



The Jury EXPERT

The Art and Science of Litigation Advocacy

A BiMonthly E-Journal

Volume 23, Issue 5, September 2011

- 1 *Eureka! Moments on the Path to Successful Visual Presentations in the Courtroom*
- 5 *Tinnitus audio exhibit admitted as evidence*
- 6 *Using Self-Efficacy for Witness Preparation*
- 14 *Red Ink and Red Tape: Understanding the Challenges in our Current Civil Trial System*
- 23 *Fooled by numbers: Why people think that 24 months takes longer than 2 years*
- 35 *I'm a lawyer. Why should I care about typography?*
- 38 *Trial Strategy Using Social Media Analytics: Not Just For High Publicity Cases*
- 44 *Artful Dodging in the Courtroom*
- 50 *Friend or Foe? Social Media, the Jury and You*

Eureka! Moments on the Path to Successful Visual Presentations in the Courtroom

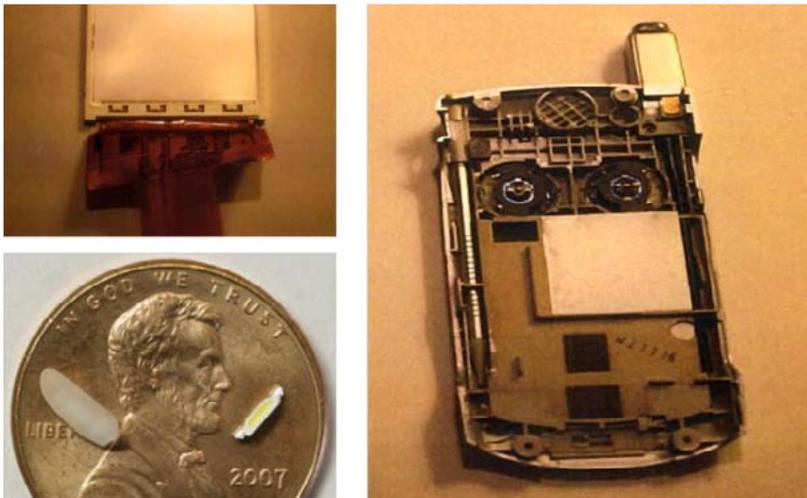
BY SUANN INGLE AND NANCY J. GEENEN

Suann Ingle, M.S., has been helping attorneys and executives deliver great presentations since the days before PowerPoint. Suann integrates the principles of graphic design, jury research and analysis, simple and purposeful communication techniques, and interactive presentation technology to achieve consistent messaging and effective representation of her clients.

Nancy Geenen, M.A. Ed. and J.D., joined Suann Ingle Communications after 23 years as a trial attorney in commercial and intellectual property cases in the United States and arbitrations for the United Nations in Geneva, Switzerland. Nancy trains clients to communicate effectively and persuasively in both formal and informal settings.

Many trial consultants who have worked in this field attest to the fact that the truly rewarding, pivotal moment only happens in the context of the thousands of other pedestrian events while preparing for trial. This article explores the unique challenges of creating a visual strategy for courtroom presentation in a design patent infringement case.

As technology and presentation software improve in capability and ease of use, most everyone is able to produce a timeline, chart, or graphic. Even elementary school students are integrating multimedia, (photos, videos, illustrations and sound) into presentations for which many of their parents and grandparents used only pencil and paper. And more than timelines, exhibit excerpts, or technology animations, trial teams are using visual presentation techniques to test concepts, trends and other intangibles to evoke emotion while telling a story. In a courtroom or other litigation setting, attorney-made graphics are frequently one dimensional and unlikely to be as effective as graphics whose visual aesthetics find roots in purposeful, balanced, and sophisticated design. Understanding and using presentation software is not a substitute for strong visual communication techniques. Unsophisticated graphics might be more harmful than a blank or dark screen when presenting a story to a jury. More than pretty pictures, great presentations at trial are the result of time, attention, synthesis, and clarity of purpose and design.

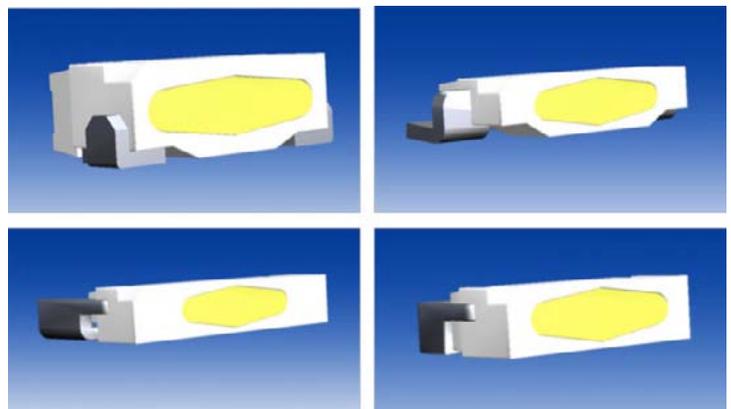


Clockwise from upper left: internal cell phone component housing 4 LED units, open cell phone unit exposing part of the backlit panel, penny with grain of rice and LED to show scale

Both parties used experienced and sophisticated trial consultant teams. Each side had experts with models and animations to “prove” the case. Animation software was used by the plaintiff as it tested the case in multi-phased jury research exercises. Specifications from other similar commercial LEDs were used to create artwork that could be manipulated in ways where “views” were similar enough to aid comparison in demonstrative charts. Live manipulation and “snapshots” taken during meetings helped the process of crafting the attorney presentations as more and more industry imagery was drawn from competitors in the multimillion dollar cell phone LED business. The early skirmishes over demonstrative exchanges rivaled the most contentious negotiations about jury instructions and exhibit lists.

In a recent design patent infringement suit, the parties asked the jury to determine whether the shapes of electrodes on an LED were rounded or straight. The rounded shape was protected by a number of design patents held by the plaintiff. The plaintiff needed to convince the jury that the typical cell phone industry buyer of LEDs cared about the way the LED looked as much as it cared about its functionality.

The “penny/grain of rice” picture was developed to test one aspect of the case – whether jurors would understand the importance of design in a product that was barely visible to the naked eye and not visible in a final product. The penny/grain of rice picture provided a perspective that was completely lost on mock jurors who were only provided with the “guts of a cell phone” photos.



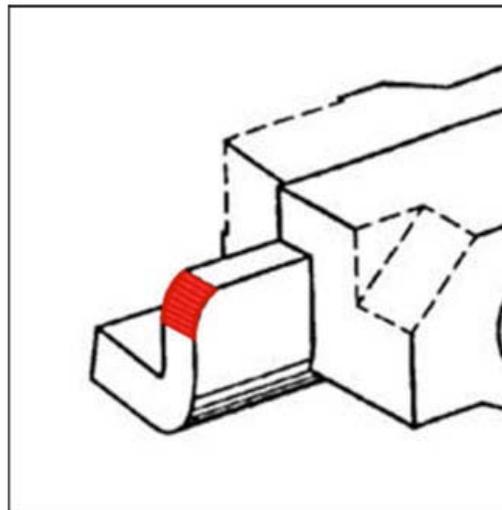
Interactive animation stills of models that were rotated and manipulated during preparation meetings

After the initial demonstrative exchange, it was clear that both sides chose similar visual formats (light blue background with darker blue title band). One side produced a plethora of images with added lines that curved around the electrode, to help prove that “of course, this is rounded,” and the other side produced just as many images that drew straight edges over the electrodes to prove conversely that “of course, this edge is slanted, which makes it much different and non-infringing of the protected design.” The similarity of demonstratives contributed to the immediate worry that the visual strategies would cancel each other out.

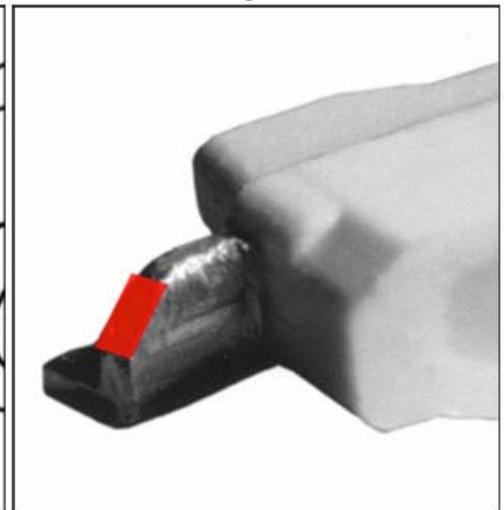
Pictures and rendered drawings of the units (literally hundreds) were adorned by red “indicator” lines so similar that it caused a client to comment about litigation espionage. The only difference of course was that the indicator lines used by the defendant were sharp-edged, and the indicator lines used by the plaintiff were rounded and curved.

The weekend before jury selection, the trial consulting team decided to experiment with a fresh and gutsy approach. “Why not put all those photos aside and just show the actual units?” It would take finding a microscope that could

*Figure 1 '784 Patent
(rounded)*



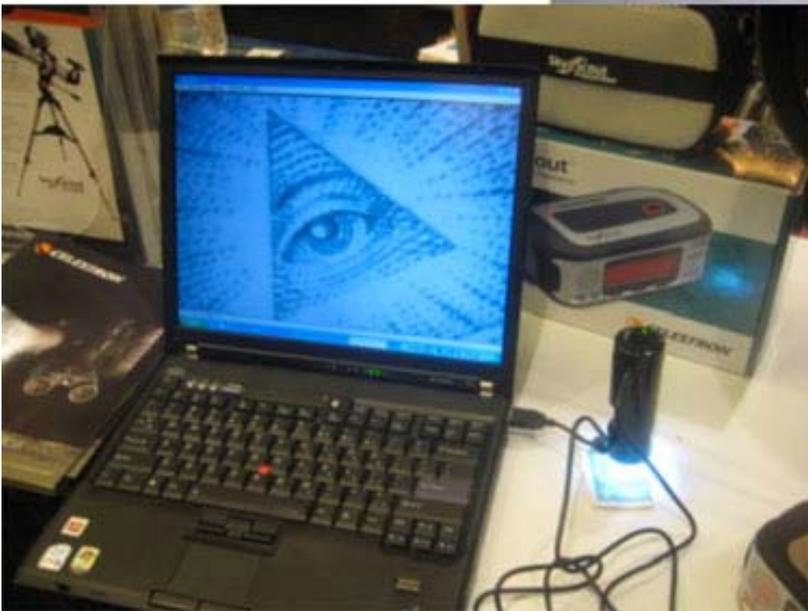
*Figure 1 Product 902
(angular)*



Patent drawing and accused product photograph

be used in the projection system and some steady hands to toss the LEDs on the table like dice, using tweezers to turn each LED on its side for viewing. The trial attorneys wanted a simple, but effective presentation that did not require an expert or a \$5000 microscope rental. The team located and purchased a \$130 microscope at Toys-R-Us within 24 hours of opening statements. Members of the team took turns tossing a handful of the LEDs onto a table and turning each LED with the tweezers. The LEDs were so lightweight that they often stuck to the oil of the fingertips. The trial team practiced every evening still unsure whether and when the live demonstration might play itself out before the jury.

The plaintiff’s expert prepared photographs of the LEDs, but “touched up” the edges for greater contrast that emphasized the similarities and roundness of the actual product. Defense counsel questioned the expert’s credibility on cross because the photos were “altered.” The defense expert used a wood block model that he pieced together while on the stand with corresponding graphics to emphasize the slant of the electrodes. While the use of the scale model was effective, with its interlocking yet removable parts and tactile impact, it opened the door for plaintiff’s counsel to point out that the testimony also was based on an artistic representation of the LED at issue, and not the real thing. The moment had come to open the evidence bag and place the defendant’s sample LEDs under a microscope that sat at counsel table, only a feet away from the jurors.



Left: handheld, USB powered microscope and camera, Right: picture of LEDs taken in court

The penny-shot was one of hundreds of images developed during trial preparation. The multi-million dollar shot was the photograph taken in full view of the jury with a hand-held microscope projected live onto a large screen across the courtroom.

In post-verdict interviews, jurors commented that they decided for the plaintiff just as the defendant's expert witness paused to answer the question: "Do you think the defendant's LED looks the same as the design of the plaintiff's product?" If he replied "yes," he conceded that the actual electrodes selected from the defendant's exhibit bag showed a curved edge. If he said "no," his answer would require the juror's to discount their own observations and be in direct conflict with the image projected on the screen.

Perhaps most enlightening is the recognition of the journey that led to this moment. With each year of experience, trial veterans are increasingly resistant to trying new things. We should all be cautioned not to be locked into what "we always or never do." While it took great courage to come to the right solution with the live demonstration, it did not come without great debate and patient practice. The "winning" graphic is sometimes the one not used because the development process turns out to be as informative as the display of the final image. Weaving consistent visual images in synchronization with an advocate's style and point of view reinforces key trial themes. Putting in the time to create images as the team and case come together thematically provides for a solution that appears credible to the jury. Using a visual communication specialist allowed the team to be dynamic and nimble in the approach to the final trial presentation, freeing up the trial attorney to focus on strategy, witnesses and evidentiary disputes. The iteration process coupled with courtroom experience prepared the team and the jury for the Eureka! Moment; the one occasion when a trial team takes a breath, pulls out a blank sheet of paper (or a hand-held microscope), and continues the search for the right visual solution.

Editors Note: We were contacted by Neal Feigenson to see if our readers had experiences with the practice issue described below. Please help out by commenting below the query!

Query for The Jury Expert: Tinnitus audio exhibit admitted as evidence

In *Janson v. J.D.O.R.A.P., Inc.*, a case tried in Connecticut in spring 2011, the plaintiff claimed to be suffering from tinnitus and other hearing impairments after a tire that a custom auto shop had sold him exploded as he was checking its bolts. The plaintiff's trial lawyer, Antonio Ponvert III, and one of the plaintiff's expert witnesses, an audiologist, presented to the jury a sound file that, the expert testified, corresponded to the tinnitus sounds that the plaintiff more-or-less continuously heard. The sound file was based on the data the audiologist had collected from his standard psychoacoustic testing of the plaintiff. Jurors took turns putting on headphones and listening to the sounds. The exhibit also went to the jury room, where some jurors chose to hear the sounds again. The jury awarded the plaintiff \$1.5 million for permanent acoustic damage and suffering, including loss of hearing in one ear, loss of high-frequency hearing, and reduced sound tolerance, as well as tinnitus in both ears.

The audio exhibit in *Janson* is unusual because demonstratives are, of course, typically introduced to depict or explain something in the real world that can be objectively known, not something that occurs or occurred only in the party's mind (the tinnitus in this as in most cases being entirely subjective). I am aware of at least one case in which a demonstrative was admitted to show a party's subjective visual (mis)perception (see *The Jury Expert* 22(1) 46-53 (January, 2010)), but the computer animation in that case was admitted only as illustrative evidence and was based entirely on the witness's recollection. The demonstrative in *Janson* was based on the audiologist's scientific knowledge and data and was admitted as substantive evidence (after the Connecticut version of a *Daubert* hearing).

I am interested in learning if any readers know of any similar exhibits being offered or admitted in other tinnitus cases, or of any other attempts to create scientifically based, computer-generated simulations of other subjective experiences. I'd be grateful for any help you can provide.

Neal Feigenson
Quinnipiac University School of Law
neal.feigenson@quinnipiac.edu

Using Self-Efficacy for Witness Preparation

BY ROBERT J. CRAMER, CAROLINE H. STROUD AND MATTHEW FERRARA

Robert J. Cramer, Ph.D. is an Assistant Professor of Clinical Psychology at Sam Houston State University in Huntsville, Texas. His professional interests are in the areas of expert witness testimony, witness preparation, jury selection and decision making, and sexual minority issues. Dr. Cramer has also provided training and trial consultation services in the areas of jury selection, witness preparation, case conceptualization and testifying in court. You can review Dr. Cramer's research and contact information on his [webpage](#).

Caroline Stroud, B.A. is a Clinical Psychology Doctoral Student at Sam Houston State University in Huntsville, Texas. Her professional interests are in the areas of expert testimony, forensic assessment, suicide, and the long-term effects of stigmatization. Ms. Stroud actively contributes to the Personality, Diversity and Law research lab under Dr. Cramer's direction. Among her scholarly accomplishments are co-authorship on a funded grant from the American Psychological Foundation, and receiving the Gordon Allport Prize for Outstanding Application to the Field of Psychology (2010).

Matthew L. Ferrara, Ph.D. is a trial consultant, credentialed mediator, and expert witness. Dr. Ferrara has provided all standard trial consulting services in civil and criminal cases, including witness preparation, focus groups, theme development, slide presentation, jury selection, supplemental questionnaires and shadow jury. You can learn more about Dr. Ferrara and Westlake Trial Consulting at <http://www.westlaketrialconsulting.com>.

The store manager decided to service the air conditioning units on the roof during the day. This is normally done at night because water leaks from the condensing units, drip down to the ceiling, and land just about anywhere on the slick, tile floor in the store. This creates a risk for customers to slip and fall and that is just what happened to Mr. Simon, the plaintiff you represent.

It is hard to imagine a better case. The manager did not follow store policy. The store itself is part of a nationwide chain. The store employees made statements to EMS that the store was at fault. Someone was even using the video recorder on her smart phone and has a digital recording of Mr. Simon's slip and fall. Great case ... except Mr. Simon makes a terrible witness.

Having a history of losing his commercial driver's license for a DWI arrest, Mr. Simon is somewhat defensive when answering personal questions. He has been injured on the job in the past and received workman's compensation. His doctors had to institute safety precautions when prescribing pain medication because it became apparent that he was "misusing" his medication.

When you have talked to Mr. Simon, you can tell he doesn't trust you, his own attorney. He looks at you out of the corner of his eye. He hesitates before answering. When he lets loose with an

answer, it is typically in a loud, bombastic tone. When he is done with his short and often irrelevant answer, he recoils and stares at you. Great case ... except the plaintiff makes a terrible witness.

It is pretty obvious that your witness needs witness preparation services. How you prepare your witness will be up to you. There are two dangerous paths you might follow.

