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A Necessary Evil: Edward Tufte and Making the Best of PowerPoint

BY JASON BARNES AND BRIAN PATTERSON

Jason Barnes, a.k.a. "The Graphics Guy" is a graphic designer and trial consultant based in Dallas, Texas. He has been practicing visual advocacy since 1990 and has worked in venues across the country. He specializes in intellectual property and complex business litigation cases. You can read more about Mr. Barnes and how he can help you tell better stories in the courtroom at his webpage and on his blog, www.igetlit.com.

Brian Patterson has been a graphic designer since 1990. In 1998, he began work at DecisionQuest, a national jury research and trial consulting company. As Art Director of their Dallas office, he created and oversaw production of multimedia presentations for more than a hundred courtroom proceedings. He joined Barnes & Roberts in 2007 as a Trial Consultant where he continues to prepare clients for trial. He blogs regularly on presentation topics at www.igetlit.com.

Introduction

In our last [article](#) we discussed the strengths and weaknesses of Cliff Atkinson's Beyond Bullet Points method of creating presentations using Microsoft PowerPoint. While we agreed with Atkinson in much of his criticism of the way PowerPoint is used, we found a strict adherence to his method and templates ill suited to courtroom and evidentiary presentations.

On the other end of the design spectrum is [Edward Tufte](#). Statistician, author and professor emeritus at Yale University, Tufte is widely considered a leading expert in information design and has authored a series of books espousing his philosophy of how best to present data to an audience.



SALES



SCIENCE

Where the Beyond Bullet Points method is well suited to the "sales" end of our spectrum, Tufte's ideas are specifically designed to benefit presentations at the "science" end. To the extent that litigation has elements of salesmanship, we were able to extract some lessons from the BPP methods. Of course, litigation relies on evidence as the foundation of all advocacy. Here, litigation presentations intersect with scientific presentations and we would do well to extract lessons from the leading authority in that field.

Tufte lists his Principles of Graphic Excellence in his book, [The Visual Display of Quantitative Information](#):

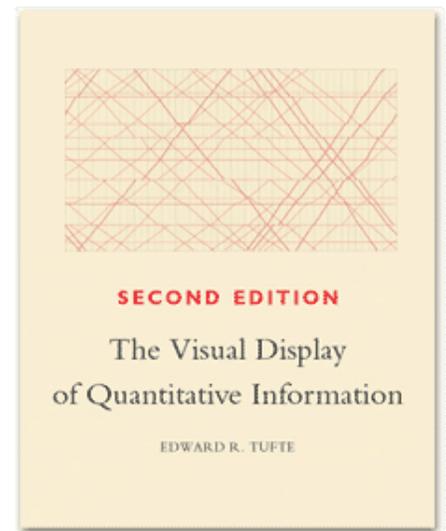
"Graphical excellence is the well-designed presentation of interesting data – a matter of substance, of statistics, and of design.

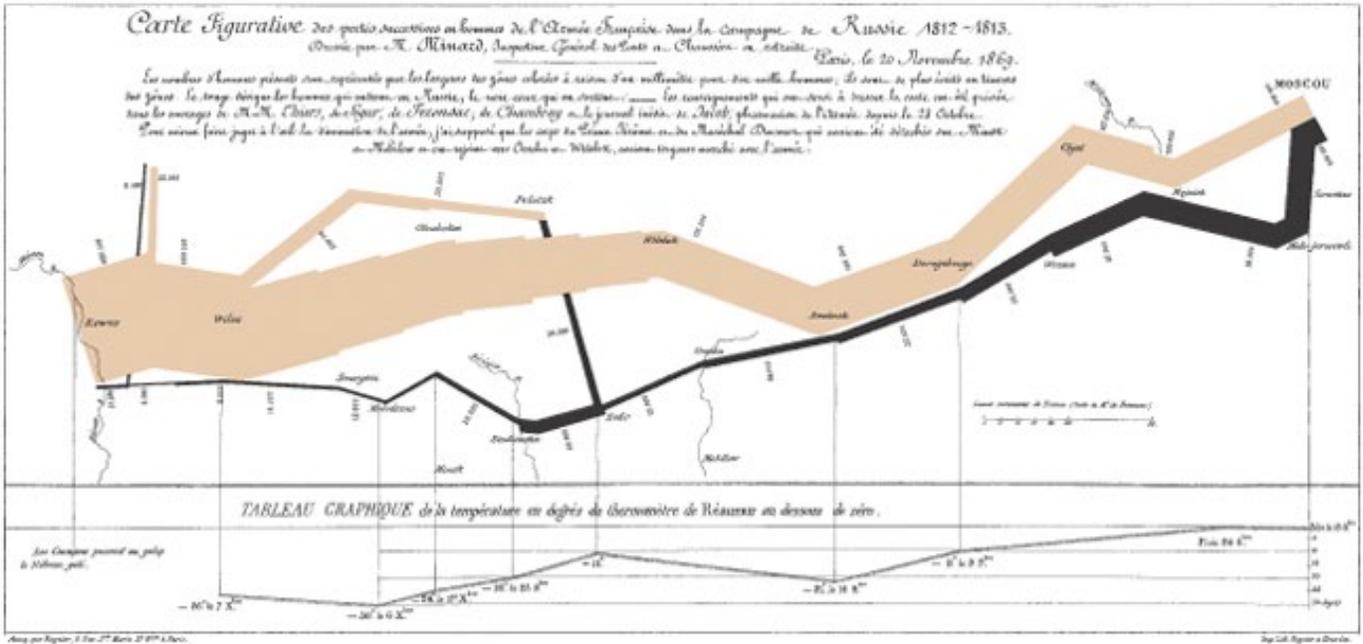
Graphical excellence consists of complex ideas communicated with clarity, precision, and efficiency.

Graphical excellence is that which gives to the viewer the greatest number of ideas in the shortest time with the least ink in the smallest space.

Graphical excellence is nearly always multivariate.

And graphical excellence requires telling the truth about the data."





Tufte has written little on creating graphics for litigation. There are, however, a few threads on his website that touch on graphics for trial (here http://www.edwardtufte.com/bboard/q-and-a-fetch-msg?msg_id=000130 and here http://www.edwardtufte.com/bboard/q-and-a-fetch-msg?msg_id=0002RP), and he discusses a chart used in the 1987 trial of John Gotti in Envisioning Information.

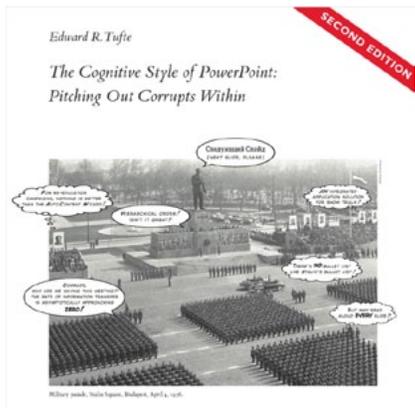
Tufte's near-silence on courtroom graphics is not surprising given that his focus is generally toward creating data-dense graphics for analysis by a technical audience, whereas in court we are presenting persuasive arguments to a lay audience. While many of his principles on data integrity apply to any information graphic, his preference for reports and dense data tables, printed and given to the audience for analysis, is rarely applicable for jury presentations.

CRIMINAL ACTIVITY OF GOVERNMENT INFORMANTS

CRIME	CARDINALE	LOFARO	MALONEY
MURDER	X	X	
ATTEMPTED MURDER		X	X
HEROIN POSSESSION AND SALE	X	X	
COCAINE POSSESSION AND SALE	X		X
MARIJUANA POSSESSION AND SALE			
GAMBLING BUSINESS		X	
ARMED ROBBERIES	X		X
LOANSHARKING		X	
KIDNAPPING			X
EXTORTION			X
ASSAULT	X		X
POSSESSION OF DANGEROUS WEAPONS	X	X	X
PERJURY		X	
COUNTERFEITING			
BANK ROBBERY			X
ARMED HIJACKING			
STOLEN FINANCIAL DOCUMENTS			X
TAX EVASION			
BURGLARIES	X	X	
BRIBERY		X	
THEFT: AUTO, MONEY, OTHER			X
BAIL JUMPING AND ESCAPE			X
INSURANCE FRAUDS			
FORGERIES			
PISTOL WHIPPING A PRIEST	X		
SEXUAL ASSAULT ON MINOR			
RECKLESS ENDANGERMENT			

While he hasn't written extensively on litigation graphics, he has written

quite a bit on PowerPoint, the presentation software often used in the courtroom, and this is useful for us to examine. His article in Wired magazine titled "PowerPoint Is Evil," and the essay, "The Cognitive Style of PowerPoint: Pitching Out Corrupts Within," lay out his criticisms of PowerPoint and it's weaknesses as a presentation tool - especially as a method for conveying technical data. It is the specifics of these criticisms, not the broader work of Tufte, that we want to address in this article and apply to presentations designed for the courtroom.



PowerPoint's Technical Limitations

One area of Tufte's criticism deals with the technical limitations of the program. There are virtually no software packages without certain drawbacks, but PowerPoint has major flaws that interfere with its main purpose as a presentation tool.

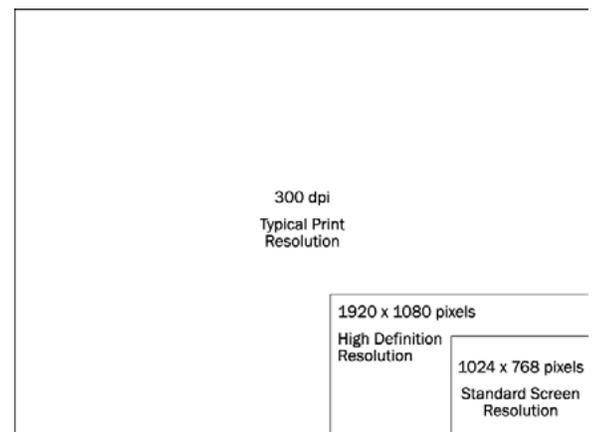
For example, it handles typography poorly. Unlike a design program such as Adobe Illustrator, the person creating the PowerPoint slides has little control over line spacing and letter spacing, and the general clumsiness of the text boxes and fonts can make reading text on a slide difficult for the audience. Labeling illustrations, charts and diagrams in PowerPoint is also challenging. This is true for tables as well, which tend to be either too crowded or too sparse unless they are heavily customized by the user.

The poor typography is amplified by the low resolution of PowerPoint slides. As Tufte notes:

"PP slides projected up on a wall are very low resolution – compared to paper, 35mm slides, and the immensely greater capacities of the human eye-brain system. Impoverished space leads to over-generalizations, imprecise statements, slogans, lightweight evidence, abrupt and thinly-argued claims"

It is unfair to blame PowerPoint for low resolution, since resolution is determined by the monitor or projector and not by the software. However, though higher resolution monitors and projectors are becoming increasingly available, we are still limited by what's available in a particular courtroom, most often the old standard of 1024 x 768 pixels.

Tufte also blames PowerPoint for being too linear, which is simply untrue. You can jump to any slide at any time during a presentation should the circumstances demand. Presentations are certainly experienced by the audience in a linear fashion, though, because they are given over time, which is a fundamentally linear construct. Using a slide projector, printed boards or a whiteboard does not change the underlying directionality of time. Tufte argues in favor of printed reports, which can be studied and analyzed – frontwards, backwards and upside-down – at the discretion of each individual audience member. But, that is not a presentation and it certainly lies beyond what can be done under the rules of court.



The Cognitive Style of PowerPoint

Technical limitations are just a small part of what Tufte sees as PowerPoint's flaws. Far more serious is the way the program pushes certain defaults on the user, encouraging bad choices by the designer and presenter. This is what he is referring to when he talks about PowerPoint's "cognitive style."

The first and most dangerous of these defaults occurs when you create a new presentation. You are presented with an empty slide with placeholders for content in the form of a title and a bullet list.

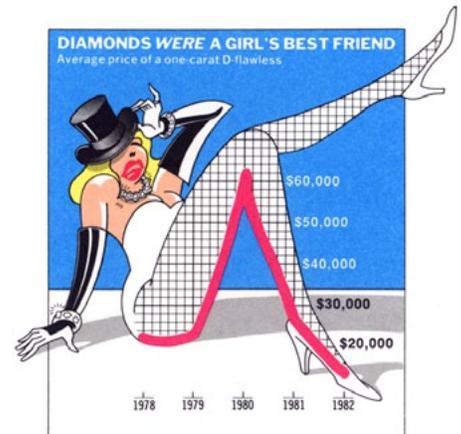


The user's inclination is to begin typing their presentation into the space provided, creating a text-heavy hierarchy of abbreviated points. The user is then in the thrall of PowerPoint's cognitive style, thinking in lists, not thinking of how to engage and inform the audience. This often carries through to the live presentation as well, when the presenter then uses their slides as a teleprompter, reading bullets to a bored and disinterested audience.

Tufte also dislikes what he calls PowerPoint "Phluff," the pre-designed templates, layouts and clip art that comes with the program. It isn't that he doesn't think slides should be visually appealing, but the ready-made designs that come with the program draw attention to the wrong thing, often overwhelming the content.

Another of his major complaints is PowerPoint's weakness in dealing with statistical data, in that it utilizes what he calls "chartjunk." Tufte writes:

"Everything is wrong with these smarmy, incoherent graphs: un-comparative, thin data-density, chartjunk, encoded legends, meaningless color, logotype branding, indifferent to content and evidence. Chartjunk is a clear sign of statistical stupidity; use these designs in your presentation, and your audience will quickly and correctly conclude that you don't know much about data and evidence."



Overcoming PowerPoint's Limitations

Though Tufte has many valid complaints about PowerPoint, we believe there are ways to limit the harm PowerPoint and its cognitive style can do to your presentation.

We must first recognize the vast differences in audiences and purposes slide based presentations are designed to accommodate. A presentation to a group of NASA engineers regarding damaged tiles on the Space Shuttle is quite different than a sales pitch to a prospective client, which is equally different from an expert witness's testimony to a group of lay jurors. And for juries, the sort of data heavy tables Tufte prefers are neither practical nor effective.

Handouts of demonstrative evidence are seldom appropriate in the courtroom, so we are constrained by the low resolution of projected images. Exhibits produced as evidence during trial can be studied in hard copy by the jury during deliberations, but that doesn't usually include summary exhibits or demonstratives.

The trial setting presents two more constraints that could preclude using handouts: time and sponsorship. It would be impossible, given the restrictions placed on presenting your case in court, to simply give a document to the jury and let them study it undirected while the rest of us waited quietly. If questioning went on, jurors would not be paying attention to the witness, and would likely miss the relevance of the information you want them to understand. They must be presented with the data as

the witness is testifying to it on record, as it is through the witness that the document is published.

For data-dense documents, including tables and charts, we can use a program such as Trial Director, which has zooming capabilities, to effectively increase our resolution. To tackle non-document resolution problems, we can use programs like Adobe Flash, Alias Maya or Prezi to zoom and emphasize pieces of a graphic or model while still retaining context. This may not satisfy Tufte’s preference for viewing everything at once, but we believe there is good reason why this method is better for court.

