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Shock and Awe

The Art of Using Focus Groups to Profile Highly Emotional Cases

BY CAREY CRANTFORD

[Carey Crantford](#) was headed for a career in academia when a fortunate graduate assistantship landed him in the role of Director of Research for a television documentary project produced by the University of South Carolina on the social transformation of the South after WWII. Through the project he became enamored with the art of interviewing and took a career turn into the field of market research. [Crantford Research](#) produces research products for a variety of clients including litigators. The firm has provided trial related services since 1994 and has offices in Columbia, South Carolina and Montgomery, Alabama.

Emotion is an important component of every trial project. No matter what the topic or nature of the conflict, emotion plays a significant role in determining how jurors will receive information and formulate verdicts. In prepping for a trial, the trial team spends a great deal of time locating the emotional buttons of a case and testing how these buttons will influence juror decision making. An equal amount of time is also spent trying to craft trial messages and stories with the appropriate amount of emotional content so we are communicating with themes that will impact and move people.

The emotional nature of the topics or issues involved in a certain class of case are so white-hot that sorting out how a juror's reactions will influence deliberations can be challenging. In 2011 there were a number of court dramas and emerging legal cases that contained rarefied emotional content. The Casey Anthony and Dr. Conrad Murray trials along with the deluge of allegations emerging from



Penn State (the Jerry Sandusky case) are examples of extreme emotional content cases that, by their very nature, raise eyebrows, excite the media and force people to collectively wonder "what is this world coming to"? A mother on trial for killing her child, a doctor accused of compromising a patient's health for profit and allegations that trusted community figures abused their positions of authority causing and allowing the sexual abuse of children. These stories push the limits of civility and everything we have been taught about right and wrong.

Over the years our trial consulting work has connected with a variety of extreme emotional content cases. These cases have brought us into uncomfortable contact with topics, issues and events that strain belief and shock the senses. Gruesome murders involving the elderly and children, accusations of child abuse leveled at neighbors, grandfathers, professionals and members of the clergy, possession of child pornography, torture, kidnapping and rape are a sample of the issues connected to cases with which we have worked. These cases are uncomfortable for the obvious reasons and as we have learned, require adopting some different methods for producing insights that can be crafted into a trial strategy.

Creating an atmosphere for rational understanding involving a situation that defies any rational explanation or understanding is a challenge in highly emotional cases. And as we found through practice, different tactics are needed when trying to use focus group activity as a barometer for testing potential trial strategies for cases dealing with extreme topics.

The core of our work is producing focus groups that test and probe potential jurors for narrative themes and imagery that incite emotion. We do the majority of our own recruiting, handle the moderation and work with the client on selecting the right qualitative research design. The first case we ever worked with involving extreme emotional topics dealt with allegations of possessing child pornography. The charge itself conjures all types of negative imagery of both the nature of the material and the character of the accused. Our client was obviously concerned about whether or not people could get beyond the topic and sort through the rational components of the story. Our focus group strategy was simple - introduce the charge, explain the nature of the evidence, probe for reactions to the dynamics of the charge, evidence and background of the accused and move the discussion to a consideration of the mitigating circumstances. The recruit was structured according to a general jury profile for the area. Possible participants were screened for any background experiences that would have been problematic during jury selection. As the first session started, it became immediately apparent that a different protocol would have to be developed with this type of case. The problems were two-fold and related to the extraordinary emotions unleashed by a case of this nature.

Rethinking the Recruiting Process

There was no discussion with the potential participants on the possession case of what the group discussion topic was as the recruit was executed. As usual, care was taken to screen for professional connections and associations that would have created some conflicts, but no specific instructions were given the participants about the topic of the case. With child pornography as a main component of the discussion, we worried that introducing the topic during the recruit could deter participation or harden the negative bias about the content that was going to be a part of the overall discussion. The topic was brought up as we finished the introductions and warm-up exercises with the first group. At that point, the facts of the case were still an abstract concept with the group. No one seemed concerned about the issues related to the case until explanations of the evidence were read. The descriptions clearly shocked and bothered many participants. People were shaking their heads and groaning as descriptions of the type of material connected to the case were explained.

As we moved deeper into the discussion of the evidence some people became visibly upset. One person left the room and another began crying when questions came up about how this type of material was allowed to exist. Clearly the specifics of the case were overwhelming to the group. They couldn't move past their emotional concern for the exploited children and their understandable revulsion at the notion that there were people out there profiting from and entertaining themselves with such material. As a result they were having noticeable difficulty formulating questions or observations about the issues involved with the case. They simply wanted to leave the room.

Coming face to face with such an unsavory topic without any preparation clearly demonstrated

how the emotions tapped by these types of cases can and do overwhelm any rational thought process. Participants had no background for considering the key topics of the case. Their immediate reactions were entirely focused on a concern about the victims. Little attention was paid to the key issue in the case [which was a definition of possession]. The disgusting material made the accused guilty because there could never be any other explanation for having such material around. In this case, however, there were other explanations but they were soundly discounted because the emotional focus in the room was about the need to protect children from predators.

Since this case we have done a variety of focus groups on equally difficult issues. In each one there has been an internal debate within the company about how to corral the emotional content. Reactions to the emotional content are salient to the research at hand. However, if they can't be managed, they overwhelm the group and limit what needs to be learned from the project. A good first step has been for us to prepare participants better before the session with a multi-part screening process that hints at the disturbing nature of the material to be discussed. This helps prepare the participant for the nature of the information and allows us to get a sense of how they will react to the discussion.

In general participants are unsure about how to discuss these types of topics. Moderators face this problem in every case. However, in these extreme situations the participants' full range of thought is very truncated because of the difficulty of confronting very uncomfortable situations. To be effective, the focus group participants must be empowered with a sense of permission and responsibility before they arrive for the discussion. Qualifying a recruit and then coming back in two additional pre-focus group interviews to generally explain the nature of the case seems to help pave the way for more settled discussion. The participant comes more prepared to deal with the topic. Even if the recruit spends time thinking about the topics before the group session, they are never given sufficient detail to allow them to locate any real information about the case under consideration.

In the pre-screening you are also able to disqualify the people who are truly unhinged by these difficult topics. We use a questionnaire in the second screening stage to let people answer some case related questions so we can locate people who might be very troubled by the topic. Finally, I speak with the qualified recruit in a final follow up to begin the process of building a relationship and to give everyone a chance to ask questions about the focus group process. Ultimately this effort provides for a better mix of focus group participants with which to work. We understand [without doing any research] where the emotions of the case are likely to lead people. But what we need for the client is a test of how any shred of mitigation creates questions about who is responsible. Overly emotional groups do a poor job of this.

In no way do we want to minimize the influence that the emotional content of the case has on determining how a focus group will sort through information; on the contrary, we understand the emotional content is a critical component for thinking through both sides of the case. The extraordinary events in these types of cases not only shock people they also raise the stakes on the consequences of the verdict. Cases that deal with these extreme topics can lead to extreme punishments. Specifically, those punishments could include a long prison term, life in prison, or the death penalty, along with being permanently labeled as an untouchable or social miscreant. If directed correctly, the extreme consequences of the case can also help focus participants on moving carefully when considering evidence. This often proves difficult in a focus group. The participants know they have no true responsibility for a verdict. They do not have to deal with the emotional issues of signing a death warrant or being publicly scrutinized for their decision. Because of this, creating a sense of responsibility for the outcome of the discussion can be problematic. However, it is important to try and lead the group into an appreciation of the consequences of their decision. This can act as more of an emotional counter balance to the content of the case rather than as a way to



structure objectivity. If handled correctly, this emotional balancing act can help establish the position that the consequences of the verdict demand careful consideration of all of the factors involved in the case.

Moderator Interaction

The nature of the evidence in the pornography possession case made testing for respondent reactions to the content that would be seen in court very difficult. There is a legal prohibition with the pornography material but the same problem about testing graphic evidence exists with other extreme cases. Knowing how much graphic reality to introduce into the discussion of a highly emotional case is an important judgment call. Too much graphic information can create a tidal wave of emotional reactions. Not enough will deprive the effort of an important component of the case. The work around on the pornography possession case was to create descriptions of the evidence that might be shown in court. This required the moderator to read a series of descriptions of some just completely disgusting and shocking material. The effort opened up the issue of how the information in these types of cases can have a significant impact on all who work on them.

An effective moderator needs a good poker face when leading focus groups. No matter what side or topic is being presented the moderator always must project a quality of engaged neutrality when presenting information and leading discussion. Training and experience constantly reinforces the need for a moderator to carefully guard against allowing his or her bias or emotions from becoming leading indicators in a group discussion. Managing this dynamic with highly emotional content requires some careful planning. In the pornography case I misjudged how difficult it was to objectively describe the material that needed to be considered. There is no training for this. My voice cracked at different intervals. I had to stop at different sections to regain my composure. The focus group participants had never met or been in a group with me so I was probably more sensitive and aware of the stumbles than the group. However, the issue of emotional involvement by the moderator is a key problem with these types of cases.

To combat emotional interaction we have relied on the simple practice of repetition. Practicing a neutral delivery over and over again develops a pattern of behavior and a degree of over-familiarity with the material that helps when it is time to deliver the information. Having spent a brief moment with each participant on the final screening recruitment call also helps everyone manage the situation better. No one is surprised by the nature of the material and the multi-step recruiting process seems to create a modicum of trust that helps foster a more settled research atmosphere.

