different standards (see, e.g., Hans, 1989; Hans & Ermann, 1989). One study, for example, found that people judge corporations and individuals differently, even

when the actions of both are identical, suggesting that they hold corporations to a higher standard (Hans & Ermann, 1989). Participants in this experiment judged corporations more harshly and punished them more severely than individuals. Further, participants defined recklessness differently when considering an individual or a corporation as a defendant. Robbinette (1999) echoed this sentiment, noting that people often hold groups to higher standards of accountability because groups are seen as more effective than individuals. Her results bore this out, finding that participants assigned more responsibility and blame to a group defendant as opposed to an individual defendant. Robbinette further reported that participants awarded punitive damages more frequently when a group defendant (i.e., a group of employees from the corporation versus an individual employee) was present. If courts require a reasonable person standard (instead of a reasonable corporation standard), it might indeed behoove corporate defendants to place a physical representative of the corporation at the defense table. Jurors might be more able to apply a reasonable person standard when a person is in fact present.

Another study reported that jurors might not be as forgiving of corporations. As Hans (1989) put it, "critics perceive harsh treatment for businesses in cases that pit corporations against individual litigants" (p. 177). MacCoun (1996), for example, noted that jurors held negative views of defendant corporations, being skeptical of testimony or believing them to be more careless in their conduct. MacCoun offered that jurors might find it easier to impose some penalty against a faceless entity rather than a flesh-and-blood individual. When the defendant is not readily identifiable it becomes easier to impose sanctions because the "it" is not a real person, making the consequences of sanctions harder to visualize.

Research into stereotypes and stereotype change may help to elucidate this explanation. When people hold strong stereotypes, they think of the stereotyped group as "them," a rather faceless entity in which all members are the same and interchangeable with one another. To change a stereotype, one goal is to change seeing a group as "them" and begin to recognize individual members of the group as individuals. The same thinking might apply to corporate defendants; rather than see the corporation as an "it," attorneys might try to have jurors conceptualize it as an individual, perhaps by even having an individual physically represent the corporation at trial. One way this might benefit defendants is by allowing jurors to put themselves in the defendant's place (Robbinette, 1999). Shaver (1985) suggested that taking a defendant's perspective might make jurors more able to understand extenuating circumstances, perhaps leading to less severe treatment. Indeed, MacCoun (1996) noted that plaintiff attorneys often try to depersonalize a corporate defendant in order to sway the jury. Similarly, results from Robbinette's (1999) research lend support to the idea that having an individual (i.e., an individual as an actor in a group, not as a representative of the group) be accountable for a group's action might be to its (the group's) benefit. Robbinette explained this further, noting that participants in her research were more likely to focus on the plaintiff and what he/she may have done to contribute to the negative outcome when an individual was the defendant.

Hans and Lofquist (1992) reported contradictory findings, however, reporting that civil jurors did not express any bias against corporate defendants.⁵ A majority, in fact, reported they attempted to treat the corporation the same as they would treat an individual, holding the two to the same standard of responsibility. In line with this, the authors noted that jurors in their research preferred to consider the facts in terms of individual actors rather than organizational entities, an idea Hans and Lofquist labeled "the juristic person standard." Hans and Lofquist went on to report that these jurors often expressed more negative attitudes toward the plaintiff rather than the corporation "and sometimes

had trouble concluding that business entities should be responsible” (p. 110).⁶ One reason for this discrepancy, according to Hans and Lofquist, was the absence of “an identifiable corporate presence in the courtroom” (p. 110).

One potential explanation for these differing findings might involve the type of business in which the corporation was involved. Researchers have reported, for example, that mock jurors have different perceptions of a corporation depending on its financial motives. When a corporation was engaged in commercial activity, jurors judged it more harshly than when the corporation was non-profit (Hans, 1994). MacCoun (1996) suggested that juries maintain higher standards for corporations, particularly those acting for-profit. To support his contention, he noted that studies have shown jurors treating corporations more harshly than individuals, but individual defendants (when engaged in commercial activity) received equally harsh treatment as corporations. Robbinette (1999) suggested that “if the actor’s identity evokes higher expectations among evaluators, then responsibility judgments will increase” (p. 40-41). It seems possible that people have higher expectations for corporations acting for-profit and therefore judge them more harshly when they do not meet those expectations. Robbinette went on to suggest that jurors not only determine whether a defendant’s action (or lack thereof) caused a certain consequence, but jurors must also consider “what the actor should have done, given his or her social position” (p. 8, emphasis in original).

Research examining corporate social responsibility (“CSR”) seems to support this contention. Vlachos, Tsamakos, Vrechopolous, and Avramidis (2008) investigated how poor CSR might affect consumer impressions and behavior. Their analyses revealed negative effects associated with poor CSR. The more suspicious a consumer was, the more s/he considered multiple CSR attributions, which negatively affected attitudes (e.g., trust) and behaviors (e.g., patronage). Wagner, Lutz, and Weitz (2009) also noted that inconsistent CSR information can fundamentally affect consumers. The more inconsistent information available, the more negatively consumers perceived the corporation. A corporation trying to save face when facing a civil or criminal action might benefit from having a representative at trial. Following this logic, a corporate defendant engaged in noncommercial activity should receive more lenient treatment. MacCoun (1996) did not find this, however. Instead, he found that, when engaged in personal activity, participants judged corporations more harshly than wealthy individuals. This finding seems to lend further support to the idea of an “anti-corporate bias” expressed by juries.