The first path of danger is to use your experience with past witnesses as the basis for helping Mr. Simon. You probably have helped past witnesses by giving helpful feedback and tips but some witnesses, like Mr. Simon, are not amenable to simple instructional techniques. In plain English, some witnesses are beyond the help you have given to the typical witness. Even some old fashioned, kick in the pants, wood shedding wouldn't help Mr. Simon.

The second path of danger is for you or a trial consultant to pull out a trusty, tried and true list of Do's and Don'ts for testifying. Lists don't work. They never have. They never will.

If a list is going to be helpful, the witness must be able to perform the following, somewhat amazing, complex process:

Understand the list → Memorize the list → Translate the list from abstract instructions to concrete behaviors → Hone the behaviors in time for live deposition or trial testimony.

Lists give false confidence to the attorney and trial consultant and they undermine the confidence of the witness. The only thing a list is good for is documenting the characteristic of the perfect witness, something that does not exist in any case. So, what's an attorney or trial consultant to do? Why not try a new approach that is emerging from the scientific research on witness preparation. Why not try the self-efficacy approach?

Self-Efficacy on the Witness Stand

Self-efficacy is not a term that is frequently bandied about but, despite its somewhat obscure status, it is a simple term that is easy to understand. Albert Bandura, a social psychologist who coined the term, defined self-efficacy as a belief that a person has about how well she can perform a task (Bandura, 1986, 1997, 2000).

You can do a self-check right now. What is your self-efficacy? Think about it ... If you took some time to think about your personal level of self-efficacy, then you probably said something like, "Well, my self-efficacy is good about certain things and not so good about other things." If you said something like, this, you would be saying something that is supported by scientific research.

The research shows that self-efficacy is not static. Your self-efficacy can change as you go from situation to situation (Bandura 1989, 1993). That is probably what is happening to Mr. Simon. He probably feels a great deal of self-efficacy when doing things that are related to his job of truck driving. He feels much less self-efficacy when he is on unfamiliar turf, like talking with attorneys.

Fortunately, the research regarding self-efficacy has shown that there are ways to teach a person situation-specific self-efficacy (e.g., Kozina, Grabovari, De Stefano, & Drapeau, 2010; Schunk & Zimmerman, 2007; Settlege, Southerland, Sherry, Smith, & Ceglie, 2009). Or, more to the point, the research regarding self-efficacy can be used as the basis for preparing a witness to testify in deposition or during trial.

Enhancing Self-Efficacy

If you want to help you witness testify in an honest, accurate, and confident manner, then you can rely on one or more of these four research based techniques (Bandura, 1997; Cramer, Neal, & Brodsky, 2009):

- **Practice** – Allow the witness to practice testifying. As the witness practices, catch the witness doing something right and give the witness praise. This will increase the witness's self-efficacy, i.e., the witness will develop the belief that she can testify well. It is generally best to start slow. For instance, practice the basic give and take of direct examination. Self-efficacy is best with comfortable skills and information. Then, move to more challenging situations like cross-examination. You will probably see a growing sense of competence build with your witness by using this sequence of practice.
- **Observation** – Allow the witness to see another witness do a good job of testifying, e.g., let the witness see a videotape of good testimony. Then point out the behaviors that make the testimony effective. Help the witness reach the conclusion, "I can do that." If possible, use a sample of good testimony whose characteristics are similar to the witness. This will only help improve self-efficacy.
- **Social Persuasion** – Social persuasion refers to the use of positive reinforcement, such as compliments. Of course, you will compliment the witness during actual witness preparation sessions. Don't forget to catch her doing the right thing when she is talking with you or others. If you catch her talking in a way that is consistent with how you have been preparing her to testify, give her a compliment. Give the witness informative feedback with compliments. A witness will best learn and retain suggested improvements when receiving them in a positive way.
- **Relaxation Training** – Guided imagery is the best form of relaxation training. Many attorneys are familiar with Gerry Spence's notion of psychodrama. Guided imagery is a little bit of Gerry Spence psychodrama and little bit of deep breathing relaxation. In a nutshell, the witness practices deep breathing relaxation while imagining being on the witness stand. As an attorney, you might feel a little out of your area of expertise if you tried to do relaxation training. Not to worry, there are plenty of mental health professionals who can conduct the relaxation training. Relaxation training, like guided imagery, is most effective when conducted by a professional with a mental health background.

A useful method to apply these skills was developed by Dr. Marcus Boccaccini and his colleagues; the scientifically sound model is known as Persuasion Through Witness Preparation (Boccaccini, Gordon, & Brodsky, 2003, 2005). Using data from mock witnesses and actual criminal defendants, the following witness preparation method has been shown to improve testimony:

1. **Baseline** – Videotape the witness prior to any witness training. This serves as the baseline.
2. **Praise** – Look at the baseline videotape with the witness and identify three behaviors that the witness exhibits that result in good quality testimony. Praise the witness for these three behaviors. Encourage the witness to keep doing these behaviors. If the witness makes self-efficacy statements like, “Hey, I think I’m getting the hang of testifying”, agree with the witness.
3. **Skill Selection** – Identify three new behaviors you want the witness to exhibit. Usually, these behaviors are replacement behaviors; if the witness exhibits these behaviors; she replaces other behaviors that are inappropriate. For example, teach her to keep her interlaced fingers on the table while testifying, so she doesn’t gesture wildly.
4. **Skill Training** - Teach the behavior in a three step process: explain → role model → allow the witness to practice.
5. **Simulation** – After you have had time to help the witness practice, videotape the witness testifying.
6. **Feedback** – After the simulation, review the videotape with the witness. Focus on the positives and compliment the behaviors you want the witness to continue to use.
7. **Repeat** – Repeat Steps 2 through 6 until the witness feels self-efficacy.

There are three implicit operating principles in the foregoing witness preparation method that are so important we will take time to make these principles explicit.

First, you probably noticed that we followed the rule of three. In Step 2, you are told to praise three behaviors that the witness spontaneously exhibits. In Step 3, you are told to identify three new skills for the witness to learn. Three is the magic number, at least that is what researchers who study the brain have discovered, i.e., a person can only keep about three things in mind at any point in time.

The rule of three is the primary reason why witness preparation lists shouldn’t be used during witness preparation. The longer the list, the more likely that the witness will not remember the tips. Talk about undermining self-efficacy.

Second, we use of positive reinforcement, like compliments. Research shows that negative reinforcement or punishment undermines self-efficacy. When you use negative reinforcement, like you tell a witness not to use a specific behavior, you are telling the witness, “You aren’t doing it right.” The witness who needs witness preparation services probably doesn’t hear what you said. The witness probably goes on a silent, long, negative tirade about her performance as a witness, “I am not doing it

right. I will never do it right. What does this guy expect? I sure hope this witness training session ends right now!" We don't use negative reinforcement because it has a negative effect. Positivity empowers witnesses.

Third, we use response competition to eliminate unwanted behaviors. Step 3 of the method is perhaps the most important step because you are not only selecting behaviors you want the witness to use; you are selecting behaviors that will cancel out unwanted behaviors. For example, let's say the witness answers questions in an explosive manner and recoils to watch the impact of his bombastic delivery. You obviously want that behavior to cease. You can eliminate that manner of responding without ever telling the witness not to do it. Instead, you teach the witness how to take a deep breath, slowly exhale, and begin responding after a count of three, while looking calmly at the person who asked the question.

Can You Feel that Self-Efficacy Growing?

Can you feel self-efficacy? Sure you can and so can your witness. Self-efficacy feels a whole lot better than anxiety, so a big part of witness preparation should be teaching the witness to feel self-efficacy.

One way we teach the sense of self-efficacy is through a technique we mentioned earlier, guided imagery. Guided imagery is a technique which pairs images with a relaxation technique. Guided imagery for witness preparation can be done in three easy steps.

1. **Practice Relaxing** – Most relaxation techniques are variations on Eastern meditation traditions. The two most popular relaxation techniques are deep muscle relaxation and deep breathing. With regard to witness preparation, you want the witness to use the deep breathing technique. If the witness is particularly anxious, the witness might have to start by doing deep muscle relaxation and when that technique is mastered, the witness can switch to deep breathing relaxation.

If you or your witness has never done any relaxation training, deep breathing relaxation might sound odd, but it is simple and effective. Athletes use this technique to reach peak performance. This technique is powerful enough to treat phobias, like the fear of flying.

To do deep breathing relaxation, find a comfortable, quiet place to sit. Close your eyes. Breathe in slowly through your nose and slowly count to five. Hold the breath for about seven seconds, and then exhale through your mouth, while counting from down five to one. Repeat this for five minutes. That is all there is to it.

2. **Create a Script** – Help the witness prepare a script for imagining what it will be like to testify. Have the witness write a script that includes the following: walking into the

courtroom, sitting in the courtroom waiting to testify, being called to testify, walking up to the bench, getting sworn in, sitting in the witness stand chair, going through direct exam, and going through cross exam. When writing the script, be sure to incorporate information from the five senses. So, the script will include sensory information like the sound of the judge's voice as he swears in the witness, the feel of the wooden witness stand chair, and the appearance of the attorney doing cross examination.

3. **Practice** – Once the witness has a script and is able to properly use the deep breathing relaxation technique, the two are paired. Someone can read the script to the witness as the witness does the deep breathing exercise. Since the witness will practice daily for at least a week, it is wise to make a recording of the script that the witness can listen to the audio recording while doing the deep breathing exercise.

In vivo practice is not a bad idea, which is to say, have the witness go to the courthouse and even go to the courtroom where the trial will be held. While en route to the courthouse and while in the courthouse, the witness should practice deep breathing relaxation.

What Does the Science say about Self-Efficacy and Witness Preparation?

Unlike many other forms of witness preparation, the technique described in this paper has been studied empirically. One of the authors of this paper, Dr. Cramer, has conducted research and determined that the self-efficacy approach can influence the way the witness thinks and the way jurors perceive the witness.

As part of this research, Dr. Cramer and his colleagues developed the Witness Self-Efficacy Scale (WSES; Cramer, DeCoster, Neal, & Brodsky, 2010) as a way of measuring the effect of witness preparation services. Below is a list of WSES items. You can use these items to monitor the impact that witness preparation services have on the testimony of the witness.

1. Remain calm under cross examination
2. Control their emotions when questioned by an aggressive attorney
3. Maintain a stable tone of voice when speaking
4. Avoid fidgeting
5. Maintain a good posture throughout the testimony
6. Be comfortable on the witness stand
7. Remain poised when being questioned by an attorney
8. Maintain eye contact with the jury
9. Hold eye contact with an attorney

10. Hide nervousness
11. Convey confidence in their ability
12. Organize their thoughts
13. Comfortably admit when they are uncertain of an answer
14. Sit up
15. Lean slightly forward when answering some questions
16. Provide more than “yes/no” answers
17. Act natural
18. Be themselves when testifying

Just so we are clear, we are giving the foregoing list to you, the attorney or the trial consultant. Please don't give this list to your witness. It will only overwhelm the witness. If you talk to your witness about the items on the list, choose three and only three items to discuss with your witness. The more items from the list you discuss with the witness, the more her self-efficacy will wane.

Conclusion

Think about what good witness preparation would do for Mr. Simon. If the witness preparation services are effective, Mr. Simon will no longer deliver his responses to questions like exploding bombs. He will no longer stare down the attorney after responding to a question. Instead, he will speak in a way that others can hear and understand what he has to say. That is what good witness preparation does. It improves communication and understanding, which improves the understanding of the facts of the case.

The public misunderstands witness preparation because they are inclined to think witness preparation is designed to help the witness cover-up or lie. Nothing could be further from the truth. The witness preparation method presented in this paper helps witnesses get out of their own way so they can present a genuine, accurate message.

Attorneys and trial consultants can also have a misunderstanding of witness preparation as reflected by using rote techniques or lists, which are not individualized to the witness.

The witness preparation method presented in this paper can help. We know it works because of the heavy scientific basis for the model. We are happy to share this technique because we are always looking for a way to combine the art of law with the laws of science.

References

- Bandura, A. (1986). *Social foundations of thoughts and action: A social cognitive theory*. Englewood Cliffs, NJ: Prentice Hall.
- Bandura, A. (1989). Human agency in social cognitive theory. *American Psychologist*, *44*, 1175-1184.
- Bandura, A. (1993). Perceived self-efficacy in cognitive development and functioning. *Educational Psychologist*, *28*, 117-148.
- Bandura, A. (1997). *Self-efficacy: The exercise of control*. New York: Freeman.
- Bandura, A. (2000). Self-efficacy. In A.E. Kazdin (Ed.), *Encyclopedia of psychology* (Vol. 7, pp. 212-213). Washington, DC: American Psychological Association.
- Boccaccini, M. T., Gordon, T., & Brodsky, S. L. (2003). Effects of witness preparation on witness confidence and nervousness. *Journal of Forensic Psychology Practice*, *3*, 39-51.
- Boccaccini, M. T., Gordon, T., & Brodsky, S. L. (2005). Witness preparation training with real and simulated criminal defendants. *Behavioral Sciences and the Law*, *23*, 659-687.
- Cramer, R. J., Neal, T. M. S., & Brodsky, S. L. (2009). Self-efficacy and confidence: theoretical distinctions and implications for trial consultation. *Consulting Psychology Journal: Practice and Research*, *61*, 319-334.
- Cramer, R. J., Neal, T. M. S., DeCoster, J., & Brodsky, S. L. (2010). Witness self-efficacy: Development and validation of the construct. *Behavioral Sciences and the Law*, *28*, 784-800.
- Kozina, K., Grabovari, N., De Stefano, J., & Drapeau, M. (2010). Measuring changes in counselor self efficacy: Further validation and implications for training and supervision. *The Clinical Supervisor*, *29*, 117-127.
- Settlage, J., Southerland, S. A., Smith, L. K., & Ceglie, R. (2009). Constructing a doubt-free teaching self: elf-efficacy, teacher identity, and science instruction within diverse settings. *Journal of Research in Science Teaching*, *46*, 102-125.
- Schunk, D. H., & Zimmerman, B. J. (2007). Influencing children's self-efficacy and self regulation of reading and writing through modeling. *Reading and Writing Quarterly*, *23*, 7-25.

Red Ink and Red Tape: Understanding the Challenges in our Current Civil Trial System

BY RICHARD GABRIEL

Richard Gabriel is the President of Decision Analysis, Inc. a national trial consulting firm with offices in Los Angeles, Chicago, and San Francisco. He is the co-author of Jury Selection: Strategy and Science, published by Thomson-West and a regular columnist for Lawyers USA on trial strategy. In a recent "48 Hours" show, CBS News said Mr. Gabriel is "by reputation, one of the best trial consultants in the country." You can read more about Mr. Gabriel at www.decisionanalysisinc.com

Our nation's economic turmoil and the subsequent slashing of state budgets are causing seismic changes in our court system, delaying or even cancelling trials across the country and prompting litigants to make difficult decisions about their cases. This crisis also provides us an unprecedented opportunity to examine the effectiveness and efficiency of the civil justice system, allowing us to improve the civil litigation process.

What is the effect of state budget cuts on the courts?

Los Angeles has the largest court system in the United States. In 2009, California's judicial branch saw a \$676 million reduction in funds, even as more and more new cases came in. In a 2010 edition of the View from the Bench newsletter prepared by the Supervising Judge of the Los Angeles Superior Court Civil Division states:

"Ultimately, 1,800 employees, or one-third of the court work force, will have to be laid off for the court to live within its reduced budgets. Without these necessary employees, it will be impossible for the court to maintain its current level of operations. On average, 10 employees are required to support a courtroom, including in-court personnel as well as back-office staff for such functions as filing window, file maintenance, copying services, imaging, information technology, accounting, and jury services, among others. The layoff of 1,800 employees will require the closure of some 180 courtrooms. Because criminal cases and many family law and juvenile cases have priority over civil actions, the heaviest burden of court closures will fall on our civil courts. Due to the financial crisis, it is anticipated that the superior court will most likely have to shutter over one-half of the civil courtrooms. As a necessary consequence, inventories of cases in the remaining courtrooms will increase enormously, resulting in greater delays in bringing cases to trial and having motions heard."¹

In 2009, 27 states saw court budgets reduced, with another 12 states expecting budget cuts in the future. Hiring freezes have been enacted in 28 state courts, and 13 state courts have implemented salary freezes – Delaware, for example, had a hiring freeze on all non-security positions. Seven states encouraged judges and staff to accept salary reductions or have enacted salary reductions. Six states mandated furloughs of court staff, and another six states reduced their court hours. Minnesota had to do both, with court hours being slashed and public counters shutting down for a half day each week. Some states were forced to reduce staff – Florida had to lay off 280 court employees. In New Hampshire, Superior Courts said they would cut about a third of their jury trials in the coming year in order to save approximately \$280,000 for the state budget. 2008 saw the number of inadequately funded courts rise by 20%. Today, over half of all courts in the country are not fully funded.²

These cuts don't just affect employees or operating hours. The Boston Bar Association pointed out that these cuts actually threaten public safety. Because many courts have been forced to reduce all staff, including security, many courtrooms are left with no court officers, creating a significant security risk for judges, litigants, witnesses, court staff, and the public.³

Money problems aren't the only issue courts are facing – there's also a lack of jurors. A Los Angeles Times reporter watched a Judge grant hardship dismissals for more than half of the 65 people sent to his courtroom. After three straight days of hardship excuses and empty seats on the jury panel, lawyers for both the plaintiff and defendant waived their right to a jury trial and instead opted for a bench trial. In the courtroom next door, 66 of 107 prospective jurors were excused for financial difficulties before voir dire even began. Los Angeles, one of the highest cost of living cities in the United States, pays jurors only \$15 a day, barely enough to cover lunch and gas. "There's a lot of tension, a lot more stress people are dealing with these days," said Gloria Gomez, director of juror services for the Los Angeles County Superior Court.⁴ This same scarcity of jurors has played out in both Michigan⁵ and Texas⁶ trials, as well as throughout the country.