Cases involving white-hot topics such as child abuse, graphic violence, sexual exploitation and murder are, by their very nature, difficult projects to work on. These cases show human beings at their worst and bring us into contact with events and actions that push against everything we hold dear. The first emotional reaction is often visceral and double edged—on the one hand there is disdain for the accused and on the other a desire to protect the victim. In the adversarial environment of a court case, the swing of the emotional pendulum creates shock waves that both sides hope to deflect or steer for their own purposes. Understanding how these unleashed emotions will assist or detract from our client's purposes is the role our research effort hopes to fulfill. Thinking through recruiting dynamics and concentrating on moderator performance has helped bring about more stable research insights for us when working in these areas. The result has been the creation of a useful but labor-intensive process essential for obtaining useful feedback in high stakes and emotionally supercharged litigation.

Image Credits: [Conrad Murray](#), [Jury box](#)

Smoking Dope and Burning Vaginas [Did I Just Say That Out Loud?] And Other Voir Dire Questions You Really Can Ask Out Loud

BY CHARLOTTE A. MORRIS

[Charlotte A. \(Charli\) Morris, M.A.](#) is a trial consultant who lives in Raleigh, NC and works wherever the cases take her. She is the co-author of [The Persuasive Edge](#) and when she is not working she practices the fine art of persuasion on her three children.

I'm on record for all the reasons I think attorneys must master the mechanics of effective voir dire, <http://www.thejuryexpert.com/2011/01/its-deja-vu-all-over-againmore-thoughts-on-doing-effective-voir-dire/> so this time I can skip theory and cut to the chase¹. Writing about jury selection in Diane Wiley's wake may be a tall order, but there's a certain logic to leaping from the sensitive questions that belong in a written supplemental juror questionnaire <http://www.thejuryexpert.com/2011/11/are-you-now-or-have-you-ever-been-crazy-questions-about-mental-health-for-supplemental-juror-questionnaires/> to the ones that are also appropriate for open court.

In my experience, there is *almost* no subject off-limits for oral *voir dire*². If it is an issue in your case, and you are reasonably certain the jury is going to talk about it behind closed doors during deliberations, you cannot be afraid to discuss it openly during the jury selection process.

Why You Must Do It (or Settle)

I only tell stories about cases if they are both true and relevant, so here's one that illustrates the importance of thinking ahead about what would be necessary for a complete and candid voir dire on the sensitive issues in your case. I work with a lawyer who represented a young woman in a medical negligence matter. She was suing a gynecologist who had prescribed, for the treatment of a common STD, an off-label use of a topical ointment which caused severe chemicals burns on the surface of her skin and left permanent damage to nerve endings. She reported the painful sensations right away but the doctor urged her to continue so she complied. Which meant that even though it hurt to do so, she kept applying the ointment once a week for ten weeks because that's what the doctor ordered. I still affectionately refer to this as the "burning vagina" case.



I told the lawyer from our first conversation that he would have to start practicing voir dire in the elevator on his way up to the office each day. I suggested that after some polite small talk, he would want to ask women if they would ever dream of continuing to apply an ointment that burned their vaginas for ten solid weeks without getting a second opinion – because that’s what his client did. And I reminded him to talk with men too, because I was certain he’d have a difficult time finding even one who would say he’d have done the same thing to his penis for ten straight weeks.

The case settled short of trial. Not only was the greatest source of bias against the plaintiff likely to be jurors’ incredulity that she kept using the drug, the lawyer would also have to get comfortable (and help jurors get comfortable) using the language of his case. The actual questions for trial would have been much more nuanced, of course; I wouldn’t really suggest that he ask people during jury selection whether they’d ever burned their private parts. But he would need to ask all prospective jurors some serious questions about the very sensitive issue of gynecologic care.

Before you read the sample questions for the topics below, be aware that every lawyer I have ever written them for has told me that it could not be done. And then each of them has told me that they were stunned at how well it works after I convinced them to try. We’ve even gotten good feedback from the judges who allowed us to ask them. As you would guess, these are written for cases in State Court in jurisdictions where attorneys conduct voir dire. And yes, you can use them (or modified versions of them) even where you may only get a few hours (or less) – as long as the topics are central to decision-making in your case.

Here’s How It Works

The best way to start is to identify jurors who may have any experience, education or training on a topic before asking for something more personal. Every prospective juror with healthcare work experience is a prime candidate for questions about a wide variety of potentially sensitive topics such as drug use, child abuse, or psychological injuries.

You can also start very broadly on any topic by getting people to tell you about their lives away from work or school. Once you know some pretty basic things about a person’s demographic profile you will find the opportunity to connect what you learn to something more specific in your case.

For example:

- Every person who has ever been married can tell you something about a claim for the loss of consortium.
- Every parent can tell you about how he or she distinguishes between corporal punishment and child abuse.
- Anyone who lived through high school or college can tell you about experiences with drugs and alcohol.

The idea that these topics are “sensitive” need not deter you from dealing with them directly. Think about the people you love and trust most in your life – they are typically the ones who aren’t afraid to speak the truth about the stickiest of subjects. If you are genuinely thoughtful in your approach and listen well, you will know when a juror needs you to back off. Consider using a little self-disclosure to introduce the topic (but only if you are telling the truth because jurors can smell insincerity). Then be sure to show genuine gratitude for their willingness to share openly with you.



Drug and Alcohol Abuse

Some topics, such as drug or alcohol abuse, require a good set-up before you ask a question. The phrase “you or someone close to you” in the questions gives jurors an opportunity to talk about someone else if they are not comfortable revealing the truth about themselves. You may also note that the appropriate use of humor can go a long way to putting jurors at ease.

Sample Questions

I need to talk to you about your experience and attitudes toward drug and alcohol use. This is an issue central to this case, it is a serious topic and your honest answers are valuable to all of us. I’m not going to ask you to raise your hand and tell us if you smoke dope, but I do need to know your thoughts.

We can promise you that no one will be in trouble for telling the truth. If you are selected to serve on this jury you may find yourself in a conversation that is very similar to the one I want to have with you...so this can be a good way for you to know if you are comfortable serving on a case with these issues.

And if you’re not comfortable talking in open court about any of the questions I ask, you can request to talk with us privately.

Some of you have already told me that you’ve had experience, education or training in the medical profession. Mr. Jones, please tell me what you were taught or trained to do as an EMT with respect to drug or alcohol use or abuse.

This question is for everyone: Raise your hand if you – or someone close to you – has ever **experimented** with alcohol or drugs of any kind.

- Tell us about that.
- Do you consider that to be drug/alcohol USE or drug/alcohol ABUSE?
- What’s the difference between USE and ABUSE, if any, in your opinion?

Tell me the difference between alcohol use and drug use?

Anyone here ever been in a situation where the use of alcohol or drugs has put you in an uncomfortable position?

- What happened?
- How did things turn out?
- What did you learn from that experience?

What have your experiences with drugs or alcohol taught you over time?

- Do you think your perspective has changed over the years?
- If so, how?
- If not, why not?

For those of you who are parents: what kind of conversations have you had with your kids about the use of drugs and alcohol?

Are some drugs more serious than others?

- If yes, which ones?
- Why do you think so?

On a scale of 1 to 10, how would you rate the danger of using marijuana?

- Why do you think so?
- How does it compare to other types of drugs or alcohol?

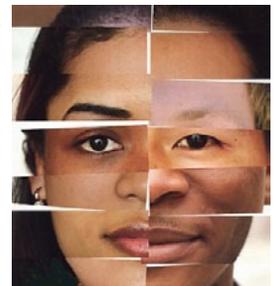
Raise your hand if you or anyone close to you has ever had such a bad experience with drugs or alcohol that it causes you to have strong feelings or a firm opinion about the issue.

- Tell us about that.

One of the first responses we got to the “experimented” question was given by an African-American woman business owner in Charlotte, North Carolina who said, “I went to Berkeley in the 60’s, of course I experimented!” She broke the ice for us with the rest of the panel.

Race Relations In Our Community

Notice how some questions on the next topic are designed to work like mini “community attitude surveys” which allows people to reveal a lot about themselves without actually sharing a personal experience. In this case our concern was that the attorney represented a mixed-race couple: African-American man, White woman in the very culturally and racially diverse (heavily Hispanic and Cuban) venue of Dade County, Florida.



Sample Questions

We live in a very diverse community and I’d like to know how you think we are doing in terms of race relations. On a scale of 1 to 10, with 10 being the most positive or the best how would you rate this community? [Get a number from everyone before following up]

We got a range of answers so I just want to hear your thoughts about the number you chose. [follow up with each]

How often does the issue come to your attention or can you give me some examples that come to mind on the subject?

What do you think we do well, as a community, to get along?

What do you think we could do better?

How have things changed in your lifetime?

How do you think your kids see things differently?

What do you think the future holds and why?

We have used an approach similar to this on the subject of homosexuality in a case in which the

client was gay. In both instances, the lawyer revealed the nature of our concern after we had the discussion with jurors and – because we had the conversation out in the open – we genuinely felt like the potentially biasing issues were neutralized from the start.

Child Abuse & Neglect

In a very recent trial we needed to explore the tough topic of experience with child abuse and we took the direct approach. The questions below provoked some startling truths about jurors who freely and sincerely answered them in open court. We started by talking to teachers, social workers, and healthcare providers about their professional experience but we didn't finish on the topic until we had spoken with every juror³.

Sample Questions

In your experience, what are the signs and symptoms of child abuse or child neglect?

- Are the signs and symptoms of child abuse always obvious? Give me some examples.
- Are there only certain types of people or certain types of families who abuse or neglect their children? Is there a “profile” for an abuser?
- Do you think it requires special expertise or training to recognize signs or symptoms of abuse? Why or why not?