The Years of our Lord	1647	1648	1649	1650	1651	1652	1653	1654	1655
Wolf				8					
Canker, Sore-mouth, and Thrush	66	28	54	42	68	51	53	72	44
Childbed	161	106	114	117	206	213	158	192	177
Chrisomes, and Infants	1369	1254	1065	990	1237	1280	1050	1343	1089
Colick, and Wind	103	71	85	82	76	102	80	101	85
Cold, and Cough							41	36	21
Consumption, and Cough	2423	2200	2388	1988	2350	2410	2286	2868	2606
Convulsion	684	491	530	493	569	653	606	828	702
Cramp			1						
Cut of the Stone		2	1	3		1	1	2	4
Drooply, and Tympany	185	434	421	508	444	556	617	704	660

In court, our mission is not just to inform, but also to persuade the jury. This necessitates guiding the jury through the information in a way that best communicates our argument. The other side will have their chance to counter, of course, so we must not misstate facts or attempt to deceive the jury. That being the case, each side narrowing the field of information to the parts they deem most important, while keeping the information presented by opposing counsel in check, actually helps the jury make a more informed conclusion as they do not get lost in details which are irrelevant.

Neutralizing PowerPoint’s Style

It is true that the templates and charts in PowerPoint can ruin a presentation, but competent design can overcome these flaws. The problem truly lies with the people creating the presentations, who, due to PowerPoint’s ease of use, are often not skilled graphic designers. It may be tempting to use the myriad PowerPoint bells and whistles to add “pizazz” to your chart, but it is better to spend that effort minimizing the extraneous special effects and making sure your graphic is legible and understandable.

Incompetent design certainly accounts for much that Tufte dislikes about PowerPoint. While the PowerPoint cognitive style encourages bad design, it does not force bad design. For that reason, we think it is an overreach to call PowerPoint “evil.” Tufte’s books are beautifully designed, but there are many books that are not designed well. That doesn’t mean books are evil, it means that bad design can taint any medium, not just PowerPoint.

Can we avoid the bad practices, bad content and bad design found in some (most?) PowerPoint presentations? Yes, but we must look objectively at both the strengths and the weaknesses of the software. Making a few adjustments to the way we approach creating presentations and staying focused on our objective can help us along this path.

When you are ready to create your presentation, resist the urge to organize it within PowerPoint. Once you’ve typed a list of bullets on a slide, they can be surprisingly hard to remove. Instead, create an outline in a word processor, making parenthetical notes as to where visuals should be used, e.g., (Timeline of Trade Secret Theft). Or if that doesn’t fit your speaking style, grab a stack of paper and draw what needs to be on each slide, interspersed with hard copies of exhibits you want to use.

Your presentation should primarily use these types of slides: timelines, charts, graphs, tables, diagrams, illustrations and other demonstrative evidence; documents; section separators or “roadmap” slides; occasionally a text slide with a definition or short explanation of a concept the jury needs to be familiar with; and very rarely, a bullet list.

What your visual presentation should absolutely not be is the transcript of your spoken presentation.

Try to make your slides as simple as they can be while still being effective. That is, resist the urge to use PowerPoint’s bells and whistles to enhance a boring slide. Instead, aim for slides that are legible, comprehensible, and visually engaging, not slides cluttered with special effects.

Don’t use any default templates or clip art that shipped with PowerPoint.

Use another program, such as Adobe Illustrator, to create your graphics. Drawings, charts, and graphs generally all look better if they are created in an art program and then imported into PowerPoint, though PowerPoint’s drawing capability has vastly improved over the past decade and some users do remarkably well with them.

Use PowerPoint as a slide projector for your content, not as a content creator. Above all, keep the focus on your content, not on extraneous and superfluous eye candy, and certainly not on droning lists of text. As Tufte says:

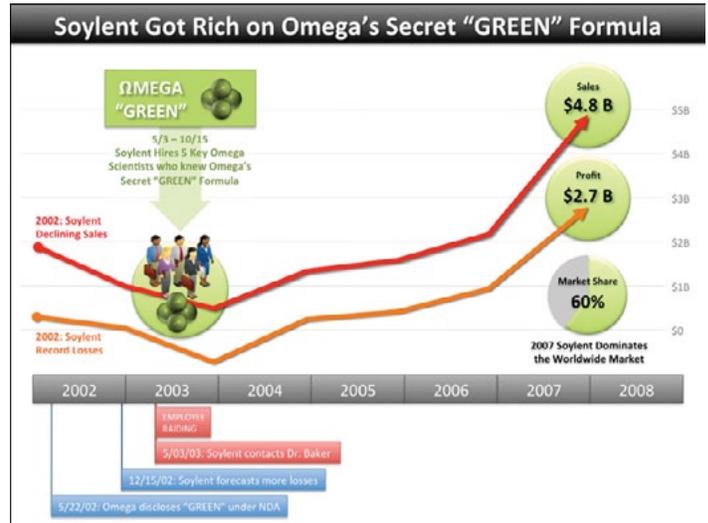
“Presentations largely stand or fall depending on the quality, relevance, and integrity of the content. The way to make big improvements in a presentation is to get better content.”

Seeking A Third Way

We highly recommend Tufte’s body of work as a knowledge base when working with demonstrative evidence. His ideas on displaying information, data integrity and graphic design are rightly regarded as the pinnacle of excellence in creating information graphics. His teachings have informed our own design standards, as can be seen in our Information Design Principles.

However, just as the Beyond Bullet Points method doesn’t fully translate to the courtroom setting, neither do Tufte’s methods completely transfer. While we believe Beyond Bullet Points sacrifices evidence for a persuasive narrative, Tufte’s methods include an overabundance of information which would overwhelm a jury, while urging us away from persuasion altogether.

While Tufte is effective for relating scientific data to experts and Beyond Bullet Points is effective in a boardroom or sales pitch, neither fully addresses the unique challenges of a courtroom setting. This leaves those of us tasked with creating compelling evidentiary presentations to seek alternatives somewhere between these two extremes. Our work lies in finding a middle ground somewhere between pure story and raw data that will inform and persuade a jury while still meeting the legal obligations of trial.



When Your Life is on the Line, Be a Victim, Not a Hero

BY KURT GRAY & CHELSEA SCHEIN

Kurt Gray is an Assistant Professor of Psychology at the University of Maryland, College Park. He completed his Ph.D. at Harvard University. He investigates the psychological basis of moral judgments and their real-world consequences, in domains ranging from animal rights to torture. He is currently the principle investigator of the Mind Perception and Morality Lab (<http://www.mpm.umd.edu>).

Chelsea Schein is completing her Ph.D. in social psychology at the University of Maryland, College Park. She studies moral decision making, moral behaviors, and mind perception, and currently works with Dr. Kurt Gray in the Mind Perception and Morality lab.

*Don't miss our trial consultant responses following the references!
Julie Blackman, Beth Foley and Kathy Kellermann offer their thoughts.*

Introduction

Knowing how best to escape blame is essential. After an affair, it can mean the difference between marriage and divorce; after a mistake at work, it can mean the difference between employment and joblessness. Nowhere is escaping blame more important than in the courtroom, where reputations, fines and jail time all hang in the balance. For those accused of capital crimes, knowing how to avoid blame can literally mean the difference between life and death.

As a defense attorney, you are often tasked with helping clients escape blame. Obviously, the best strategy for escaping blame is to deny that your client had any sort of involvement in the wrongdoing, however, when faced with irrefutable evidence, that strategy is not an option. When it is clear that the defendant is guilty, defense teams often appeal to either the *hero strategy* or the *victim strategy* in hopes of reducing blame. They paint their clients either as upright citizens, with glowing records of previous good deeds, or as victims, with long lists of harms suffered at the hands of others. In a series of studies, we have explored which tactic – if either – is effective in reducing blame. When punishment hangs in the balance, is it better to be a hero or a victim?

Heroes or Victims

Two legal cases gained national attention in the summer of 2011 – the New Orleans Danziger Bridge Case and (more notably) the Casey Anthony trial. In the first case, the legal team framed the defendants as heroes, in the other, as a victim. Although both strategies are intuitively appealing, in the end only one strategy was effective in mitigating blame.

The Danziger Bridge Case took place in post-Katrina New Orleans, where five NOLA police officers were accused of killing two men, seriously injuring four others, and then orchestrating an elaborate cover-up scheme. Their defense attorneys employed the hero strategy, painting the police officers as “the good guys” in hopes of reducing blame. Despite the serious charges against them, attorneys argued that the police officers were not heartless killers, but rather the ones restoring order in a time of chaos and anarchy.

The intuitive logic behind the strategy is clear – if the police officers are the city’s heroes, how can they also be criminals? This strategy suggests that jurors employ a kind of moral calculus of good versus evil when judging defendants; the more good someone does, the harder it is to see them as blameworthy. This is certainly intuitively appealing, as there seems to be a big psychological gap between heroes and villains, and so the more someone seems like a hero, the less they should appear to be a villain.

Indeed, there is some psychological research suggesting that good deeds might serve as a type of karmic insurance policy, safeguarding heroes from future harsh judgments. People generally believe that we live in a just world where good people ought to be rewarded and bad people punished (Lerner & Miller, 1978). Holding to this just world belief, it seems reasonable to expect that, in the courtroom, previously upright citizens should be rewarded with less blame for a crime.

It also seems reasonable that a person’s past good deeds would encourage a charitable interpretation of one’s transgressions. Consistent with this idea, people ascribe blame for specific acts on irrelevant [irrelevant in what sense?] bad character, blaming generally despicable people more harshly than others (Alicke, 1992). Juries are also more likely to grant clemency to good people, but not bad people who espouse ignorance of the law (Alter, Kernochan & Darley, 2007). If you know that the accused has a history of saving children, then maybe he committed a crime accidentally, or to help others. Despite the evidence in favor of the hero strategy, however, it ultimately failed the NOLA police officers, who were found guilty on all 25 counts.

Unlike the NOLA police, when Casey Anthony stood accused of murdering her three-year-old daughter and burying her in a neighbor’s backyard, her lawyers framed her as a victim. After hearing the alleged sexual abuse that Anthony suffered at the hands of her father and brother, it seemed more difficult for the jury to view her as a monstrous mother. Although the evidence against Anthony was compelling [was it? Jury disagreed.], she was acquitted of all charges.

Anthony’s trial is only the most recent example of famous cases that ended in an acquittal when the attorney used the victim strategy. In 1996, O.J. Simpson escaped a murder conviction partially because his lawyers painted him as a target of the LAPD’s racist leanings. A half decade earlier, Lyle and Erik Menendez were accused of murdering their wealthy parents. Although the brothers were found guilty of first degree-murder, being framed as casualties of their abusive father and overbearing mother helped them escape the death penalty. Why might the victim strategy work, when the arguably more intuitive hero strategy fails? Why do we seem to punish police officers, our national heroes [Are police officers our national heroes? This seems like a big assumption.], more harshly than victims? The answer stems from the underlying structure of morality.

Moral Typecasting

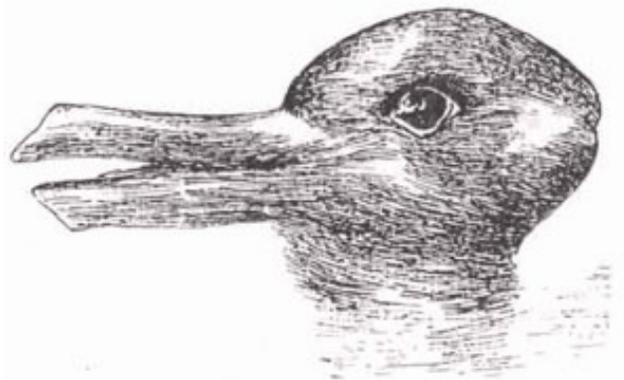
Moral and immoral behaviors typically require two parties, a dyad of *moral agent* and *moral patient* (Gray & Wegner, 2009). The moral agent is the doer of the moral action, while the moral patient is the recipient – for example, in a robbery, the thief is the moral agent and the victim is the moral patient. Without this dyadic structure, the moral nature of an action tends to disappear: without the victim, stealing is simply finding something; without the thief, a person has merely lost something. In the parlance of the law, moral agents represent *mens rea* – the presence of blameworthy intent – while moral patients represent *actus reus* – the presence of someone harmed by an action.

Although people are generally able to serve as both moral agents and patients – as both perpetrators and victims – in any specific moral act, people take on the role of either one or the other: the rapist is not the one raped; the thief is not the one who is stolen from. Research suggests that this tendency to be either the agent or the patient in a specific act is extended more broadly to perceptions of character, such that people see others as *either* agents *or* patients across moral acts in general. This phenomenon is called *moral typecasting*: just as we typecast actors into enduring Hollywood roles (think of Leonard Nimoy as Spock), so too do we typecast others into enduring moral roles, as either perpetual perpetrators or everlasting victims.

An analogy to visual perception can help capture the phenomenon of moral typecasting: when viewing the duck-rabbit illusion (Figure 1), at times you might see a duck whereas at other times you might see a rabbit. Despite knowing that the figure depicts both animals, we struggle to see the image as simultaneously being both animals. Likewise, as a result of moral typecasting, we perceive others as either the moral agent or the moral patient, despite knowing that people can technically be both victims and perpetrators.

At first blush, this distinction between moral agent and moral patient seems to be less important than the dichotomy we see between good and evil. From a young age, we split our social worlds into angelic heroes and nefarious villains and learn that heroes are praised, and villains punished. In moral typecasting, however, both the good and the bad agents are lumped in a single category – the moral agent. Since both heroes and villains do moral actions, we perceive them similarly – both are seen as responsible for their actions. In contrast, we perceive moral patients solely as the recipients of the moral action; we focus on the pain they suffer from villains or the help they need from heroes, and this perceived helplessness leads them to be seen as incapable of responsible action. More succinctly, moral typecasting suggests that a) victims should escape blame and b) heroes should earn blame at a level similar to villains.

The claims of moral typecasting seem to contradict both intuition and psychological research. In addition to the research discussed earlier about the supposed power of past good deeds, there is also ample research on “blaming the victim” (Lerner & Simmons, 1966). One of the best-known examples of blaming the victim involves survivors of rape. Upon hearing stories of rape, people often try to justify the assault by condemning the victim’s provocative clothing or flirtatious behavior. Blaming the victim stems from our belief in a just world. The flipside of believing in a just world



Does this picture depict a duck or a rabbit?
Jastrow's (1899) Duck Rabbit illusion.

where good people are rewarded is the belief that only those deserving harm will suffer (Lerner & Miller, 1978). Since we live in a just world, those who suffer somehow deserve their suffering. However, in “blaming the victim,” the victim is blamed solely for the act that casts him as a victim, and not for all subsequent behaviors. Typecasting, on the other hand, is more enduring and so extends attributions of blame beyond the harm that causes one to be cast as a victim. So, it is not how much blame a victim deserves for a rape, for instance, but instead how much blame a rape victim deserves for a subsequent murder.

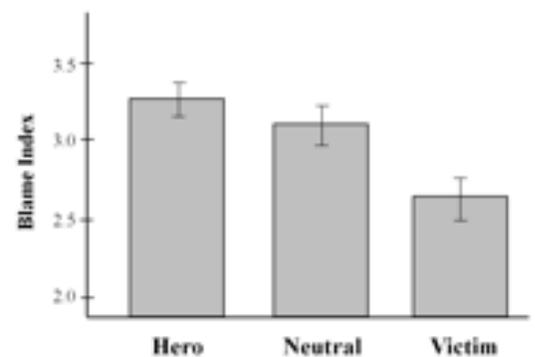
Through a series of studies, we tested whether people’s judgments of blame follow the predictions of moral typecasting, rather than an intuitive distinction between good and bad. In particular, we tested whether highlighting victimization (the victim strategy) was better than highlighting virtue (the hero strategy).