In addition, there is concern that court budget cuts may also be unconstitutional. Reduced court budgets can affect a defendant's right to appear before a judge within 48 hours of an arrest, the right to have an attorney appointed if a person can't afford one, and the ability to apply for temporary protective orders in domestic violence cases. After DeKalb County in Georgia approved a cut in its court budget, DeKalb Chief Superior Court Judge C.J. Becker had a strong reaction.

*"Cutting [Superior] court 17 percent is unconstitutional and irresponsible. That means the poor won't have representation. That means those folks will stay in jail. The unfunding of the courts in DeKalb County will mean this will be the county where you don't have constitutional rights 24/7."*⁷

As the courts become more affected by state budget decisions, these problems will worsen. People will continue to file lawsuits, causing even greater pressure on an already strained system. As courts scale back operating hours and staff, the buildup of lawsuits will further clog the system. The economic and state budget crises have made things a lot worse, and in doing so they have exacerbated the rampant inefficiencies in the justice system that make litigation so costly and protracted.

How efficient and effective are our current civil courts?

On May 10-11, 2010, Duke Law School conducted a symposium to specifically examine the challenges facing both plaintiffs and defendants in today's courtrooms. As part of this symposium, the Institute for the Advancement of the American Legal System conducted a survey of Chief Legal Officers and Legal Counsel to gauge their opinions of our current civil system.

When asked about their current views, a majority of the respondents felt that the civil justice system was "too complex" while more than 90% agreed that the civil justice system took too long and was too expensive. Importantly, over 80% don't believe that the merits of a case drive the outcome of the case or that litigation costs are in line with the value of the case. This suggests that the fears, risks and idiosyncrasies of trials drove counsel's estimation of settlement and verdicts. Said one respondent in the survey:

"The plaintiff[s] lawyers take the tactic of suing as many defendants as possible under as many legal theories as possible to see what sticks . . . The defense attorneys, billing at an hourly rate, benefit [from the resulting] broad discovery and the amount of time and effort it requires . . . The judges . . . often do not grant motions . . . that could serve to whittle the complaint down to the true cause of actions [or] act to sufficiently limit discovery. By freely granting motions to continue, they allow the cases to drag on for years . . ."

Corporate counsel also expressed a desire for streamlining and specialized courts to deal with the complexities of business litigation. One of the frustrations is the prolonged discovery process where two thirds of respondents felt that discovery focused on the core issues of the case infrequently or less than half of the time. Said one respondent:

"I find that judges (at least state court judges) handle too few business cases to really be familiar with contract and commercial law. They are too busy with their criminal dockets to really pay attention to the evidence (which is often complicated) put before them on a contract or commercial matter."

All in all, the study expresses what seems to be a consensus among those that engage in the litigation process: the desire for more consistency, more planning and more information in order to accomplish greater efficiency.

Even before the current fiscal crisis, the average time to get to trial in a civil case could be two to three years, depending on the jurisdiction. Although there are fast track jurisdictions, and some courts have increased their efficiency in bringing cases to trial, current cuts in state budgets will surely increase the time it takes to get a case in front of a jury. When a case is finally assigned to a courtroom, the trial can often be continued more than two or three times, either because of caseload conflicts with the Court or because of the schedule of the attorneys and their witnesses. In some cases, after a case has been prepared for trial, the case can be transferred to another judge with a different outlook on the case. Attorneys may then have to scramble to re-prepare their case because of new rulings from the current judge. With the current cutbacks in the courts, these delays will be extended as criminal and juvenile matters take more precedence in the current courts.

When a trial finally does start, the average amount of actual court time can be only three to four days per week, three to four hours per day. Some of these scheduling difficulties are a result of union limitations on the work hours of courtroom staff. Once the judge's, counsel's, or jury's needed days off are factored in, a relatively simple matter can stretch into weeks of trial.

These extended trials have had a significant impact on litigation decisions because they make the prospect of going to trial a tremendously expensive choice for both plaintiffs and defendants. A National Law Journal article titled *Life in the Doldrums Continues for Civil Litigators* describes how the recession affected various parties' decisions to go to trial and why litigants are so reluctant to file suits. The article states:

"What happened, according to law firm litigation department heads interviewed by the NLJ, was that corporate clients worked to control costs by waiting to file suits. They likely will continue do so through the first half of 2010, said Peter Haveles Jr., co-chairman of Kaye Scholer's complex commercial litigation department. 'Part of it is deferring activity and not necessarily commencing a lawsuit if you can sue now or a year from now,' he said.

*"Steven Yerrid of The Yerrid Law Firm in Tampa, Fla., concurred with Haveles' assessment. 'In tough economic times, people are going to look at the efficiency of taking a case through the full cycle of litigation,' he said."*⁸

Unfortunately, we have come to accept these delays and the expense as "the cost of doing business" in the civil litigation system. But are they necessary? What are the practical effects of long, protracted litigation battles and trials?

These delays undoubtedly make litigation more expensive. Plaintiff attorneys must make a business decision based on their belief in whether they can ultimately prevail in the case as well as whether they can settle quickly, or whether the verdict in a lengthy litigation matter will be worth their time.⁹ Corporate and defense counsel also make business decisions about whether to fight or resolve a case based on how long it will take to bring it to trial. Because of cutbacks in the courts, heavy caseloads and resulting continuances, defendants in civil suits are paying attorneys to prepare for trial two, three or even four times, not to mention the hours waiting in court for motions to be heard. For those working on contingency, these continuances make it harder to take new cases as the attorney's case and work load increase.

The irregular scheduling of many trials can also create comprehension problems for a jury. Research shows that juries (and judges) process information in a narrative model and not in a compartmentalized, linear fashion. As a result, skipped days, long breaks, and witnesses taken out of order make it harder for a jury to formulate a cohesive story of the case, which may lead them to misremember or misunderstand key evidence.

In some of the various conferences addressing these challenges, there has been an expressed desire for Judges to take a stronger hand in controlling the litigation by placing stricter limits on discovery. However, judges are often deciding rulings on a number of cases involving different types of litigation such as product liability, medical malpractice, premises liability, and contract issues. As a result of the sheer volume of their caseload, there is pressure for them to push parties to settle a case. Since they are conducting motions and hearings on multiple matters and conducting trials during the

day, they are then pushed to read and research multiple cases at night. This full docket makes it difficult for them to control the litigation with a great deal of scrutiny.

In the civil justice system, there are often complaints about juries in a specific venue being particularly pro-plaintiff or pro-defense. As a result of perceived unfairness they may receive at the hands of a specific judge or jury, plaintiff and defense counsel may become more concerned with the appellate record than with presenting their case in order to get a meaningful, thoughtful resolution from the jury. Thus, they end up making more motions and presenting more experts in order to preserve their record for appeal. While this presentation of extra evidence may give a jury a more comprehensive view of the issues in a case, it may also confuse them and distract them from some of the key evidence in the trial.

What is the quality of information we use to predict trial outcome and manage risk?

Effectively managing litigation entails risk evaluation. How will jurors apportion fault and award damages in a car accident to a plaintiff who was slightly over the speed limit and suffered a mild brain injury? Will they find a key expert credible? Will they find an email between the parties in a contract dispute to establish an agreement?

Litigants and attorneys often engage in forecasting future trial outcomes using their personal experience with similar cases, prior jury verdicts, and by guessing how they think the case facts will play out in trial. Some research has shown that these outcome predictions often dictate settlement of a case.¹¹ A recent study indicates that attorneys are erratic when predicting the outcomes of litigation, both in achieving their litigation goals and their chances of success.¹² Only 32% of cases matched the minimum goal set by the attorneys. 24% exceeded their goals and 44% failed to reach their estimated goals. One of the interesting findings in this study shows that an attorney's years of experience had no effect on their ability to predict the outcomes of a case.

Counsel also uses past jury verdicts or settlements as way of determining their risk, case value, and whether to take a case to trial. They will look at the past record of opposing counsel, how jurors have decided cases involving similar issues, and attempt to find out settlement amounts of similar cases. They then factor this into their thinking about the perceived strength of their evidence, their expert reports, the credibility of their witnesses, the current economic pressures they are experiencing as well as how the case settlement may affect the value of future cases.

One study shows that litigants who use past trial outcomes to set their beliefs about trial award expectations will consistently overestimate the size of the award and incorrectly evaluate who is likely to win the case.¹³ These studies suggest that litigants consistently use biased, flawed and incomplete information to value, settle and try cases.

While review of prior verdicts can be combined with an analysis of the case evidence, expert opinions, strengths of witnesses, opposing counsel and judicial disposition, one of the great unknown factors in any trial risk analysis is, "What will a jury ultimately do with this case?" This question is routinely addressed in settlement discussions and mediations, in conference rooms and courthouse corridors. For those who truly want to evaluate the risk of going to trial, how well can we know what a jury would do with a case?

To answer this question, some attorneys conduct focus groups or mock trials and some even employ “shadow jurors” to sit in the courtroom and give feedback on how they see the case being tried. No doubt this research gives attorneys valuable feedback about which issues drive juror decisions in their cases and how to adjust their trial presentations accordingly. However, the response from focus group and mock trial jurors ultimately depend on the presentations they are given from the side that hired them and future predictions about judicial rulings on the scope of evidence. Shadow jurors usually give incremental feedback on how they see the evidence unfold in the courtroom – what they thought of opening statements or how a particular witness performed. When we are evaluating the risk in case, how well are we anticipating the vast number of legal and extra-legal issues that can affect the outcome of the case, whether it be judicial inclination, evidence impact, witness and attorney performance, community and cultural values, news events related to trial issues or jury expectations, experiences and attitudes?

***How well armed are jurors to make
the most informed decisions about a case?***

“I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.” - Thomas Jefferson

“When you go into court, you are putting your fate into the hands of twelve people who weren’t smart enough to get out of jury duty.” - Norm Crosby

These two quotes demonstrate our combined hope and skepticism about the jury system. As one of the key mechanisms of democracy, the jury system is the embodiment of our rebellion against the tyranny of monarchs deciding whom to send to prison or favor in disputes about property or money. The jury is a proverbial check on unbridled power. Yet, we criticize our jury system on a regular basis. The tort reform movement condemns juries for what they call “runaway verdicts”. Juries are routinely criticized for their ignorance in complex civil matters and reviled for acquittals in high publicity cases. Yet, we revere the rights a jury system affords us. In fact, The American Judicature Society published an article last year where a study shows that a majority of litigants still favor a jury over a judge.¹⁴

Despite a vast wealth of social science research about psychology and practices that increase juror comprehension and participation in trials, we still tend to conduct trials the same way we have for more than 200 years. That is, jurors are passive observers who neutrally listen to case facts and objectively render an impartial decision, not unlike computer processors that calculate an evidence algorithm to come up with answers to verdict questions. Of course, those that routinely try cases know this is a fallacy. But, the courts still operate procedurally under this fallacy.

Despite the strong attachment for this passive jury role, some strides have been made to address the gap between the cognitive needs of jurors and the procedural limitations of trial. Some of these reforms include allowing jurors to ask questions during the trial. Some judges give jurors exhibit notebooks, pre-instruct on the law and allow attorneys to give summary statements to help jurors understand complex testimony and how it applies to the case. Three states now allow jurors to discuss the case prior to deliberations. But these reforms are used sparingly¹⁵, hampering the kind of participatory learning that increases juror comprehension.¹⁶

This fundamental misunderstanding about the static model of how jurors look at, listen to and decide cases also prevent us from sometimes getting the most accurate information about what really motivates a jury to find for a party or award damages. This information gap creates myths about juries that affect the advice that attorneys give their clients and ultimately their decision to settle or go to trial.

Why don't we employ better trial communication techniques to enhance the learning experience of jurors? We place great importance in the law on procedural accuracy. Procedures in the courts are mainly conducted in an authoritarian rather participatory manner. When courts started allowing jurors to ask questions, there were concerns that the questions would be disruptive to the proceedings and allow jurors to control the trial, rather than the lawyers and the Judge. There have also been concerns about jurors pre-judging the case or using information outside of evidence to influence their verdict. These concerns have been alleviated by numerous studies showing that these reforms meaningfully increase jurors' understanding of the case.¹⁷ As a result of increased participation and comprehension, the main benefit of these reforms is that they significantly increase a juror's satisfaction with their jury experience.¹⁸

How well informed are we about our jurors?

We also have limited information about our individual jurors and which experiences and attitudes will affect how they listen to the case. Can the juror who has had a terrible experience with a doctor or hospital be a fair and impartial juror in a medical malpractice case? While the courts routinely ask jurors to "set aside" any experiences or beliefs they may have, there is a host of psychological literature, which says this is a difficult, if not impossible task. In fact, ordering jurors to suppress their bias may in fact amplify them.¹⁹ Why don't we get better information from jurors about their background and opinions? Are we concerned that if we take ask too many questions about a juror's attitude or life experiences, we will never be able to find a jury that can be truly fair and impartial? The courts, in their quest for orderly, rational, and objective fact finding have always had an uneasy relationship with the intangible psychology of defendants, witnesses and jurors. These limits are amplified by administrative necessities as jury commissioners struggle to get enough jurors to show up for jury service. As a result, both the courts and attorneys either limit their questioning of jurors or apply stereotypes to jurors in lieu of the deeper information about how a juror's experience or beliefs may shape how they see the case. This leads to many jury selection myths about jury profiles, leading many to still rely on demographic stereotypes.

These stereotypes affect not only jury selection but also how attorneys view their cases. Cases are routinely settled based on how attorney's and their client's speculation about how sympathetic a plaintiff may be, how a jury will view a given witness, or the strength of the attorney's presentation or track record. Depending on the case and the jury, certainly some of these musings may be valid and accurate assessments. However, if we allow these stereotypes to determine how much money we are willing to accept to settle a case, is this a systematic and reasoned evaluation of what that case is truly worth?

Conclusion

All of these challenges in our civil courts contribute to the phenomenon of “the vanishing jury trial.”²⁰ Risk and uncertainty all contribute to the settlement of cases. While ADR certainly has provided excellent tools for resolving disputes today that previously would have gone to trial, no doubt the fear of juror unpredictability causes many cases to resolve. Do we need to consider a jury trial a last resort or necessary evil?

We have come to accept that there is little we can do to improve how we conduct civil jury trials. That administrative pressures, procedural protocols, facile labels, and a “roll of the dice” rather than factual merit are an inevitable by-product of civil trials. While some of these extra-legal pressures are unavoidable, is this really the best way to resolve disputes between individuals, organizations, institutions, and companies? How can we use juries and trials to more effectively and efficiently resolve and try cases? These questions must be addressed in order to restore confidence and utility to a unique system that guarantees all citizens a Seventh Amendment right to resolve disputes.

References

- ¹ Recent Changes in Civil at the Los Angeles Superior Court. (2010, March). *View from the Bench*, 2(3).
- ² National Center for State Courts. (2009, July 7). *State court budgets: Reduce hours, consolidate courts, improve technology*. Retrieved from http://www.ncsconline.org/D_Comm/Press-Release/2009/NCSC-COSCASurvey_budgets.html
- ³ Finucane, M. (2010, March 10). Court security hindered by budget cuts, bar says. *Boston Globe*, from http://www.boston.com/news/local/massachusetts/articles/2010/03/10/court_security_hindered_by_budget_cuts_bar_says/
- ⁴ Williams, C. (2010, February 15). Weighed down by recession woes, jurors are becoming disgruntled. *The Los Angeles Times*, from <http://www.latimes.com/news/local/la-me-re-luctant-jurors15-2010feb15,0,824472.story>
- ⁵ Hausman, J. (2010, June 15). No-shows causing problems with Muskegon County’s jury pool. *Muskegon Chronicle*, from http://www.mlive.com/news/muskegon/index.ssf/2010/06/no-shows_causing_problems_with.html
- ⁶ Waller, M. (2010, June 26). FLDS trial jury pools dry up. *The San Angelo Standard-Times*, from <http://www.gosanangelo.com/news/2010/jun/26/flds-trial-jury-pools-dry-up/>
- ⁷ Matteucci, M. (2010, February 9). DeKalb court officials: Budget cuts will slow justice. *The Atlanta Journal-Constitution*, from <http://www.ajc.com/news/dekalb/dekalb-court-offi->

[cials-budget-295235.html](#)

- ⁸Qualters, S. (2010, March 15). Life in the Doldrums Continues for Civil Litigators. *The National Law Journal*, from <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202446084878>
- ⁹(2010) Panel: Issues With the Current State of Discovery: Is There Really Excessive Discovery, and if so, What are the Possible Solutions? *Duke Conference on US Civil Litigation*.
- ¹⁰Conley, John M. and Conley, Robin H. (2009), Stories from the Jury Room: How Jurors Use Narrative to Process Evidence. *Studies in Law, Politics, & Society*, Vol. 49, p. 25; UNC Legal Studies Research Paper No. 1510290. Available at SSRN: <http://ssrn.com/abstract=1510290>
- ¹¹Wittman, D. (1988) Dispute resolution, bargaining, and the selection of cases for trial: A study of biased and unbiased data. *The Journal of Legal Studies*, XVII, 313-352.
- ¹²Goodman-Delahunty, J., Granhag, P. A., Hartwig, M., & Loftus, E. (2010). Insight or Wishful Thinking: Lawyers to Predict Case Outcomes. *Psychology, Public Policy, & Law*, 49(2), 133-157.
- ¹³Seabury, S. A. (2008) Inerring Beliefs about Potential Trial Outcomes Using Jury Verdicts in Civil Litigation. *American Law & Economics Association Annual Meetings*, 75.
- ¹⁴Rose, M. R., Ellison, C., & Diamond, S. S. (2010). Juries and Judges in the Public's Mind: Race, Ethnicity, and Jury Experience. *Judicature*, 93(5), 194-200.
- ¹⁵ National Center for State Courts (2007). The State of the States – Survey of Jury Improvement Efforts: Executive Summary. Retrieved from http://www.ncsconline.org/d_research/cjs/pdf/sos_exec_sum.pdf
- ¹⁶Heuer, L. & Penrod, S. (1996). Increasing Juror Participation in Trials Through Note Taking and Question Asking. *Judicature*, 79, 256.
- ¹⁷Ibid.
- ¹⁸Ibid.
- ¹⁹Wenzlaff, R. & Wegner, D. (2000) Thought Suppression. *Annual Review of Psychology*, 51, 59-91.
- ²⁰<http://marcgalanter.net/Documents/papers/thevanishingtrial.pdf> and <http://courtex.blogspot.com/2010/01/vanishing-jury-trials.html>

Fooled by numbers: Why people think that 24 months takes longer than 2 years

BY MARIO PANDELAERE

*Don't miss the trial consultant responses at the end of this
article from Bradley Hower and Paul Roberts!*

Mario Pandelaere, PhD is an Associate Professor in Marketing at Ghent University, Belgium. His research focuses on two main themes: 1) Social influence and persuasion in the interest of consumer welfare (including research on biases resulting from information description) and 2) Materialism, luxury consumption, conspicuous consumption, and their impact on subjective well-being. More information can be found on his webpage <http://users.ugent.be/~mapandel/>

People often use numerical information and even prefer it to more relevant non-numerical information (Hsee, Yang, Gu, & Chen, 2009). This preference may reflect the belief that numerical information is more objective, reliable and precise. However, the way quantitative information is specified often alters the judgments and decisions people make based on that information.