Who do you think is in the best position to recognize signs or symptoms of child abuse? Why do you think so?

How do you think doctors or nurses can spot child abuse or neglect?

- Are they better trained to do so?
- Are they in a better position to see the signs and symptoms?

What should someone do if they see signs or symptoms of child abuse or neglect?

- Does anyone here think you can get in trouble for reporting potential child abuse?
- Tell us what you think or know and how or why you think so?

Raise your hand if you've actually learned or discovered that someone in your own family was abused or neglected but you had not known about the abuse at the time it was happening?

- Tell us about that.
- How do you think it happens that sometimes even family members don't know about abuse?
- In your experience, why don't children tell on their abusers?

During our discussion one juror revealed her experience with abuse at the hands of both her biological family and the foster family that adopted her. To say that everyone in the courtroom was moved by her honesty is an understatement. And “all” we had to do was ask.

Loss of Consortium⁴

Finally, here are a few ideas on talking about the taboo topic of S-E-X. This is a topic most important for plaintiffs' attorneys who, frankly, struggle to talk candidly even with their own clients about the details. Here again, set-up is the key.

Sample Questions

Most of you told the judge when you first introduced yourself that you are either currently married or have been married before. We're going to tell you some things about our clients that are extremely personal to them, but they are things I think we all have in common. So first let me start with an easy one for the married folks:

What do you think are some of the most important aspects of a healthy, happy marriage?

[If no one mentions attraction or intimacy:] None of you specifically mentioned intimacy: does that count among the things you have mentioned or is it something that came to mind for any of you?

I'm going to be even more specific and we're going to talk in this case about physical intimacy, or more simply, sex. So the next question is really for everyone whether you've ever been married or not.

On a scale of 1 to 10 – how important do you think sex is for a healthy, happy marriage?

- Why do you feel that way?

We are seeking compensation for a host of injuries associated with Mr. Smith's medical treatment, including the physical and emotional damage it has caused to their marriage. Given your thoughts about the importance of physical intimacy in a marriage, does the loss of what our state's law calls "consortium" seem like a potentially legitimate element of damages in a lawsuit?

Is there anyone who would not be comfortable hearing evidence about this type of loss or discussing it with your fellow jurors? If so, we want to give you an opportunity to tell us if you think you would be better suited for a different type of case.

If you are still a skeptic or you are certain these questions could not be asked in your jurisdiction, you will need to consider using a written questionnaire. Otherwise, you will need to settle the case, because if you can't get comfortable with the idea of talking about something like burning vaginas before the trial, you won't be able to effectively represent your client during the trial.

References

¹See [TJE Vol 23, Issue 1](#), Morris

²You might be thinking of some really good exceptions already, like personal experience with rape or a prior criminal conviction, so there are other ways to deal with those situations covered nicely in the previous issue: Wiley: [TJE Vol 23, Issue 6](#).

³This is not a complete list of the extensive questions we asked about child abuse/neglect because the entire case against the defendants was failure to recognize and report symptoms of abuse resulting in catastrophic brain injury.

⁴A plaintiff might have non-economic damages that arise out of sexual dysfunction whether or not he/she is married, so you could expand the question to refer to “relationships.” But for most cases involving a spouse’s claim for loss of consortium it is usually best to frame the questions in terms of marriage.

Image credits: [Red canna](#), [Gumshoe](#), [Race relations](#)

Why we might be more moral than we think: The Importance of Emotion for Moral Action and Moral Forecasting

BY RIMMA TEPER, MICHAEL INZLICHT, ELIZABETH PAGE-GOULD

[Rimma Teper](#) is a psychology graduate student at the University of Toronto in Toronto, Ontario, Canada. Her research revolves around the emotional processes that drive moral behavior. Specifically, she is interested in how emotional processes account for the disconnect between moral behavior and moral forecasting. In her second line of research, Rimma Teper explores how meditation practice improves the affective and cognitive aspects of executive control.

[Michael Inzlicht, PhD](#) is an Associate Professor at the University of Toronto in Toronto, Ontario, Canada and the Director of the Toronto Laboratory for Social Neuroscience. His research centers on self-regulation, examining how it is affected by stigma, implemented neurally, and bolstered by religious belief. You can review Dr. Inzlicht's research and contact information on [his webpage](#).

Elizabeth Page-Gould is an Assistant Professor of Psychology at the University of Toronto Scarborough in Toronto, Ontario, Canada. Her research focuses on intergroup relations, stress, and social interaction, taking both social psychological and psychophysiological perspectives. You can find detailed and up-to-date information on Elizabeth Page-Gould's research and professional activities on [her website](#).

Imagine yourself discovering a loophole in your company's financial software that would allow someone to siphon money out of corporate accounts essentially undetected. You recently found out that your youngest child needs special services and thus you will have to spend hundreds of thousands of dollars in extra education, training, and special equipment over the next few decades. Sitting in front of your computer, you realize that the only thing that separates you from embezzling your company's money is a few strokes of the keyboard. You notice your heart pounding in your chest and you are breathing fast. This opportunity to setup the heist may not occur again. What do you do? We will argue here that you may end up surprising yourself. The reason for this is that your decision to behave morally or immorally rests on the intensity of your emotional experience at the moment you decide.

In the past decade, social psychologists have explored how people decide what is morally right or wrong. This trend is not surprising, given the applicability of such research to real-life issues, such as litigation. Yet, strangely enough, little research has explored moral behavior. Social scientists, in other

words, have spent much time studying morality through individuals' moral judgments and predictions of how they might act in a moral dilemma, assuming that such measures reflect real-life moral behavior. However, classic research in social psychology indicates that attitudes and behaviors may not always align. As such, the assumption that self-reported measures of morality will translate to actual behavior is problematic for the field of litigation because moral judgments, and predictions about future behavior are constantly being made throughout the litigation process. In the study we report on here, we examined the relationship between actual moral behavior and moral forecasting (i.e., predictions of future moral behavior), while investigating internal processes that might account for any disconnect between the two. Our research rests on the hypothesis that moral action and moral judgment are different, primarily because the psychological processes that guide moral behavior are not fully engaged during moral forecasting.

The Role of Emotion in Behavior and Forecasting

Although recent research on moral decision making is of great importance, its narrow focus on judgment is problematic given that attitudes are often incompatible with behaviors,^{1,2} and many of the conclusions drawn about the nature of morality have been based on empirical studies of judgment and predicted moral behavior alone.^{3,4,5} As such, there is good reason to believe that moral behavior will deviate from moral judgment. Research on "affective forecasting," or people's ability to predict their own future emotions, indicates that individuals are not very good at predicting their emotions in future situations.⁶ If emotions play an important role in moral behavior, then limited access to these emotions while predicting moral behavior will translate to errors in this prediction. For example, research suggests that when individuals are not emotionally aroused, they have little appreciation for the role that emotion plays in motivating their behavior.⁷ This work implies that individuals have a tendency to underestimate the intensity of the emotions they will feel in real-life situations.

Related work in the field of psychophysiology specifies that emotional signals are important for effective decision making.⁸ These physiological signals are perceived as "feelings,"⁹ and individuals rely on these feelings to guide socially relevant behavior. Indeed, research confirms that emotional processes are engaged when individuals make moral judgments.¹⁰ Here, we suggest that emotional processes may be more active when people are involved in actual moral dilemmas than when they make moral judgments.

Are People More Moral Than They Think?

Neuropsychologists state that there exist primary and secondary emotional inducers.⁹ Primary inducers are stimuli that are present within the immediate environment and cause pleasure or pain (e.g., eating cake, encountering a snake, etc.). Secondary inducers are generated by recalling or imagining an emotional event (e.g., imagining eating a cake, imagining a snake, etc.). Secondary inducers are thought to simulate the physiological state associated with corresponding primary inducers, but typically at a lower level.



Even though moral emotions are present during moral forecasts,¹⁰ if these emotions are less intense than the emotions experienced during actual moral dilemmas, then individuals may underestimate the strength of their emotions when they are making predictions. And if emotions such as guilt and love drive moral behavior,¹¹ then underestimating emotion may result in moral forecasting errors; that is, people may act more morally than they might predict. We tested this hypothesis in the following study.

Overview of Results

Sixty-seven university students participated in our experiment for course credit. Physiological sensors were applied in order to detect patterns in heart rate, respiration, and sweat in the palms. Participants were then randomly assigned to one of three groups: moral action, moral forecasting, or a control group. Participants in the moral action group had to complete a math test in which they had the opportunity to cheat. This task consisted of 15 simple, but tedious, arithmetic problems (e.g., $45 + 679 + 8 + 11 + 234 + 50 - 71 - 1 - 524 - 25 = ?$). We informed participants that a “glitch” in the software would cause the answer to each question to appear on the screen when they pressed the space bar. Participants thought we had no way of knowing whether or not they pressed the space bar. We informed them that they would be rewarded with \$5.00 if they answered 10 or more questions correctly. Participants in the moral forecasting group were presented with the same 15 problems, but instead of solving the problems, they indicated whether they would reveal the answer for each question under the circumstances just described. Finally, participants in the control group had to complete the same math test, but with no option of cheating; this group allowed us to separate the emotion (measured physiologically) elicited by a moral dilemma from the emotion elicited by solving difficult math problems.

As Figure 1 demonstrates, we found that participants who actually completed the math test cheated significantly less (an average of 0.96 out of 15 questions) than did participants who had to predict how many times they would cheat (an average of 4.82 out of 15 questions). In other words, the individuals in our study cheated approximately 5 times less than their counterparts predicted they would. Next, we investigated the role of emotion in this relationship.