Victimhood Versus Virtue

In the first experiment, we gave people a scenario concerning a man named George, who was initially seen as a hero, a victim, or neither before committing a misdeed. In particular, participants read that every week, George either donates \$100 to charity (hero), gets \$100 stolen from him by his cruel boss (victim), or spends \$100 on groceries and other expenses (normal). George then takes \$10 dropped from a woman’s purse, and we asked how much blame George deserves for this misdeed. Consistent with the moral typecasting hypothesis, we found that victim George received less blame and less punishment than both normal and hero George. We also found that hero George was given no less blame than normal George, suggesting that his previous good deeds did nothing for assignments of blame. Importantly, this occurred without specifying where George would be spending the money – it could be that hero George was a modern day Robin Hood and would be given the \$10 to charity – but no one cut the hero a break. So while victims escaped blame, heroes did not.

In a second study, we examined the power of moral typecasting with a real-world workplace negligence scenario comparing heroes and victims. Participants read about two restaurant cooks – a “hero” cook who started a charity in college, and a “victim” cook who had been hit by a drunk driver while in college (though now fully recovered). The men ignore a woman’s request for a peanut-free salad, even though she is severely allergic to peanuts. The woman eats the salad, has a near deadly allergic reaction, and then threatens to sue the restaurant unless they fire one of the cooks. The question is who would participants choose to fire? Asking people to fire someone provides a strong test of moral typecasting, because while you might give less blame to a victim, presumably you would want to keep the hero on the staff so he or she could keep doing good. Consistent with typecasting, however, the hero cook was overwhelmingly assigned more blame than the victim, and – despite his good deeds – given the axe significantly more often.

These studies suggest that the victim strategy is optimal for escaping blame and punishment after a transgression, but sometimes the victim strategy is not an option. For example, a defendant might come from a privileged background and never have suffered real harm. In these cases, should one then turn to the hero strategy? Does being perceived as a hero earn one less blame than simply being perceived as a neutral character? If so, then the hero strategy might still have some utility in the courtroom.



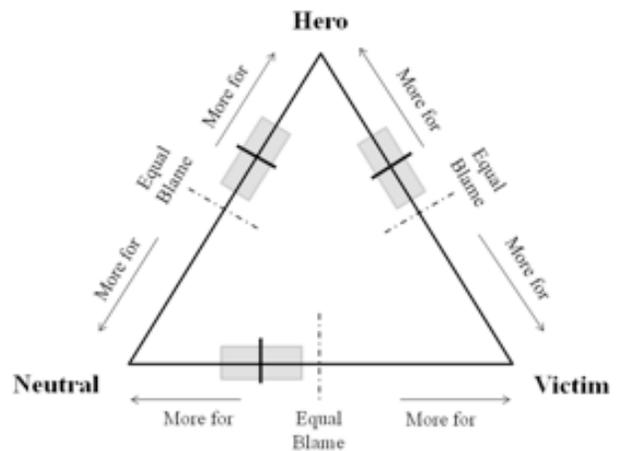
The relative amount of blame assigned to heroes, victims, and neutral characters in the “George” case (Gray & Wegner, 2011).

In the next set of studies we compared the blame assigned to heroes to the blame assigned to neutral targets. Following-up on the workplace negligence study, we added a neutral cook to contrast with the hero and victim cooks, who – in contrast to being characterized by good deeds or harm – simply majored in communications in college and used to work at a local hardware store. When both the neutral cook and the victim cook caused a life-threatening allergic reaction, people chose to fire the neutral cook – victims win again. On the other hand, when the neutral cook was paired with the hero cook, the majority of people fired the hero cook (Figure 3). This is consistent with the idea of moral typecasting – a moral agent, whether good or evil, remains more capable of earning blame than your average person. In the courtroom, this suggests that it might be better not even to mention a history of good deeds once guilt has been established.

In another study, we found that the punishment of heroes holds even when people judge those with a lifetime of good deeds. In the previously discussed dropped money case, we replaced the anonymous “George” with prototypic heroes, victims and neutral characters (Gray & Wegner, 2009), and a similar pattern emerged. People blame the Dalai Lama more than a high school teacher for keeping dropped money, and a high school teacher more than an orphan. If people assign blame solely by comparing tallies of good versus evil, the Dalai Lama should clearly earn the least amount of blame; however, consistent with the moral typecasting hypothesis, living a lifetime of good deeds actually earned him more blame, and only the victim escaped blame relative to a neutral target.

The power of the victim strategy extends not only to explicit judgments but also to memories of immorality. We presented people with a detailed story of a businessman’s morning (get up, brush teeth, put on grey suit, eat bagel, drive to train, board train, etc...) which included one moral transgression: as with “George,” this man sees a woman in front of him drop \$10 and he picks it up and doesn’t give it back. Importantly, a single sentence of background was provided at the beginning of this story, casting him as a hero (once worked for Habitat for Humanity), a victim (once hit by a drunk driver), or your average person (once worked at a hardware store).

After reading this story, participants had a five minute break, and then we asked people to recall five things from the story; we were interested in whether people recalled the moral misdeed. Consistent with typecasting, we found that significantly fewer people remembered the moral transgression when it was enacted by a victim, relative to the average and heroic person. Also consistent with typecasting, the moral misdeed was recalled earlier in the list of remembered details for the hero relative to the average person, suggesting that it was more salient for the good doer. Thus, people seem to forget the wrongdoings of victims but never forget those of previous good doers, providing one more piece of evidence in favor of victimhood over virtue as a way to avoid blame.



The relative amount of blame assigned to heroes, victims, and neutral characters in the workplace negligence case (Gray & Wegner, 2011).

Boundary Conditions

Through a number of studies, we found evidence in favor of moral typecasting, which advocates the victim strategy over the hero strategy. Despite these data, there are important cases in which victim strategy may be unlikely to work. First, if it is employed without real harms to back it up, then

the defendant might seem like a malingerer, and earn even more blame (i.e., not only are they guilty, they're also dishonest). Even without perceptions of dishonesty, harms suffered by a defendant must be perceived to be extreme enough to others; just imagine a privileged defendant complaining of some minor harm in front of a jury of less well-off peers – these complaints will likely prompt more hostility than sympathy.

The victim card can also backfire if people are perceived as responsible for their misfortune, for although people typically respond to tragedies with sympathy, they generally feel resentment when someone appears to have brought suffering upon him or herself (Weiner, 1980). For example, we sympathize with AIDS patients when they contracted the disease through a blood transfusion, but resent those who contracted it through sexual behaviors (Weiner, 1995). If people perceived the defendant as responsible for his past victimization, then the blame for that victimization can increase the blame in the current case.

The victim strategy also has limits, as even the most prototypical victims can seem responsible if the crime is particularly egregious. For example, children are strongly perceived as moral patients – sensitive to harm but not responsible for causing it – but when two British children tortured and murdered toddler James Bulger in 1993, they were perceived as moral agents, and tried as adults. In general then, typecasting suggests that the more horrific the crime, the harder it will be to perceive the defendant as a victim.

We are not suggesting that the power of the victim strategy is necessarily rational. Certainly, we are not suggesting that everyone stop doing charity work and helping out in their communities to take on the mantle of victimhood. Indeed, being a victim has psychological costs associated with it (Tait & Silver, 1989; Bergeron, 2005) and good deeds have a host of benefits; engaging in moral behavior not only helps society, but boosts the mood of do-gooders (Dunn, Aknin, & Norton, 2008) and can even make them physically stronger (Gray, 2010). Even in courts of law, being a hero can be advantageous if it is unclear whether one has actually committed the crime, because highlighting one's good deeds leads to a more charitable interpretation of the situation (Alicke, 1994). However, the benefits of heroism disappear once guilt is assured, so one must weigh the chances of complete acquittal afforded by the hero strategy against the robust power of victimhood.

Conclusion

Popular imagination holds that at the gates of Heaven, St. Peter has a record of each person's life events. If good deeds outweigh the bad, then that person earns their Heavenly wings; if bad deeds outweigh the good, then that person is condemned to eternal perdition. As compelling as this metaphor may be, research suggests that in cases where blame is at stake, people seldom count good deeds against bad. If anything, previous good deeds actually make you more blameworthy for moral transgressions because they cast you as a moral agent – and therefore as ultimately responsible. Instead, it seems that the best route to escaping blame lies through victimhood, because it is so difficult to see moral patients as moral agents. This victim strategy may not always work, but when guilt is clear, it consistently trumps the hero strategy.

There is no doubt that society needs heroes, but when the life of a defendant hangs in the balance, it seems you should leave stories of valiant heroism at the door and instead focus on the harms suffered at the hands of others. For once, victory goes to the victims.

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Response by Julie Blackman

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As Kurt Lewin, the father of social psychology, said, "There is nothing so practical as a good theory." Clear, practical implications for the courtroom flow from Gray & Schein's attention to theoretical work (and empirical results) on moral typecasting. For any of us who consult to attorneys who represent defendants in criminal matters, there is much of value to consider here.

Gray & Schein's article adroitly combines theory, research and practice. It is good to see a well-developed line of research bear directly on key trial strategy decisions. And, the take-away message is clear: those likely to be found guilty of crimes will fare better if their experiences as victims are emphasized. A history of good deeds will not exonerate them and indeed may make their misdeeds more memorable and more blameworthy. So, criminal defense attorneys are well-advised to feature their clients' suffering rather than their clients' benevolent acts. Victim-perpetrators fare better, say Gray and Schein, than hero-perpetrators.

The fact that the findings are somewhat counter-intuitive enhances their appeal since they lead to a more nuanced trial position that one's courtroom adversary is less likely to discern and refute effectively. One might have imagined that heroes would retain some of their shine when they face criminal charges. The research suggests otherwise. It is, by the way, better to be "normal" than to be a hero when facing criminal charges say Gray & Schein.

This research and the resulting advice are particularly interesting to me as they are largely consistent with my observation that character witness testimony at criminal trials is poorly received. In countless mock trials, we have seen mock jurors decry the efforts of character witnesses. Their testimony is seen as disconnected from the charges and as a blatant effort to distract the jurors from the matters at hand. Complimentary descriptions of criminal defendants are seen as smoke screens and, if anything, seem to weaken rather than strengthen the defendant's case. I have seen defendants convicted at trial in the wake of testimony designed to make them seem like generous, caring, and helpful members of society.

Gray & Schein also note that despite their recommendation that victimhood be emphasized over virtue, sometimes there is little victimhood to point to. Particularly in securities fraud or other white-collar crime cases, defendants are often well-to-do and unlikely to be convincing victims, except for their arrest and prosecution. Not surprisingly, perhaps, defense attorneys often point to an overzealous prosecutor in an intuitive effort to reclaim victimhood for their clients. While such defendants may not have been victims before, criminal defense attorneys may argue that they are being victimized right now, before the jury's eyes, by an unjust prosecution.

I have advised defense attorneys not to rely too heavily on the idea that the prosecutor is overzealous. Most jurors like and respect the government and may be moved to resist a defense that suggests that the government has cast its net too wide or has overstepped in its efforts to convict the defendant. It is hard to put the government on trial. It is as if, psychologically speaking, the defendant has taken on its own burden of proof - a great and legally unnecessary burden for the defense since as a

legal matter the burden of proof rests entirely with the prosecution. Even so, in light of Gray & Schein's research, accusing the government of victimizing the defendant may be the best course of action for an attorney representing a defendant with little pre-indictment victimization.

I would encourage Gray & Schein to continue their line of research in this direction. Does casting a defendant as victimized by the prosecution work to soften the jurors' sense of the guilt of defendants who have lived good lives, free of victimization, before the instant case? How does blaming the government for victimizing the defendant work in a case where the defendant is already more easily seen as a victim (e.g., a homeless person who is charged with a crime)? Does it increase the likelihood of acquittal or lead to a less severe sentence if the defense blames the government along with other factors in a victim-defendant's life?

Theory and research yield grounded recommendations that promote more effective trial strategies. This article by Gray & Schein represents a significant advance in insight with regard to the relationships among moral typecasting, the perception of victims (and heroes) and trial strategy.

Response by Beth Foley

Beth Foley is a founding partner at [Zagnoli McEvoy and Foley](#). She conducts jury research in a variety of case types including environmental & toxic torts, product liability, personal injury and commercial litigation.

This research confirms what I have been observing for several years and adds nuance to case strategizing. However, the challenge is applying this research to jury trials because there are many variables that affect juror decision-making. I definitely think the characteristics of the defendant are important, but not more important than the themes, the evidence, the verdict questions and the jurors' life experiences. I've seen jurors have negative views of a defendant and still find in his favor. In the case of Casey Anthony, it's unclear if the strategy of portraying her as a victim of child sexual abuse made a difference.

Trying to make police officers out to be heroes was probably a risky strategy to begin with because the line between "good cop and bad cop" has been blurry for a long time. Jurors' personal experiences with law enforcement in New Orleans likely trumped the "hero" theme.

Still, there are practical take-aways from Gray and Schein's research for both criminal and civil cases and for corporate leaders and braggadocios witnesses too. Most important is the notion that the "hero" strategy may be riskier than we realized, especially in today's cynical climate. It's one thing if a strategy isn't persuasive, it's another thing if it backfires and makes the punishment worse.

Jurors are increasingly more suspicious – and for good reason. It's a common occurrence in our society for someone to be a hero one day and villain the next. Heroes and villains are sometimes one in the same. There is no clearer example of this than disgraced Penn State football coach Joe Paterno.

The cautionary message from the Gray and Schein research is that previous good deeds actually make you more blameworthy for moral transgressions because you are cast as a moral agent. This all suggests that when the stakes are high, you are safer to position in a neutral light instead of a "heroic."

Response by Kathy Kellermann

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At the start of a trial, jurors think of very few criminal defendants as victims and even fewer as heroes. Even more problematic, jurors think of very few criminal defendants as “normal” or “like themselves.” At the start of trial, many jurors already believe criminal defendants are bad people, probably guilty of having committed the charged offense(s). Many jurors objectify defendants as being “unlike” themselves and “not normal people.” Prosecutors use these juror predispositions and cast defendants as members of disliked out-groups many people believe are deviant, such as gang members, skin-heads, white supremacists, terrorists, gypsies, Muslims, and even attorneys, tax cheats and manipulators.

In my experience, re-humanizing and “normalizing” a defendant often must precede casting the defendant in the role of a moral agent, or any other role. Jurors are often surprised to learn that a gang member graduated from high school, held a job, and has a girlfriend, making the defendant neither a hero nor a victim, but “normal” or “typical,” rather than hated. Jurors are often surprised to learn that a white supremacist had no prior criminal record, takes care of his mother, and can feel remorse, making the defendant neither a hero nor a victim, but “normal” or “typical,” rather than hated. Jurors are often surprised to learn that an attorney has a wife and family, and lives in a middle-class neighborhood, making the defendant neither a hero nor a victim, but “normal” or “typical”, rather than hated. This process of humanization is not to make the defendant either a victim or a hero, but to make the person “normal” or “typical,” rather than hated; a person who is a member of similar groups as jurors, rather than a member only of disliked and deviant out-groups.