The current article first describes two large classes of biases: context and framing effects. It then shows how people's tendency to engage in relative number processing creates such biases. At the same time, some more recent lines of research have identified biases that occur when relative differences between numbers are held constant. I discuss in more detail the effects of expanding a scale (e.g. multiplying all numbers by 10) on people's perceptions of differences. I end with some implications of research on number processing for dealing with people's biased interpretation of quantitative information.

Context and Framing Effects

Context effects occur when people try to make sense of quantitative information by relating it to other numbers. In that situation, the same number often leads to different perceptions and evaluations, depending on the background information they receive. For instance, the difference between a 4 year and a 5 year warranty looks more substantial when people are told that most warranties in that product category vary from 3 to 6 years than when they are told that these vary from 1 to 9 years. This is because people relate a difference between the entire range, which is the maximal difference that could occur (range effect; Parducci, 1965).

Framing effects occur when specifying quantitative information in a different type of units alters perceptions and evaluations. For instance, people find the same ground beef tastier when it is labeled

as ‘75% lean’ than when it is labeled as ‘25% fat’ (Levin & Gaeth, 1988). One of the most robust findings is that people react differently to information when it is represented as a loss rather than as a gain. For instance, if people have to choose between a program that saves 200 people (out of 600) or a program that has a 33% chance to save all and a 67% chance to save no one (both programs focus on the gains), the majority of people prefer the former (saving a guaranteed 200 people). However, when the same information is specified in losses, these programs become: a program in which 400 will die for sure and a program that offers 33% chance that nobody will die and 67% chance that all will die, the majority of people prefer the latter program (Asian disease problem; Tversky & Kahneman, 1981).

Sensitivity to Relative Differences

Studies on number representation have shown that the same objective difference is perceived as subjectively smaller when it involves higher numbers (Dehaene, 2003). For instance, the difference between 100 and 101 seems smaller than the difference between 1 and 2. As a result, people often pay more attention to relative attribute differences than to absolute attribute differences (cf. Hsee et al., 2009), which renders them susceptible to various context and framing effects.

For instance, people are more likely to drive an extra couple of miles to visit a store that offers a \$5 USD discount on a \$10 USD item than a store that offers a \$5 USD discount on a \$200 USD item (cf. Thaler, 1980; Tversky & Kahneman, 1981). Also, people are willing to pay more for an intervention that would prevent 5 deaths of the estimated 50 to occur than for an intervention that would prevent 50 deaths of the estimated 1000 to occur because the former intervention saves 10% of the people at risk, while the latter saves “only” 5 % of the people at risk (e.g., Baron, 1997; Fetherstonhaugh, Slovic, Johnson, & Friedrich, 1997). In both cases, people’s decisions are influenced by relative comparisons while they should not be: a \$5 USD discount is the same amount of money, irrespective of the original product price. Similarly, preventing 50 deaths should be viewed as saving 5 deaths, irrespective of the number of people at risk.

Recently, several lines of research have documented various biases that do not involve a preferential focus on relative differences. These lines of research have focused on so called numerosity effects demonstrating that the use of alternative units leads to different evaluations, although different mechanisms may operate depending on the specific setting.

Ratio Bias

A first line of research has focused on *probability information*. This type of information is often given in a numerator-denominator format. For instance, the probability of something happening may be specified as “1 in 5” or, alternatively, “20 out of 100”. Various studies have shown that people exhibit a ratio bias: equivalent odds or probabilities are perceived more favorably when expressed in higher numerators (and obviously also higher denominators). This is because people pay insufficient attention to the denominator (5 vs. 100) and are overly sensitive to the numerator (1 vs. 20). So, because 20 is bigger than 1, 20% looks bigger as “20 out of 100” than as “1 out of 5”. Correspondingly, people prefer drawing from a bowl containing 10 winning and 90 non-winning possibilities to drawing from a bowl containing 1 winning and 9 non-winning possibilities (Kirkpatrick & Epstein, 1992). Yamagishi (1997) even found that cancer was incorrectly rated as riskier when it was described as ‘kills 1,286 out of 10,000’ than as ‘kills 24.14 out of 100’.

The existence of a ratio bias is linked to experiential processing: people can more easily simulate (or visualize) drawing a winning possibility (or contracting a disease) as the number of possibilities increases. In fact, Denes-Raj and Epstein (1994) found that a significant portion of their participants preferred a gamble with 9/91 odds of winning to a gamble with the higher odds of 1/10 of winning, even though they knew that the objective probability of winning is larger in the second case. It just didn't feel right!

Currency Numerosity Effects

A second line of research has investigated people's valuation of money when it is specified in alternative currencies. In this situation, ease of simulation cannot operate because the quantities involved do not refer to probabilities. Raghurir and Srivastava (2002) found that people may spend less in a foreign country if the value of the foreign currency is lower per unit than the value of one's own currency (e.g., American people spend more in Great Britain as 1 U.S. dollar is less than 1 British pound, and spend less in Mexico as 1 U.S. dollar is greater than 1 Mexican peso). Interestingly, when people's budgets or income are also translated into the foreign currency, the opposite phenomenon is observed (Wertenbroch, Soman & Chattopadhyay, 2007).

These currency numerosity effects result from *inexact translation* from one currency to another. Confronted with prices and budgets in foreign currencies, people try to estimate the corresponding prices and budgets in their own currency. In this estimation process, however, people try to adjust the posted, foreign prices and budgets to their own currency. This typically results in anchoring: estimates are too close to the posted numbers than they should be. So, while 185 Mexican pesos equal 15 U.S. dollars, people overestimate it to be 20 U.S. dollars or more (a value closer to 185). In contrast, while 9 British pounds also equal 15 U.S. dollars, people underestimate the equivalent as 12 U.S. dollars or less (a value closer to 9). As a result, prices seem larger in Mexico than in Great Britain (e.g., a blouse seems more expensive when it costs 185 pesos than when it costs "only" £9). At the same time, the residual budget after spending seems larger in Mexican pesos than in British pounds.

Although this line of research has exclusively focused on specifying prices and budgets in unfamiliar currencies, the anchoring mechanism is relevant for any setting where people are confronted with quantitative information in unfamiliar units that they can *translate* to a familiar unit. For instance, when American citizens prepare for a European summer trip, they may underestimate the temperature at their destination when they view these temperatures in Celsius (because in summer, temperatures in Celsius use lower numbers than temperatures in Fahrenheit). Conversely, Europeans may overestimate the temperature in the U.S. if they view temperature information in Fahrenheit. A similar logic applies for translations between miles and kilometers, gallons and liters, and so on.

The unit effect - overview of our findings

In many cases, people are confronted with quantitative information that they feel perfectly comfortable with and have no problem making sense of the numbers they receive. Hence, no translation occurs. For instance, people can rate the quality of a service or product on a scale from 1 to 5 (as Amazon.com uses in customer reviews) or on a scale from 0 to 100 (as Robert Parker uses in wine ratings). Although one can translate ratings on a 5-point scale to ratings on a scale from 0 to 100, people would not feel the need to do so. In fact, this translation issue probably does not even enter their minds as

they can easily interpret the ratings. Similarly, companies can specify warranties in years or in months. Because people are equally accustomed to both measurement units, again they readily interpret the numbers they receive.

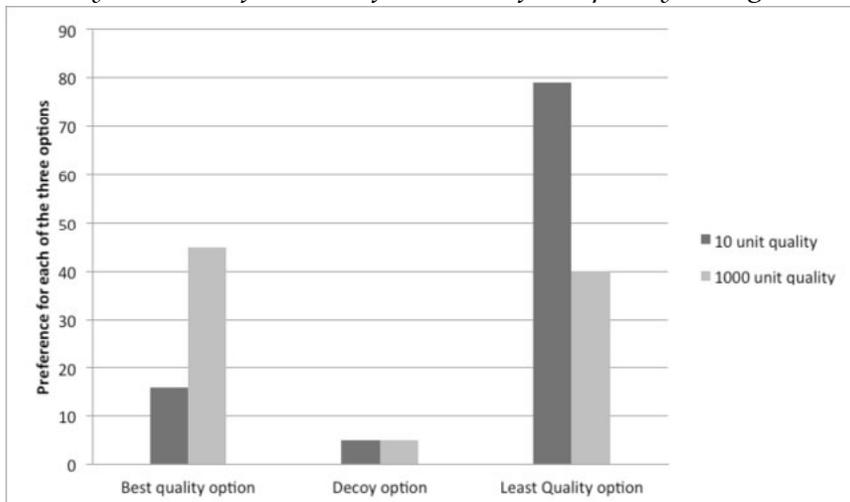
We (Pandelaere, Briers & Lembregts, 2011) found that, when people are confronted with numbers they feel they can make sense of, they often do not sufficiently account for the specific unit in which the information is expressed and focus primarily on the sheer number that is communicated. As such, they act as if a bigger number on an expanded scale represents a bigger quantity. Expanding a scale occurs when information in one unit (e.g. years) is translated to a smaller unit (e.g. months). We conducted five studies to test whether and when expressing quantitative information on different scales changes people’s judgments and decisions. We were particularly interested in whether people would be biased by the magnitude in which a difference is expressed when this does not alter the objective difference.

In a first study, participants had to compare the warranties of two dishwashers and rated the difference between 84 and 108 months was bigger and more meaningful than the difference between 7 and 9 years. In a second study, we gave participants price (in Euro) and quality information about three home cinema systems and asked which system they would buy. The quality ratings were either expressed on a scale from 0 to 10 or on a scale from 0 to 1000. The price difference between the cheapest

and the most expensive model was €50. The quality difference between these two options was .either .5 on the 10 point scale or 50 on the 1000 point scale. While only 16% of the participants indicated they would be willing to buy the most expensive home cinema system when the quality information was expressed on 0 to 10 scale, about 45% of the respondents would be willing to buy the superior system when it was expressed on a 0 to 1000 scale (See Figure 1).

Study 3 tested the unit effect in real life. Students were invited in the lab for a series of experiments in return for course credit. None of these experiments had any bearing on our study. In fact, our study was disguised as a gift at the end of the session. When the students had finished their tasks, they had to come to the front of the lab to indicate they had finished. They were thanked and their name was written down to ensure they would receive their course credit. The experimenter (blind to the hypotheses), then told them that they could also choose a snack to take home. They were presented with two choices: a candy bar and an apple. Before they made their choice, we told them that as consumer researchers we felt it important to inform them on the caloric information of the options so they could make informed choices. We either gave this information in kilocalories (apple = 59 kcal; candy bar = 246 kcal) or in kilojoules, a unit that is approximately four times smaller (apple = 247 kJ; candy bar = 1,029 kJ). Students were more likely to choose the apple when the caloric information was specified in kilojoules (making the difference in calorie content between the two options seem big) than when the caloric information was specified in kilocalories (making the difference in calorie content between the two options seem not so big).

Figure 1: Probability of selecting each of the three home cinema systems as a function of the scale of the quality ratings.



Note. The decoy option offers the least quality but at a higher price and is therefore selected very infrequently.

When the students had finished their tasks, they had to come to the front of the lab to indicate they had finished. They were thanked and their name was written down to ensure they would receive their course credit. The experimenter (blind to the hypotheses), then told them that they could also choose a snack to take home. They were presented with two choices: a candy bar and an apple. Before they made their choice, we told them that as consumer researchers we felt it important to inform them on the caloric information of the options so they could make informed choices. We either gave this information in kilocalories (apple = 59 kcal; candy bar = 246 kcal) or in kilojoules, a unit that is approximately four times smaller (apple = 247 kJ; candy bar = 1,029 kJ). Students were more likely to choose the apple when the caloric information was specified in kilojoules (making the difference in calorie content between the two options seem big) than when the caloric information was specified in kilocalories (making the difference in calorie content between the two options seem not so big).

A fourth study showed that when people are reminded that the choice of unit is somewhat arbitrary, the unit effect is eliminated. Participants had to imagine having bought a product online and were asked whether they would pay extra to get the product delivered earlier, either specified as 'one month sooner' or as '31 days sooner'. Before making this decision, participants had to indicate whether they thought various lengths of time were very short periods of time or very long periods of time. For half of the participants, all time periods were specified in the unit they would see later on, either specified in only months or in only days. The other half of the participants, however, had to make subjective time estimates for periods specified in months as well as periods specified in days. We expected that for the latter, the alternative temporal frame would be made salient, which would eliminate the unit effect.

Participants in the group who had made subjective time estimates in only days or in only months, corresponding to the time unit used in the expedited delivery service, were more likely to pay for expedited delivery if it referred to '31 days earlier' versus 'one month earlier' - this replicates the unit effect. However, participants who made their estimates in both days and months were not more likely to pay for expedited delivery if it referred to '31 days earlier' versus 'one month earlier' (See Figure 2).

So far, all our studies focused on the effect of changing the scale of quantitative information without varying relative differences. For instance, a 9 year warranty is 29% better than a 7 year warranty. Likewise, a 108 month warranty is 29% better than an 84 month warranty. However, in the introduction, I argued that people are very sensitive to relative differences. We therefore investigated whether changing the scale on which quantitative information is specified may alter this sensitivity. Participants had to indicate how much more they would be willing to pay for the perfect home cinema system compared to systems of varying qualities. Quality information was expressed either on a scale from 0 to 10 or on a scale from 0 to 1000.

Our research design allowed us to investigate the willingness to pay for different levels of relative difference between a focal home cinema system and a perfect one. The relation between willingness to pay and relative improvement in quality was much stronger when the quality information was expressed on a 1000 point scale versus on a 10 point scale (see Figure 3). This shows that the sensitivity to relative differences is more pronounced if all quantities are specified as large numbers (i.e. use small units) rather than as small numbers (i.e. big units)

Figure 2: Probability of paying additionally for earlier delivery as a function of temporal frame and the salience of the other temporal frame.

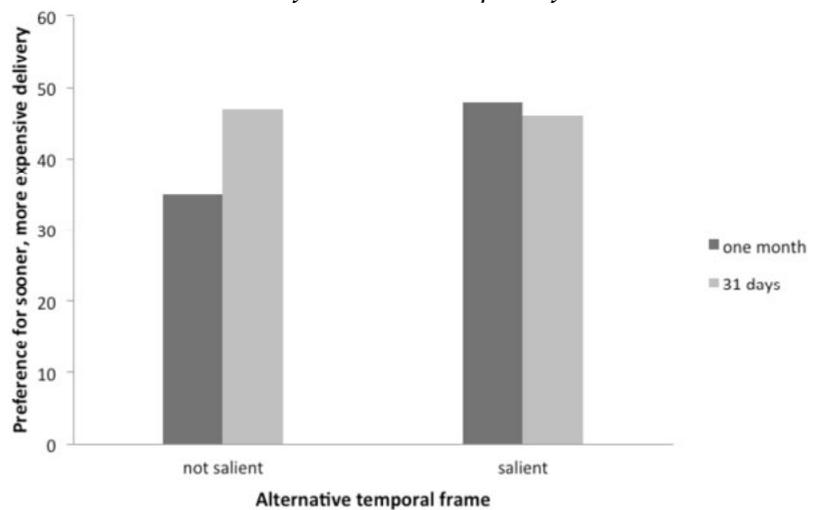
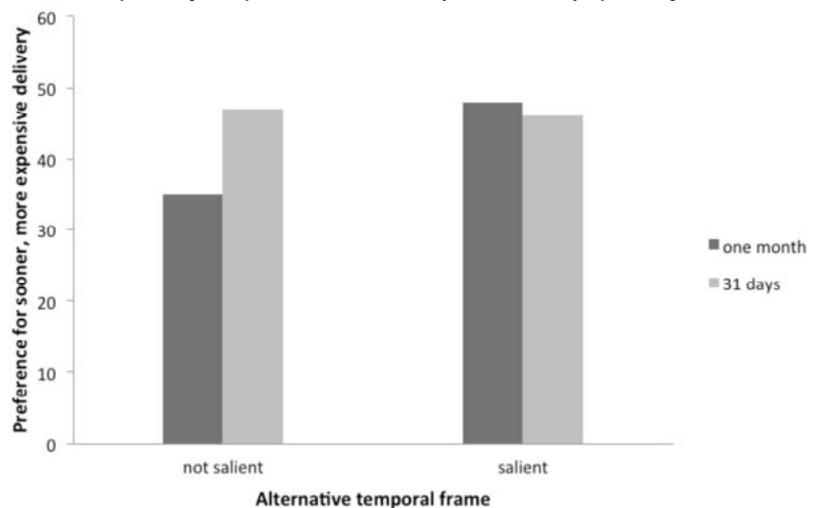


Figure 3: Willingness to pay for various levels of relative quality improvement as a function of quality scale



Summary of the Findings and Implications

The most important thing to bear in mind is that while quantitative information may seem objective, biases in how people process numbers may lead to radically different evaluations. The current paper shows that merely altering the scale in which quantitative information is provided affects people's judgments and decisions. In particular, expanding the scale (i.e. increasing the number of units, resulting in higher numbers) increases the perceived difference between options; conversely, contracting the scale (i.e. decreasing the number of units, resulting in lower numbers) decreases the perceived difference between options. This effect is very robust and very general as it is observed for time, quality ratings, probabilities and prices and budgets.