We hypothesized that participants who had the chance to behave immorally would exhibit greater emotionality (as measured by physiological arousal) than would participants in the two other groups. The three indices of physiological arousal that we recorded were pre-ejection period (PEP), which can be conceptualized as the strength of the heart contraction,¹² respiratory sinus arrhythmia (RSA), a measure derived from heart and respiration rates which represents parasympathetic nervous system activity,¹³

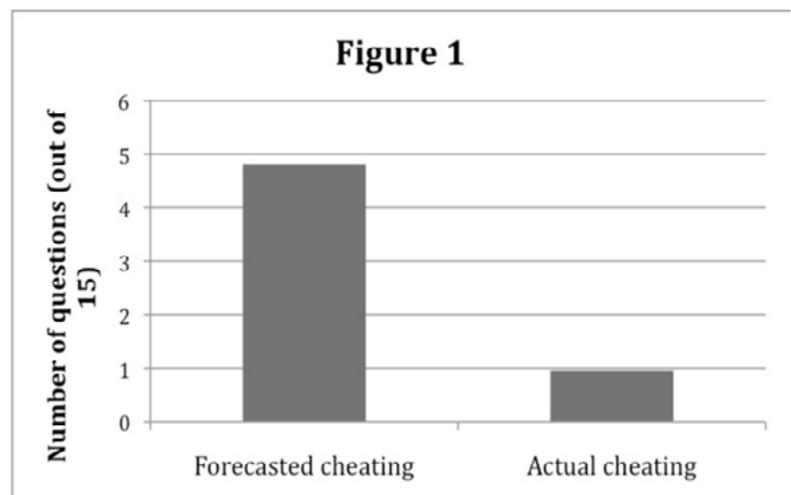


Figure 1.

The average number of times that participants in the moral action condition compared to the average number of times that participants in the moral forecasting condition predicted they would cheat in the same situation.

and skin conductance response (SCR), a measure of sweat in the palms, which is indicative of general arousal. Our results revealed that participants who had the chance to cheat on the math test, displayed greater levels of arousal on all three indices than did participants who simply had to predict whether or not they would cheat. Importantly, participants in the moral action group exhibited greater arousal than did participants who completed the math test without the option of cheating, suggesting that the arousal they felt was above and beyond any arousal that might be attributed to test-taking (see Figures 2, 3, and 4).

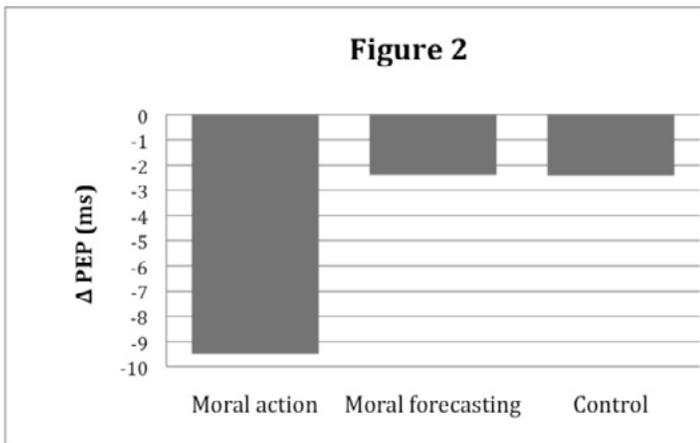


Figure 2.

Participants in the moral action condition displayed significantly stronger heart contractions, as represented by a smaller PEP, than did participants in the moral forecasting and control conditions. The graph shows mean change (arousal during math task minus arousal during resting period). The graph shows mean change (arousal during math task minus arousal during resting period).

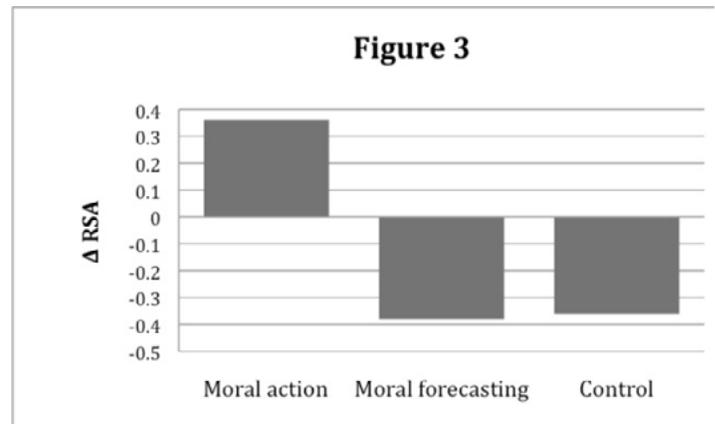


Figure 3.

Participants in the moral action condition displayed significantly greater parasympathetic nervous system activity, as represented by greater RSA, than did participants in the moral forecasting and control conditions. The graph shows mean change (arousal during math task minus arousal during resting period).

Finally we wanted to investigate the role that emotional arousal plays in the disconnect between actual cheating and predicted cheating. Statistical analyses revealed that the differences in heart and respiration rates and sweat in the palms between the action and forecasting groups were a key reason for the disconnect between actual and predicted moral behavior. In other words, it seems that the reason individuals' predictions of their behavior do not coincide with their actual behavior is because individuals predicting their behavior do not feel the intense emotions present during real-life moral dilemmas.

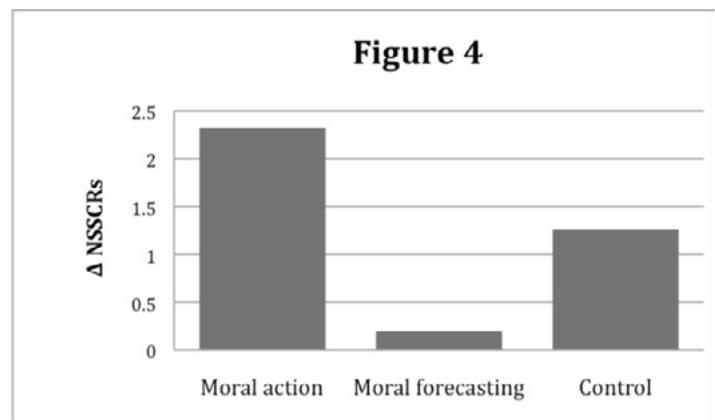


Figure 4.

Participants in the moral action condition produced significantly more sweat in their palms, as represented by the number of non-significant skin conductance responses (NSSCRs), than did participants in the moral forecasting and control conditions. The graph shows mean change (arousal during math task minus arousal during resting period).

Discussion and Implications

This research explored the relationship between moral forecasts and moral behavior as well as the internal biological and psychological processes that drive the two. We found that individuals underestimate their moral capacities (for at least the type of moral dilemma we studied). Furthermore, our results imply that people's moral forecasting errors result from the inability to access the emotional experience that occurs during real-life moral dilemmas.

This issue is directly applicable to litigation, in that jurors, by virtue of their duty, forecast, predict and imagine the behaviors of the litigants based on the evidence that is presented in the courtroom. Although the results of our study revealed that individuals underestimate their own capacity for morality when asked to predict their actions in specific moral dilemmas, they further imply that individuals make these errors because they lack the emotions that arise "in the heat of the moment." Similarly then, jurors may make inaccurate moral judgments because they may fail to appreciate the strong influence that particular emotions and affective arousal may have on the behaviors of the litigants in question.

Lawyers can use the results of the current research to their advantage by presenting relevant evidence in a way that highlights or minimizes the emotional aspects of the moral decisions pertaining to the case at hand. For instance, if the jury is presented with a case of an innocent man who is accused of stealing a vehicle, the defense attorney may attest their client's innocence by stressing the emotions that prevented him from committing the crime. Specifically, the lawyer could ask the jury to imagine the love that the defendant feels for his family whom he would be kept away from if caught and convicted of the crime, or the fear of getting caught that the defendant would feel, or possibly the impending guilt that the defendant would be faced with after having committed the crime. Such emotions serve as a moral compass,¹¹ and often prevent individuals from committing moral transgressions. Simulating the emotional experience of the defendant in this way, might be a helpful tactic for lawyers to use. By using this technique, lawyers can help the jury to put themselves in the shoes of the defendant, so to speak, and thus help them to recognize how difficult it might be to transgress.



It is important to note, however, that the current study utilized only one specific moral dilemma, in which the incentive to transgress was fairly low (\$5.00). It is quite possible, and even likely that if the incentive to cheat was higher (for instance, if we offered \$100.00 for answering 10 or more questions correctly), then the participants in our study might have actually underestimated their likelihood to cheat. In such a scenario, the emotions associated with the potential gain of \$100.00 (i.e., excitement) might overpower any "moral" emotions that the individuals would feel. As such, these gain-related emotions might dominate the decision-making process, and consequently drive the behavior. In such a scenario, the plaintiff's lawyer might benefit from thoroughly illustrating the emotions that could be associated with the defendant's incentives to commit the crime. If we imagine a woman who sells illicit drugs in order to pay for her university tuition, it is not difficult to see how the emotions associated

with being able to pay her university fees might overpower any moral emotions that might normally prevent her committing this offense. As with any moral dilemma or court case, there exist forces that pull the individual to either act morally and forces that push the individual to transgress. It seems that an important factor in determining the outcome of any specific case may be realizing which forces or emotions are likely to be stronger in that particular scenario.