Another way to reconcile the findings is to consider that Hans and Lofquist (1992) focused on the plaintiff-versus-defendant comparison, whereas MacCoun (1996) and others have focused on the type-of-defendant comparison. Jurors might perceive corporate defendants more favorably than plaintiffs, while simultaneously perceiving corporate defendants less favorably than individual defendants.

Presence at Trial

To date, only one study that we know of has actually examined reactions to a defendant’s presence at trial in a jury simulation study in a civil trial. In a series of two experiments, McGorty (2004) examined the effects of corporate presence (or absence) in the courtroom, corporation size, and damage severity (Experiment 1). In Experiment 2, McGorty again examined the effect of corporate presence (or absence) in the courtroom, corporation size, and professional relatedness of the offense.

She operationalized corporate presence/absence as whether a high-ranking corporate official sat with counsel during the trial. For example, in both studies, the “corporate-present” condition involved the CEO joining defense counsel at the defense table, whereas the lawyer sat alone in the “corporate-absent” condition.

Corporate presence affected jurors’ perceptions of both plaintiffs and defendants. McGorty (2004, Study 2) reported that mock jurors perceived defendants more positively when a representative was at trial. Absence of a representative, conversely, benefitted perceptions of the plaintiff: Participants reported more positive views of the plaintiff when the corporation had no representative at trial. Mock jurors in the corporate-representative-present condition further reported they would have had more negative perceptions of the defendant had no representative been in the courtroom. Absence of a representative often led mock jurors to wonder about that absence (Experiment 2). This curiosity about defendant absence seems to fall in line with Antonio and Arone’s (2006) research regarding criminal defendant testimony. Perhaps absence leads jurors to question what the defendant is hiding. In terms of damage awards, McGorty (2004) found no major differences in juror damage awards when the corporation had a representative compared to when it did not; that is, the absence of a physically present defendant did not result in higher damage awards. Of course, differences in perceptions of corporate defendants can be important even if they do not influence damage awards, as by influencing judgments of negligence and consumer behavior.⁷

Conclusion and Implications for Trial Consulting

A number of factors can affect the decisions juries make. One of the least studied, yet undoubtedly important, factors in civil litigation is corporate representation at trial. With an increase in business litigation and an increase in public dissatisfaction with corporate wrongdoing, corporations naturally want to do all they can to avoid liability judgments or large damage awards. Fortunately for corporations, empirical research has not borne out the “deep-pocket hypothesis.” Unfortunately for corporations, however, researchers have empirically demonstrated an “anti-corporate bias.” One possible way for corporations to assuage this bias in juries is to have a representative at trial. By putting a face to the corporation, juries might be less likely to see an intangible “it” with whom they feel no connection and begin to see (and judge) the corporation as a person, with whom it might be easier to establish a connection.

Corporations often have a number of tools at their disposal when they go to trial. An individual plaintiff who takes on a corporation might face a Goliath with tremendous financial and personnel resources with which to work. The individual plaintiff, however, has something the corporation does not: an actual physical presence at trial. By physically representing itself at trial, a corporation stands a better chance of winning over jurors.

Trial consultants working on behalf of corporate defendants can, and should, take steps to “personalize” a corporate client at trial. As with many other areas, more research will help clarify the extent to which such personalization can benefit a corporation. Current research trends, however, indicate that providing a physical defendant can affect jurors’ perceptions of the corporation, often to its benefit.

References

- Antonio, M. E., & Arone, N. E. (2005). Damned if they do, damned if they don't: Jurors' reactions to defendant testimony or silence during a capital trial. *Judicature*, 89, 60-66.
- Bornstein, B. H. (1994). David, Goliath, and Reverend Bayes: Prior beliefs about defendants' status in personal injury cases. *Applied Cognitive Psychology*, 8, 233-258. doi:10.1002/acp.2350080304
- Cronin Fisk, M. (2011, January 18). Defective-product verdicts against companies increase. Retrieved from <http://www.bloomberg.com/news/2011-01-18/defective-product-awards-rise-as-u-s-jurors-slap-companies-with-verdicts.html>
- Greene, E., Johns, M., & Smith, A. (2001). The effects of defendant conduct on jury damage awards. *Journal of Applied Psychology*, 86, 228-237. doi:10.1037/0021-9010.86.2.228
- Hans, V. P. (1989). The jury's response to business and corporate wrongdoing. *Law and Contemporary Problems*, 52, 177-203. doi:10.2307/1191910
- Hans, V. P. (1994). Perceptions of civil justice: The litigation crisis attitudes of civil jurors. *Behavioral Sciences & the Law*, 12, 181-196. doi:10.1002/bsl.2370120207
- Hans, V. P. (2000). *Business on trial*. New Haven: Yale University Press.
- Hans, V. P., & Ermann, M. D. (1989). Responses to corporate versus individual wrongdoing. *Law and Human Behavior*, 13, 151-166. doi:10.1007/BF01055921
- Hans, V. P., & Lofquist, W. S. (1992). Jurors' judgments of business liability in tort cases: Implications for the litigation explosion debate. *Law & Society Review*, 26, 85-115. doi:10.2307/3053837
- Hovencamp, H. (1991). *Enterprise and American law: 1836-1937*. Cambridge: Harvard University Press.
- MacCoun, R. J. (1996). Differential treatment of corporate defendants by juries: An examination of the "deep-pockets" hypothesis. *Law & Society Review*, 30, 121-161. doi:10.2307/3054036
- McGorty, E. K. (2004). *Embodying the corporation at trial: The effects of injury severity, case type, and company size* (Unpublished master's thesis). University of Nebraska-Lincoln, Lincoln, NE.
- Nader, R., & Smith, W. J. (1996). *No contest: Corporate lawyers and the perversion of justice in America*. New York: Random House.
- V. O'Connell. (2011, April 29). Rising tide of litigation lifts firms [Web log post]. Retrieved from <http://blogs.wsj.com/law/2011/04/29/rising-tide-of-litigation-lifts-firms/>
- Robinette, P. R. (1999). *Differential treatment of corporate defendants as a form of actor identity and evaluator expectations*. (Unpublished doctoral dissertation). University of Kansas, Lawrence, KS.

Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886).

Sclafane, S. (2010, December 6). EPL insurers brace for severe recession claims. Retrieved from <http://www.propertycasualty360.com/author/susanne-sclafane?page=8>

Shaver, K. G. (1985). *The attribution of blame: Causality, responsibility, and blameworthiness*. New York: Springer-Verlag.

Vlachos, P. A., Tsamakos, A., Vrechopoulos, A. P., & Avramidis, P. K. (2009). *Journal of the Academy of Marketing Science*, 37, 170-180. doi:10.1007/s11747-008-0117-x

Wagner, T., Lutz, R. J., & Weitz, B. A. (2009). Corporate hypocrisy: Overcoming the threat of inconsistent corporate social responsibility perceptions. *Journal of Marketing*, 73, 77-91. doi:10.1509/jmkg.73.6.77

Endnotes

- ¹ Please address correspondence regarding this article to [Sarah Thimsen](#). We thank Beth Foley for suggesting the idea for the article and for her encouragement.
- ² Some corporations might be said to have a symbolic face. For example, one could say that Bill Gates is the “face” of Microsoft. However, if a plaintiff sues Bill Gates, then Bill Gates would likely be present at trial; but if the same plaintiff sues Microsoft, then he would probably not be.
- ³ Throughout this article, we use the term “representation” to refer to “standing for” or “embodying” the corporation, and not in the more customary sense of providing legal representation.
- ⁴ Antonio and Arone (2006) interviewed jurors in capital cases. It is important to note that less severe cases might reveal different results.
- ⁵ These data are based on interviews of jurors in actual cases as opposed to relying on mock jurors as the research cited above had done. Also, the jurors might have had nonconscious biases.
- ⁶ This trend might possibly be shifting, however. With recent economic turmoil and the amount of attention corporations (e.g., Goldman Sachs, BP) have received for their bad behavior and its far-reaching consequences, jurors could potentially become more punitive. An employment practices liability attorney, for example, recently reported that she has seen juries, acting in response to the plaintiff’s economic difficulties, awarding higher awards to plaintiffs suing for emotional distress (Sclafane, 2010; see also Cronin Fisk, 2011).
- ⁷ Because McGorty’s (2004) study had mock jurors award damages on the presumption of defendant liability, her data do not speak directly to these judgments.

We asked two trial consultants to offer their perspectives on this article. On the following pages, Jill Holmquist and Bill Grimes provide their thoughts.

Corporate Representation & Anti-corporate Bias Response to Thimsen, McGorty & Bornstein

BY JILL P. HOLMQUIST AND MARTIN Q. PETERSON

Jill P. Holmquist, JD President of Forensic Anthropology, Inc. (FAI), has been a trial consultant since 1995. Martin Q. Peterson, PhD is the founder of FAI and has been consulting on trials for decades. FAI, incorporated in 1989, provides a broad range of litigation consulting services nationally for both plaintiff and defense counsel on cases involving matters from personal injury and medical malpractice to complex business transactions and intellectual property.

Sarah Thimsen, E. Kiernan McGorty, and Brian H. Bornstein provide a great overview of the challenges facing corporate defendants, as well as revealing a few challenges for plaintiffs suing corporate defendants.

Since we work with both plaintiffs and defendants on a wide variety of cases, including personal injury, products liability, contract disputes and patent and trademark infringement cases, we have a wealth of experience dealing with the challenges cases present on both sides and in developing approaches for surmounting them at trial. In our work, we have observed juror decision-making that both conforms to and contradicts the research reported.

Despite the paucity of empirical research on the topic, the authors' recommendation of having a corporate representative at trial to combat anti-corporate bias is generally considered a necessity. We agree and recommend selecting a representative who has clout in the corporation. The jury must understand that this is a senior person who will take responsibility, if necessary, for correcting any problems or deficiencies. The corporate representative is "the hammer"; she must be able to sit in judgment of employees and take action if necessary to right any wrongs.