As a lawyer, one can therefore manipulate the perceived differences between two options by changing the scale. For instance, in case of a suspected racial bias in hiring decisions, one could downplay the difference in hiring probability for White Americans versus African Americans by using small numbers (e.g. a 1-in-20 chance versus a 1.5-in-20 chance) or highlight it using large numbers (e.g. a 100-in-2000 chance versus a 150-in-2000 chance).

When the information refers to probabilities, the framing effect is partly due to differences in mental simulation. One can try to diminish the impact of mental simulation by appealing to people's rational side. When people engage in rational processing rather than in experiential processing, the ratio bias decreases. When the information involves units that people are unfamiliar with, the framing effect occurs because people engage in a quick-and-dirty estimation of the corresponding value in a unit they are familiar with. To reduce the framing effect, one should give people an exact translation to the familiar unit and not leave this calculation to them.

Our research shows that framing effects even occur when people think they can readily interpret the quantitative information they receive. This is important because people are not aware that they may exhibit a bias and it may also be very difficult to persuade them of that fact. I would therefore recommend that lawyers should not make people explicitly aware of this bias – it may be hard to believe and trigger reactance effects. However, our research does show that merely reminding people that the information they receive could have been specified in alternative units may eliminate the unit effect. Reminding people of this fact should be very subtle by referring to some alternative units in one's argumentation.

It is important to recognize the fact that our studies use a between-subjects design. That is, the unit effect is demonstrated as a difference between the perceptions between some people who receive information in one unit and other people who receive the same information but in a different unit. Reminding people of alternative units eliminates the effect. That is, it eliminates the difference between the two groups. It does not directly specify what decision people will make after being reminded of alternative units. Our studies do not speak to this issue.

So, eliminating a bias does not necessarily mean that the interpretation has become more congenial to one's case. For instance, in a case where people sue a restaurant because it made them fat by providing high-calorie food, one could specify caloric information in kilojoule to exaggerate the quantities in comparison with some healthy standard. Opposing counsel could remind the judge and jury by using kilocalorie information. It is not clear, however, what information judge and jury will ultimately use in their decisions. Even when reminded of kilocalories, they may still think in terms of

kilojoules. All our studies show is that reminding people of different units is sufficient to eliminate differences due to specifying information in alternative units. On the other hand, it is possible that judge and jury may base their decision on the newly provided numbers – the kilocalories. As it is not clear a priori which type of information will be most important, one could investigate this in a mock jury. Also note that even if reminding people of the alternative unit might not always work in one's favor, there is likewise no evidence that it might backfire. As such, reminding people of alternative units is a safe, though possibly not always effective, strategy.

Finally, it is also important to be aware of the fact that both absolute differences and relative differences play a role in the interpretation of quantitative differences. So, the difference between a 100-in-2000 chance versus a 150-in-2000 chance looks big in both absolute (difference of 50) and relative sense (a 50% difference). While a 1-in-20 chance does not differ much from a 1.5-in-20 chance in an absolute sense (only a difference of .5), it still does represent a 50% difference in relative sense. So changing from the first frame (in 2000) to the second frame (in 20) will definitely alter perceived differences, but it may not necessarily render the differences meaningless! However, it is possible to reduce the relative difference by changing what the numbers refer to. In the example, shifting from 'how many people are hired' to 'how many people are not hired' changes the numbers to 19-in-20 versus 18.5-in-20. This decreases the relative difference from 50% to below 3%.

To conclude, while people often feel that they can readily interpret numerical information, their interpretation is often susceptible to context and framing effects. Our research shows a very basic but robust framing effect: merely altering the scale in which quantitative information is specified can lead to different evaluations. Such numerosity effects are likely to be observed in many different situations.

References

Baron, J. (1997). Confusion of relative and absolute risk in valuation. *Journal of Risk and Uncertainty*, 14, 301–309.

Burson, K. A., Larrick, R. P. & Lynch, J. G. Jr. (2009). Six of One, Half a Dozen of the Other: Expanding and Contracting Numerical Dimensions Produces Preference Reversals. *Psychological Science*, 20 (9), 1074-78.

Dehaene, S. (2003). The Neural Basis of the Weber–Fechner Law: A Logarithmic Mental Number Line. *TRENDS in Cognitive Sciences*, 7 (4), 145-47.

Denes-Raj, V. & Epstein, S. (1994). Conflict Between Intuitive and Rational Processing: When People Behave Against their Better Judgment. *Journal of Personality and Social Psychology*, 66 (5), 819–29.

Fetherstonhaugh, D., P. Slovic, S. Johnson, & J. Friedrich (1997). Insensitivity to the value of human life: A study of psychophysical numbing. *Journal of Risk and Uncertainty*, 14, 283–300

Hsee, C. K., Yang, Y. Gu, Y. & Chen, J. (2009). Specification Seeking: How Product Specifications Influence Consumer Preferences. *Journal of Consumer Research*, 35 (April), 952-66.

Kirkpatrick, L. A. & Epstein, S. (1992). Cognitive-Experiential Self-Theory and Subjective Probability: Further Evidence for Two Conceptual Systems. *Journal of Personality and Social Psychology*, 63 (4), 534-44.

Levin, I. P., & Gaeth, G. J. (1988). How Consumers are Affected by the Framing of Attribute Information Before and After Consuming the Product. *The Journal of Consumer Research*, 15(3), 374-378.

Pandelaere, M., Briers, B. & Lembregts, C. (2011). How to Make a 29% Increase Look Bigger: The Unit Effect in Option Comparisons. *Journal of Consumer Research*, 38(2), 308-322.

Parducci, A. (1965). Category Judgment: A Range-Frequency Model. *Psychological Review*, 72 (6), 407-18.

Raghubir, P. & Srivastava, J. (2002). Effect of Face Value on Product Valuation in Foreign Currencies. *Journal of Consumer Research*, 29 (3), 335-47.

Thaler, R. (1980). Toward a positive theory of consumer choice. *Journal of Economic Behavior and Organization*, 1, 39-60.

Tversky, A., & Kahneman, D. (1981). The framing of decisions and the psychology of choice. *Science*, 211, 453-458.

Wertenbroch, K., Soman, D. & Chattopadhyay, A. (2007). On the Perceived Value of Money: The Reference Dependence of Currency Numerosity Effects. *Journal of Consumer Research*, 34 (1), 1-10.

Yamagishi, K. (1997). When a 12.86% mortality is more dangerous than 24.14%: Implications for risk communication. *Applied Cognitive Psychology*, 11, 495-506.

We asked trial consultants who specialize in visual evidence to respond to this article. Below Bradley Hower and Paul Roberts give their perspectives.

Bradley Hower responds:

Bradley Hower is the founder and principal of Insight Design LLC. Insight Design is a demonstrative evidence design firm with an international practice based in Maryland. He has been concentrating on intellectual property and complex business litigation for 21 years.

Dr. Pandelaere raises a number of important points in his paper, the impact of which should be thoroughly explored by both lawyers and their demonstrative evidence experts. In my response I will attempt to extrapolate these into usable practices for the preparation and critique of demonstrative evidence.

1. **Use native units.** Just as you would not expect an American jury to understand you if you spoke Russian or Tagalog, do not expect them to translate from Yen or kilograms to US units, unless it is your purpose to confuse them. Dr. Pandelaere’s paper concludes that individuals are not likely to perform conversions accurately. Conversion information for virtually any unit is readily available on the Internet. Just because counsel may provide data in unfamiliar units does not mean it should be presented that way. Check with counsel and testifying experts to make sure that they agree with your conversions.

2. **Use small units to emphasize the impact of quantities, large units to diminish.** Consider the following fictitious damages demonstratives. Exhibit 1 is presented in small units, dollars, to maximize the extent of damages suffered. Exhibit 2 is stated in millions of dollars, minimizing the impact of the numbers. At first blush, we might assume that the Plaintiff would present exhibit 1 and the defendant would present exhibit 2. But the situation calls for more critical consideration.

The plaintiff who wants to say “Look how badly the defendant has hurt me” might use something like exhibit 1. But if he wanted to say “My demands are modest and reasonable” he might use exhibit 2. Similarly, the defendant who wants to trivialize the damages might use exhibit 2, but if he wants to say that the plaintiff’s demands are unreasonable, he might use exhibit 1. We must examine very closely the intent of each and every demonstrative in light of the teachings of Dr. Pandelaere.

Damages

Type of Loss	Loss Amount
Lost clients still with Defendant	\$ 6,388,515
Lost clients no longer with Defendant	1,737,428
Future loss: class A clients	3,365,539
Future loss: class B clients	411,745
Free premiums for class A clients	4,608,851
Other Defendant revenue not above	20,081,366
TOTAL	\$36,593,444

Damages

Type of Loss	Loss Amount (millions)
Lost clients still with Defendant	\$ 6.39
Lost clients no longer with Defendant	1.74
Future loss: class A clients	3.37
Future loss: class B clients	0.41
Free premiums for class A clients	4.61
Other Defendant revenue not above	20.08
TOTAL	\$36.59

3. **Look at the other side of the coin.** There is always another way to look at the message to be delivered. We can look at failure rates or success rates, parts per billion of contaminant or percent purity. Consider the following statistics.

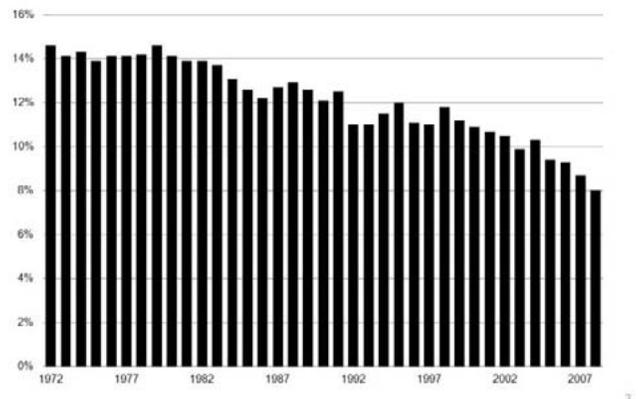
Exhibit 3 illustrates high school dropout rates while exhibit 4 quantifies high school completers. Which graph to use is, again, a function of examining critically and deciding clearly what point is to be made. If the objective is to criticize the educational system then exhibit 3 illustrates failure. If the objective is to praise the educational system, then exhibit 4 celebrates success. Litigation is frequently a rather acrimonious battle of egos, something the jury is not likely to miss. Framing in the positive gives you a chance to take the high ground and look reasonable, perhaps even generous. Be clear about what you intend to say.

4. **Analyze the whole story.** Perhaps the biggest lesson to be drawn from Dr. Pandelaere’s work is the critical need to do a detailed analysis of the complete story to be presented. Only with a thorough understanding of the nuance of the message can we apply these principles to design. Anything less risks lack of clarity and continuity. It is not enough to blindly prepare a chart with data provided by counsel; we need to know the objective of each and every demonstrative and how it fits into the overall story.

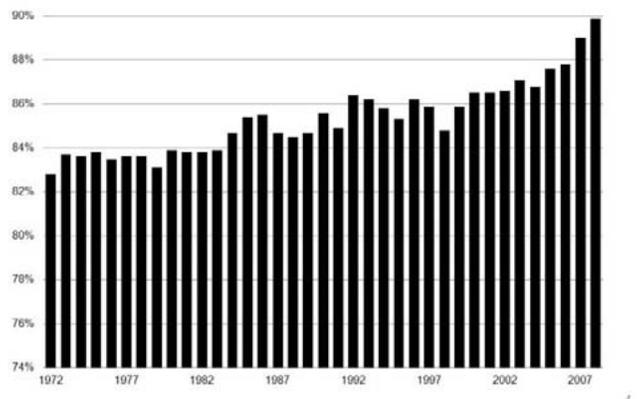
5. **Retain experts and use them well.** Lawyers are trained in the law and verbal argument. Graphic designers, specifically those with long experience preparing demonstrative evidence, are trained and experienced in the visualization of information. Counsel should not have to look for the visual nuance implied by Dr. Pandelaere’s research, that is the job of the demonstrative evidence expert. Designers should bring these details to the attention of Counsel during preparation of demonstratives. Also, counsel would do well to have their designer review opposing demonstratives with an eye toward “impeachment.”

We would be foolish to ignore the work of Dr. Pandelaere and his colleagues. As design criteria, it is very useful, but perhaps the most important thing to be learned is the critical nature of the upfront story analysis that must be employed before we can make use of what he teaches us here.

US High School Dropouts



US High School Completers



Paul Roberts responds:

Paul Roberts is a senior case manager at The Focal Point based in Oakland, California. He works with the country's top trial teams on a wide variety of cases ranging from complex intellectual property litigation to commercial disputes and class-action lawsuits.

Dr. Pandelaere's article offers a useful survey of several different types of perception biases in relation to how people interpret quantitative information. While his studies do not deal directly with courtroom or juror behavior, he quickly makes a connection between the quantitative biases that people exhibit and the potential for those biases to be exploited in the courtroom in order to influence a jury's evaluation of numerical information.

Dr. Pandelaere's studies seem to confirm the prior literature on the subject rather than push new boundaries, although he does explore the breadth of the unit effect by documenting it in a series of different contexts (units of time, quality ratings, and calories). While his primary conclusion is fairly straightforward (changing the unit scale can serve to emphasize or deemphasize differences) its implications for juror decision-making are murkier.

In positing ways to apply his conclusions to trial situations, Dr. Pandelaere suggests that a lawyer might downplay a difference by expressing a probability with a smaller numerator and denominator (1 in 20 instead of 100 in 2000) or emphasize a difference in caloric content by using a higher number expressed in kilojoules instead of a lower number of kilocalories. However, he immediately notes that someone translating the probability for jurors or making jurors aware of alternate unit options "may eliminate the unit effect." Therefore, it seems that as long as opposing counsel does not adopt the same "manipulated" scale (which would be unlikely), the unit effect would not have much bearing on a juror's evaluation of the numeric information.

Furthermore, all of Dr. Pandelaere's studies involve individual decision making in the absence of group discussion. If the same numerical information is evaluated by a group of jurors during deliberations, it would likely increase the chance that at least one person would point out the unit discrepancy, thereby mitigating the unit effect for the group.

Despite these limitations, it seems plausible that framing effects might still contribute to the way a juror evaluates the totality of the evidence in a case. As Dr. Pandelaere points out, many people hold "the belief that numerical information is more objective, reliable and precise" than non-numerical information. Given that perception, presenting numerical information in a way most favorable to your client should be the goal of any trial presentation of this sort. Whether the evaluation of a single value exhibits a bias is not as important as ensuring that your data is framed in the most persuasive fashion possible for your case.

While Dr. Pandelaere's article explores ways to enhance your presentation by manipulating scale, it is also possible to emphasize and de-emphasize comparisons by manipulating visual perception. The following are some examples of graphics designed to illustrate the possibilities of visual framing effects similar to those that Dr. Pandelaere covers. How these visual unit effects would change the numerical ones that Dr. Pandelaere discusses would be an interesting course for future study, spe-

cifically because so much quantitative information is now presented visually to jurors at trial.

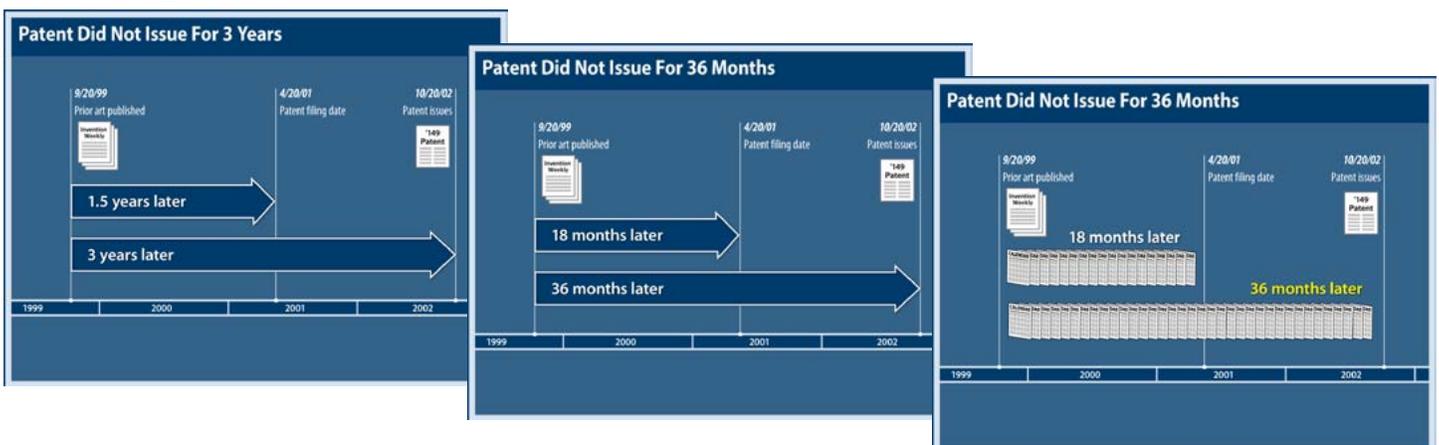
I would hypothesize that reinforcing scale manipulations with visual manipulations of this sort would likely hinder opposing counsel’s ability to reverse the unit effect by merely raising awareness of the units. Furthermore, because visual manipulations are often subtle, they would likely not be pointed out to jurors at trial, making them less susceptible to reactance effects. This would lead to a premise that many trial graphics consultants likely have observed experientially: It is possible that the gestalt of a visual presentation can have a strong, yet subconscious influence on a juror’s perception of a case.

These two examples demonstrate a visual example of the unit effect. Even though both graphics express the amount in the same monetary units (cents), the one on the left does so in a smaller visual unit (pennies) to emphasize the difference in amounts. The example on the right uses fewer, larger visual units (nickels) to minimize that same difference.