Does this process of humanization matter? Yes, and even if the humanization is based on seemingly trivial characteristics. For example, Zukier and Jennings (1983-1984) examined the influence of diagnostic and non-diagnostic information on judgments of guilt in a murder trial. One group of jurors considered only information that was diagnostic of guilt (i.e., direct evidence). A second group of jurors considered this same information and also received non-diagnostic information that was “typical” about a defendant’s height and vision: these jurors learned the defendant was of average height and had average vision. A third group of jurors considered the same diagnostic information, and received “atypical” information about the defendant’s height and vision: the defendant was extremely tall and had extremely good vision. “Atypical” diagnostic information had no effect on jurors’ verdicts. However, jurors given “typical” non-diagnostic information were more likely to acquit the defendant. The researchers concluded “extremeness in one category (a defendant’s height and vision) is related to “extremeness” in another category (a defendant’s likely guilt) and that “typicality” in one category (a defendant’s height and vision) is related to “typicality” in another category (a defendant’s innocence).

Humanizing a defendant is a strategy that is usually only effective when the evidence for guilt is weak or ambiguous. Smith, Stasson and Hawkes (1998) found that only when there was a small amount of diagnostic information pointing toward guilt did non-diagnostic character information of “typicality” (i.e., showing the defendant was not the sort of person who would be likely to commit the

alleged crime) reduce guilty verdicts. The impact of character evidence was greatest when evidence diagnostic of guilt comprised only 20% of the total evidence presented to jurors. Jurors tend to follow the evidence when it is clear, independent of how a defendant is framed by the defense or the moral role in which a defendant is placed.

After a defendant is humanized, a decision can then be made as to whether to cast the defendant as a victim or a hero or in some other role (e.g., insane). If the role of victim is selected, the nature of the victimization matters. First, some excuses are more compelling than others to jurors. Heath and colleagues (2001) compared excuses that were self-inflicted to those that were not self-inflicted. Jurors judged a defendant who gave the excuse of Cocaine Dependency Disorder (a highly self-inflicted condition) as guiltier than a defendant who gave the excuse of PTSD (Post Traumatic Stress Disorder, a condition inflicted by others). Excuses involving self-inflicted conditions are less persuasive than excuses involving conditions inflicted by others.

Additionally, some jurors are more compelled by excuses than other jurors. Some people believe we live in a just world, while others do not. Some jurors believe bad things happen to good people, but others believe that people are in control of their destiny. Some jurors believe all accidents have an explanation though others believe accidents are accidents. These differences between jurors can affect which excuses jurors find persuasive.

For example, younger jurors are more persuaded than older jurors by excuses based on conditions inflicted by others. Higgins and colleagues (2007) investigated whether younger or older jurors were more persuaded by excuses. Jurors learned about a defendant in an assault case who either gave an excuse of Cocaine Dependency Disorder or PTSD. Younger and older jurors equally (and highly) believed the defendant with Cocaine Dependency Disorder was responsible for the assault. However, older jurors felt the defendant with PTSD was more responsible for the assault than did younger jurors – they were more certain of their verdicts, as well.

As another example, jurors who support the death penalty are less compelled by mitigating factors of child abuse and alcohol abuse than jurors who are opposed to the death penalty. In the sentencing phase of capital cases, jurors frequently hear about a defendant's history of child abuse and alcohol abuse, both of which are offered by the defense as mitigating factors. Stevenson and colleagues (2010) investigated whether jurors used a defendant's child abuse and alcohol abuse as mitigating factors, aggravating factors, or ignored the evidence. Over 370 death-qualified jurors watched a sentencing hearing related to a murder in the course of an armed robbery. Jurors learned from the prosecution that the defendant had a history of six prior convictions, two of which were armed robberies, and a psychiatrist testified that the defendant was dangerous and likely to commit future crimes. Jurors learned from the defense that the defendant was physically abused by his father when he was a child, had been an alcoholic since age 12, was intoxicated at the time of the crime, and the times when he has been violent are when he was drunk. Thirty-four juries deliberated on the appropriate sentence. In deliberations, jurors discounted child abuse and alcohol abuse as mitigating factors. While a higher proportion of jurors' comments about child abuse were oriented toward mitigation (33%) than aggravation (7%), an even higher proportion of jurors' comments (44%) argued to ignore child abuse as a mitigating factor. Similarly, jurors made more mitigating (22%) than aggravating (18%) comments about alcohol abuse, and even more comments about ignoring alcohol abuse as a mitigating factor (26%). The more strongly a juror supported the death penalty, the more he or she argued to discount child abuse and alcohol abuse as mitigating factors, and use them as aggravators.

The importance of focusing on the jurors – their experiences and attitudes – matters not only for an effective positioning of a defendant as a victim, but also as a hero.

Many jurors hold people in a hero role to a higher standard. I have worked on cases involving allegations of sexual abuse by a minister and election fraud by a judge. In both cases, we were concerned about jurors who might hold the defendant to a higher standard than the typical defendant because of the defendant's "everyday" role. And we saw our task to be to "normalize" the defendant. In the case of the election fraud, we decided to cast the judge as a "victim" of the District Attorney's office, because he had beaten a District Attorney in the judicial race, a rare event in the venue where this case occurred. The judge was gay, and in voir dire we focused extensively on jurors' attitudes about the judge being gay. In so doing, we implicitly provided jurors with an explanation for why the charges were filed against the judge and we cast the judge into a victim role. We chose to cast the judge as a victim to counter the higher standard by which jurors might otherwise judge the judge.

However, cases exist in which certain types of jurors hold heroes to a lesser or different standard. Consider the authoritarian juror, that is, the juror who is very conventional, traditional, and submissive to authority; the juror who identifies with power figures and has a desire to punish violators of norms and social values. Authoritarian jurors in criminal trials tend to be prosecution-oriented and conviction prone because they respond well to the fact that prosecutors represent the legitimate authority of the state and society, an authority that endeavors to punish violators of the law.

Authoritarian jurors, however, are not always desirable for the prosecution. A number of exceptions exist to the pro-prosecution orientation of authoritarian jurors:

1. Cases involving "crimes of obedience," such as the Oliver North case or William Calley's trial for the My Lai massacre in Vietnam, gain a sympathetic ear with authoritarian jurors. In these instances, authoritarian jurors are less likely to convict than non-authoritarian jurors because they can sympathize with a defendant who obeys orders.
2. Cases involving allegations of misconduct by law enforcement personnel (e.g., excessive force or police brutality) are likely to enlist authoritarians' sympathy for the criminal defendant in the absence of other compelling issues. Authoritarian jurors are receptive to claims by law enforcement personnel that they were responding to the level of force necessary in the situation at hand. The fact that the defendants, being police officers, and the potential for other police to testify in favor of these defendants would play into authoritarian sympathies. Of no minor importance is the fact that the alleged victim is likely to be someone who is thought to have broken the law, a fact that does not escape the attention of the authoritarian juror.

Said differently, authoritarian jurors are more lenient in their verdicts for offenders who are similar to themselves, presuming the evidence is not clear for conviction.

The hero role has limits, however, and I believe, more than the victim role. Nonetheless, I believe the hero role can be effective under certain circumstance such as (a) the "right kind" of people are on the jury (e.g., authoritarians), (b) the "right kind" of defendants are on trial (e.g., police officers), and (c) the evidence for guilt is weak or ambiguous. A given law enforcement officer might be convicted using

a hero strategy because the evidence of guilt is strong, the officers may not have been cast as “typical” officers, and/or the jurors are not the “right kind” of jurors for that case and defendant. Another law enforcement officer might be acquitted because all of these needed conditions for the hero role are met.

I am intrigued by the importance of the victim role versus the hero role, and believe that generally the victim role is an easier role in which to cast defendants than the hero role. Very few people, and so very few defendants, have led a perfect life, free from any criticism or bad acts. Character witnesses offering general positive information about a defendant’s personality and good character can be impeached through cross-examination that allows prosecutors to introduce specific bad acts in which a defendant has engaged. Hunt and Budesheim (2004) found that positive character evidence did not reduce guilt perceptions or decisions to convict, and when a character witness was cross-examined with examples of a defendant’s previous specific bad acts, jurors’ impressions of the defendant were more negative, guilt perceptions higher, and conviction decisions more likely than when no information at all was provided about the defendant’s character. The hero role is dangerous for many criminal defendants.

I believe that even the victim role has limits, however, and so cannot be seen as the only other choice of a role in which to case a defendant. These limits include (a) excuses are differentially compelling to jurors, (b) who is on the jury affects how acceptable the excuses are, and (c) the evidence for guilt cannot be clear. For me, the victim role will be effective only if the excuse(s) offered are acceptable to jurors, the “right kind” of jurors are on the jury, the evidence for guilt is not clear, and the defendant is humanized so as not to be placed by jurors into disliked out-groups.

Defendants adopting a victim role are frequently convicted, as can be seen in cases involving battered women. Russell and Melillo (2006) found that defendants most likely to receive verdicts of not guilty matched jurors’ expectations about a prototypical battered woman and had passive response histories of never aggressing against the abusive husband. Defendants most likely to receive guilty verdicts deviated from jurors’ expectations about the prototypical battered woman¹ (e.g., in her 50s, rested, strong, working, no children, blaming husband, not appearing fearful, etc.) and had an active response history of having fought back on previous occasions. Further, male jurors were more likely than female jurors to render guilty verdicts. An effective victim role for a battered woman defense demands “typicality”, the “right kind” of defendant, and the “right kind” of juror.

My first thoughts in most criminal cases are how to humanize a person I anticipate most jurors will dislike, and how to lower the standard by which jurors judge the defendant. When a victim role serves this purpose, I advise it. When a the hero role serves this purpose, I advise it. Many times, I do not have a choice of role for the defendant – it is pre-decided by the case facts, the jurors in the venue, or by other factors.

¹Russell (1999) found that jurors expect a battered woman to exhibit certain physical, social, behavioral and psychological characteristics:

- physically being young, frayed, weary, fragile, and thin (135 lbs)
- socially having little to no interaction with others, two children and financially dependent on her husband
- behaviorally hiding signs of abuse, making excuses for her husband’s behavior, and trying to please her husband
- psychologically guilt-ridden, confused, depressed and fearful

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Are You Now, or Have You Ever Been, Crazy: Questions about Mental Health for Supplemental Juror Questionnaires

BY DIANE WILEY

Diane Wiley is a pioneer in the field of trial consulting, a founder of the [National Jury Project](#) and President of the Midwest Office in Minneapolis. Diane has extensive experience in assisting attorneys and prides herself on making her work available to attorneys on cases both big and small across the country since 1973. She has written numerous articles and chapters for legal publications and teaches at seminars.

Imagine having to talk about having depression or that your child has a drug problem to a room full of strangers. This is what we often expect our jurors to do. It's not fair to them and many of them simply don't tell us about their experiences. Yet, in most personal injury, employment and other civil rights cases there are issues involving the mental health of the plaintiffs. Some of our clients have brain injuries. Physical injuries, harassment and discrimination generally produce mental stressors – from reactions to horrific and chronic pain, to the inability to work, the inability to participate in leisure activities, or to pick up grandchildren. At the same time, more and more people in our society (our prospective jurors) are experiencing, and being diagnosed with, depression, anxiety, Attention Deficit Hyperactivity Disorder (ADHD), Bi-Polar Disorder, Post Traumatic Stress Disorder (PTSD) and other mental illnesses.

These are issues that are important to identify during jury selection when the plaintiff has mental health issues as a result of an injury or discrimination. While there is increasing recognition by the public about the impact of psychological injuries and conditions, there are still people who refuse to believe that psychological injuries are “real” and others who feel that while these conditions may affect people, they should not be compensated. An additional problem is that some jurors and/or their family members have had bad experiences with psychiatrists, psychologists, social workers or other mental health counselors which may affect how they respond to testimony about mental health.

Because of the stigma still attached to mental health problems, many jurors do not want to talk in open court about issues they or family members have had. Thus, as with all sensitive issues, prospective jurors' experiences with and attitudes towards mental health and mental health providers are easier to identify using a Supplemental Juror Questionnaire (SJQ). We find that more people will report mental health issues when given a questionnaire than in open court.

Before constructing the questionnaire, consider the conditions under which you will be conducting the voir dire. If there will be no time allowed for following up on the questionnaire answers, you will want to make the questions as complete as possible in drawing out the issues you need information on.

Jurors, like the rest of us, form their opinions and attitudes based on their experiences, combined with their core beliefs. Thus, the questionnaire should be designed to identify:

- Jurors' experiences with mental health issues in general
- Specific juror experiences which might impact their reaction to the issues in the case
- Attitudes towards mental health issues in the case
- Attitudes towards compensation for mental health problems caused by an injury or discrimination

In many cases, it will not be necessary to follow up on individual jurors' mental health experiences during voir dire if you design the questionnaire correctly. However, if you do have attorney voir dire, you will still want to ask questions dealing with jurors' attitudes about mental health treatment and people's ability to recover.

If you feel it is necessary to follow up on something in the questionnaire, be sure to tell the jurors that you are going to ask them about some of their answers in the questionnaire:

"If you or a loved one have had a mental health (or chemical dependency) issue or have had a problem with a mental health professional and you don't want to talk about it in front of the other jurors, please raise your hand and we can talk about it with the judge in private."

It goes without saying, but I'll remind you anyway, that you must clear this with the judge first. If the judge will not allow you to examine jurors at sidebar about their or family members' mental health problems, I recommend that you not ask them in front of the other jurors. Those who are willing to talk about it in open court may bring it up in talking about their attitudes towards mental health professionals or other more general questions.

The occurrence of mental health problems is significant enough that whenever we have used questionnaires, jurors report problems ranging from slight depression to chemical dependency and even schizophrenia. They will have relatives with alcohol and drug problems or who are bi-polar. Some will have received family counseling in relation to divorce or because of children with problems. Some will have had court ordered counseling. These are often formative life experiences and many jurors will find it painful or embarrassing to talk about them.

You will have jurors who have successfully overcome mental health problems. Some of them will be empathetic towards other who have problems, some will be self-righteous. Some will be dealing with mental health issues with family members who have not been successful and some of those jurors will feel frustrated and blame the family member for not working hard enough. Others will be sympathetic to the struggle to overcome depression, anxiety and other mental health problems. Some

jurors will have dealt with mental health problems in their employment. As with all of the issues we deal with in voir dire, simply having had a similar experience does not mean that the juror will have a certain attitude or be good or bad for your case. It is their reaction to the experience that counts.

The following are some sample questions designed to cover a variety of mental health issues that may arise in different cases. We generally provide three lines for providing an explanation, which will not be reproduced here.