The corporate representative comes in alone and leaves alone. She does not socialize with counsel and counsel greets her formally with a handshake. The representative, sitting behind counsel table, takes notes on a pad of paper and makes no attempt to discuss what is going on during the day – she remains above the fray. This relieves jurors of the need to send a message to the corporation because the corporation is paying attention.

To bolster the company's seriousness, we often advise corporate clients to take responsibility for whatever errors they made. As the article noted, sympathy for the plaintiff can influence judgment of corporate responsibility. But when a corporate representative communicates empathy for the injuries suffered by plaintiff and accepts responsibility for its role, it becomes more human and less blameworthy.

Plaintiff's counsel, however, can use corporate personification to his advantage. He should call

the corporate representative to testify when possible and point out her lack of knowledge when she cannot – emphasizing the impotence of the “corporate functionary”. Rather than making points with a look at opposing counsel’s table, he should look at the corporate representative to drive home that the plaintiff’s message is to the corporation. He should ask why the corporate representative “is here now but wasn’t there then”. That way, the corporation’s personified presence can be framed as providing the jury the opportunity to tell the corporation what to do to rectify its wrongs.

In our experience, jurors (including mock jurors) willingly ascribe responsibility to corporations for the actions, good or bad, of the people who comprise it. The most common exception occurs when liability is solely based on *respondeat superior*. Some jurors balk at holding a corporation responsible for an employee’s independent actions. But plaintiffs can establish liability by linking the solitary actions to corporate policy; the employee’s conduct is an extension of the corporation’s conduct.

Similarly, jurors are willing to attribute human motivations to the corporation. Its people’s motives become the company’s motives. We believe that explains why a corporation’s for-profit or non-profit status makes a difference, why it has social responsibility and why jurors are willing to punish a corporation for bad behavior. Impressions of a corporation’s goodness and the desire to punish arise from moral judgments. Morality is a human standard and jurors readily apply those standards to corporations.

Although we have seen jurors judge corporations as humans, they can be less likely to feel sympathy for a corporation, which might explain harsher juror judgments of corporate actions than individual actions. It is difficult to feel empathy for the consequences of bad behavior to a corporate entity, especially a large one. Because it is difficult to envision corporate “suffering”, its status as an entity can trump personalization. It has no feelings and no emotional hardship, so there is no basis for sympathy.

We suspect that sympathy for the corporation, however, can be vitiated simply by extreme conduct. In criminal cases, the offensiveness of the human defendant’s conduct can squelch any prospect of sympathy for him. Similarly, the desire to punish a corporation or prevent it from repeating egregious conduct could easily outweigh any perceived harm to the corporation, its people or even its customers. It seems logical that the harshness or leniency with which a corporation is judged can stem largely from its actions, rather than its status.

In addition, corporations profit enormously by providing goods and services to the public, which can differentiate them from individuals. We have observed that jurors’ judgments of corporate conduct increase in severity when a company derives great profit at the expense of, and without regard for harm to, individuals.

However, we have also seen jurors judge individuals more harshly than corporations. Pro-tort reform jurors often ascribe improper motives to individuals and invent explanations for conduct they would never attribute to corporations. We have also seen pro-business jurors exhibit lower expectations of corporations out of deference to their right to profit. Caveat emptor suggests that corporations even have the right to engage in somewhat shady conduct and we have seen jurors excuse behavior they might not tolerate in an individual. Perhaps in some way, the depersonalization of a corporation can work to the defendant’s advantage.

Jurors’ judgments about corporate liability and blameworthiness, in our experience, derive from many factors. We hope that the Thimsen, McGorty, and Bornstein article inspires new research that sheds light on how having a corporate representative at trial affects jurors’ judgments about the propriety of individuals’ and corporations’ conduct.

Response to Thimsen, McGorty & Bornstein

BY BILL GRIMES

Bill Grimes has been a litigation consultant for over twenty years. He has been with [Zagnoli McEvoy Foley LLC](#), Chicago, IL.

Putting a Face on the Corporate Defendant brings to mind what media theorist Marshall McLuhan famously wrote in 1964, "The medium is the message." He was referring to electronic communication beginning to dominate the industrialized world, namely television. What McLuhan meant, exactly, is debated to this day, but communication researchers and practitioners know the *who, when, where and how* often dwarf the *what* of the message.

Thimsen, McGorty and Bornstein reveal the unique dynamic created by the presence of corporate defendants in litigation, but the distinction is probably less in the jurors' eyes than the litigants. True, "a corporation, as a legal entity, has no body and cannot testify," but most jurors, number one, don't think in terms of legal entities, and number two, don't really care that a corporation is an "it." That's a good thing. Jurors think in terms of people and their motivations. As litigation consultant Beth Foley of Zagnoli McEvoy Foley says, "Facts don't sell cases, people do."

While empirical research is lacking in this regard, jury consultants know anecdotally and through post trial interviews that most jurors prefer there be a face of the corporation in court everyday, that it be someone relevant, and that they hear from him/her. [*Whether a criminal defendant should testify or not is a separate matter. Many variables need to be taken into account. This response will not address that issue.*]

As Thimsen, McGorty & Bornstein allude to; who the face of the corporation is requires some thought. Simply assigning a corporate "mouthpiece" is unwise. It's akin to a reporter doing a story on how hurricanes form and National Hurricane Center offering up its spokesman rather than the researcher who flies into the eye of the hurricane. Who would you rather hear from? The researcher has the credibility and better stories. You would feel slighted by the PR person, so would a jury.