In addition to using different visual units, the layout invites the viewer to read each group of coins as single stacks and compare their heights. By altering the visual units, these graphics achieve a similar effect as when one changes the vertical scale of a bar graph to distort the differences in heights of the graphed data.

The following examples show three versions of a simple timeline illustrating the duration of two specific periods of time. The first two versions demonstrate the types of framing effect described in the article (merely changing the units). The third version explores the possibility of further emphasizing the difference in the two time periods by adding a visual element (a calendar icon) that corresponds to the change in units.



I'm a lawyer. Why should I care about typography?

Editor's Note: Typography for Lawyers <http://www.typographyforlawyers.com/> has been the topic of much conversation among lawyers and others. Should lawyers really care about typography? Author Matthew Butterick graciously answers questions we posed below.

A Q&A WITH MATTHEW BUTTERICK

*[Matthew Butterick](#) is an attorney, designer, and writer in Los Angeles. He is the author of the website and book *Typography for Lawyers* (Jones McClure Publishing).*

Excuse me! I'm a lawyer. Why should I care about typography?

No matter what kind of lawyer you are, writing is part of your job. That means every lawyer is a professional writer. But the nature of what we write makes lawyers the most consequential writers in the world. Even if legal writing isn't always good, it's always important. And where the written word is important, typography — which I define as the visual component of the written word — is also important. Typography isn't the core of a lawyer's work, but it can optimize that work.

For instance, there's no rule that says lawyers have to arrive at jury trials wearing a clean shirt and suit. But most do. Nor is there a rule saying that lawyers are forbidden from presenting their opening argument to the jury while chewing gum and mumbling. But most don't. So I think lawyers, especially trial lawyers, are well attuned to the idea that how you present yourself, as well as your argument, affects what jurors and judges think. Typography is no different. Maybe the tools and techniques are unfamiliar, but the goal is the same: persuading an audience.

Times New Roman: everyone else uses it; judges are used to it; ours is a conservative profession; why not stick with what works?

First, I should clarify that fonts are part of typography, but typography goes beyond fonts. Typography includes fonts, but also type composition, text formatting, and page layout. Though I want lawyers to be aware that other fonts exist, if you truly prefer Times New Roman, I won't try to talk you out of it.

"Why not stick with what works?" Because even the most conservative lawyer you know doesn't rely on a typewriter, or a fax machine, or an answering service. They rely on a laptop and

an iPhone. We don't stick with things merely because they work; we upgrade because it's better for our clients and better for ourselves. The software and hardware in today's law office can produce documents that rival a professional print shop. Why not take advantage of that technology?

Sometimes I hear that judges "prefer" Times New Roman, which is a generalization unsupported by evidence. Judges write court rules so they can tell us what they prefer. If the court rules don't specify Times New Roman, then judges at that court don't prefer it. In fact, the U.S. Supreme Court forbids lawyers from using Times New Roman. And Chief Judge Frank Easterbrook of the Seventh Circuit is an outspoken critic of Times New Roman – he never uses it, and encourages lawyers to use something else. (Both those courts have also stocked their libraries with copies of my book.)

I've read the research that says for some audiences you want to present plain facts to optimally persuade and for others you want to present your evidence in the form of a story to optimally persuade. Does a font choice make a difference in persuasion?

I don't think a font can have some spooky neurological influence on readers that makes them want to agree with you. But I think font choice, and typography more broadly, is one of the many ways a lawyer can quietly make their argument more appealing and more credible. If you're giving a closing argument to the jury, you're going to practice it, right? You're going to make sure your spoken delivery is smooth, and clear, and emphatic. You do this not because you think you'll win purely on speaking skills, but because you want to maximize the persuasive value of your oral argument. So it is with typography in a written document.

"The judges I practice before use two spaces at the end of a sentence. Shouldn't I do the same?"

No. If judges were infallible, we wouldn't need appellate courts. But the rule is one space. All typographic authority and professional practice is aligned on this issue. There's no way the two-spacers can debate this, so they invent excuses that boil down to "How can I change? I've been doing it wrong for so long!"

All I can do is give lawyers information to make their own choices. If you know the rule and have a principled reason for departing from it – "the partner I work for makes me use two spaces" – fair enough. But denying that the rule exists is silly.

I get asked about one vs. two spaces a lot, but it doesn't bother me nearly as much as THE OVERUSE OF CAPITALIZED TEXT IN LEGAL DOCUMENTS.

If you were to recommend specific fonts for legal documents, what would they be for a PC user? And a Mac user?

I prefer to avoid reducing my recommendations to one or two fonts because it deprives readers of the pleasure of picking a font out for themselves. The Typography for Lawyers website has a large collection of font sample pages with free PDF samples of legal documents set in each font.

In November, I'm also going to be releasing my own text font for lawyers, called Equity.

Do you recommend differing font choices within the same document? Like for titles, sections, and text or all the same font?

Mixing fonts is a matter of taste, but I recommend going as far as you can with one font before switching to another. For instance, I'm more likely to emphasize a heading by increasing the amount of white space above it rather than emphasize it by changing the font. Using white space is just as effective, and more understated.

What about line spacing? Is it easier on the eyes to do a single space or double space or something in between?

In between — the optimal line spacing is usually between 120% and 145% of the point size. So if your font is 12 point, you'd use between 14.5 and 17.5 points of line spacing. It's good to learn how to set exact line spacing in your word processor. The built-in "single space" and "double space" options are held over from typewriters. Worse, they're not even accurate. For a 12 point font, double spacing should mean 24 points. But on Microsoft Word 2007, double spacing is closer to 28 points. If your local court rules require double-spaced lines and impose page limits, that means you might not be getting all the lines you're entitled to.

What if I don't know if a judge will read my document on screen or from a hard copy? Do I choose a different font based on how it will be read?

Many courts are moving to electronic filing using PDFs so I get asked this frequently. The counterintuitive but correct answer is that you should always use a print-optimized font for a PDF, even if you expect it to be read on the screen. The longer, slightly techie answer is that Adobe Acrobat doesn't rely on your operating system to draw text on screen. Acrobat has its own text-rendering software built in, so text will render the same anywhere Acrobat is used. While it's true that the core Microsoft Windows fonts (like Verdana, Georgia, Calibri, and Cambria) look better on screen when used in a word processor (like Microsoft Word), they lose their screen advantage once they get embedded in a PDF.

By the way — a clerk at the Utah Supreme Court discovered *Typography for Lawyers* earlier this year and persuaded the justices to adopt a new template for their opinions, based on my advice. To anyone unsure whether good typography makes a difference in legal documents, or whether lawyers have the skills to do it themselves: I think this settles it.

Opinion Before

Opinion After

Trial Strategy Using Social Media Analytics: Not Just For High Publicity Cases

BY DIANA GRENINGER AND AMY SINGER

Today's online environment has brought about new possibilities and along with it, new terms. For years, trial consultants have had the option to conduct Face-to-Face Focus Groups and Online Research. Now, with the unprecedented influence of Social Media, trial consultants can take Online Research to another level with Social Media Analysis.

Social media, in short, is the use of web-based and mobile technologies to turn conversation into an interactive dialogue. Trial consultants can use a workbench to analyze content based on specific criteria they desire to use. On that workbench, trial consultants can identify Phrase Clouds (new topics or phrases that are used). Trial consultants can then analyze and evaluate data by trends, such as source, author, comment or time period. They can also start to notice social influence (by media source, topic, phrase cloud and author) and be able to perform a sentiment analysis (by topic, phrase cloud, source and author). Social Influencers won't go unnoticed as they are the key drivers of conversation about trial consultants' "mark" or criteria.

According to Nielsen's third quarter social media report, "social networks and blogs reach nearly 80 percent of active U.S. Internet users and represent the majority of Americans' time online." Almost a quarter of the time these Americans spend online is passed on social networks and blogs, "Whether it's a brand icon inviting customers to connect with a company on LinkedIn, a news ticker promoting an anchor's Twitter handle or an advertisement asking a consumer to 'Like' a product on Facebook, people are constantly being drive to social media." (Nielsen). Needless to say, Americans feel more comfortable than ever sharing their thoughts, opinions and personal lives with millions on-line.

Nielsen's study, prompted curious individuals to do some searches on their own. Brand consultant Jeff Bullas pulled together a list of twenty stunning social media statistics. Among them, one out of nine people on the earth (roughly 750 million out of 6.94 billion people) are on Facebook; each user spends roughly fifteen and a half hours on the site, each month. There are over 2.5 million websites integrated with Facebook. "YouTube generates 92 billion page views per month...Wikipedia hosts 17 million articles... Twitter is handling 1.6 billion queries per day... Google+ was the fastest social network to reach 10 million users at 16 days" (Bullas) It's fair to say these statistics speak for themselves.

Casey Anthony's trial grabbed the attention of thousands of viewers across the nation. Unlike previous high publicity cases, viewers were not only getting information via televised, printed and on-line news; viewers were able to watch the entire trial online and freely share their comments with thousands of other avid watchers. Trial Consultants, Inc. followed every post, tweet and blog regarding this

case. As a result, we gained great insight into social media analytics as an innovative trial strategy. We discovered that social media can be used not only for brand research (such as when Starbucks creates a Facebook page that allows users to rate their products and ad campaigns), but also in litigation.

It is estimated that there were over 40,000 online posts regarding the Anthony trial. Orlando's WFTV blog alone was receiving more comments than the moderators could go through, receiving over 5 comments per second from viewers at one point. This was the first case where social media mining, farming and analytics were pro-actively used. When social media was in its infancy, private investigators began using Social Media Mining as part of their strategy; this however was being used in a very passive manner. This year in the Anthony trial, Trial Consultants, Inc. was able to incorporate Social Media Farming by taking information that was publicly shared by potential jurors and avid viewers in a more pro-active manner, using that information to make suggestions to the defense team. For example, as soon as we started seeing a pattern of negative comments about George Anthony, we advised the defense attorneys to start asking him tough questions, thereby focusing the negative attention on him while diverting it from Casey Anthony. Finally, we were able to then look at the trends within the blog comments and analyze the results which led to a successful defense tactic.

While it is obvious how Social Media can be advantageous in high publicity cases, how else can it be used? What if an attorney could get the same type of responses on a regular vehicular tort case that leads to a few broken bones, or on a case involving construction defect, or any type of case for that matter? With the right workbench, they can!

Imagine a program (or a mobile app) where attorneys can submit videos of opening statements (from both sides), witness interviews, depositions, pictures, etc. and get responses from hundreds of already active social media users online. Sure, you might think that only someone who has been involved in a car accident will want to share their opinions loud and clear but you'd be surprised. Many Americans already participate in online surveys to get a few Amazon bucks or airline miles, so why not give them richer content? We have developed a litigation social network web application that will allow attorneys to capture people's opinions and reactions in real time. This program will analyze any slice of data such as (but not limited to) a preselected portion of ADR/trial stimulus: depositions, demonstrative evidence, videotaped or live testimony or the complaint. (Wizpor™) Such a program can then organize comments and generate invaluable results.

We've all seen the success and popularity of Facebook. Part of that success can be attributed to Facebook's ever evolving features. In an article posted to Website Magazine, Michael Garrity highlighted that "After unveiling new privacy features last month that are reminiscent of Google+ Circles, Facebook posted on their blog today about the new subscribe feature which is said to make it easier for you to alter your News Feed to block specific content, specify which friends you want to see more content from (and which you want less of) and hear directly from people you're 'interested in but don't know personally,' artists or politicians." (Garrity) In other words, Facebook is constantly moving to keep up or stay ahead of the competition.

Furthermore, Facebook has given marketers the ability to do something else with it: use it as a real-time focus group. Dave Williams, who runs a technology and media company, explained in an article posted to Ad Age Digital that Facebook's 'Like' feature, allows its members to associate themselves with specific brands, activities, entertainment choices and so forth. In turn, the 'Like' feature allows marketers to target specific users for their product advertisement, making marketing dollars go further and attaining impressive results. (Williams)

Social Media Analytics is the answer when it comes to the future of litigation research. It has proven success in market research and it can now be used for a multitude of industries. While Face-to-Face focus groups have been getting the job done, it is well understood that it usually takes more than one group to produce valid results; according to an article by Elle Esse Smith on Chron News website, “market researchers know they’ve reached a point of saturation when no new responses are heard during the group session.” (Elle Esse Smith) Concurrently, traditional online research tends to be limited to the amount of questions and responses. Alternatively, social media analysis removes the barriers created by time and space while bringing a vast amount of feedback from users and/or participants. Below you will find a chart comparing the differences, similarities and advantages of face-to-face (F2F) focus groups, traditional online research and social media analysis.

***Face to Face Focus Groups vs. Online Focus Groups
vs. Social Media Analysis***

How do each compare? What are the advantages of each?

	F2F	Online	Social Media Analysis
Information	Qualitative	Quantitative	Quantitative
Participants	Pre-screened	Random quota sample	Random quota sample based on topic
Interaction	Controlled	Uncontrolled	Medium Control
Moderation	Moderated	Little or no moderator interaction	Can moderate depending on cyber network
Place and Time	Limited	Unlimited	Unlimited
Attorney Interaction	YES	NO	YES
Interaction between participants	YES	NO	YES
Visual Stimuli	YES	YES	YES
Monitoring of Non-verbal Cues	YES	NO	NO
Statistical Analysis	NO	NO	YES
Rationale	When you want to see real time reactions of participants who can meet at a specific time and location. Allows you to change direction or focus at any point and test different approaches.	When you want multiple opinions and reactions of participants who cannot meet at a specific time and location. Allows you to get candid opinions of participants who are comfortable in their own environment.	When you want multiple opinions of participants who cannot meet at a specific time and location. Allows you to change direction or focus at any point and test different approaches.
First Started	In the 1950's	Widespread in mid to late 1990's	2011
Acceptance of Methodology	Almost 100% accepted, often seen as a preferred method.	Mostly used in high-tech applications. Acceptance is growing.	Too early to judge.

T H E J U R Y E X P E R T

Richest Expression, Greatest Results for Interpretation	Body language, facial expression, in addition to questionnaires and discussion.	Most personal expression is lost. Difficult to interpret based on words or even emoticons.	Free response allows participants to emphasize their thoughts or feelings.
Workbench/Stimulus Materials	Unlimited types of stimulus materials.	Limited to words and few pictures.	Video Streaming allows unlimited types of stimulus materials
Following the Thread of the Conversation	Not a problem.	Sometimes difficult as online participants can respond at the same time as each other or veer off to different subjects.	Difficulty depends on analytic tool used.
Amount of Information	Unlimited within time and space	About 1/3 less words per unit time.	Unlimited.
Technology Bias	None	Yes	Yes
Honesty of Responses	Participants may encourage each other but not all will give candid opinions.	Full due to anonymity.	Not concerned.
Set-up	Hard. Must obtain place and participants who are willing and able to attend at specific time.	Easy.	Extremely Broad. Can create and upload all content. Can mine existing data as well.
Show-up Rates	50-80%	<50%	Unknown
Ability to Reach/Recruit	Poor. Reason why phone and online groups were invented.	Better than F2F but not nearly as good as SM due to acceptance and show up rates.	Easiest. Can be used in all cases, not just high profile.
Opportunity for Dominators to Sabotage Group	Can be difficult to control as you would not want to kick someone out of an already small group.	The person who types the fastest wins. Voice dictation allows someone to type 3 times as fast as regular folks. It is easy to kick someone out without hurting the sample size.	Same as online. It is easy to kick someone out without hurting the sample size.
Turnaround for Recruiting, Executing and Reporting on Groups.	The slowest of the 3 methods.	Much superior to F2F.	Likely to become the most superior out of the 3.
Bias Issues	Lower potential for bias than online as one can recruit as diverse of a group as desired.	Higher opportunity for bias as there is a low recruitment rate.	Highest opportunity for bias as one cannot control the participants who chose to comment about specific issues.
Personal Questions Can Be Addressed While Remaining Anonymous	NO	YES	YES
Sampling Advantages	Notorious Problems within F2F groups	Many advantages due to anonymity	The sample is in the comments.

T H E J U R Y E X P E R T

Availability of the Technology to the Participants	Participants might not show up due to weather, traffic, car problems, etc.	Over 70% of Americans have a computer at home	
Conversation Flow	Usually natural but easy to break into side conversations or feel ignored.	Parallel typing creates a disjointed conversation by nature.	
Possible Recruiting Bias to Self-Selected Participants	Most F2F groups are not self-selected. Some facilities to offer that option but should be avoided.	Often participants self-selected when they chose to sign up on a website. Can be avoided as recruitment procedures are available.	
Difficulty of Getting In-Depth Information	Known for its effectiveness in getting in-depth information.	Least effective way as participants can refuse to answer or give short answers.	Not as good as F2F, however, easy if accessing discussion groups. If moderating, participants can be probed or encouraged to provide more in-depth information.
Participation Issues	Show up rates is usually unpredictable. Once warmed up, participants are usually extremely involved.	Respondents often lose interest and drop out mid-research. No-shows are high.	None.
Group Control Issues	Groups can get out of hand but it's up to the moderator to keep everyone from talking at once, etc.	Amount of text streaming can be overwhelming to moderator and respondents.	Text streaming can be overwhelming but not when participants are forced to classify posts into different categories.
Skills Needed to Participate	Speak clearly and understand language of discussion.	Almost completely dependent on typing skills. Must have ability to log on and follow participation instructions on a computer.	
Novelty Effect on Recruitment Rates	This is the oldest method. Some people are tired of having to travel to facilities to be able to participate in groups.	Higher acceptance rates due to convenience.	Should be highly accepted. Already creating a lot of interest.
Client Novelty Effect	Tried and true method.	Has become widely accepted over the last few years.	Becoming widely accepted.
Travel Time and Expenses	YES	NO	NO
"Sensitive" Topics	Hard to get participants to open up.	These methods create ideal environment for participant to open up due to group support effect and anonymity.	
Participation on Respondents' Schedule	NO	YES – Participants can chose to respond at their own convenience	Somewhat, depending on type of group/website
Ability to Moderate	Likely the easiest method	Fairly easy as moderators do not have to think as quickly on their feet, although they do have to process a lot of information at once. Not a problem for experienced moderators.	