- 1. Have you or anyone close to you ever taken any courses or training in or worked in the field of mental health or with people who have mental health issues?**

___ Yes No ___

IF YES, is this: you spouse/partner child relative friend

Please explain:

- 2. Have you or anyone close to you ever suffered from depression, anxiety, emotional distress or mental illness of any kind?**

___ Yes No ___

IF YES, is this: you spouse/partner child relative friend

Please explain:

- 3. Have you, anyone in your family, or anyone close to you ever received counseling for any kind of emotional, family or psychological problem or for a mental illness of some kind?**

___ Yes No ___

IF YES, is this: you spouse/partner child relative friend

Please explain:

Type of professional providing treatment:

Was the treatment satisfactory? ___ Yes No ___

Please explain:

4. Have you, anyone in your family, or anyone close to you used medications for emotional or psychological problems?

___ Yes No ___

IF YES, is this: you spouse/partner child relative friend

Please explain, including what medications were used:

Was this medication helpful? ___ Yes No ___

Did you, or your family member, or person close to you have any side effects from using this medication? ___ Yes No ___

IF YES, what side effects were experienced:

There may be cases where it is important to know if the juror has any experience with specific medications:

5. Have you or anyone close to you ever taken any of the following medications?

	No	Self	Relative	Friend	What problem was this medication prescribed for?
Prozac or Fluoxetine					
Desyrel or Trazadone					
Klonopin or Clonazepam					
Tagamet or Cimetidine					
Halcion or Triazolam					
Xanax or Alprazolam					

6. What is your general opinion about professionals who provide counseling, such as psychologists, psychiatrists, pastoral counselors like ministers, and other mental health professionals?

positive negative mixed neutral

Please explain your answer:

7. Have you or anyone close to you ever had any kind of brain damage – whether from birth, due to an injury or stroke, or other medical condition?

___ Yes No ___

IF YES, is this: you spouse/partner child relative friend

Please explain the person’s condition, the cause (if known), and his/her age at the time the brain damage occurred:

8. Have you ever heard of PTSD or Post-Traumatic Stress Disorder?

___ Yes No ___

IF YES, do you have any concerns about the diagnosis of PTSD?

___ Yes No ___

Please explain:

9. Do you know anyone who may have had or has been diagnosed as having PTSD?

___ Yes No ___

IF YES, is this: you spouse/partner child relative friend

What was the cause?

How has PTSD affected the person?

10. Do you know anyone who has a serious emotional or psychological problem who has not received any help or treatment?

___ Yes No ___

IF YES, is this: you spouse/partner child relative friend

Please explain, including why this person has not received any help:

11. Have you or anyone close to you ever threatened, attempted or committed suicide?

___ Yes No ___

IF YES, is this: you spouse/partner child relative friend

Please explain:

12. Have you or anyone close to you ever engaged in self-harming or intentionally injuring acts?

____ Yes No ____

IF YES, is this: you spouse/partner child relative friend

Please explain:

13. Have you or anyone close to you ever taken any courses or training in or worked in the field of alcohol or chemical dependency?

____ Yes No ____

IF YES, is this: you spouse/partner child relative friend

Please explain:

14. Have you or anyone close to you ever belonged to Alcoholics Anonymous, any 12 step or other kind of chemical dependency organization, or received alcohol or chemical dependency treatment?

____ Yes No ____

IF YES, is this: you spouse/partner child relative friend

Please explain:

15. Have you or anyone close to you ever had a chemical dependency problem involving the use of legal or illegal drugs?

____ Yes No ____

IF YES, is this: you spouse/partner child relative friend

Please explain:

16. What do you think about providing money to compensate a person who proves that he or she suffered emotional distress as a result of (an injury caused by the negligence of another, sexual discrimination, etc.)?

17. What do you think are the biggest problems facing residential (treatment) facilities for the mentally disabled and what is the cause of those problems?

18. Do you think that anyone can overcome any kind of mental health problem if they try hard enough?
 ___ Yes No ___

Please explain your thoughts about this:

It's always important to have a privacy question such as the following at the end of every questionnaire, but especially important in SJQ's with questions about mental health. This allows jurors to feel more comfortable about the jury selection process and not worry that they may be forced to talk about these issues in open court.

Are any of your answers to the questions in this questionnaire so personal that you would not want them to be discussed in front of other jurors?
 ___ Yes No ___

IF YES, which questions? _____

If you want to get accurate information in your questionnaire, you'll need to construct it in a way where you get prospective jurors to identify whether the answer to a question refers to the juror or someone else they know. The easiest way to do this, and which takes the least space, is to use the following:

IF YES, is this: you spouse/partner child relative friend

It's also important to ask about "partners" due to the number of people who are living together. Some people will answer about their partners when asked about a "spouse", but others won't.

Supplemental Juror Questionnaires can make the crucial difference in our ability to identify problem jurors, particularly when there are sensitive issues that jurors will not want to talk about in open court or when there is no attorney conducted voir dire. Attorneys are most likely to convince judges to use SJQ's if the questionnaire is designed well and if the other side agrees.

For more information about Supplemental Juror Questionnaires in general, including jurisdictions where they have been used, sample questionnaires and motions, see JURYWORK: Systematic Techniques (National Jury Project; Elissa Krauss, General Editor; Sonia Chopra, Ph.D., Associate Editor (West Publishing, 2d Ed., updated annually)).

Generation X members are “active, balanced and happy”. Seriously?

BY DOUGLAS L. KEENE AND RITA R. HANDRICH

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Generation X used to be inscrutable. So-named, according to some, because of the challenge in identifying the ‘X’ factor in this generation. There was a struggle to describe this generation coming on the heels of the Baby Boomers and after the wide use of birth control that prompted the sexual revolution of the 1960s. Generation X (born 1965-1980) is a smaller population than either the Boomers before them (1945-1965) or the Millennials that followed. They have sometimes been called the “sandwich generation” and often they feel squeezed between these two larger and flashier generations.

As Gen X came of age, media depictions of them were very negative: grungy, slackers, cynical, unwashed and challenging of authority. In 1990, Time Magazine described Gen Xers as “cautious” in this [oft-cited article](#):

“They have trouble making decisions. They would rather hike in the Himalayas than climb a corporate ladder. They have few heroes, no anthems, no style to call their own. They crave entertainment, but their attention span is as short as one zap of a TV dial. They hate yuppies, hippies and druggies. They postpone marriage because they dread divorce. They sneer at Range Rovers, Rolexes and red suspenders. What they hold dear are family life, local activism, national parks, penny loafers and mountain bikes.” (Time, 1990)

In 1993, Mike Royko, at the Chicago Tribune did a [piece quoting a Generation X member](#):

"Sometimes I wonder why we haven't all committed mass suicide, because we don't have a hell of a lot to look forward to."

The speaker was a healthy, 23 year old female sitting naked in a hot tub with her boyfriend and eight other naked friends – which is likely irrelevant, but nonetheless intriguing. Royko's article chides the self-centered nature of the young speaker – who, after all, doesn't have much to whine about from Royko's point of view.

Then, seven years after their initial article (June 9, 1997), Time Magazine published an [*'oops' article*](#) (on the cover) and retracted much of what they had initially published about Generation X. It was not until members of Generation X began to write about their own generation (rather than Boomers doing all the writing about this new upstart generation) that the negative slant of articles began to shift.

In late 2001, we wrote our [*original article on Generation X*](#) – in large part to evaluate the merits of the negative press they had gotten over a period of almost ten years. Even though the tide had begun to turn with new writers and new data, the original stereotypes regarding Generation X were sticking.

Now, it's time to update that article with new information resulting from a longitudinal study just released as well as additional data. In order to efficiently present the old with the new, we are going to include generational descriptions from our 2001 article with 2011 updates for ease of comparing and contrasting what we knew then with what we know now. Generation X may have been negative, frustrated (perhaps frustrating for older generations), and often unwashed slackers when they were young – but they've grown up.

Before the negative media blitz on the Millennials/Gen Y, Generation X was the most maligned generation of all time. While their Boomer parents were seen as idealists, hippies, beatniks, flower children, yuppies, and a marketers' dream, Gen Xers were characterized as slackers, grungers, cynical, disdainful, disconnected, and apathetic twenty-something losers. As Gen-X has aged, descriptors have mellowed and marketers acknowledged their initial negative descriptors missed the mark – or the 'X' – and that there was more to this generation than first described.

This paper will briefly review the earlier literature as well as the more recent research and writing on Gen Xers. We will touch on the positive and negative characterizations in the popular and professional literatures, present more balanced narrative descriptions of Gen Xers approach to various social, political, and familial issues, and identify possible strategies attorneys can use to engage these now 30 to 45 year old potential jurors. But first, a brief review of some of the terms in generational writing – the cohort and the generation.

What is a cohort? What is a generation?

A 'cohort' is basically a band of years (usually 10 to 20) used to define the birth years of a generation. Social scientists believe that these 'cohorts' (eventually given generational names) have shared experiences in their formative years that forever shape their subsequent behavior, attitudes and values.

A 'generation' is said to form when a 'defining moment' occurs: a moment so momentous that all members of that generation can tell you where they were when the event took place. These defining moments are so entrenched and significant, many of us can remember with breathtaking clarity, the weather, the scene, even what we were eating or wearing¹. Social scientists tell us that one sign of a 'generation' emerging in our collective perception, is when the generation begins to be given a 'name' (such as the Baby Boomers, or in this case, Generation X). The assignment of a name indicates that the generation has coalesced in the eyes of the public and has taken on a generational identity (see Table 1).

Generation X and the lack of a ‘defining moment’. A consistently acknowledged difference for Generation X, (as compared to earlier generations) is the very lack of a defining event shared by their generation. What Xers recall from childhood are: long gas lines; sitting in their classrooms and watching the Challenger shuttle explode with a schoolteacher on board; Americans being held hostage; AIDS; the Persian Gulf War; the Rodney King trial verdict and the riots which followed; corporate downsizing which affected their parents; and the erosion of our public educational system. In short, the constant for Generation X was change, lack of predictability, and the decline and deterioration of many long-recognized social institutions (not the least of which was the impact of all these societal changes on the American family and the rise in divorce rates). Multiple writers suggest the early difficulty in describing this generation stems from the lack of a defining moment (no Great Depression, no Vietnam)²⁻⁶.

*Table 1:
Generations Summoned for Jury Duty in 2011*

Generation Name(s)	Birth Years	Defining Moment(s)	Well-Known Representatives	Perspective
Silent Generation Came of age during Truman and Eisenhower presidencies	Born 1928-1945 Turned 18 from 1946 to 1963 (now 66 to 83 y/o) 80% of those aged 65+ in the US – - now roughly 34 million in size	Korean Conflict	Martin Luther King, Jr. Bobby Kennedy Sandra Day O'Connor Rosalind Carter	Helpmate Mediators Conservative Recently political activists
Baby Boomers Came of age during LBJ, Nixon, Ford & Carter	Born 1946-1964. Turned 18 from 1964 to 1982 (now 47 to 65 y/o) Roughly 79 million in this generation	Vietnam War	Oprah Winfrey Hillary Clinton Spike Lee George Clooney	In Youth: Idealistic Dreamers Entitled Now: Worry about \$
Generation X Came of age during Reagan, George H.W. Bush & Clinton	Born 1965-1980 Turned 18 from 1983 to 1998 (now 31 to 46 y/o) Roughly 51 million in this generation	Social changes: Divorce Latchkey Increased violence (9/11/2001??)	Julia Roberts Tiger Woods Leonardo Di-Caprio Angelina Jolie	Multicultural Friends replace ‘family’ Work/life balance “Emerging adulthood” introduced due to this generation
Millennials (a.k.a Gen Y) Came of age in G.W. Bush presidency	Born 1981-1993 Turned 18 from 1999 to 2011 (now 18 to 30 y/o) Roughly 75 million in this generation	Candidates: Terrorist attacks on US soil 1st Gulf War Iraq war Columbine shootings	LeBron James Olsen twins Paris Hilton Britney Spears	Civic personality “Can-do attitude” Entitled Disorganized Digital natives

September 11th as a defining moment? The September 11, 2001 terrorist attacks and their anticipated impact on Generation Xers were discussed by a number of writers in the early and middle 2000s. There was a sense that September 11th gave Gen Xers their own “where were you” moment with the possibility of linking generations⁷; that September 11th has “subdued this generation”⁸; and that September 11th was both a tragic and heroic event for Generation X⁹.



Why? Generation X members had the most casualties and were also the major heroes on September 11th. They were the police and firefighters. They were the passengers who crashed the plane rather than having it go on to Washington, DC. They were the workers in the World Trade Center Towers. Gen X members responded to the terrorist attacks with bursts of patriotism and national fervor that surprised even themselves^{10, 11}.

Family as the defining ‘moment’? There seems to be little consensus on whether the terrorist attacks of 2001 were indeed a defining moment or, alternately, a doorway to societally acknowledged adulthood for members of Generation X. A recent Wall Street Journal article posits what may be the true defining moment for Generation Xers:

“For much of my generation – Generation X, born between 1965 and 1980 – there is only one question: “When did your parents get divorced?” Our lives have been framed by the answer. Ask us. We remember everything.” <http://online.wsj.com/article/SB10001424052702303544604576430341393583056.html>

So who is Generation X? Generation X is the name given to the ‘birth dearth’, those born in the 60’s and 70’s; the valley between the Boomers and Generation Y (the “boomlet”)¹². Generation X grew up in the shadow of their Boomer parents and initially defied tidy descriptions and categories. They were typically defined as what they were not, since what they were was harder to discern. The Generation was called ‘X’, as in “fill in the blank” or “solving for the X”¹³. More recent labels proposed include Generation Xtraordinary and Generation Xcellence but these have not caught on. Various demographers attempted to describe Gen X in the late 1990s and early 2000s – some positively, but, for the most part, early descriptors were almost universally negatively slanted (see Table 2). From our 2011 perspective, it is amazing how many of these negative (and positive) descriptors are now applied to the Millennial Generation.

Table 2:
Earlier Depictions of Generation X

Negative descriptions	Positive descriptions
Whiners and complainers ¹⁴	Slackers are atypical; the real Gen Xer multitasks, works, is financially savvy and entrepreneurial ¹⁶
Declining SAT scores ¹⁴	Voracious learners, rapid-fire information consumption as opposed to 'short attention spans' ¹⁵
Materialistic, pessimistic, cynical ¹⁶	Flexible, adaptable, comfortable with technology, independent problem-solvers ¹⁷
Slackers, disloyal, dumb, just plain bad, watch too much TV ¹⁸	Determined individualists, fiercely independent ¹⁹
Most politically disengaged generation ²⁰	Sophisticated media connoisseurs ²¹
Less than 1% could name 3 Supreme Court Justices in 1999 ²²	Frank, filled with tremendous variety, and copes well with change ²³
Lazy ²⁴	Tolerance for diversity ^{4,6}
Losers and whiners in ratty clothes ²⁵	Secure in their abilities, seek rapid advancement and demand quality time with friends and family ²⁶
Backwards baseball caps, grungy clothes, body piercing, apathy and hostility, unknown and inscrutable ²⁷	Self-reliant, entrepreneurial, techno-focused, media-savvy, tolerant, with unique perspective on the importance of family life ²⁸
Cynical, apathetic, disrespectful losers ²⁹	Optimistic, savvy, confident, ambitious, determined, independent, materialistic ²⁴
Insecure and slow to transition to adulthood ³⁰	Uniquely suited to the workplace of the future ¹⁵

Over time, more distinctly descriptive images evolved of Generation X. Some writers called for a moratorium on attempting to describe generations as one homogenous group and opted for narrative descriptions of various outlooks or lifestyle choices that characterized Generation X members. We will take that approach as we describe the Generation X seen up to the turn of the century and the Generation X we now see.