Juries will also sense tokenism if the corporate face is someone who really doesn't fit, or doesn't testify. Juries do not necessarily need a senior executive. They are looking for knowledge and accountability.

As *Putting a Face on the Corporate Defendant* reveals, anti-corporate bias exists in the courtroom. A credible, likable, relevant corporate face will help soften that predisposition. And jurors prefer the medium of that message be a "him" or "her," rather than an "it."

References

Marshall McLuhan, *Understanding Media: The Extensions of Man*, Gingko Press, 1964.

Juror Race and Capital Sentencing

BY BRYAN EDELMAN

Bryan Edelman Ph.D. is a co-founder of Trial Innovations, a trial consulting firm with offices based in Northern and Southern California. He has experience working in venues across the country on both civil and criminal matters. You can read more about Dr. Edelman at the [Trial Innovations website](#).

*This article provides a summary of dissertation research conducted at the University of Nevada, Reno. The larger work can be found in Edelman, B.C. (2006). *Racial Prejudice, Juror Empathy, and Sentencing in Death Penalty Cases*. New York: LFB Scholarly.*

Race has been shown to have an impact on jurors' sentencing decisions in capital cases. This article describes a model for juror decision-making that helps explain the subtle effects of race on capital jurors' sentencing decisions, and offers recommendations to limit these effects. The model was developed and tested using data provided by the Capital Jury Project. The Capital Jury Project has interviewed over 1,100 capital jurors from 340 capital trials.

THE SENTENCING PHASE OF A CAPITAL TRIAL

The discretion granted to prosecutors to introduce non-statutory aggravating evidence (e.g., victim impact statements) in support of a death sentence has broadened significantly since the death penalty system was revamped in 1976. The shift toward the admissibility of such evidence has increased the complexity of the sentencing task. Before deciding upon sentence, capital jurors must first declare the defendant "death eligible" by unanimously finding the presence of at least one statutory aggravating factor. Only then is the jury free to weigh the victim-oriented evidence, which supports a death sentence.

However, jurors are given little instruction on what evidence is off limits when deciding on the presence of an aggravating factor. As a result, evidence, which has been ostensibly presented by the state for the sentencing decision, may be inappropriately used to determine "death eligibility." For example, the Florida criminal code allows victim impact statements to be admitted into evidence strictly for the purpose of deciding upon sentence. However, this emotionally charged evidence may be incorrectly used by a juror to establish the presence of ambiguous aggravating factors such as: "The capital felony was especially heinous, atrocious, or cruel." Emotional expressions of loss by a victim's family member may enhance the perceived cruelty of the crime, and as a result prove the existence of the aggravator. It is in this emotionally charged environment where race-of-victim effects are most likely to occur.

THE IMPACT OF RACE ON SENTENCING

There have been over forty studies documenting the effects of illegitimate factors – including race – on sentencing decisions in the capital punishment system. Taken as a whole this body of research has shown that: *Murderers of white victims suffer a higher probability of being sentenced to death than murderers of blacks* (see the GAO 1990 Report).

An effort was made to develop a model of juror behavior that explains why murderers of whites are more likely to be sentenced to death than murders of blacks. The model is built around a victim evaluation process that is largely influenced by empathy. When jurors empathize with the victim, they are more likely to evaluate the victim positively and support a death sentence. Non-legal factors, including race, are expected to have an impact on jurors' empathy toward the victim, particularly in cases where the defendant is black and the victim is white. When the victim is categorized as a member of the same racial group (in-group) as the capital juror, he will perceive himself to be similar to the victim. This should lead to more positive affect, and the ability to take the perspective of the victim and his family. When these conditions occur, capital jurors will evaluate the victim more positively and favor a death sentence at higher rates in comparison to instances where the victim is a member of a different racial group (out-group).

FINDINGS

The proposed model was tested using data provided by the Capital Jury Project. Empathy was found to play a larger role in influencing jurors' sentencing decisions than expected. Not only did empathy toward the victim have a direct impact on how jurors evaluated the victim, but it also affected white jurors evaluations of black defendants. In addition, empathy toward the victim had an effect on how jurors used mitigating evidence. Mitigating evidence was more likely to be rejected or used as aggravating evidence when victim empathy was high. In contrast, empathy toward the defendant had no influence on how jurors used mitigating evidence.

Race had a subtle influence on jurors' sentencing decisions that operated through its impact on victim empathy and victim evaluations. White jurors empathized more with white victims and evaluated them more positively than black victims. As a result, white jurors were more likely to reject mitigating evidence that would justify a life sentence when the victim was white. In addition, killers of white victims were evaluated less positively than killers of black victims. As a result, white jurors were more likely to support a death sentence when a black defendant was convicted for murdering a white victim.

DISCUSSION AND RECOMMENDATIONS

These findings have several important implications pertaining to a defendant's constitutional rights to a trial free of racial bias and prejudice. Over the last 30 years, the Supreme Court has expanded the types of evidence the prosecution can present in support of a death sentence. The inclusion of

highly emotional victim-oriented evidence may exacerbate the effects of non-legal factors. Because defendant and mitigating evidence evaluations appear to be affected by empathy toward the victim, evidence that cultivates this type of empathy will ultimately limit the impact of the defendant's life circumstances on jurors' sentencing decisions.