As previously stated, the results of the current research do not imply that individuals always underestimate their morality. Rather, we interpret our findings to mean that individuals have a hard time forecasting the presence and intensity of their emotional states, and that this difficulty leads to inaccurate predictions. Sometimes, as in the current experiment, emotions elicited by actual situations increase moral behavior; other times, however, these emotions may undermine moral behavior. Key scenarios in which we may overestimate our moral behavior are situations where one has to act in order to behave morally. In our study, it was the immoral behavior that required action (i.e., pressing the spacebar to cheat on the math task). It is possible that intense states of bodily arousal make people freeze in the moment of a moral decision. For example, when asked whether they would save a small child from a burning car, almost everyone would say they would risk their life to do so. However, when standing in front of the burning car, the unquestionably intense experience of that moment may inhibit our ability to move and act, thus leading fewer people to save the child than they would predict.

Another more specific scenario to which the current work can be applied is the case of appealing for parole or an early release from prison. The verdicts of such cases are almost purely based on predictions of how the individual in question is likely to act upon their release. Undoubtedly, information from the defendant's past, as well as their behavior during imprisonment is used to make such decisions. However, the emotions that might play into any future decisions should not be overlooked. On a related note, the current research seems to support the introduction of emotional development programs in prisons. Past research has reliably confirmed that sociopathic criminals lack the emotional signals that are important for navigating through social interactions, and specifically moral dilemmas.¹⁴ In other words, when faced with a moral dilemma, they are likely to transgress because they lack the emotions (i.e., guilt, nervousness, shame, etc.) that steer other individuals in the right direction. As such, emotional development and awareness programs might be quite useful for cultivating the emotional sensitivity that seems to be required to make moral choices.

The finding that individuals may act more morally than they think they will is a novel one. Moreover, it seems to have interesting implications for the litigation process, and offers new insight into the deliberation process of the jury. Finally, the current research can be applied to issues closely related to litigation, such as prison programs for inmates. In sum, it seems that several law-related domains stand to benefit from the knowledge that, at least in some cases, people underestimate their moral capabilities and that emotions play a crucial role in the relationship between what we think we will do and what we actually do.

We asked two trial consultants to give their reactions to this article.
On the following pages, Ken Broda-Bahm and Tara Trask respond.

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Reasoning With Emotion from Ken Broda-Bahm, Ph.D.

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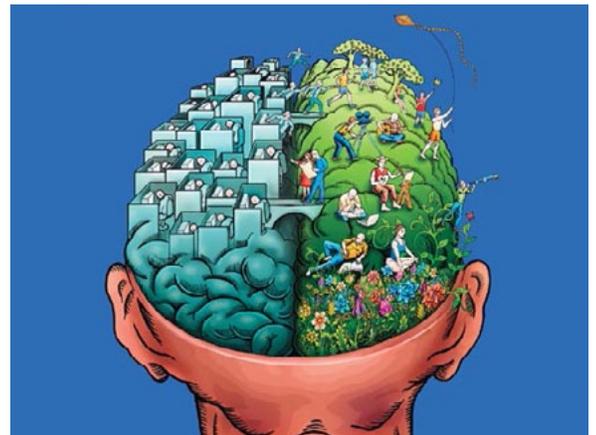
The authors of this study deserve congratulations for three things: For furthering an increasingly relevant focus on moral experience, for focusing on moral behavior rather than simply prediction, and for applying it all to the realm of litigation, where average people create and apply morality on a daily basis. It is that third area where I plan to focus my comments. Specifically, from the perspective of a litigation consultant, I would like to respond with one caution and one contribution. The caution relates to an area where the authors' suggested advice could pose a problem. The contribution relates to one additional application to trial communication that the authors did not consider.

The Caution: Take Care in Arguing from Emotion to a Jury

The main conclusion of the study is that predictions of future moral behavior tend to be weak in the abstract: When made in conditions that are divorced from the emotional experiences that tend to occur at the moment one actually decides, we can end up under-estimating the likelihood of moral action. The error occurs, they say, based on the "inability to access the emotional experience that occurs during real-life moral dilemmas". The application to litigation comes in the advice that lawyers should seek to re-connect the action to the emotion when describing, for example, a defendant's decision to commit a crime or not: "The lawyer could ask the jury to imagine the love that the defendant feels for his family who he would be kept away from if caught..."

That may make sense from the empirical context of the study results, yet it could be a dangerous strategy in practice. The problem is that jurors understand the law is a unique setting for moral judgment and they are primed repeatedly – in jury selection, pre-instruction, and opening statement – to be suspicious of emotions, to set them aside, and to prefer evidence and reason instead. So, in that context, the lawyer who stands up and invites the jury to connect with the party's feelings will be seen as making an emotional appeal, and engaging in per se inappropriate argument, a move that jurors see as the surest sign of a weak case.

Now, the social scientist will respond – rightly – that this dualism separating "reason" from "emotion" is a figment of our Cartesian imaginations. However much that is true, jurors don't see it that way, and neither does the law. That said, re-connecting emotions to actions remains an important goal, it just requires much more subtle means in legal argument. Here, the rule "show, don't tell" applies. Saying "my client has suffered terribly," will never lead to a conclusion as durable as when a juror looks at your client and decides *on their own* that they see genuine and terrible



suffering. So, instead of describing a client's emotions and asking the jurors to "put themselves into the shoes of the defendant" (a move that runs afoul of the Golden Rule objection), attorneys need to work creatively to find a permissible, natural, and most importantly, credible way to show jurors the emotional component.

The Contribution: Consider Arguing For Emotion to a Judge

The advice the authors provide focuses on the defendant as the moral agent. But the other critical context in which this research should be considered is the action of the jurors themselves. In the highest-stakes cases of all, capital cases, jurors understand that they are *acting* and not just *deciding* through their verdict, and their actions carry moral weight. In civil cases as well, jurors are very focused on the consequences of their verdict. Even in simple contract cases, the jurors that I talk to post-verdict are generally humbled by the importance of what they've done, and some even experience a fair amount of stress. Deliberation itself is an arena where jurors are forced to evaluate not just the parties, but the morality of their own actions as well.

The authors' central finding is that moral judgment can be inaccurate when it is artificially divorced from the emotional components of the decision. In the cold and abstract light of predicting one's own actions – or, in the jurors' case, evaluating another's actions – we make errors. So this study adds one argument against the tide working to drain emotion from a jury's decision making.

One application of this might be in the evidence hearing. Crime scene photos, or other evocative pieces of evidence, are often the best ways to meet the "show, don't tell" advice that I give above. But first, they often need to make it through a hearing to determine their admissibility. If one side argues that the piece of evidence is too inflammatory to be admitted, the standard is whether the evidence's prejudicial value exceeds its probative value. That is admittedly a subjective formula, and the bottom line will generally be, "Does the judge approve of the evidence?" But when you have a judge open to argument, it may be worth pointing out one assumption that this formula makes: namely that "emotional" means "prejudicial." Armed with studies like this one the attorneys seeking admission of the evidence should argue straightforwardly:

Yes, your honor, it is undeniable that this evidence elicits an emotional response. But there is no indication whatsoever that an emotional response by itself will render the jury less capable of reason. Indeed, the weight of the empirical evidence cited in my brief is that emotion is an inseparable part of reason. In order to prevail in their objection, my opposing party will need to show not that the evidence is emotional, but that it prevents the jury from reasoning clearly and completely. My argument, your honor, is that their reasoning can only be clear and complete if it includes the emotional content of this photograph.

It shouldn't be too much to think that in 2012, a judge might be open to the notion that emotion per se is not the bad guy. In any case, that is an oral argument I would like to hear. The authors, as well as all of their colleagues who are continuing to plow the fields of motivated reasoning and moral action, are doing us all a service by making arguments like that one more plausible in the days ahead.

Simple, Truthful and Almost Impossible from Tara Trask

Tara Trask, CEO of [Tara Trask and Associates](#), is a trial consultant with offices in San Francisco and Dallas and is the current President of the American Society of Trial Consultants. Her practice focuses on complex commercial litigation including intellectual property, products, oil and gas and securities.

Someone once said “To understand a man, you have to walk a mile in his shoes”. The origin of this lovely idea is difficult to pin down, but its simplicity and truthfulness are both undeniable and at the same time almost impossible for many people to grasp. The research laid out here by Teper, Inzlicht and Page-Gould underscores the difficulty that we have as humans in putting ourselves in one another’s shoes and therefore being able to predict what others will do, or even what we would do ourselves when wearing shoes that are different than the ones we are wearing. *Why* this is difficult is one of the issues they address and although there is certainly more to be researched on this topic, the notion that emotion plays a role is useful and comports with other, more anecdotal solutions I’ve seen utilized with great effect: namely story-telling techniques to help close the gap on putting the jury in my client’s shoes.

The notion of a subject/object split, or in the case of litigation, the judge/judged split, dates to Rene Decartes and is firmly entrenched as the rational and proper way to judge the actions and even motivations of others. As a general rule, people believe that they can “objectively” judge others and in fact we ask them to do so in courtrooms every day. Whether that is even possible is not usually a question that gets much attention, unless you have an interest in postmodern philosophy, which questions the ability to separate the subject and the object or the judge and the judged in the first place.

From a philosophical perspective, I find the authors’ work interesting because on a small scale, it supports the notion that rationality alone is not the proper tool for determining how and why a person might do something or not do something. This research supports the idea that *emotion* cannot be discarded with regard to determining what a person would do or not do, or in fact what you yourself would do or not do. While many of us as practitioners know this intuitively, it is always useful to see research to back it up.