Psychological Safety of Participants	Lowest of the 3 as participants can be easily intimidated by other participants looking at them. Even experienced moderators have to work hard to make participants open up.	Equally high as participants can't even hear each other's tone of voice.
Immediate Transcripts	Takes a few days to organize results.	Available during session.

Works Cited

Bullas, J. (n.d.). *20 Stunning Social Media Statistics*. Retrieved from CyberJournalist.net: <http://www.cyberjournalist.net/20-stunning-social-media-statistics/>

Elle Esse Smith, D. M. (n.d.). *What is a Paid Focus Group*. Retrieved from Chron Small Business: <http://smallbusiness.chron.com/paid-focus-group-22912.html>

Garrity, M. (n.d.). *Facebook Launches Subscribe Button*. Retrieved from Website Magazine: <http://www.websitemagazine.com/content/blogs/posts/archive/2011/09/15/facebook-launches-subscribe-button.aspx>

Nielsen. (n.d.). *State of the Media: The Social Media Report*. Retrieved from <http://blog.nielsen.com/nielsenwire/social/>

Williams, D. (n.d.). *Connecting the Data Dots on Facebook and Beyond*. Retrieved from Ad Age Digital: <http://adage.com/article/digitalnext/marketers-facebook-audience-data/229244/>

Wizpor™. (n.d.). Retrieved from Trial Consultants, Inc.: www.trialconsultants.com/wizpor.html

Artful Dodging in the Courtroom

BY TODD ROGERS AND MICHAEL NORTON

Don't miss the trial consultant responses following this article
from Katherine James and Charli Morris!

[Todd Rogers, PhD](#) is an Assistant Professor at the Harvard Kennedy School of Government. His research uses the science of human behavior to understand and influence socially consequential decisions. Read more about his research at: <https://sites.google.com/site/rogersbehavioralscience/>.

[Michael I. Norton, PhD](#) is an Associate Professor at the Harvard Business School in Boston, Massachusetts. His research focuses on the effects of social norms on people's attitudes and behavior, and the psychology of investment. Read more about his research at: www.people.hbs.edu/mnorton.

The authors are eager to conduct experimental research on how question dodging affects legal outcomes. Please contact them with opportunities or discussions about collaboration.

While being deposed about his alleged steroid use, former baseball MVP Barry Bonds was asked directly if he had ever had a syringe injected into him by his former trainer. Bonds answered:

I've only had one doctor touch me. And that's my only (sic) personal doctor. Greg, like I said, we don't get into each other's personal lives. We're friends, but I don't – we don't sit around and talk baseball, because he knows I don't want – don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends, you come around talking about baseball, you go on. I don't talk about his business. You know what I mean? That's what keeps our friendship. You know, I am sorry, but that – you know, that – I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see...

This rambling and disjointed answer – which might best be described as him answering the question, “How has being the child of a celebrity affected your life?” - led to his conviction on obstruction of justice, for dodging the question he was asked and offering such an egregiously unrelated answer.

Our research has explored two questions: how and when can people manage to dodge questions without being detected, and how can we prevent these “artful dodgers” from getting away with it? Bonds' attempted dodge – while far from artful – highlights the relevance of our work to court rooms.

Our research suggests strategies for pushing evasive witnesses to either answer questions more directly, or be penalized more harshly by judges and juries for failing to do so.

To understand how observers could fail to detect when a speaker dodges a question, first consider a basic fact about humans: our attention is limited. Whether it's walking and chewing gum at the same time or remembering what question we were just asked, our attention is regularly tested – and regularly fails those tests. A classic example is shown in the brief video clip below. Before reading further, please take the test and see if you can get the correct answer.

http://www.youtube.com/embed/IGQmdoK_ZfY

Midway through, from the right side of the screen, a person in a gorilla suit walks across and bangs his chest. He then slowly walks off the screen to the left. When viewers are asked if anything unusual happened during the video, only a small fraction report noticing the gorilla. Of course, when told about the gorilla in advance, nearly everyone spots it. Without advance warning, people do not expect the gorilla to walk across the screen and so do not direct their limited attention toward it.

Does a similar blindness play out when observers watch speakers dodge questions? We studied this exact question in a [recent paper](#). In a series of experiments, we found that observers fail to detect dodges when speakers answer similar – but objectively different – questions. For example, in one study speakers were asked either what they would do about healthcare coverage in America, the illegal drug use problem in America, or America's War on Terror. They all offered the exact same answer, *"I'm glad you asked me that. There are so many important problems facing America today. We need universal healthcare because..."* (and gave a long answer about healthcare). Not surprisingly, people rated the speaker who was asked about healthcare coverage in America as trustworthy, honest, and likable – after all, he answered the question he was asked. More surprisingly, the speaker who was asked about illegal drug use but answered a question about health care was seen as just as trustworthy, honest, and likable. In short, speakers who offered an answer to a question that was similar to the one that was actually asked (i.e., illegal drug use feels at least vaguely similar to healthcare) were rated just as positively as those who were actually asked the question to which they offered an answer (healthcare). Moreover, this failure to punish the dodging speaker went hand-in-hand with failing to remember what question he was actually asked.

Question Topic	Response Topic	Perception	Question Recall	Result
Healthcare	Healthcare	On point	Yes, recalled	Trustworthy, honest and likable
Drug Use	Healthcare	Feels close enough	No, cannot recall	Trustworthy, honest and likable
War on Terror	Healthcare	Egregiously dissimilar	Yes, recalled	Untrustworthy, dishonest and unlikable

But not all dodges were equally effective. When the speaker answered a question that was egregiously dissimilar to the question he was actually asked – when he answered about healthcare to a question about the War on Terror) – he was punished as untrustworthy, dishonest and unlikable. Not unlike Barry Bonds' failed dodge attempt, people noticed the egregious dodger, and they punished him.

This blindness to artful dodges, we argue, is a result of observers devoting their attention primarily to evaluating whether or not they like and trust the speaker. They assume that the speaker will attempt to answer the question asked – that is, after all, how most discussions operate. So unless the speaker outrageously dodges the question asked, observers appear to rarely notice. Our research also shows that speakers are better off answering the wrong question well than the right question poorly. Compare the following two scenarios. In the first, a speaker asked about the illegal drug use problem offers a smoothly delivered answer about healthcare coverage,

“I’m glad you asked me that. There are so many important problems facing America today. We need universal healthcare because...”

In the second scenario, a speaker asked about healthcare coverage offers a stuttering and decidedly unsmooth answer about healthcare coverage,

“I’m glad you, ummm, asked me that. There are, well, so many important, you know, problems facing America. We need, umm, universal healthcare because....”

While we might think that offering the correct substance would triumph over delivering it the incorrect substance in an unhalting style, people actually thought the smooth speaker was more honest, trustworthy, and likable than the unsmooth speaker – even though the smooth speaker answered the wrong question.

We have identified one relatively simple solution to this disturbing pattern. Posting the text of the question on the screen *while* the speaker offers his answer directs observers to detect efforts to dodge. In many situations, of course, such interventions are unlikely to be feasible: it would undoubtedly be awkward to hold up a sign indicating the specific question you expected an acquaintance to be answering, for example.

But that may not be the case in court. Imagine that counsel had written the question asked of Barry Bonds about syringe use on a board for him – and a judge and jury – to peruse while he offered his answer. It may have discouraged him from dodging the question in the first place; even failing this, it would have made his attempt to dodge the question even more glaring to the already skeptical judge and jury. Attorneys have reported to us that because they are sensitive to being perceived as aggressive by jurors, they often resist repeating a question to a witness or highlighting that a witness dodged a question asked. Writing a key question on a board may be a strategy for helping a judge and jury detect dodging, without suffering the cost of appearing to badger a witness.

We asked two trial consultants to respond to this article. On the following pages, Katherine James and Charli Morris offer their reactions.

Katherine James responds:

I find the basic premise of this very interesting article to be the difference between what people expect from someone in a news conference versus what people expect from someone on a witness stand. One of my “un-teaching” moments in witness preparation always comes when a witness has been “media trained.” I then get to play “how great you had that experience – because testifying in court is the opposite!”

In media training, people are often taught to say something like “I’m so glad you asked me that!” (as in) “I’m so glad you asked me about how the country is going to hell in a hand basket because of _____.” Or, “I’m so glad you asked me about what our company feels about safety in light of the fact that our entire warehouse just blew up _____.”

My experience tells me that jurors are much more likely to say, “Stop spinning!” when given some canned answer that begins with “I’m so glad you asked me that!” Consider this example: “I’m so glad you asked me about how I shot up steroids!” It just doesn’t pass the “smell” test for them when a witness doesn’t answer the question directly, much less when a witness has some self serving preamble that they expect to hear from politicians and owners of companies when the cameras are in their faces.

I look at the sad “answer from the bizarre-o-world” that Barry Bonds gave and say, “Here’s a man who completely missed the concept of listen to the question.” **Think** through it, and then **answer** that actual question. I have a whole system of teaching witnesses how to do just that. I know a lot of us at ASTC have our own systems. I have a funny feeling that whoever did or did not work with Barry missed the mark here.

P.S. I enjoyed taking the YouTube test. Spoiler alert – do it before reading the rest of my comments. I would pat myself on the back for seeing **everything** that many people miss and getting the right number ... but ... of course, I was saying all kinds of disparaging things to myself. Things like, “Counting! I’m so bad at **math!** Better **concentrate!**” and “These women are almost as bad at passing the ball as I am – Title IX was SO wasted on me!” and “I hope she doesn’t back into anything as she goes off stage!” and “Note to self – only use lighting changes on curtains that are that color for a comedy” and “That poor kid in the Gorilla Suit – they really need to unionize those costume character actors at every theme park. It’s like 102 degrees in those awful things...”

Charli Morris responds:

*Charli Morris is a trial consultant with 18 years of experience who lives in Raleigh, NC and works wherever the cases are. She is co-author of *The Persuasive Edge* and can be found at www.trial-prep.com or reached directly at cmorris35@nc.rr.com.*

The Dodge Is In the Eye of the Beholder

I would be hard pressed to defend Barry Bonds, Marion Jones or Floyd Landis on their answers to questions about illegal doping. It is equally tough to explain former Senator John Edwards' denials of his affair while he ran for President and his wife struggled with terminal cancer, or former Governor Mark Sanford's wildly varying accounts of his whereabouts after he disappeared to South America for a week.

Rogers and Norton pose two questions, one of which is, "how do we prevent dodgers from getting away with it?" Bonds was convicted and even experts say his place in baseball history books will be marked with an asterisk. Jones was convicted and forfeited her five Olympic medals. Landis was stripped of his 2006 Tour de France title. We may never know how many hundreds of thousands of dollars in endorsements were never realized by these and other athletes who stretched their credibility until it snapped.

John Edwards and Mark Sanford both went from potential presidential front-runners to public humiliation. Politicians often talk themselves right out of their positions of power even at the height of it. Arguably, each of these high-profile dodgers paid a serious price for dancing on the head of the proverbial pin. It is possible their demise may deter others.

In my view, questions about big, abstract ideas like Healthcare, Drug Use or the War on Terror are so subjective they beg to be dodged and it's no surprise speakers get away with it. Although I like the idea of showing the printed question while an evasive witnesses bobs and weaves his way around it, I see fewer applications of the research to litigation on the issue of prevention.

The authors also ask, "how can people dodge without detection?" and on this question I come in defense of the "dodge."

No ethical trial consultant (or lawyer) helps a witness avoid giving a truthful answer in a deposition or on the stand even if we think he could get away with it. On the other hand, there are undoubtedly times when witnesses can and should refuse to answer questions that are unfair, misleading or improper and we do help them master the "art" of the "dodge" for wholly legitimate reasons and through entirely professional means.

Here are three important tips we give witnesses to prepare them for navigating the tricky waters of deposition and trial testimony:

- 1. Know your rights and responsibilities as a witness.** You must always tell the truth. But you don't have to accept opposing counsel's point of view, accommodate demands to answer within arbitrary limits, or acquiesce when your truthful answer isn't satisfying to the other side.

2. **Listen carefully to every word in every question.** No matter how colloquially opposing counsel asks the questions, it isn't a conversation. Pause before answering to ensure you that you hear and understand the question before you answer it. Seek clarification if you do not. A witness must live in the moment.
3. **Use your own language in response to the question whenever possible.** The witness is the only person under oath. Individual words or phrases can matter as much as meaning. Lawyers get at least three years of higher learning and annual continuing education to hone and polish their skills. They routinely craft their questions to prove a particular point. Witnesses who aren't prepared will be unfairly over-powered.

This is only a short list of ideas and the bottom line is this: in the context of the courtroom a dodge is in the eye of the beholder. A lawyer who doesn't get his way in cross-examination may accuse a witness of dodging, but the jury may recognize that his questions weren't fair to begin with. (Tomato, To-mah-to.) A witness who resists the loaded language of a leading question from opposing counsel may not be dodging so much as he is attempting to be clearly understood. (Potato, Po-tah-to.)

Consider the following example from a recent medical malpractice case. The Plaintiffs claim that a defendant doctor failed to accurately assess the signs and symptoms of child abuse. The child was returned to an abuser who ultimately delivered the final blow, which rendered him a brain-injured, spastic quadriplegic.

The child's biological father – a one-time star athlete himself – was being challenged by defense counsel in the second of two depositions. The defendants allege that the father (the witness) was also negligent in failing to prevent the abuse committed by the child's mother's live-in boyfriend. The attorney was trying to get the father/witness to concede that he bears some responsibility for what happened to his son.

Q. You know, we don't get to live life over again, you know, we don't get a redo. We can watch the game film, and you're a great -- I know you were a college basketball star, and you go back and watch old film. And we can't replay the games, can we?

A. We can't compare this to a basketball game.

The witness/father had gained full custody and to this day gives round-the-clock care to his son in their tiny home. I don't get any credit for preparing this witness to handle a tough question so well; I wasn't involved in the case until later. But I can't think of a better response when the intention of the question was to belittle and blame the witness. It's not even clear this is a question that could be answered directly, but if the answer amounts to a dodge, I am confident that it was the attorney who paid the price for asking it.

Friend or Foe? Social Media, the Jury and You

BY LESLIE ELLIS

Leslie Ellis, Ph.D. is a Senior Jury Consultant with TrialGraphix, and works out of its Washington, D.C. and Atlanta offices. She works primarily on complex civil and white-collar criminal matters, and has worked in venues across the country. She assists clients with mock trials and focus groups, witness preparation, jury selection, venue surveys, theme development, opening statements/closing arguments, and general litigation strategy. You can read more about Dr. Ellis at her company's [web-page](#).

Introduction

Jurors' improper use of social media, and the ensuing appeals, mistrials and reprimands, have been covered in dozens of press articles over the last several months. Just in the last year we have seen jurors write online about how they are going to get out of jury duty, their verdict preferences, and – in perhaps the most egregious uses of social media – poll Facebook friends about what the verdict should be, and “friend” a defendant during deliberations. There have also been reports of witnesses, attorneys and judges misusing social media.

It can be difficult and time consuming to keep up with all of the ways in which trial participants can publish or receive information about their jury service. Some have decided not to bother tracking the technological advances, arguing it is irrelevant or too difficult to keep track. However, information flows both to and from online jurors. If properly used and monitored, social media can be a help and not only a hindrance. This article will discuss how to take advantage of jurors' online footprints, the ways in which social media is disrupting jury decision making and the trial process, and ways to minimize those disruptions.

Making Social Media Your Friend

Most of the publicity about social media and juries has been about jurors' inappropriately disclosing information about their case via various social media sites, such as Facebook or Twitter. However, experienced litigators have been using social media and other online resources to learn more about their jurors for years, and to great advantage.

Some people may remember stories of private investigators going to potential jurors' homes, interviewing their neighbors, and taking photos of yard signs and bumper stickers. Not only have many courts now prohibited parties from doing so, it isn't really necessary. You can see jurors' virtual bumper stickers via blogs, online comments, Facebook profiles and Twitter feeds.

According to the Pew Center's Global Attitudes Project, 46 percent of Americans use social networking websites.ⁱ Litigants can and should use social media to their advantage prior to and during the voir dire stage. If the parties can get the list of potential jurors prior to jury selection, parties have ample time to research them. If they don't get the list of names until the start of voir dire, searches can be done on the fly using laptops, iPads or smartphones in the courtroom. At its most basic, a Google search of jurors' names can find political donations, publications, organization affiliations, blogs, prior occupations and more. A more exhaustive search of public databases, usually for a fee, can identify litigation histories, liens, mortgages and car registrations. Finally, searches of networking and updating sites such as Facebook, LinkedIn and Twitter can be a source of information about people's opinions and experiences, if their profiles are public.

It is true that there is a technology age gap - younger jurors are likely to be online and using social media sites more often than older jurors. However, the gap is not as large as many people think. The Pew Center study found that roughly three-fourths of people ages 18-29 use social networking sites, compared to 55 percent of people ages 30-49. And in a recent comparison of internet use among generations, the Pew Center found that older generations are making quick strides to tighten the gap.ⁱⁱ Within the last two years alone, use of social networking sites has gone from 20 to 50 percent in Young Boomers (45 - 55 years of age) and from 9 to 43 percent in Older Boomers (55 to 64 years of age). The fastest growth in the use of social networking sites has been among those 74 and older, which quadrupled from 4 to 16 percent.

However, the information is only valuable if the parties know how to use it. You must be able to confirm that the people you have found online are the same people in the courtroom (and not just people with similar names) and have a well-planned voir dire strategy in place to be able to make quick use of whatever information you may find. Otherwise, the jumble of information will be just that - a jumble - which is not helpful in the heightened pressures of trial and speed of voir dire. Decades of research tells us that, in most types of civil litigation, demographics are not predictive of verdict preferences, with the exception of cases in which a particular demographic is the basis of the litigation, such as harassment or discrimination cases. Rather, jurors' case-specific experiences and attitudes are most predictive of verdict preference. Therefore, counsel should determine in advance which experiences and attitudes will work for or against them. Then, when they find that a juror has donated to a certain politician or belongs to a certain special interest organization, they will quickly be able to use the information to their advantage in trial.