In the trial of Scott Peterson, Sharon Rocha testified for over thirty minutes. Sitting in front of a picture of her daughter, she brought legal experts, journalists, and jurors to tears. Ms. Rocha berated the defendant for leaving his wife at sea knowing she often experienced motion sickness, "You knew she would be sick for the rest of eternity and you did that to her anyway" (Murphy, 2004). This type of emotional testimony is likely to cultivate juror empathy and shift the focus away from the defendant. When this occurs, the status of the victim may become the deciding factor between a life and death sentence.

In *McCleskey v Kemp* (1987), the Supreme Court ruled that an appellant must provide evidence of intentional and purposeful discrimination to prove successfully that his Fourteenth Amendment rights have been violated. Data from the current study show that race has a subtle impact on capital jurors' sentencing decisions, which is unlikely to meet this standard of proof.

The results from this study provide some guidelines for how the defense should approach the sentencing phase of a capital trial, particularly in interracial homicides.

The defense should aggressively move to limit the admission of non-statutory, victim-oriented evidence that is likely to shift the focus away from the defendant and toward the victim. In addition, the defense should seek to bifurcate the sentencing phase into two components: 1) a death eligibility phase, and 2) a sentencing phase. In this first phase, the jury would only hear evidence relevant to determining the presence of an aggravating factor. Only after the jury has deliberated on this issue would the prosecution be allowed to present evidence in support of a death sentencing, including victim impact statements. This approach should help reduce the risk that jurors will inappropriately use victim-oriented evidence to determine the presence of aggravating factors.

References

- Bowers, W.J., Steiner, B.D., & Sandys, M. (2001). Death sentencing in black and white: An empirical analysis of the role of jurors' race and jury racial composition. *University of Pennsylvania Journal of Constitutional Law*, 3(1), 171-274.
- Edelman, B.C. (2006). *Racial Prejudice, Juror Empathy, and Sentencing in Death Penalty Cases*. New York: LFB Scholarly.
- General Accounting Office (1990). *Death penalty sentencing: Research indicates pattern of racial disparities* (GAO Publication No. GGD-90-57). Washington, DC: Author.
- Lynch, M. & Haney, C. (2000). Discrimination and instruction comprehension: Guided discretion, racial bias, and the death penalty. *Law and Human Behavior*, 24(3), 337-358.
- Murphy, D.E. (2004). 'Divorce was an option,' Laci Peterson's Mother Cries, *New York Times*, A22.

Jury Box: Post-It Replacement for Jury Consultants and Lawyers

BY TED BROOKS

Ted Brooks is a well-known Trial Presentation Consultant, Author and Speaker, who has been involved in numerous high-stakes and high-profile matters, including the Los Angeles Dodgers divorce trial (with David Boies), People v. Robert Blake (with M. Gerald Schwartzbach), Western MacArthur v. USF&G (\$3 Billion), May-Carmen v. Wal-Mart (Defense Verdict), and PG&E v. U.S. He is the Founder of [Trial Consulting Network, Inc.](#), and Litigation-Tech LLC. The [Court Technology and Trial Presentation Blog](#) features a collection of his articles, many of which have been published in various magazines and online.

The Jury Expert asked two ASTC members: Jury Consultant Ken Broda-Bahm, and Trial Presentation Consultant Ted Brooks to review the new Jury Box software for your computer (not the iPad). Ken brings many years of jury selection experience, while Ted offers a great deal of experience writing legal software and app reviews (in addition to Trial Consulting). Ken has offered some valuable feedback, including a few feature improvement requests, which Ted has incorporated into this review.

If you've seen the movie, "[Romy and Michelle](#)," you already know who invented the Post-It note, and the thought of replacing them with software might be disturbing to you. If you've ever spent a few hours scribbling notes and then frantically swapping the little buggers around on a table or pad during voir dire, you're probably anxiously waiting for any alternative.

With the advent of several iPad apps for jury selection and monitoring (see reviews: [iJuror](#), [JuryTracker](#), [Jury Duty](#)) it seemed odd that nobody had yet developed a similar application for the laptop. Enter [Jury Box](#), the first commercially available Voir Dire (Jury Selection) software designed for the PC. Not everyone uses an iPad, and most of us that do also use a computer for tasks requiring more flexibility. Don't get me started - I'm not saying which is better for which purpose. The two are different, and these days, it's tough to live without both.

San Diego Deputy District Attorney [Adam Gordon](#) developed Jury Box, based on his own experience in the courtroom. He shares, "Just like how an effective PowerPoint presentation can help you better advocate on behalf of your client, Jury Box can help you make better decisions in the jury selection process by reducing the clutter and confusion of Post-Its®."

While I am certain that other Trial Consulting firms have also developed their own "in-house" solutions, the only one that I'm personally aware of by name, is JuryNotes, a "rough around the edges" program used by Persuasion Strategies, Ken's firm. You could put something basic together using a spreadsheet, but unless you're really good, it probably still looks and acts like a spreadsheet. The important features for this type of application would be the ability to quickly enter and sort data, along

with the added benefit of having a template of fields and data to apply to an entry (e.g., “good for plaintiff,” “business owner,” etc.).