My goal as a consultant is put the jury in my client’s shoes, whether my client is a criminal defendant, a business person, a company or an inventor on a patent. To accomplish that, we try to tell the best story we can for the client within the bounds of the available evidence. Setting the stage, describing the scene, identifying the conflict or dilemmas in our protagonist’s head or in his or her world, describing emotions, fears and doubts *from his or her perspective* and using action words to describe what unfolded, all help to create a dramatic scene, hopefully building emotion, all to help put the jurors in our client’s shoes. It is using these techniques that help us break through the difficulties laid out so well here by these authors.

Images Credits: [Right way/wrong way](#), [Auto theft](#), [Emotion v logic](#)

Talkin' 'bout our Generations: Are we who we wanted to be?

BY DOUGLAS L. KEENE AND RITA R. HANDRICH

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This article is the fourth we have written for *The Jury Expert* on intergenerational differences. The research is evolving, and our understanding of both the differences and how they inform a smart litigation practice is equally dynamic. This article is written differently than the previous three, with less of a focus on data and more on how the trends and contrasts of young and old can be productively considered as jury selection and case presentation decisions need to be made. The authors encourage you to [read the prior papers](#) for an examination of comprehensive studies that are not re-presented here.

One of the conclusions that emerged over the course of the previous articles remains true in the current update: Whenever the research is done (even 500 years ago) the generation that is then in their teens and 20's is ruthlessly criticized by their elders. "Sallow Youth" becomes Hippies/Punks/Slackers and who knows what will be next. But overall, the evidence suggests that every generation is driven by what they view as pro-social and worthwhile values. The form of expression changes, and each generation is 'progressing' from a benchmark established by those who went before them. And there is always a tension with that change.

As always, it's important to remember that papers referring to generations, by necessity, are full of stereotypes. We do not mean to say (and we do not believe) that all members of a generation are identical and that they all believe, do, or say the same sorts of things. If they did, voir dire would be a truly simple matter.

This paper is meant to help all of us reconfigure our understanding of the jurors in the American venire. We all have stereotypes about Boomers, Generation X and the Millennials (aka Gen Y). But those stereotypes are often dated and not useful to us as we attempt to make trial-related decisions. We need to know how the generations are shaping up in 2012--and that requires modifying/changing our stereotypes. Stereotypes are, by definition, largely automatic and often unconscious. In order to modify stereotypical beliefs, you have to *make yourself consciously aware* of them.



In this paper, we examine attitudes, beliefs and values as held by current venire members about topics such as: multiculturalism, liberal versus conservative outlooks, attitudes about the government, gender roles, the environment, confidence in scientific findings, religious beliefs, thoughts about same sex marriage, the death penalty, gun control and marijuana legalization, as well as how much trust the various generations have in others.

For each of these areas, we provide a 'Practice Implications' section suggesting applications of the findings to voir dire and jury selection as well as case themes/case narrative development.

A cross-generational review

But first, a brief overview of who makes up each of the four generations we'll be discussing, their generational label, age and dates of births, current age, and the sense in the data and in their own behavioral histories of their perspective or world view.

Generational Label Coming of Age and Current Age

<i>Generational Label</i>	<i>Coming of Age and Current Age</i>	<i>Current Perspective [from the November, 2011 Pew Report on Generations and the 2012 Elections]</i>
Silent Generation "Matures"	Born 1928-1945 Turned 18 from 1946 to 1963 [now 66 to 83 y/o] 80% of those 65 or older in the US	Conservative. More uncomfortable than younger generations with social changes (including racial diversity & homosexuality). Social Security as top voting issue. 79% non-Hispanic whites. Very frustrated with government.
Baby Boomers "Me Generation"	Born 1946-1964 Turned 18 from 1964 to 1982 [now 47 to 65 y/o]	Nearly half say life in US has gotten worse since the 1960s. Concerned about finances & may not retire. Express as much frustration with government as the Silent Generation--Boomers have grown more critical of government in the last decade. Jobs most important voting issue.
Generation X "Baby-Busters" "Slackers"	Born 1965-1980 Turned 18 from 1983 to 1998 [now 31 to 46 y/o]	Similar to Millennials on social issues. Since 2009, financial worries. Backed Obama in 2008 but went Republican in 2010. Jobs most important voting issue.
Millenials "Generation Y" "Boomlet"	Born 1981-1993 Turned 18 from 1999 to 2011 [now 18 to 30 y/o]	Socially liberal. High rates of unemployment but still upbeat. Most diverse generation: only 59% are non-Hispanic whites. Welcome the new face of America. Jobs most important voting issue.

Practice Implications:

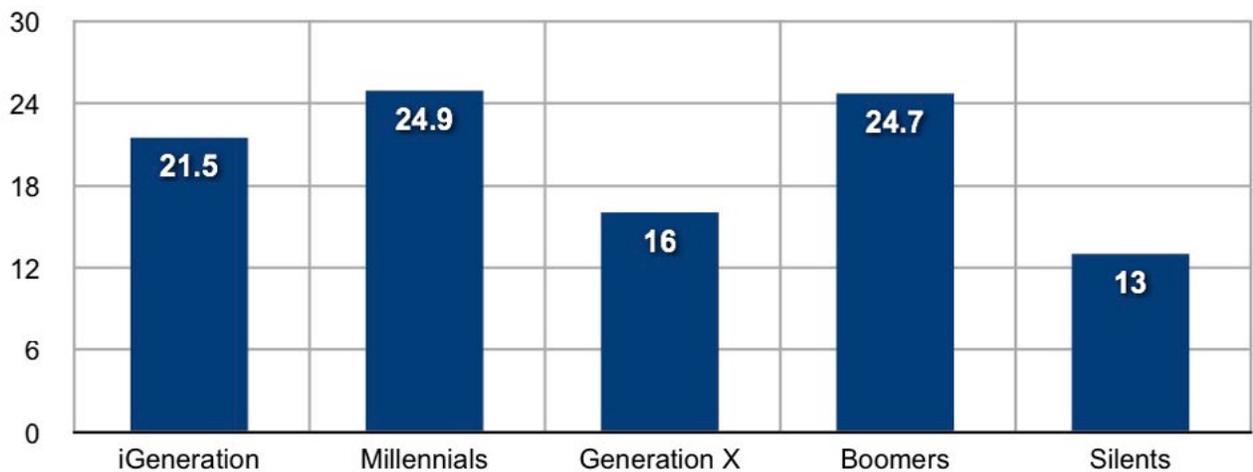
We are going to see fewer Silent Generation members in our jury panels over the next decade. As the remaining generations age up, maintaining awareness of how their needs and concerns change will be essential to continued success in all aspects of case planning and presentation.

Know your venire! America's population of old and young is shifting unevenly, with some communities being disproportionately younger or older. Pay attention to the research and census results and check the characteristics of unfamiliar venires. Remember to explore who actually shows up for a jury summons in the venue--that profile may be different than would be expected by a demographic profile of the venire.

Population:

Boomers were the largest generation for most of their lives but the Millennial Generation surpassed them in size in 2010. Comparatively, the Silent Generation and Generation X are dwarfed by the Millennial and Boomer generational groups. The table below displays the varying generational percentages of the total population (currently about 310 million) in the United States. ('iGeneration' is the working label for those now aged zero to fifteen.)⁵

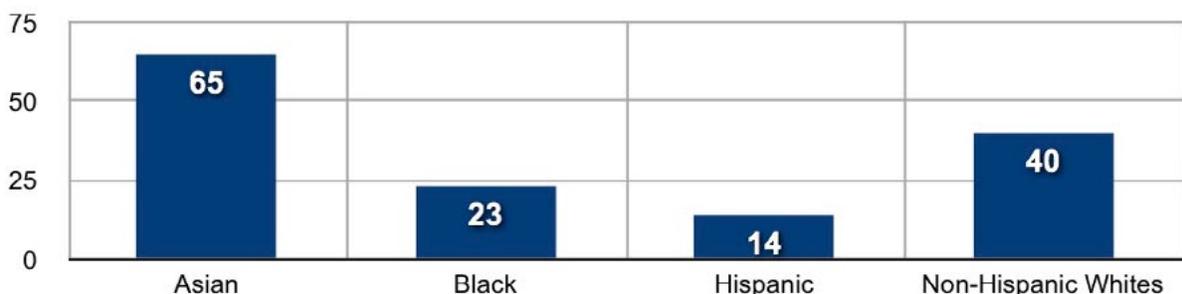
Generational Size: Percentage of Total Population in 2011



Education:

Middle-aged and younger generations are better educated than older generations and among the younger generations--women are better educated than are men.⁶ The stereotype of the educated Asian American is actually true--Asians are the most educated of any ethnic group in the country while Hispanics in America are among the least well-educated. (As with other groups, younger Hispanics are better educated than their elders.)