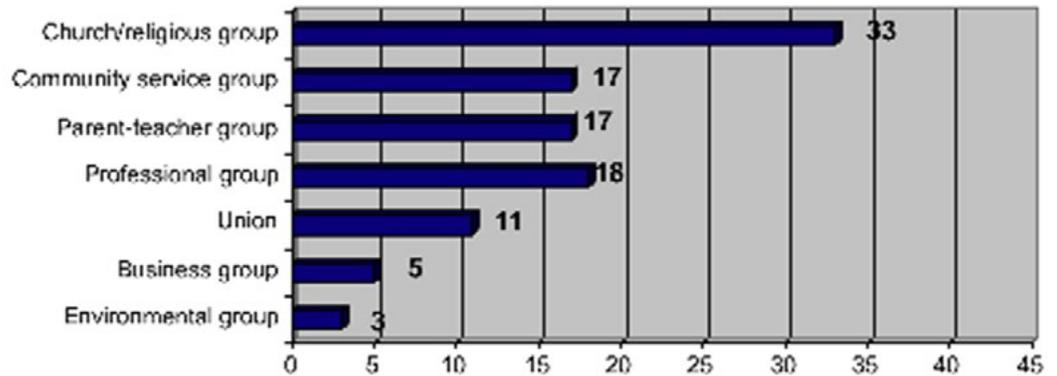
2000: Balancing work and life. The slogan on Eddie Bauer's shopping bags was seen as emblematic of Generation X's approach to balancing work and life: "Never confuse having a career with having a life"²⁴. Having witnessed their Boomer parents struggle to have both careers and families, Generation Xers were planning in advance just how they would arrange their work lives to have room for children³¹. Gen Xers, even in their earlier lives, were generally seen as committed to the idea of work/life balance: they wanted a job and they wanted a life³².

2011: Balancing work and life. And they have done it! Almost all Gen Xers (86%) are employed either part-time or full time <http://www.lsay.org/GenX-1Report.pdf>. They were the most likely of all adults to be employed in 2008. They are also active members of their communities and maintain extensive friendship ties. They participate in organizations supporting their children, in book clubs, professional associations and other groups.

We are grateful to the staff working on the Longitudinal Study of American Youth (LSAY) for two decades. The LSAY project gathered data via a yearly questionnaire study done from 1987 through 2010 – first in schools and then via questionnaires either on-line or through the US Mail. Learn more about this important data collection effort at <http://www.lsay.org/>

2000: Politics/Community involvement. Patriotism and national pride were typically seen as low on Gen Xers lists of values. Rather they were described as valuing things such as: making a difference to people they care about; appreciating diversity; and valuing individual freedom and responsibility^{3, 33}. Gen Xers were thought to be the first generation not drawn to charismatic national figures as political leaders: their focus seemed to be more on the ability of small groups to make a difference for their communities³⁴.

Percent of Generation X (LSAY participants) active in selected organizations and groups



Yet, Gen Xers were political. For this generation, the personal was (and is) political. Having grown up in the shadows of Watergate and while national religious and political figures were repeatedly exposed as having feet of clay, Gen Xers were (and are) wary of self-serving politicians whom Gen Xers see as enslaving themselves to the highest bidder rather than operating from a true internal sense of belief and conviction^{20, 24, 35}. While this may be something of a continuation of the Boomer ‘don’t-trust-anyone-over-30’ ethic, the difference, according to at least one author, seems to be that the 2000 era Xers wouldn’t trust anyone *under* 30, either³.

Finally, there is ample evidence that Gen Xers in the pre-2000 literature cared quite deeply about their communities. Up to 2000, however, there was little appearance that their civic-mindedness extended to the country as a whole. Gen Xers paid attention to things local and small-scale: places wherein they believed their investment of energy, time, and attentions would make a difference^{3, 35, 36}. Gen Xers both thought and acted locally (not globally).

2011: Politics/Community involvement. The picture here is still mixed. Gen Xers remain actively involved in their communities (as demonstrated in the previous section on work/life balance). They



do volunteer work, as well, and the LSAY data indicates they are active outside of groups that would support their immediate family (such as PTAs and sports groups for their kids). The question remains as to their political outlook. Is it local or national or global? We can’t tell for sure.

In the past decade, Gen Xers have grown more critical of government in general and since 2009, they report a sharp drop in financial satisfaction. Gen Xers are more conservative (36%) than liberal (19%) and yet are more tolerant and accepting of diversity than their Boomer predecessors. Gen Xers say that jobs (65%), the deficit (49%), and health care (42%) top their 2012 election concerns. Unlike the Boomers and the Silent Generation, Gen Xers still see life in America as having changed for the better (45%) and not for the worse (31%).

(The 2011 data reported in the above section comes from multiple Pew Research Center reports.) <http://www.pewresearch.com/>

2000: Family. Gen Xers grew up in a time of tremendous social change. Divorce rates sky-rocketed, dual career parents generally meant childcare outside the home rather than in the home, step-parents and step-siblings became normative for many, and Gen Xers tended to see their parents primarily in the car while being transported from one activity to another^{2, 13, 30, 37}. Rather than recreating their own childhood experiences, Gen Xers chose consciously to delay forming their own families. Gen Xers were termed the “boomerang generation” since so many had returned home to live with their parents – over and over again.

In 1990, 53% of 18-24 year olds were still ‘at home’^{3, 38}. Gen Xers married later, bought homes later, and were more interested in a return to a traditional family lifestyle, which they seemed to understand would mean sacrificing some level of career advancement in favor of relationships with family^{28, 37}.

2011: Family. Here again, Gen Xers have not abandoned their youthful ideals. The divorce rate is now the lowest it’s been in 40 years and many credit this change to Generation X. <http://www.cbsnews.com/video/watch/?id=7373173n> Since young Gen Xers struggled with the divorces of their parents, many of them vowed they would not divorce when they were adults. While not all succeeded, Gen Xers have maintained a family focus as they have moved into middle adulthood.

Most Gen X adults (roughly 2/3) are married and 71% in the LSAY sample <http://www.lsay.org/GenX-1Report.pdf> had minor children at home. They have high educational aspirations for their children with 80% expecting a college degree and 39% expecting a graduate or professional degree! To that end, they commit to supporting (and are actively supporting) their children’s education through volunteer activities and hands-on homework assistance whether their child is entering preschool or enrolled in high school.

Gen Xers have grown into actively involved parents who value education and encourage and support their children in attaining educational goals. Contrast this with the ‘home alone’, latchkey kid experience of many Gen Xers and we can see why this is an important area of focus for them.

2000: Learners and Workers. Gen X was the subject of lively debate as they entered the workforce with some authors contending that Gen Xers were ‘slackers’ and unmotivated workers and with others contending just the opposite. By 2000, the understanding of Generation X workers was that they were highly practical and focused. They began to be seen as independent problem-solvers and self-starters who were technologically literate, responsive, focused, lifelong learners, ambitious and fearless.

They seemed to crave stimulation and personal contact, have a preference for concrete and specific information, a strong wish to learn leading edge technology, and to hold a strong desire for a balanced lifestyle^{2, 39}. They were self-reliant and cooperative and more team-minded than the Boomers. They also tended to be informal and direct with some potential weaknesses in analytical abilities and capacity for long-term perspectives⁴⁰⁻⁴². Finally, as one of their generational representatives said, they are smart, savvy people who just want to have some fun while they’re at work⁴³. (Again, from the vantage point of 2011, young Gen Xers sound very much like young Millennials.)

2011: Learners and Workers. <http://www.lsay.org/> Generation X is the best-educated generation in US history. <http://www.epmcom.com/products/item83.cfm> Ten percent have a graduate degree and 43% have earned a 4 year college degree (46% of women and 40% of men).

As mentioned earlier, Gen Xers have the highest employment proportion (86%) of any generation today. Male Gen Xers are more likely to be in the workforce (likely a reflection of the desire for

a more traditional family unit) but 79% of female Gen Xers were also in the workforce and 57% of these women worked 40 hours or more each week. Of those who were employed, 2/3 were satisfied with their current job in 2010.

When surveyed about their work, the primary complaint is a lack of career advancement. Gen Xers are frustrated by their expectation that Boomers are never going to retire. There is no place for them to advance in today's workplaces. A recent article in the Harvard Business Review⁴⁴ describes attitudes Gen Xers have toward Boomers and corporations. It isn't pretty. This is a generation that felt forgotten as children and that feeling is being repeated again in the workplace. There are some who believe Gen Xers (never ones to assume security) will end up leaving corporations and striking out on their own to finally be recognized as adults with much to offer. Supporting this notion is the idea that Gen Xers have a higher need for authenticity and balance in their lives than do the Boomers.⁴⁵ They may simply feel it is time to move on and be more authentic and balanced rather than simmering with resentment.

2000: Religion and Spirituality. Gen Xers parents, the Boomers, tended to avoid going to church. Gen Xers were thus raised with what has been called 'diminishing religious expectations'⁴⁶. Gen Xers developed their own approach to religion and spirituality, much as they adapted other values to their own experiences.

More than 85% of Gen X participants in an August 2000 Gallup poll said religion was important to them personally. In follow-up conversations with Gen Xers about spiritual beliefs to clarify poll results, what emerged was a personal, non-traditional embracing of God, religious beliefs, and spirituality – which may not necessarily translate into church attendance or affiliation. Yet, Gen Xers made an effort to teach their children a strong sense of morals, of right and wrong, as well as working to teach their children how to examine information you are given to critically assess its relevance to your own life^{37, 46, 47}.

2011: Religion and Spirituality. <http://www.religionnewsblog.com/25722/mainline-church-membership-decline-continues-but-more-slowly> There is no real argument that religious affiliation and attendance has been declining. However, Gen Xers appear more likely than their Boomer parents to maintain their religious adherence – if they had it in the first place. <http://www.sciencedaily.com/releases/2010/08/100826083620.htm> The researchers believe this is likely due to the more flexible choices Gen Xers have for religious affiliation than the Boomers had. If they don't like one church, they simply move to another.

2000: Past-times. Gen Xers were less fond of exercise than their Boomer parents. They were described as liking movies, TV, and art but as being less likely to participate in sports and outdoor activities. They were almost twice as likely as older adults to have tried micro-brewed beer in the last year (important because these are local, specialized products). They were expected to have strong influences on changes in children's television – with those programs growing an edgier look, being more inter-

How Xers View Boomers and Corporations⁴⁴

The Boomers will never retire.

The Boomers made it plain our whole lives that no generation could ever compare with theirs.

Boomers had security...and as we (Xers) have aged, become parents, and earned our stripes...we have seen very, very little loyalty.

The upper-level managers refuse to retire--and then hire their children. I honestly feel as though I'm being asked to train the Boomers' replacements.

Boomer executives expect us to act and think like they do...it's only now that we've been molded appropriately that we can be permitted to take up the reins.

Being the servant of a company is an empty and meaningless life.

Xers are the sandwich generation and we're getting totally mashed.

active, working on multiple levels, and stressing themes important to Xer parents such as: tolerance, diversity, self-reliance, an appreciation of irony and so on^{28,30}.

2011: Past-times. <http://www.lsay.org/> Gen Xers continue to enjoy spending time with friends and family. They talk on the phone, visit, text, email and have people over for dinner. While in 2000, Gen Xers saw the movie but didn't read the book, they are now reading and active in book clubs.

And they also go outside! Gen Xers in the LSAY sample describe hiking, water sports, hunting or fishing, bird watching, skiing or snowboarding and mountain climbing. Only 13% did not engage in any of these outdoor activities. When they are not doing physical activity themselves, they enjoy professional and amateur sports as well as frequenting the arts (e.g., the ballet, the symphony, plays, or the opera).

2000: Guarded optimism. Contrary to the early media conclusions that Gen Xers were cynical slackers, more recent findings (circa 2000) were that Gen Xers were actually fairly optimistic. While they may have seen their 'generation' as pessimistic, individually, Gen Xers tended to see their own individual futures as bright and hopeful and better than their parents experiences in terms of quality of life, personal satisfaction, and relationships.

2011: Guarded optimism. As 30 to 45 year olds, they are happy. When asked to 'rate' their happiness in 2009 and 2010 on a scale of 1 to 10 with 10 being high, the average score was 7.5! (For those of you attuned to statistical nuances, the median score was 8.) Only 4% rated their happiness at a score of 3 or lower. Actually, according to the LSAY study, <http://www.lsay.org/> the majority of Generation X are "active, balanced, and happy". This is a long ways from their early depiction in the media and may be due to having actually maintained their youthful ideals of valuing family, being involved and present parents, and having a life and a job rather than only a job (with no life).

A caveat mentioned earlier is in the area of financial satisfaction. Since 2009, Gen Xers have had a significant drop in financial satisfaction, as have the other generations. Gen Xers are concerned they have too little retirement money (much like the Boomers). There is some speculation that since Gen Xers were raised in financially flush times, they have saved less and have little cushion against the economic recession. As their financial satisfaction has dropped, so has their trust in government to resolve problems. Gen Xers are now in favor of smaller government – much like their older Boomer and Silent peers.

The Gen X Juror

This final section outlines strategies for the attorney to capture and hold the attention of Gen X jurors. The prototypical Gen X juror is not the same as the Baby Boomer or Millennial sitting on either side of them. For both the Gen Xer and the Millennial, there is a readiness to question authority which is considered sensible, not radical. The authority of the court, the social status of both lawyers and experts, and the art of persuasion are all less impressive to these generations than to their older peer in the jury box.

Gen Xers are not as impressed with snappy argument or authoritative presence. They want the facts, they want them succinctly, and they don't want a great deal of extraneous detail. While not all members of any generation fit the predominant stereotype, those that fit the mold of Gen X are not going to tolerate an unnecessarily long case presentation, will bore quickly if video edits are not done

crisply, and will disdain argument that feels more like spin than substance. Trial strategy axioms related to the need to earn the jury's trust have never been truer. This is a group that requires justification for their emotional investment in a case, and will resent as pandering efforts to persuade without substance. Woe to those who tell these self-directed jurors what to think. Give them the facts, and they will tell you what to think. Once convinced that they should care about an issue, Gen X jurors can produce strong commitment to that belief and a verdict that reflects it.

Although part of the image of generation X is that they are not empathic, and consequently do not value the "human losses" related to non-economic damages, this does not need to be the case. What is required, though, is communicating the loss in a manner to which they can relate. This is a generation that values friendships, freedom, and expression more than any before. They do not generally connect with suffering, but they may respond better to the notion of lost freedom, or of being trapped and confined in disability or pain.

They may not be able to identify with the concept of "chronic pain" the way those older jurors who have had glimpses of it might, but they readily relate to foreclosed opportunities to experience joy or personal expression. For many, the term "mental anguish" communicates weakness, but being trapped in depression, sameness, or isolation is alarming. Gen Xers relate to the feeling of being 'stuck' professionally (there is no room for advancement for them in corporate America). The sense of also being 'stuck' in one's body or trapped with no hope of escape due to a catastrophic injury could resonate with Gen X jurors.

Like the Millennials after them, this is a visual generation, not the verbal generation of previous epochs. Case presentations need to be graphical, and argument needs to evoke strong imagery. Fact patterns do not need to be presented chronologically, but they do need to have a structure that resembles that of a well-constructed dramatic presentation.

Finally, remember phase of life. These are young adults in the prime of their lives with mortgages, children, family commitments, community commitments and important relationships with friends and neighbors. They have chosen a more traditional family structure and the safety and security of their children is of paramount importance to them. If there are children involved in your case narrative, do not make them an afterthought. Gen Xers want to know the kids are all right. They will not forget if you neglect what is most important to them.