Available for Windows, Mac and Linux, installation of the free trial is quite simple, and the user interface is very intuitive. While most people could just spend some time immediately building their first case, there is a detailed [PDF tutorial](#) available on their website.

Anyone who has ever read my iPad app and software reviews, knows that one of my pet peeves is a lack of sample data to play with. It just makes it so much easier to learn something new when you have an example of what it looks like when it’s put together correctly. Jury Box does not come with a sample case.

Setting up the courtroom layout is simple. You are able to position the jury box and courtroom seating to match the courtroom, including the seating direction. There are three basic jury box layouts available, including right-hand, left-hand, and center-oriented. Next, you can add the correct number of seats in each row, add or remove rows, and even remove individual seats. In addition to the jury box, the jury pool seating may be set up like the courtroom. The software does not visually allow for “unique” courtrooms (e.g., round, or other than square or rectangular), although the seating can still be set up appropriately.

One nice feature with the jury pool seating chart is that you may choose to ignore the actual seating arrangement, and add as many “seats” as you wish, in order that you might enter info for the entire venire. I didn’t find a limit to the resizing, but I had it well over 200. The problem is that in order to add seats (so you can enter juror info), you need to resize the chart. It would be nice to be able to enter a number of rows and columns (e.g., 10 x 20) rows, to get at the desired total (e.g., 200). I realize this is for the largest of cases, but then these are the cases where you’ll often find Jury Consultants who would use this software. That’s not to imply that an attorney or paralegal cannot also take advantage of Jury Box.

You cannot alter the courtroom seating layout once you’ve finished setting it all up. I would like to be able to modify the seating layout at any time. Alternate jurors might be seated in one place during voir dire, and then the temporary seating may be changed for the trial.

Entering juror data is quick and easy, and it is automatically saved when you close the window. A nice template offers a quick and easy way to enter most of the basic info, and also features a general ranking system.

You can search by Juror Number or other terms for quick grouping of jurors with something in common, as entered in their profiles. For instance, you might enter the search term “insurance,” in order to sort out all jurors who have mentioned something noteworthy on the topic, either in the Jury Questionnaire or during voir dire.

The print function produces a summary of one juror per page. This is a nice feature, but to take it a step further, it would be nice to be able to also print various reports, based on sorting by search topic. For instance, rather than printing the info of every juror entered, having the option of printing only those jurors needing additional work and/or research, based on entries you’ve made in their profiles. I will admit there is one little “issue” I found with the tutorial and icon labeling – the fact that excused jurors are referred to as “Excused Garbage.” Now maybe it’s just me, but I’m thinking that it might be a bit more PC to use a little discretion when referring to people – even in software features.

I’m not sure why certain limitations exist, such as a maximum of 4 parties, and a limit of 3 items displayed for each juror’s icon (i.e., Last Name, Education, etc.). While the default “seat” icon size would make it difficult to display more, adding the ability to increase the size of the icons would be helpful, since current laptops have a high screen resolution, and many have larger screens.

Ken shares three areas that are of concern, which if addressed, would greatly improve Jury Box. He even suggests some possible “fixes.”

- **Limit one** is that allows only four custom categories. In my experience, attorneys picking juries in criminal matters tend to be interested in the same general facts about potential jurors: friends/family in law enforcement, occupation, and demographics. Whether they should be interested just in that limited set is another matter (they shouldn't), but many of them seem to focus on it narrowly, and that narrow focus is reflected in the program. In civil cases, there are a lot of relevant attitudes – what do they think about dangerous products, contracts, economic damages, lawsuits, banks, etc. In some cases, we have tracked as many as 150 different variables about jurors. Limiting it to just four would force me to generally supplement the program with paper notes or a separate spreadsheet, which defeats the purpose. **Fix:** Allow unlimited custom categories for juror personal information. Within the categories it should be possible to create a response set for closed-ended questions (e.g., based on questionnaire responses) instead of all being open-ended.
- **Limit two** is that there is no weight or value assigned to individual juror answers. Most consultants I know will develop some kind of system for scoring the information that the potential juror provides. E.g., if someone thinks there are too many lawsuits, that adds 2 points in the negative for a plaintiff (or the reverse for a defendant). It isn't perfect, but particularly when you have a lot of information gained from extended oral voir dire or from a questionnaire, then the score provides an irreplaceable starting point. Intuitively, one of the best advantages of using a computer as opposed to a notepad for this is that the computer can continuously keep track of the math and help in comparing one potential juror to another. But without the ability to put a weight on juror responses, no such luck. **Fix:** Create an optional field that would provide a "helps defense" or "helps plaintiff/pros" and a scale of 1-10. Then provide that sum on juror reports, and the ability to create a list that ranks the potentials from best to worst or worst to best.
- **Limit three** is the inability to provide group responses. E.g., if it is a hand-raising question ("how many of you believe that banks are primarily to blame for the current economic crisis?") thirty hands go up, and there is no practical way to open up 30 juror fields and enter a "yes" answer for that custom item. **Fix:** It should be possible to open up a dialog box for the question itself, and then quickly click or type numbers for all the jurors who answered "yes." In the "virtual courtroom" or on another screen, there should be space for a "question bank" that would allow you to see how each juror has answered a given question (e.g., a birds-eye view of prior jury service, or occupation, or whatever would be useful), and to update information from that screen.