Educational attainment of 30-to-34 year olds (percent with bachelor's degrees in 2009)



Practice Implications:

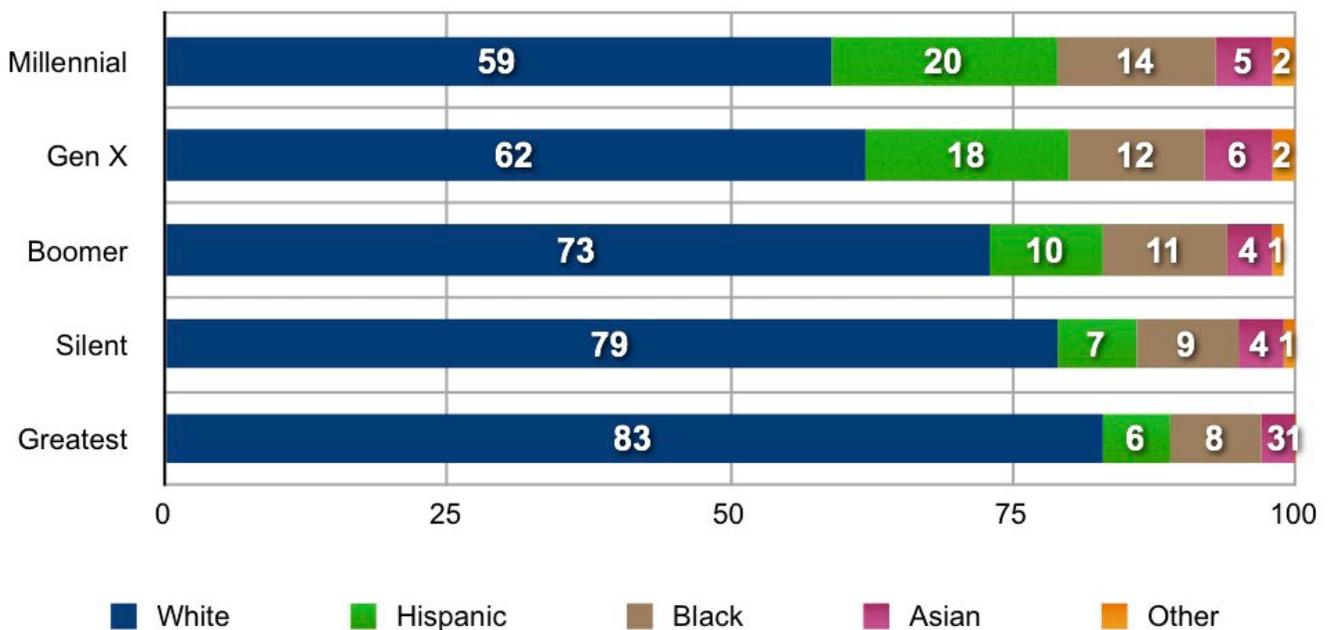
Education is often thought to be critically important in juror’s ability to understand case facts. Often, however, formal education is not as important as the trial attorney and witnesses speaking a language that jurors can understand. We see mock jurors who work with their hands and often have little formal education grasping very difficult and highly abstract concepts in high tech cases when the language helps them to understand the case facts.

Ethnicity:

Most of us know (because it’s been repeated a lot!) that the Millennial generation is the most ethnically diverse generation yet in America. Another fact (often repeated) is that minorities will soon become the majority. While estimates vary as to when this will happen, it is expected that by 2020 (eight years from now) only 50% of children under age 5 will be non-Hispanic White.⁷ As you will see when we move to the discussion of attitudes across the generations--some of us are more comfortable with this eventuality than are others.

Regardless of our comfort or readiness for change, this change is coming. The Pew Research Center offers a snapshot of America’s race and ethnicity by generation in 2011. It is easy to see how the proportion of non-Hispanic whites has shrunk over the past five generations.

Nation’s Race and Ethnicity in 2011 (% by generation)



Practice Implications:

Litigators will need to tell the trial stories that appeal to an increasingly diverse audience, without pandering. This will mean heightened awareness of our own individual biases and prejudice and understanding when to talk about racial biases and when to say quiet. It will also mean paying increased attention to language, being respectful to jurors of varied ethnicities. Most of us try to pay attention to these things now. In the future, it will be increasingly important.

Work Roles:

Much has been written about the central role of work in the lives of Boomers and the desire for a work/life balance in the lives of Generation X. The various opinions of what work is supposed to 'mean' isn't usually considered when picking juries or constructing trial themes. This is a risky omission. Millennials appear to be following in the Gen X path--attempting to weave a life encompassing both work and non-work life. Theoretically, at least. Millennials, launched into the workforce during a very difficult economy, are the most likely among the generations to be unemployed. In an Alice-in-Wonderland, upside down sort of world, the older you get, the less likely you are to be unemployed.⁸



Hispanic men have the highest level of employment⁹ (likely because they are younger than white males and less likely to be in school than young Asian males) while young black men have the highest percentage of unemployment.¹⁰ Hispanic women are the least likely group to be employed.

Finally, it is fairly unusual for younger workers to be self-employed. Only 7% overall are self-employed but that rate rises with age. Ten per cent of those aged 55 to 64 years of age are self-employed while 18% of those over age 65 are self-employed. It is anticipated that the self-employment rate among older Americans will increase as Boomers postpone retirement after turning 65 years of age.¹¹

Practice Implications:

The difficult job market has seen an increase in 'hardship' complaints related to jury duty. You will likely see this in court until the economy improves substantially. When you consider that Hispanic males are less likely to be educated and therefore, less likely to be in employment that would continue to pay them while they are in jury duty--it is likely many of them may make hardship pleas or simply not show up for jury duty.

Most civil litigation is about jobs. The trial story usually involves someone doing something in the course of their employment (driving a truck, negotiating a contract, inventing a widget). What jurors think about personal responsibility, what they believe about corporate culture, what they think of the world of work, and whether they can identify with the life of the worker in the case is worthy of careful thought. The challenge of connecting your trial story to the values and experiences of jurors-- even when the context is alien-- is the art of being a trial lawyer.

Finances:

Not surprisingly, the economic downturn has seriously changed the financial future for most Americans. In general (and adjusted for inflation), men's incomes are actually lower today than they were in 1980. The rapid growth in women's incomes since 1980 may be coming to an end as well.¹² Generations still working have been hit much harder than those who have already retired--with Gen Xers and Boomers hit the hardest.

While Boomers have long been concerned with retirement finances (and the economic downturn has only intensified those concerns), Gen Xers are increasingly concerned about their own retirement finances. Two-thirds of Boomers in their 50s say they might have to delay retirement. While there is much talk about simplifying and downsizing, Gen Xers (who bought during the housing bubble) cannot afford to make this choice without losing significant sums of money and Boomers do not seem to be downsizing at all.^{13, 14}

Practice Implications:

Courts continue to struggle with requests for financial hardship exemptions in a financially struggling jury pool. It's a difficult balance to strike. This past year we assisted in a jury selection on a complex case in which there were almost 40 financial hardship requests. As we watched our minority and lower-income jurors be excused time and time again, we were struck by the improbability of having a truly representative jury.

Yet, if we insisted on keeping those jurors, we would have angry faces (and hearts) in the jury box and that would likely not result in a fair trial either. White collar workers are often paid their regular wages for jury duty. For the rest of the jury pool, their 'wages' for jury duty don't cover the costs of lunch and parking.

Technology Use:

We all know that Millennials are tech-wizards. Often referred to as digital natives, they are always connected. Gen Xers are much the same. What may surprise you is that Boomers and even the Silent Generation are also remarkably 'connected'. Certainly not to the same degree as the Millennials, but [*Grandma is also wired \(mostly\)*](#).

Millennials: 91% use the internet (up from 89% in 2008) and 86% use social networks. Despite their constant connectivity, texting is more popular among this group than either email or social networks.¹⁵

Generation X: 88% of Gen Xers were internet users in 2011 (up from 80% in 2008) and of those online, 73% used social media. Gen Xers are "fully comfortable using both traditional and digital media channels".¹⁶

Boomers: 75% use the internet (up from 70% in 2010) and 93% use email. Of those online, 47% used social networks in 2010 with 20% doing so daily. Intriguingly, Boomers spend more money on technology (monthly telecom fees, gadget/device purchases) than any other demographic!¹⁷

Silents: 47% used the internet in 2011 (up from 36% in 2008) and of those online, 94% use email and 26% use social networks!^{18,19}

Practice Implications:

*Don't assume that only the young use technology. When you are in a tech-heavy case though, make sure to use simple [even anthropomorphized] explanations for the complex layers of technology as exemplified in [*Barnes \(2009\)*](#).*

Old and young alike can understand concepts, metaphors and analogies when presented in a familiar format. We've seen the esoteric technology underlying complex patents simplified using [for example] comparisons to drive through orders, vending machines, and pizza delivery. Use examples that are universal and jurors will 'get' enough of the concept to talk about it in their own words.

Differences in Generational Attitudes, Beliefs and Values

Attitudes and beliefs are the lens through which facts are viewed. There is little more important for a trial lawyer to understand than the the value of a potential juror as they might impact the issues in your specific case. Obviously, not every value will resonate with every case. The following section includes litigation-relevant variables we have found to be useful tip-offs on how individual jurors will respond to a trial story.

On the following pages you will find generational perspectives on the following variables: comfort with multicultural diversity (including a look back to the terrorist attacks of 9/11/2001); liberal versus conservative outlook; anger/frustration with the government; beliefs about gender roles; attitudes toward the environment, scientific findings, religious beliefs, gun control, legalization of marijuana, same sex marriage, and how much members of the various generations trust others.

Attitudes, Beliefs and Values: Clues to Juror’s Case Reactions

Multicultural/Diversity comfort:

As demonstrated earlier, America is increasing multiculturally composed. The Silent Generation is the least comfortable with these changes. Then Boomers. Gen X and the Millennials are more at ease. When we examine data on generational attitudes toward interracial dating (blacks and whites dating each other), the pattern is the same. The younger you are, the more comfort with interracial dating and marriage. For example, when asked if it is *“all right for blacks and whites to date each other”*, 91% of Millennials agree it is while other generations tend to agree--Gen X (92%), Boomers (87%) and Silents (76%).