In addition to learning about jurors' backgrounds, corporate litigants should also search social media for references to the company. People blog, tweet and post about their experiences with companies, as well as post recommendations for employees and employers. These can be valuable sources of information on popular sentiment about your company. Just as your marketing, public relations or branding teams want to know what the public is saying about your company, you want to know what jury pools are saying about your company. Keep track of what is in the ether about your company and its practices. Then you will know what kinds of attitudes potential jurors may have about your company, and your trial counsel can be prepared to ask about them in voir dire.

Finally, litigants who use social media sites to gather information about jurors should be very careful not to cross ethical boundaries. While most people agree that it is acceptable to view content that the user has designated as public and/or unrestricted (e.g., blogs or unrestricted Facebook pages), the issue gets murkier when users have taken efforts to keep their identity anonymous or their con-

tent private. Recent ethics opinions in New York Countyⁱⁱⁱ and Pennsylvania^{iv} state that it would be in violation of their Rules of Professional Conduct to directly, or through a third party, contact a juror (the subject of New York County's opinion) or witness (the subject of Pennsylvania's opinion) through a Facebook "friend" request. Resist the temptation to join restricted chat groups, "friend" people, or otherwise gain access to restricted information in order to find out more about your potential jurors – the risk is not worth the reward.

Inappropriate Disclosures via Social Media

It is a common misconception that only young people use wireless devices to go online or frequent social media and networking sites. As of September 2009^v, 30 percent of adults aged 30 or over had gone online using a cell phone or other handheld device. By August 2010, the number of adults ages 50 and older who used social networking sites doubled, from 22 percent to 42 percent.^{vi} The use of the updating site Twitter among older adults is not as high (6 percent of all internet users ages 50-64), but is still higher than many would expect.

The popularization of such sites, as well as the frequency with which many people access them in a day, have led to dozens of problems when jurors and other litigation participants took to the "airwaves" to discuss their experiences. The two major concerns are when jurors go online either to disclose information about the trial or to search for information and introduce it into their deliberations.^{vii}

A recent study by Reuters Legal found that Internet-related juror misconduct has led to 21 overturned verdicts or new trials since January 2009.^{viii} However, judges found instances of misconduct in three-fourths of cases in which the verdicts were challenged but not declared mistrials. This is indicative of what you find when you look closely at what jurors are writing online about their jury experiences – a vast majority have nothing to do with their job as a fact-finder.

Jurors are given very specific instructions that they are not to talk about the case prior to their deliberations (with the exception of civil trial jurors in Arizona, Colorado and Indiana) and they are not to disclose anything about their deliberations until they are complete. However, they do not receive that instruction until they are sworn in, so potential jurors feel (and are) free to comment online about how much they are dreading jury duty, what they are doing in the jury room, etc. Even after being sworn in, most posts are fairly innocuous – jurors may say they are serving on a murder case or mention how bored they are during the long breaks, or even "friend" each other during the trial. These posts do not refer to the evidence or parties, and are usually determined to be harmless.

More troubling, some jurors take the instructions very literally – they do not equate updating their Facebook page or tweeting about the case with "discussing" the case. They are careful not to talk about the case at home with their families, but they do not think that posting about an attorney's ugly tie or how bored they were during a witness' testimony is prohibited. This is more likely to cause problems, because jurors may divulge evidence or their opinions without realizing it is prohibited. Moreover, even though the jurors' disclosures may be permissible, they are not the only cause for concern. Comments on their posts can influence what they are thinking. The information jurors are considering is no longer subject to the regular rules of evidence, which is a key issue for judges when they are deciding whether a jurors' disclosure is problematic.

Most problematic is when jurors understand the intent of the judge's instruction and simply ignore it. Publicized examples of this scenario include a juror who tweeted about giving away millions of dollars of someone else's money or how "fun" it would be to tell a defendant he is guilty before the jury reported their verdict to the Court. In a worst case example, a juror in a Queens County, NY rape trial emailed his friends, one of whom was a prosecutor, about his jury's deliberations. We cannot know why these jurors decided to defy the instructions so directly – it may be that they did not take their jobs seriously, could not resist the urge (one blogger reported getting out of jury duty because said there was no way she would be able to stop herself from blogging about the case during the trial), or did not understand the consequences of their actions.

And not all violations have been from jurors. A witness was caught sending text messages to counsel from the witness stand during a break, and a judge in North Carolina was reprimanded for "friending" an attorney who was trying a case before him and commenting to each other about the case. It appears that all types of trial participants have trouble understanding how the old rules apply to new types of communication.

As much as instances like these seem to be more and more common, we must ask ourselves, is this really a new phenomenon, or are we just able to catch them now? A study in 1986 found that 10 percent of former jurors admitted discussing the case before their deliberations, and that was those who would admit it.^{ix} We do not know if these kinds of violations are more common than they used to be, or just more public.

Inappropriate Research via Social Media and Online Sources for Research

We can assume that jurors' use of online sources for their own research is more common, simply because the information is more accessible. Another Pew Center study found that 41 percent of Americans surveyed said the internet is their main source of news, which is up from 24 percent in 2007.^x The Internet passed television as the main source of news for those younger than 30. More than one-third of adult internet users had consulted Wikipedia, and Wikipedia use far surpasses any other educational and reference online source, including Dictionary.com and Merriam-Webster Online. Until recently, Google was accessed more often per day than any other Web site (Facebook surpassed it for the first time in January 2011). Clearly, the first place many people go for information is the Web. Why should jurors be any different?

Research on jury decision making has proven that the old concept of "Tabula Rasa" – that jurors are empty tablets to be filled with information – is inaccurate. Rather, jurors are very active users of information. They also try very hard to make the right decision, and they struggle when they think they are missing a critical piece of information.

Just as we have heard about dozens of incidents of jurors' disclosing information online, we have also heard about many incidents of jurors' bringing in information they acquired online. And as with the disclosures, we do not know if they are doing it more often than they used to, or we are just hearing about it more often. Jurors may have a more difficult time understanding why they cannot have the information they want in the age of instant access. Verdicts have been overturned when jurors looked up definitions of legal terms, searched defendants' criminal histories and looked up symptoms of "rape trauma syndrome," just to name a few examples.

What Are the Remedies?

It is easy to talk about all of the problems caused by jurors' use of social media and the Internet. But what are the solutions? Unfortunately, there is no silver bullet. Judges will always instruct jurors not to disclose or import information, and some jurors will always ignore them. But there are a few ways to reduce the frequency with which it happens. Judge Dennis M. Sweeney (Ret.) has recently published a very thorough review of several remedies that judges can undertake (as well as a few that are unlikely to work).^{xi} Attorneys can take a proactive approach by suggesting the remedies discussed here, when judges are less attuned to the problems or unsure how to best address them.

One remedy is to be proactive about it in voir dire. Trial counsel should ask potential jurors if they have an online footprint. Do they blog, do they have Facebook or MySpace pages, or do they have Twitter accounts? If so, how often do they post, tweet, update, etc.? This will give counsel an idea of how prevalent an issue it might be. Some medical and research professionals have discussed the existence of "internet addictions" or "online addictions," which can be generally defined as "online-related compulsive behavior which interferes with normal living."^{xii} The validity of such a disorder is heavily debated, but some people do find it difficult to stay offline. Additionally, those who have become reliant on having constant access to information might also find it difficult to abide by the judge's orders not to do any investigations. Counsel should ask the necessary questions to find out if any potential jurors fall into those categories.

More importantly, counsel and/or the judge should ask jurors if they will be able to refrain from saying anything about the trial (in the broadest sense of the word) online. Make them promise not to do so, out loud. We are less likely to break promises we have made in public and on the record. Some have suggested asking jurors to sign forms promising they won't violate the rules^{xiii}, and research suggests that having jurors promise to do so at the start of trial (perhaps followed by reminders) will be more of a deterrent than having them say they haven't done so at the end.^{xiv} Counsel can ask the judge to have jurors sign such a form. Finally, counsel should follow their sitting jurors (and witnesses, judges and opposing counsel, to be safe) online during and shortly after the trial to make sure they aren't posting anything they should not.

The second remedy is to improve the instructions on "discussing" the case and conducting independent investigations, referring specifically to the use of social media and information sites. Several states^{xv}, the Federal Judicial Conference^{xvi}, and the American College of Trial Lawyers^{xvii} have drafted instructions on the topic, some of which are better than others. California has made great strides in writing their pattern instructions using common, everyday language so laypeople can more easily understand them, and their preliminary instructions on using technology to research or communicate about a case is no exception. The instruction is very explicit in what jurors are not to do.^{xviii} However, they only expand the list of admonitions, without explaining why it is important to follow the rules, and what the consequences might be if they do not.

Many jurors may not understand the consequences of disclosing information or doing their

own research. Most instructions simply tell jurors what not to do. But jurors, like small children, ask, “Why?” They want to know why something is or isn’t important, or why someone did or didn’t do something. And telling them why helps them follow the rules. The instructions proposed by the American College of Trial Lawyers explain why relying on untested information is problematic (and, interestingly, asks jurors to sign an oath that they will not violate the instructions). Further, participants in a small survey estimated that jurors who were instructed on why they should not disclose or research case information would be less likely to do so than jurors who were not.^{xxix} Whether informing about the consequences of their actions would help is less clear, but California is considering adding a discussion of consequences to their instructions. A Massachusetts judge recently fined a juror \$1200, the court costs to retry a case, after he told the other jurors about the defendant’s criminal history, which he found online^{xxx}, and a judge in England recently sentenced a juror to jail for eight months when a juror “friended” and communicated with a defendant via Facebook, during deliberations, leading to a mistrial in a case that has already cost the justice system over £6 million^{xxxi}.

Finally, allowing jurors to ask questions of witnesses could alleviate a lot of problems with jurors’ doing their own research about the case. More than 30 states permit jurors to pose questions to witnesses. Only 10 states prohibit the practice^{xxxii}, but it is almost always at the judge’s discretion – very few states mandate that jurors be allowed to pose questions^{xxxiii}. The Seventh Circuit recently conducted a study on the impact of several jury trial innovations, including juror questions.^{xxxiv} They found that the majority of questions were asked to clarify information, check on a fact or explanation, or get additional information they thought was important. The majority of judges and attorneys reported that jurors asked either the right amount or not enough questions, and that most or all of the questions were relevant.^{xxxv} Most importantly, a full 86 percent of jurors reported that being able to ask questions increased their understanding of the case. That improvement comes at little cost – two-thirds of attorneys and three-fourths of judges said the process either had no impact or *improved* the efficiency of the trial process.^{xxxvi} A study conducted in Pima County Superior Court in Arizona found that allowing jurors to ask questions increased the length of the trial by a mere 33 minutes.^{xxxvii}

Conclusion

Jurors, like the general population, are accessing social media and information on the Internet more and more frequently. We are just now beginning to understand the impact this can have on the trial process and identify ways in which it can be minimized. It is important to note there are literally thousands of trials a year. While instances of juror misconduct and mistrials receive a great deal of press, they are disproportionately reported. We don’t hear about the thousands of trials in which nothing went wrong, so we should be careful not to overstate the problem. However, it is a real problem that can have real consequences for litigants. But, being aware, proactive, progressive and vigilant can help turn potential problems into opportunities.

References

- ⁱ <http://pewglobal.org/2010/12/15/global-publics-embrace-social-networking/>
- ⁱⁱ Pew Internet & American Life Project, “Generations Online in 2010” Report, December 16, 2010
- ⁱⁱⁱ New York County Lawyers Association Committee on Professional Ethics Formal Opinion No. 743 (Issued on May 18, 2011)
- ^{iv} Philadelphia Bar Association Professional Guidance Committee Opinion 2009-2 (March 2009)
- ^v Pew Internet & American Life Project, “Social Media and Young Adults” Report, 2010
- ^{vi} Pew Internet & American Life Project, “Older Adults and Social Media” Report, 2010
- ^{vii} A third concern regarding the use of social media, and one that is growing, is that of trial participants or observers contacting jurors during the trial. Judge James Zagel, who presided over both prosecutions of former Illinois Gov. Rod Blagojevich, kept the jurors’ identities in both trials secret until after the trial, arguing in part that it would keep people from trying to contact jurors. This is not an unreasonable fear – the friend of a defendant in Fort Valley, Georgia did try to contact at least one juror through Facebook, and a review of tapes of jailhouse telephone conversations revealed the defendant gave his family members and friends the names of multiple jurors and instructions to contact them during the trial, resulting in a mistrial and an investigation into jury tampering. See <http://www.macon.com/2011/06/23/1606284/alleged-jury-tampering-halts-start.html>.
- ^{viii} <http://www.reuters.com/article/idUSN0816547120101208>
- ^{ix} Loftus, Elizabeth F.: “Do Jurors Talk?” (Trial, vol. 22, 59-60, 1986)
- ^x Pew Center, “Internet Gains on Television as Public’s Main News Source.” January 4, 2011
- ^{xi} Sweeney, Hon. Dennis M.: Worlds Collide: The Digital Native Enters the Jury Box. (*Reynolds Courts & Media Law Journal*, vol. 1, 121-146, 2011).
- ^{xii} Young, Kimberly S. Internet Addiction: The Emergence of a New Clinical Disorder. (*CyberPsychology and Behavior*, vol. 1, no. 3, 237 – 244).
- ^{xiii} The American College of Trial Lawyers have a recommended form, at page 6 of their Jury Instructions Cautioning Against Use of the Internet and Social Networking, which can be found at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213>
- ^{xiv} Shu, Lisa L., et al. “When to Sign on the Dotted Line? Signing First Makes Ethics Salient and Decreases Dishonest Self-Reports.” (*Harvard Business School Working Paper*, vol. 11-117, 2011).

- ^{xv} Examples from Florida, Arizona, New York, and other states have been compiled by the National Center for State Courts and can be found at: <http://www.ncsc.org/topics/media-relations/social-media-and-the-courts/state-links.aspx?cat=Jury%20Instructions%20on%20Social%20Media>
- ^{xvi} The Federal Judicial Conference's suggestions instruction can be found at: <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>
- ^{xvii} The proposed instructions from the American College of Trial Lawyers can be found at: <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213>
- ^{xviii} Judicial Council of California, §100 Preliminary Admonitions. Last revised December 2009.
- ^{xix} Diamond, Shari S. "Jurors and the Electronic World." Paper presented at the National Jury Symposium, October 2010
- ^{xx} Timmins, Annmarie, "Juror Behind Mistrial Pleads, Pays \$1,200." Concord Monitor, October 9, 2010
- ^{xxi} <http://www.bbc.co.uk/news/uk-13792080>
- ^{xxii} When permitted, jurors write down their questions for a certain witness and give them to the judge, who reviews them with counsel for objections. The permitted questions are then posed to the witness by the judge or counsel. The judge may choose to explain why the unasked questions were not permitted.
- ^{xxiii} Mize, Hon. Greg E. (Ret.), et al., The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report. (The National Center for State Courts, April 2007)
- ^{xxiv} Seventh Circuit Bar Association American Jury Project; the report can be found at: <http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf>
- ^{xxv} Ibid, p. 61
- ^{xxvi} Ibid, p. 62
- ^{xxvii} Diamond, Shari S., et al.: "Juror Question During Trial: A Window into Juror Thinking." (*Vanderbilt Law Review*, vol. 59, issue 6, 1927-1972, 2006)

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



Are you getting
quality
mock
jury research?



Diverse recruiting • Spacious facility



GROUP DYNAMICS IN FOCUS, INC.

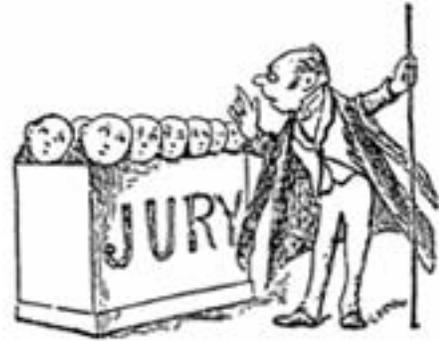
866-221-2038 groupdynamics.com
Philadelphia, PA



Consumer Centers
Meadowlands, NJ • New York City

For all your mock trial needs

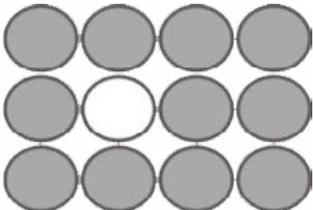
Largest rooms in New York & New Jersey.
Top-rated Recruiting & Client Service team.



with your next mock trial by
1/31/12. Contact us for details.

www.consumercenters.com (800) 998 - 4777



ASTC 
AMERICAN SOCIETY OF TRIAL CONSULTANTS

A Note From the Editor

*It's officially fall. Someone should let the meteorologist know in the western part of the country because it's still really really hot and dry. This issue of The Jury Expert is full of good things to sit down and read with a tall glass of something cold. We have two different articles on visual persuasion--good ways to help persuade using the eyes. We also have two articles on social media--Leslie Ellis updates us on how social media is currently having impact on jurors and justice. Then Diana Greninger and Amy Singer tell us how they are using social media communications to help select juries and frame argument. A researcher writes in to get your thoughts on a re-creation of how tinnitus is experienced in a plaintiff's head--evidence admitted in an actual case. We have a Q&A with the author of *Typography for Lawyers*. If you have not yet read this book--it's a good one to pick up. A piece on witness preparation, challenges to the civil trial system and a discussion of how artful dodging is seen in both politicians and witnesses involved in testimony round out this issue.*

We hope you'll enjoy our fall issue. We're proud of the work our trial consultants do every single issue to bring you the latest ideas for litigation advocacy. If you have thoughts about topics you'd like to see us cover, let me know. We'll listen.

Rita R. Handrich, Ph.D.
Editor, The Jury Expert
[Twitter.com/thejuryexpert](https://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](http://www.persuasium.com)

Editors

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

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

Jason Barnes — Associate Editor
jbarnes@barnesandrobets.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.