Conclusion

I agree with Ken that you could use this now for voir dire, but with a few improvements, Jury Box really could be a great tool to replace the sticky-notes. Ken shares, "Jury Box is the first commercial program that I've seen that I could see actually using in court at this stage. I do think that using it now, as is, would present a number of advantages over paper based systems, and over the iPad apps that I've looked at so far." Although I'll stop a little short of saying it's better than anything on the iPad, it's just as good. Now if Adam adds all of our feature requests, it may be a different story. So, my opinion at this point is if you're ready to ditch the sticky-notes, that you first choose your hardware (iPad or laptop), and then get the right one for that. Jury Box is sold via an annual subscription, running \$199.

S

SheldonSinrich
Trial Consultants

404-872-5123
www.sheldonsinrich.com



Consumer Centers
Meadowlands, NJ • New York City

For all your mock trial needs

- Largest rooms in NY & NJ
- Spacious, flexible suites
- Top-rated recruiting & client service team



Group **net**

www.ConsumerCenters.com (800) 998-4777



The Jury

EXPERT

The Art and Science of Litigation Advocacy

Taylor Research is the first choice of attorney-litigators and trial consultants who prepare to win.



TAYLOR
RESEARCH • SAN DIEGO
RISING ABOVE

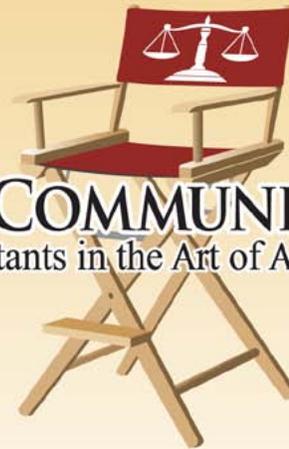
- San Diego's largest mock jury room plus four breakout rooms
- Quality recruiting • Diverse respondents
- Courteous, experienced staff
- Complete A/V services



FocusVision
WORLDWIDE

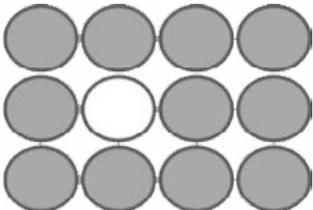
800-922-1545 taylorresearch.com

Need to turn
your
problem witness
into a star?



ACT OF COMMUNICATION[®]
Consultants in the Art of Advocacy

www.ACTOFCOMMUNICATION.COM

ASTC 
AMERICAN SOCIETY OF TRIAL CONSULTANTS

A Note From the Editor

Trials and Tribulations and a Media Blitz...

What a couple of months it's been since publication of the last issue of *The Jury Expert!* Record heat (both outside and in the courtroom) as well as extreme drought. It's been a summer of extremes. When last we published, Rod Blagojevich was still on trial (the second time around). And so was Casey Anthony. Flash forward two months and we have verdicts in both cases as well as countless media pundits pontificating on what happened, why the juries reached the verdicts they reached, and what should be done.

While Rod Blagojevich quickly faded in the blinding light of publicity generated by the Casey Anthony trial – such a quiet ending was not to be for Casey Anthony. We're sure you've heard all the media pundits pontificate. But they are simply guessing. Richard Gabriel was the trial consultant for the Casey Anthony team for more than two years. And he is sharing a peek behind the trial planning and preparation curtain in this issue of *The Jury Expert!*

We also have an opinion piece on why the prosecution did so much better in the Blagojevich II trial. In *The Ultimate Mock Trial*, Alan Tuerkheimer offers his perspective on what the prosecution learned from Blagojevich I and shares lessons we can all benefit from as we listen to mock jurors in pretrial research.

We have research pieces on the corporate defendant and on the issues of moral guilt and moral anger in the courtroom with responses from trial consultants on each of those articles. And we have practice pieces generously shared by our trial consultant members on preparing anxious and depressed witnesses and on how to use Powerpoint effectively (and how to repair – and potentially avoid that mess you sometimes find when you plug in to present while on the road). We have an original research piece from a trial consultant on the relationship between juror race and capital sentencing and an evaluation of the new software application: *The Jury Box*.

It's a lot crammed into a single issue. Our hope is you will sit down with us and a big (and cooling) liquid beverage and read and enjoy. Let us take you places you've never been before. Or as a mock juror told his peers in a recent project as they were filling out damages recommendations, "Let your mind take you to places you've never been before. Then double it."

Enjoy!

Rita R. Handrich, Ph.D.
 Editor, *The Jury Expert*
Twitter.com/thejuryexpert

A M E R I C A N S O C I E T Y O F T R I A L C O N S U L T A N T S



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/>
<http://twitter.com/thejuryexpert>

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

Editors

Rita R. Handrich, PhD — Editor
rhandrich@keenetrials.com

Kevin R. Bouilly, PhD — Associate Editor
krbouilly@persuasionstrategies.com

Jason Barnes — Associate Editor
jbarnes@barnesandroberts.com

Jason Schwartz — Assistant Editor
jschwartz@zmf.com

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