Strategies for Generation X Jurors

Many of the strategies we recommended ten years ago are now common practice. We have included some of the still relevant turn of the millennium strategies and added new ones to incorporate the new data on Gen Xers.

Make the trial visual (colored charts, graphs, photos, cartoons, computer simulations, CD-ROM slide shows, music, narration and videotaped demonstrations).

Gen Xers are visual learners. <http://keenetrial.com/blog/2009/12/16/a-picture-is-worth-a-thousand-words/> These aids will help you capture and keep their attention by accessing multiple sensory organs and allowing interactive learning.^{30, 39, 49, 50} Keep the videos short and, if ap-

appropriate, with some entertainment value. Use real life examples, but try to make them relate to the pop culture of Xers⁴⁹ and other jurors.

Stay concrete and practical. Be “cool” but not “slick”²⁸

Gen Xers may be more captivated by image and style than generations before them, but they are also very savvy. They want an honest, straight-forward approach not embellished by ‘spin’.^{21, 24, 50} Gen Xers are masters at seeing through deceptive communication. If you are trying to deceive them, they will tend to know that and they won’t like it²⁴ and they won’t like your client.

Focus on issues of what is ‘right’ and what is ‘wrong’⁵⁰

What society defines as ‘right’ and ‘wrong’ has little import for many Gen X jurors – use a subjective rationale for defining ‘right’ and ‘wrong’ from your client’s point of view. If a Gen X juror is shown why a crime is ‘wrong’ and why it deserves punishment, s/he may be ‘tough on crime’.⁵⁰

Consider case narratives focusing on relationships, family and friends

Gen Xers valued friendships and connection when they were young and have maintained that focus into middle age. When there are legitimate themes of relationships and connection, use them. But don’t stretch the evidence to make them fit. Gen Xers cynicism and wariness will kick in and they will see you as attempting to manipulate.

Understand the impact of growing up digital

Gen Xers were the early adopters of digital tools, and many (if not most) have been emailing and text editing since they were in school. They understand it. And they understand the limits of the tools. ‘Smoking gun’ emails and text messages from one young manager to another are less likely to gain traction with these people, because they understand the sorts of impulsive wisecracks and unfounded theories they themselves (along with their peers) have shared from time to time.

Build Connections: Make witnesses and parties ‘like’ the jurors

If you don’t have themes that resonate with connection and friendship, you can still make your client and any important witnesses ‘like’ the jurors. Whether jurors are Gen Xers or not, we all respond to core values and beliefs. The connection may simply be stronger with Gen Xers. Emphasize your clients connections, relationships, community involvement, volunteer work and so on. The goal is to humanize your client and help jurors see how s/he is ‘like’ them. We’ve written about how to do this on our blog. <http://keenetrial.com/blog/category/witness-preparation/>

Review jury instructions and questions, and explain what they mean and how to complete them accurately

This is important for Gen Xers but also for any other generation. The courtroom is a strange and often confusing environment. Explaining the jury charge and how to complete them accurately gives jurors focus and clarity on the questions before them. While you're at it, you may also want to teach them how to deliberate. <http://keenetrial.com/blog/2010/04/26/educating-jurors-how-not-to-start-deliberations/> The more they understand, the more predictable the process of deliberations.

Consider how to use 'balance'

Balance is something Gen Xers have worked for since they were young adults. They watched their Boomer parents having jobs but no life and vowed they would somehow have both – and make room for children too by planning for them in their lives. There are times when one's personal life can negatively affect the professional life. If your client has done 'bad things' but part of the reason was a desire for work/life balance – you might propose that while still taking responsibility for the bad acts. The goal is to make the bad acts due to situations rather than bad character.

Demonstrate the 'meaning' in your case, and how it personally effects the GenX juror^{3,50}

Focus on the outcome, what happens is very important to Gen Xers.³⁹ Gen Xers search for meaning and for being able to make a difference on an individual level. They want their participation to have practical benefits or it loses purpose.³ Gen Xers will invest if they are personally effected by a problem. An issue that 'benefits me' or 'relates to me' is often a precursor to action.³ Remember, Gen Xers act locally. You want them to see their actions will make a difference.

Be aware of the "mean world syndrome" http://en.wikipedia.org/wiki/Mean_world_syndrome

Use this phenomenon to bolster your case (i.e., by reinforcing that the world is unsafe and juror decisions can 'right that wrong'). A variety of studies show that people who watch relatively large amounts of television are more likely than others to see the world as dangerous, violent and crime-ridden¹⁶. Television, according to the 'mean world syndrome' theory, distorts the way people view the condition of the society around them. Gen Xers have probably viewed more television than most of us, and are likely in possession of 'mean world syndrome' beliefs.

Move around and vary your position and speech style

Gen Xers are used to the changes inherent in multimedia presentations. Even standing and talking for 10 minutes is a very long time. Break up your presentation with visual aids and other activities. If the court permits, unshackle yourself from the podium. If the court

doesn't permit that, move from one side of the podium to the other, use postural changes and gestures, and avoid appearing wooden. Find ways to let jurors interact with the information.⁵¹

Highlight digitized material or short bits of information that outline key points or concepts

Gen Xers are multimedia connoisseurs who like scanning and surfing through information. Highlight what is important for them³⁹ to remember. Keep the information highlighted relevant to your case narrative and be sure it is consistent with the facts you are presenting. Gen Xers will notice inconsistencies and be suspicious.

It is very common in mock trials for jurors to focus on non-highlighted materials around the place we want them looking. They discuss what they read in the deliberation room! And often, if they believe the information that was not highlighted casts a different light on what was highlighted -- you lose credibility. Be careful. Be honest. Or, to borrow a phrase, "don't be evil". http://www.siliconvalleywatcher.com/mt/archives/2009/04/google_quietly.php

Summary

Gen Xers have been affected by the pessimism of the 1970's, the cynicism of the 1980's and the skepticism of the 1990's¹². They responded to the negativity in part by going local – focusing on family, friends and community. Attorneys should keep in mind the reality that phase of life (e.g., single, child-rearing, saving for retirement) is often more important than the age (and generational assignment) of the juror in the identification of attitudes and expectations¹⁹. Generational differences are no different than racial or gender differences, and should be treated the same, as a diversity issue¹⁵ which, while informative, is not truly predictive of attitudes, values and behavior.

Gen Xers are 'grown ups', in the best sense of the expression. They are sensitive to being treated disrespectfully and discourteously. They want to be valued. They want to be trusted with the truth. And they want us to make room for them.

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Things To Know About Being Interviewed on TV

BY ELAINE LEWIS

Elaine Lewis is President of Courtroom Communications LLC and its Public Speaking division at speechimpact.com. She is a member of the American Society of Trial Consultants, American Federation of TV and Radio Artists, Screen Actors Guild, and Actors Equity Association.

Recently, three very high-level professionals, a lawyer, a trial consultant, and a psychologist, expressed frustration about TV interviews they had given. One was annoyed that he hadn't been given questions ahead of time. Another complained she wasn't given enough time to make her points. The third couldn't understand why he wasn't included in the editing process.

These statements indicate that there are a number of misconceptions about the entire TV interview process. What follows is a look at the reality of being interviewed for TV, from what to do when first invited to be interviewed, through what happens at the studio, to what can be expected after the interview.

Getting Ready for the Interview

Preparation. Once the time and place of your TV interview has been scheduled, the most important thing you can do to prepare is to start planning some responses you might give to possible questions. Do not expect to be given questions ahead of time. That seldom happens, but you will certainly be informed about the topic on which you will be commenting. Although good interviewees may look as if everything they say has popped out of their mouths spontaneously, it is rarely true. Great quotable phrases, clear statements of a position, supportive details or stories, are examples of things that need to be thought out before the interview. This does not mean you should memorize material. Memorizing results in a very stiff performance. It means think about your topic. Have in mind main points you would like to make, some statistics you could offer, or other information you think might be of interest.

Not everything you prepare will be something you can use in answer to the questions asked of you, but some of what you prepare surely will be. Trusting inspiration, as opposed to preparation, usually results in a less effective, less informative, and possibly even poor interview. One short, pertinent, well thought out and quotable comment can turn an ordinary interview into an outstanding one.

Planning your wardrobe. Business attire is generally a safe choice in most TV interview situations. However, if you are someone who does not dress for business, consider what you would wear if

you were attending a graduation, or going to court, or attending an event somewhat more formal than going to your place of work. It is not a good idea, nor necessary, for you to run out and buy something new. If you wear something you've worn before you will have no wardrobe surprises. If you don't own business attire, wear what you have. What you choose should be something you like, that fits well, and reflects who you really are.

Within the parameters of type of dress, are considerations of color and pattern. You want to look your best, so you need to be aware that there are certain elements the camera does not handle as well as others. Stripes, patterns, and checks (unless small and very subtle) can distort and be very distracting. Some bright reds can be a problem because the edges of the red tend to bleed and fuzz. High contrasts, such as wearing a very dark jacket with a very white shirt or blouse can cause unflattering shadows on your face. The camera does like bright colors, particularly on women. And soft solid colors are always good on both men and women.

Regarding jewelry, if it wiggles, clinks, or is ultra shiny, don't wear it. The focus should be on your message – not what you are wearing.

Eye glasses can be a problem since they are apt to reflect and prevent the audience from seeing your eyes. If you don't really need them don't wear them. However, don't give yourself an unnecessary problem. If you can't see without, by all means put them on.

When you are comfortable with what you are wearing you can forget about wardrobe and concentrate on the reason for your TV appearance.

Preliminaries on Arrival at the Interview Site

Makeup and Hair. Many television stations have people available to do your makeup and hair. Shortly after you arrive, the makeup room will likely be the first place you are sent. Makeup for men is a base that is put on your face to hide any beard shadow and to even out your skin tone. Getting your hair done generally means wispy ends will be sprayed down. Particularly with HDTV, every blemish or stray hair shows. The camera lens is not forgiving.

For women, having your makeup and hair done is a little more involved. Some women, who are regularly interviewed at the same place and know the routine, arrive bare faced and with hair undone, leaving the complete job for the makeup and hair staff. However, for most interviewees, it is a better idea to appear at the studio having done your hair and makeup as usual. This will let the makeup and hair people know how you like to look. Then they will make improvements. You will be seated in a chair in front of a mirror. On the shelf in front of you will be an arsenal of grooming products, including a box overflowing with all kinds of makeup for face, lips, eyes, and cheeks, a curling iron, combs and brushes, and hair spray. The person responsible for making you camera-ready will go to work, right over what you have done. Generally it comes out great.

If there is no makeup department at the location of your interview, you are of course on your own. With women, who arrive already combed and made up, at least you will look like you always look. For men, take your choice. Get a small makeup base compact to take with you, or just let the beard show. If you are concerned, it doesn't hurt to ask ahead of time about makeup.

The Briefing. A production assistant will tell you things such as where you are to sit, when you are slated to appear in the program, whether or not there will be commercial breaks during your interview, etc. Those who brief interviewees often forget to mention everything you need to know, so ask if you have questions. For example, if you haven't been told how much time has been allowed for the in-

interview, you should find out. If you learn it is to be very short, which is usually the case, you will know to make your strong points almost immediately to be sure you get them in. Two or three minutes can go by very quickly. If you are going to be interviewed over a long period of time, such as throughout an entire program, you will have time and opportunity to say more of the things you planned.

In the briefing, you should not expect to learn much about the questions. Often this is because they haven't been written. Many interviewers prefer to work from information they have been given on your topic and base their questions on your responses. Not knowing questions before hand is really nothing to worry about. You are an expert on your subject or you would not have been asked on the program. With no advance knowledge of the questions, your responses will be fresher and more interesting.

If you are lucky, you may be introduced to the interviewer before being interviewed, but not always. Sometimes you will not meet the interviewer until it's time for your part of the program. If the interview is remote, you may never meet the interviewer in person.

The Microphone. When it is time for the interview to begin, a microphone will be attached to your clothes with a clip in the area of your upper chest. The microphone, a small, thimble-sized device, is very sensitive, so coughing, throat clearing, or rubbing anything across it are all amplified. If you need to cough or clear your throat, turn your head away. (In some situations it is possible an overhead boom mike may be used, but not as likely.)

If you are to make an entrance, the microphone clipped to you will be cordless with a little battery pack. If you will be introduced while seated, it is more common that the mike will have a wire connected to it. You won't be able to walk anywhere once you are hooked up. You may be asked to say a few words so the sound engineer can be sure the microphone is working and that the levels for you are set correctly. You don't have to count, "testing, one, two, three." Just speak in a normal tone. Say your name or why you are there or anything that lets us hear how you naturally speak.

If the person who is to interview you is in a remote location you will also be given an ear piece attached to a wire so you can hear the questions.

The Actual Interview

Your Introduction. The interview will begin with an introduction of you. If the interview begins with you in your chair, you will probably be instructed to smile into the camera when your name is given. If nothing is said about where to look, look to the interviewer with a pleasant expression and wait for the first question.

If you and the interviewer are in the same room, you can ignore the camera and interact only with the interviewer. If the interviewer is in a remote location you will have to look directly into the camera because that is the only logical place to look to appear to be facing your interviewer.

The TV Cameras. In well-equipped TV studios, the cameras do not have an operator behind them. They are remote and move about like robots. If there is more than one camera, you will know which one is taking your picture because you will see its tiny red light turn on.

When you look into the camera you may actually be looking at a video screen in front of the camera lens. What you see on the screen can vary depending on what the control room puts up for you.

Sometimes you see yourself, sometimes the interviewer, and sometimes the screen is black. It can be a little disconcerting to be looking at something that distracts you. By knowing that there are options, if what you are looking at is bothering you and you get a chance in a break, you could ask to have it changed or turned off.

Look Your Best When Sitting and Speaking. Be aware of your posture. Do not slouch or slump or shift around too much in your chair. Since most shots of you will be head and shoulders, you run the risk of getting out of the camera's frame if you move very far, either up and down or sideways, leaving viewers looking at half a head.

Speak in a conversational tone. No need to project. The microphone will do the work for you.

Answering questions. The job of the interviewer is to make you the center of focus by asking short questions that will trigger somewhat longer responses. A good target length is around 30 seconds. In a 2 or 3 minute interview, if your comments are much longer than that, you will only get to speak about 3 times. If you are going to do a long interview, your answers can be a little more than 30 seconds, but keep in mind protracted comments can get tedious and turn off viewers. People do not tune in to TV interviews to hear speeches. The best answers are as short as possible while still being clear. There is usually not enough time for you to give a lot of background before making your point.

If your answer length is appropriate, along with being interesting and informative, there is a good chance you will be invited back again when other issues come up in your area of expertise.

Sound Bites. TV loves a "sound bite." It is short, quotable, catchy and/or provocative. Interviews are recorded, and sometimes sections from them are played at other times on other programs. Remember the line, "If the glove don't fit you must acquit."? It was replayed everywhere.

After the Interview

If the interview is done live, the entire interview, including any goof, will have been broadcast. After the interview there is a possibility some of it will be edited for future use. Do not expect to have any role in the editing process. The station will decide what is most newsworthy and this may not necessarily be what you would like the audience to hear. Once the interview is over, you have no part of what happens to it next.

Before leaving, check to find out if you will be given a DVD copy or your section of the program. Not all stations do this, but some do as thanks for your participation.

False ideas about being interviewed on TV can result in unpleasant surprises. Although interviews can vary somewhat in details, the conventions presented here should provide enough insight into what one can typically expect so that your first, or next, TV interview will be a rewarding, successful, and positive experience.

Book Review: "Evaluation for Personal Injury Claims" [by Andrew Kane and Joel Devoskin]

BY WENDY SAXON

Wendy Saxon, PhD, CT, CTS is a trial consultant based in Los Angeles County. She has been picking juries since 1977.

The authors, both psychologists and diplomates, could have entitled this book "Sizing up the Psychological Experts on Both Sides". Their information is elegantly and efficiently presented and arms those of us in the trenches with everything we need to know by providing empirically based descriptions of best practices in the field of forensic psychology.

Far too often, lawyers and trial consultants are at a loss regarding how to shop for a truly competent forensic psychologist and how to effectively counter the methods, report writing, and testimony of the psychological expert testifying for the opposing side. Add to these troublesome tasks the fact that ultimately a jury of twelve with no education, training, and experience in the complex field of forensic psychology has to listen to "dueling experts" and you have the potential for disaster.

Jurors receive such little direction from the Court's Instructions that it is no wonder that they may end up relying on nothing more than preconceived notions based on personal dramas and expectations. When this happens, awards for righteous damages can be rejected and plaintiffs with frivolous claims can receive awards of hearty proportions.

Contrary to popular belief, we who put heart and soul into working these civil cases want the truth to be known and honored. Routinely we examine the reports of psychologists and psychiatrists sensing and/or knowing that best practices were not utilized. And so we turn to and trust our experts to guide us, educate us, perform properly for us. Indeed, the reputation of forensic psychology and the field of psychology in general are at stake as evaluations of personal injury claims often become public and live on in trial transcripts.

Evaluation for Personal Injury Claims by Andrew Kane and Joel Devoskin gives us the resources, thoroughly yet straightforwardly, to evaluate the evaluators. This 262 page, soft cover volume is packed with wisdom, common sense, and guidance. It reads so well that the committed lawyer and/or trial consultant can virtually memorize its contents, so that analysis of methods, reports, and testimony can be done quickly, precisely, reliably, and convincingly. If you grasp this book, you will never be caught speechless in depositions, round tables, mediations, and most importantly, during direct and cross-examination.

Clarifying the difference between an expert witness and a consulting expert nicely, the authors then caution regarding potential sources of bias and error. Much too often, we fail to pause to consider the possibilities: anchoring bias, attribution bias, confirmation bias, conformity effects, halo effect, observer effects, overconfidence bias. Lawyers and trial consultants alike need to know about these potential pitfalls. The mentally healthy and insightful, self-examining professional knows how to rise above such biases and hence become attack-proof in formulating opinions and ruling in, as well as out, both diagnoses and likely causes of psychological disorder and/or distress. These authors have detailed potential sources of bias rather than just making the usual comments about objectivity being a must.

The main portion of the book is devoted to application, including the absolute essentials on data collection, interpretation, report writing, and the giving of testimony. Clearly, the authors are not at all interested in deviating from a neutral stance and endeavor to delineate best practices for psychological experts called upon by both the plaintiff and the defense.

We find extensive coverage of the types of records which must be reviewed, the reliability and validity of acceptable psychometric instruments and their strengths and weaknesses, and the gathering of collateral information from those persons who know the person being evaluated and can provide third-party history and observations.

Then, we find clarification on how to frame a referral question, the necessity of a proper literature review, cautions on misinterpretations or going beyond the data (a dilemma as all clinical opinion by definition requires going out on a limb to some extent), and finalizing conclusions that factor in all discoverable alternative interpretations. Incremental validity is discussed and a caveat as to computer-based test interpretations, the bane of many of us when utilized inappropriately by psychiatrists with no appreciation of the limitations of such data.

Malingering is a “tread lightly” issue that hovers over every evaluation of psychological distress, including chronic pain complaints. All ethical and seasoned professionals know that it must be ruled out in the forensic context. The authors describe how to do this in a manner that insults no one and short changes no one. It simply must be done, like an unpleasant part of a routine medical examination. Ample and gratefully received research is intertwined with clinical practice suggestions. Since we all want to feel “clean” at the end of the day, preserving the dignity of the plaintiff, the respectful handling of this uncomfortable topic is enough on its own to recommend this book.

Proper report writing is also addressed, with emphasis on a logical progression from history and presenting complaint, to methods and results of assessment, to clinical opinions, to summary and conclusions. The ten most frequent problems with reports are outlined. Satisfying the referral question is addressed in such a way that testimony should follow clearly and concisely. Transparency is emphasized, which is to say that each opinion must be based in empirical evidence to the extent possible

This is a book you will want to refer to frequently and recommend to every personal injury attorney and to every psychological expert you may engage. Any psychological expert that relies on this book as a roadmap for excellence in the forensic field will be assured of success in the courtroom. If you have just one book on the subject in your library, this is the one to have.

The Jury Expert Favorite Thing for November, 2011

November 2011's Favorite Thing is offered by The Jury Expert's Editor Rita Handrich of [Keene Trial Consulting](#).

We know how dramatically visual evidence can propel jurors understanding of complex information forward. Sometimes, just looking at graphic interpretations and summaries of massive amounts of information can help us think more flexibly about how to present our own data/evidence.

To that end, we give you '[Chart Porn](#)'. And no. It isn't that kind of site. It is, instead, our Favorite Thing for November, 2011.



CHART PORN

data visualizations you just gotta love

From what you should have brought to Thanksgiving dinner,
<http://chartporn.org/2011/11/17/what-should-you-bring-to-thanksgiving-flowchart/>

to an annual visualization of the US budget
<http://chartporn.org/2011/11/08/death-and-taxes-2012/>

to "proof that Monday's suck"
<http://chartporn.org/2011/09/30/proof-that-mondays-suck/>

Chart Porn has a wide variety of informative, educational and silly data visualizations.

What's not to love?

Image <http://chartporn.org/>

Using Online Surveys to Conduct Jury Research

BY BRYAN EDELMAN

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

Over the span of the last decade technological advances have created new ways to test case strategies and develop jury profiles. One development, which has been hotly debated, surrounds the increasing use of online surveys as an alternative to traditional modes of jury research. In 2002, nearly \$500 million was spent on online surveys. By 2009, that number exploded to \$2 billion (AAPOR). The shift away from traditional telephone methodologies can be attributed, in part, to the low cost and high degree of flexibility that online survey research offers.

The Benefits of Conducting Online Research

In addition to its low relative cost compared to telephone options, online survey platforms offer a high degree of flexibility and control over the presentation of information. For example, response bias can easily be addressed by rotating response options across participants, complex skip patterns can be built into the survey and verdict form, questions can be presented in a manner that precludes participants from reading ahead and can be tagged as “mandatory” to prevent missing data. Trial stories can be designed to be highly engaging and can incorporate photographs, diagrams, and videos. Furthermore, unlike telephone surveys participants can complete online research at a time that is most convenient to them. The convenience factor may help to improve response rates.

For decades, attorneys and trial consultants have employed telephone surveys as a means for devising jury profiles and refining strategies for jury selection. This approach can be traced all the way back to the 1972 trial of the Harrisburg Seven when social scientists used a telephone survey to identify important attitudes and experiences that proved invaluable during *voir dire*.

While telephone surveys have proved useful over the years, the method has several limitations. The number of background questions that can be asked over the telephone is limited and case descriptions must be kept brief. In contrast, online survey platforms afford the opportunity to collect a significant amount of case-relevant attitudinal, experiential, and demographic data; present an engag-

ing and detailed trial story; and provide key jury instructions and verdict questions with built in skip patterns. Furthermore, due to the convenience factor, online surveys can be considerably longer than the telephone option. Respondents often report positive experiences with well-crafted online surveys, which can take more than 20 minutes to complete: *“I was actually very impressed with the quality of this type of survey!”*

The Limitations of Online Research

Internet-based research has the potential to be a valuable tool for developing jury profiles and identifying complex relationships between verdict preferences, attitudes, and life experiences. However, there are also serious concerns about the validity of online survey research and the generalizability of results to the jury pool as a whole. Most telephone surveys employ a simple random sampling method, meaning that everyone in the population of interest (e.g., the jury pool) has an equal and known probability of being selected. As a result, inferences can be made beyond the sample. In contrast, most online surveys use a non-probability sampling technique based on “opt-in” panels. These panels are comprised of people who choose to participate in online survey research. When the individuals who join such panels are different in important ways from those who do not, samples are not representative of the jury pool.

Under the Hood: How Are Opt-In Panels Built?

The increase in online survey research has led to a growing demand for participants willing to take surveys. Companies are constantly working to build and maintain large opt-in panels to meet clients’ survey needs. When a panel is too small to meet demand, or is comprised of a large number of inactive members (i.e., those who do not respond to requests to complete a survey) vendors are forced to rely on a cohort of experts – known in the industry as survey crack heads – to complete survey projects. This can lead to biased results. As such, online survey vendors compete with one another to find participants willing to join their panels and take surveys.

Several different approaches are employed to build opt-in panels. Visitors can go directly to a survey provider’s website and join a panel. Online survey providers also advertise on websites with high traffic volume (e.g., news, special interests, and social media sites) and e-currency sites (e.g., PrizeRebel.com). Many of the larger vendors competitively bid on key words on search engines (e.g., Google) and place sponsored text ads in hopes of recruiting participants.

Borrowing from the online advertising model, vendors also develop networks of “publishers.” Depending on their agreements, publishers are paid a fee whenever a visitor joins a panel, clicks on an ad, or completes a survey. Agencies and affiliate networks offer an additional source of potential recruits. Agencies are hired to identify and place ads on websites expected to maximize returns.



Several vendors appear to recruit heavily from e-currency and online gaming websites. Farmville serves as a prime example. Players who are willing to take surveys are able to accrue e-currency, which can be used to purchase items on the Farmville game platform.

This approach has several drawbacks. When hardcore gamers discover easy opportunities to earn e-currency, they may devise ways to take advantage of the offer, which can lead to bad data. In the age of blogging, this concern can cause serious problems:



“Yo guys listen up!!! for those who havent heard of it yet, you got an option to take a survey and then receive free G coins. Gunz are doing it because they get paid for that. Take survey BUT when your about to start the survey ALWAYS MARK YES IN THE FIRST QUESTIONS cuz if not , you will not be able to qualify for the survey. You can also make some new accounts so that u can earn more and more coins and then GIFT it to your self from the other account lol...”

Websites have also cropped up that attempt to monetize panel recruitment. Many of these websites advertise that visitors can earn hundreds of dollars by taking online surveys: “I have paid for all of my Christmas presents this year from the money I’ve made taking surveys. Thank you SurveyClub!”



Survey Club claims to have over 15 million members and encourages new recruits to be honest about their lifestyle so that “you can qualify for as many surveys as possible...”

Survey respondents from sites such as Survey Club who sign up for multiple panels and take several surveys a week are not likely to be representative of the general public. This small faction of the online community actively searches for opportunities to profit by taking surveys. These individuals even post reviews of the competing online panel providers on the basis of incentives offered, timeliness for payment, and survey opportunities available. As one reviewer commented: “The rewards/incentive offered for completing a survey is fairly good compared to other survey sites...I would love to have the opportunity to participate in a survey at least once a week...”

Shopping for Survey Panel Providers

When assessing competing online survey vendors, it is important to get a good understanding of how panel members are recruited and compensated for completing surveys. Panels with purported millions of members should be evaluated with caution. A large percentage of the panel may be inactive, meaning only a small percentage of the panel actually responds to survey invitations. Vendors also tend to emphasize the many sources their panels are drawn from. This too can be misleading. While a vendor can recruit from a large number of partners and websites, a significant percentage of

the panel may be built from just one or two sources. Panels built largely from social media or online gaming websites should be viewed with caution.

The European Society for Opinion and Market Research (ESOMAR) has published the *26 Questions to Help Research Buyers of Online Samples*. This is a valuable resource, which provides guidelines for assessing the quality of opt-in panels.

How to Maximize the Value of Online Survey Research

Attorneys and trial consultants can take advantage of the flexibility offered by online survey platforms and limit threats to validity by using a simple random sampling technique to recruit participants. This approach has been successful in the past. For example, Trial Innovations recruited a random sample of jury eligible community members over the telephone and asked them to take a survey online for compensation. Participants were provided with a link that directed them to a survey, which included a juror eligibility section and lengthy “voir dire” component. Participants then read a detailed trial story, reviewed jury instructions, and rendered their verdicts. This approach helped to ensure that our sample was representative of the jury pool.

How Should Jury Consultants and Attorneys use Online Surveys?

Organizations such as the American Association for Public Opinion Research (AAPOR) and ESOMAR have made an effort to assess the strengths and weaknesses of the online survey method. AAPOR’s *Report on Online Research* concludes that results derived from non-probability samples (e.g., opt-in panels) should not be used to estimate population values. However, the results can be used to improve understanding of how “personal characteristics interact with other survey variables such as attitudes, behaviors, and intentions.”

These relationships can have practical value to jury consultants and attorneys. Online survey research can provide an affordable means for identifying important relationships between attitudes, experiences, and verdict preferences. These relationships can be used to develop jury profiles, jury questionnaires and oral *voir dire* scripts.

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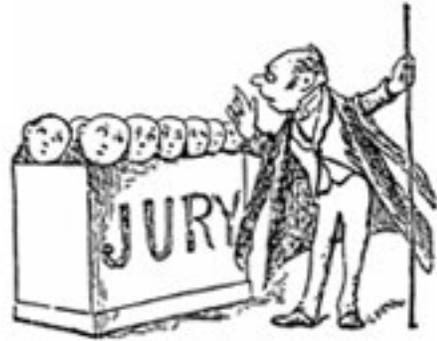
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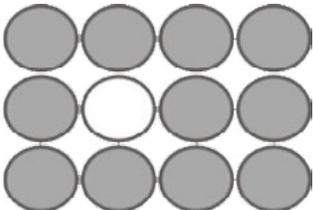
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A Note From the Editor

Ahhhh...November! Crisp cool air and fall rains – and, in some places, snow. This issue of The Jury Expert comes on the heels of Thanksgiving and perhaps finds you with some leftovers still to conquer. Here at The Jury Expert, we don't do leftovers. Everything herein is freshly prepared and original just for us. And you as well!

This issue we have a feast for the mind. Whether it is critically evaluating a presentation perspective (consultants assessing Tufte) or considerations of whether you should present your client as a hero or a victim in the courtroom (new research with consultant reactions) or even preparing for a TV interview – we have a cornucopia of choices!

If that isn't enough, how about an update on Generation X (yes, X and not Y)? Or maybe you prefer a look at online research? Or a book review on evaluating personal injury claims? Or SJQ questions that more tactfully ask "Are You Now or Have You Ever Been Crazy"? And for dessert, we present our Favorite Thing (right now, anyway).

As we send this issue to you, our readers, we want to say 'Thanks'! We continue to exist thanks to you reading us and forwarding our URL <http://thejuryexpert.com/> to your friends and colleagues. We are grateful. And we'd like to ask a favor. Do it again. Tell people you know about us. In return, we will continue to bring you the latest research and our best recommendations for practice, presentation, and reading. Let me know if there is a topic you'd like us to cover.

*Rita R. Handrich, Ph.D.
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