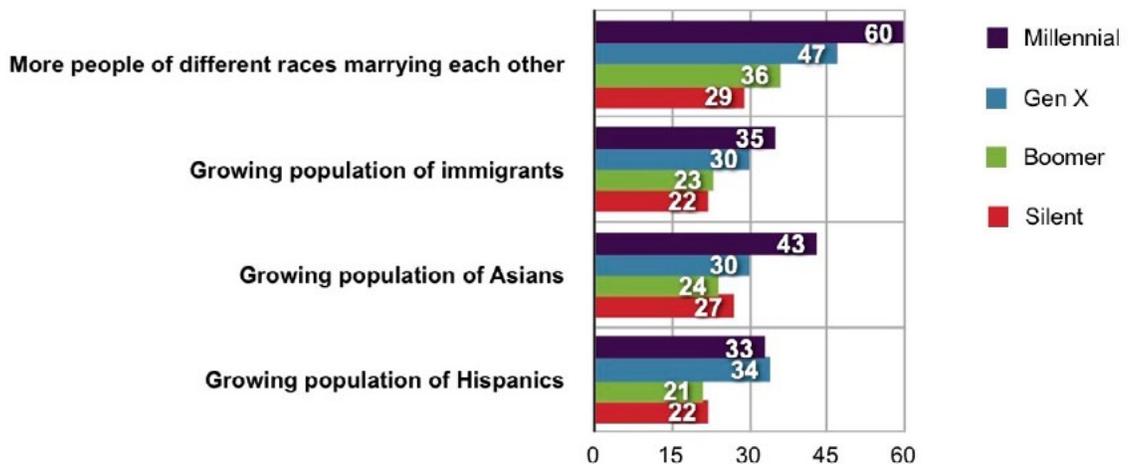
It is perhaps unsurprising that our *attitudes toward immigration and immigrants* follow the same trend. Only 27% of Millennials believe that “newcomers [i.e., immigrants] threaten our customs and values” while 37% of Gen Xers endorse the belief, as do 46% of Boomers and 45% of the Silent Generation.

Our youth lead the way with tolerance--as they have across all younger generations. On multiple issues related to America’s growing cultural diversity, the younger you are, the more likely you are to see these changes as positive. We can see this clearly if we compare visually the generational perspectives on the changing face of America.

Generational Perspectives on the New Face of America

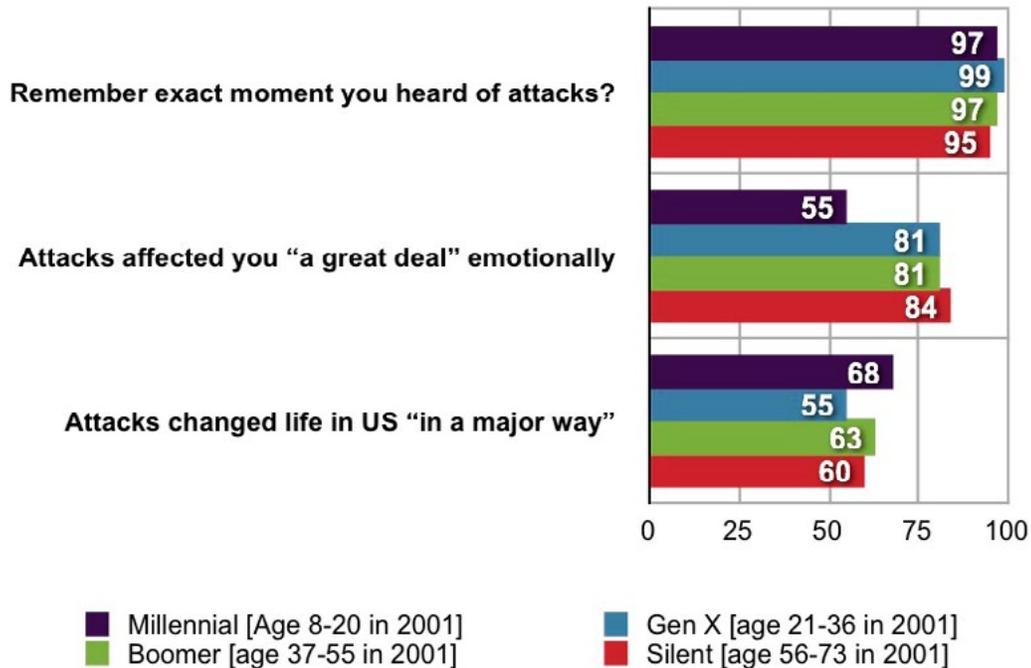
[data depicts % saying each is a “change for the better”]

From the 2011 Pew Report on the Generation Gap and the 2012 elections



Recollections of 9/11/2001: Another way to look at our comfort with multicultural America is to look a decade later at recollections of the terrorist attacks of 2001. Ages of the generations are included as a critical contextual anchor when looking at the emotional response of the Millennials.

How Generations Look Back at 9/11



We might be tempted to judge the Millennials as unfeeling when examining their emotional response unless we look at their age range in 2011. They were children. They know things have changed but overall they were not old enough to emotionally understand just how much our lives were irrevocably changed.

Practice Implications:

The first lesson is that context is critical. We can make assumptions that are completely wrong based on evidence not placed in context. It is important that you supply jurors with contextual information about surprising evidence or 'bad facts' (if any). The [fundamental attribution error](#) ensures that without context, jurors will assume [bad] character reasons for behavior rather than situational reasons. [See Sam Sommers' article in this issue for more on how context matters for attorneys.]

The second lesson is that when we have strong emotional reactions, we look for someone to blame. There is ample evidence in the literature that [prejudice against Arab Americans and Muslims is rampant since 9/11](#).

What the polls [and the research] tell us is that our [suspiciousness extends to everyone who is "different" than us](#)--whether that difference is skin color, religious beliefs, sexual orientation, or some other variable that makes 'them' different. It is counteracted by addressing it directly, beginning in voir dire and judiciously (and usually subtly) throughout the trial.

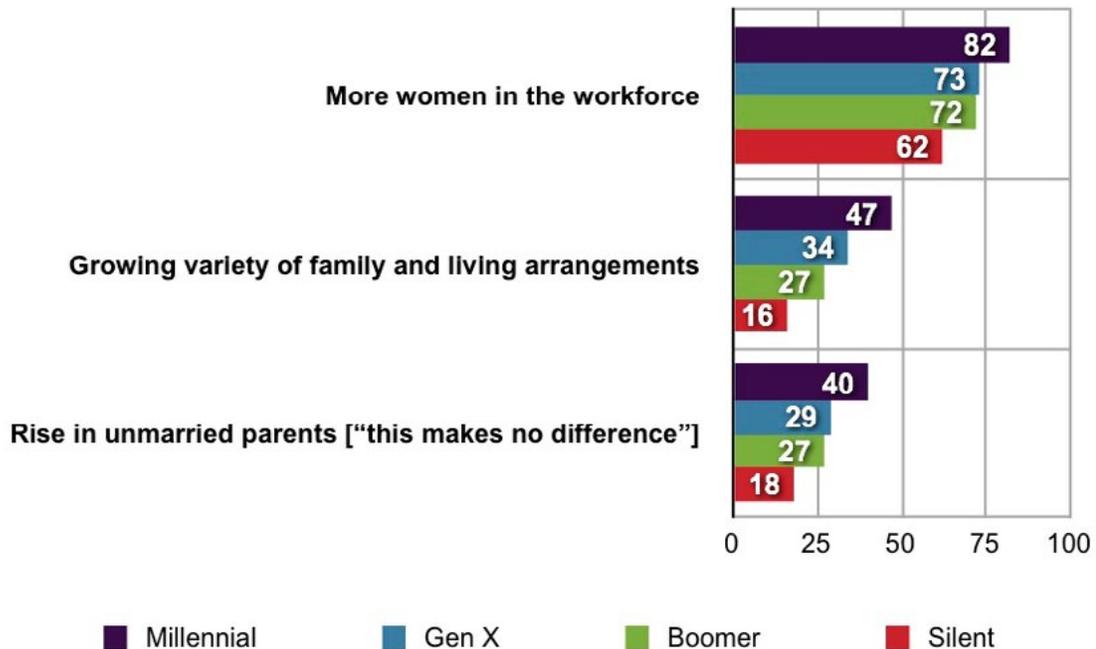
Gender roles and family structure:

Changes in gender roles and family structure have been continuous since WW II. But we still have strong feelings about whether these changes are good or bad. The debate over [how we define families](#) and even how we define marriage have been at the epicenter of public discourse continuously.

The generational perspective on these issues mirrors those of other social issues--the younger you are, generally the more tolerant you are. For example, no generational group really supports the unmarried parent as a “good thing” but Millennials see it as mattering much less than do older generations.

Intriguingly, despite the tepid support for unmarried parents, [more Americans support same-sex marriage](#) than ever before--although there are strong generational differences in this support. The pattern follows the same one we’ve seen before. Millennials are most supportive (59%), then Gen X (50%), then Boomers (42%) and then the Silent Generation (33%).

Generational Perspectives on the Changing Gender Roles and Family Structure
 [data depicts % saying each is a “change for the better” except for the unmarried parent question which depicts those saying it is a “change that makes no difference”]
 --From the 2011 Pew Report on the Generation Gap and the 2012 elections



Practice Implications:

When your client is not traditional, you want to emphasize to the jurors the ways in which your client is much the same as the jurors. Identify universal values by highlighting family connections, community involvement, parenting activities, et cetera.

Despite younger jurors being more positively disposed to changing family structure, more than half of them are not supportive. It remains just as important that you connect jurors to your client (via similarities) regardless of whether your jurors are older or younger.

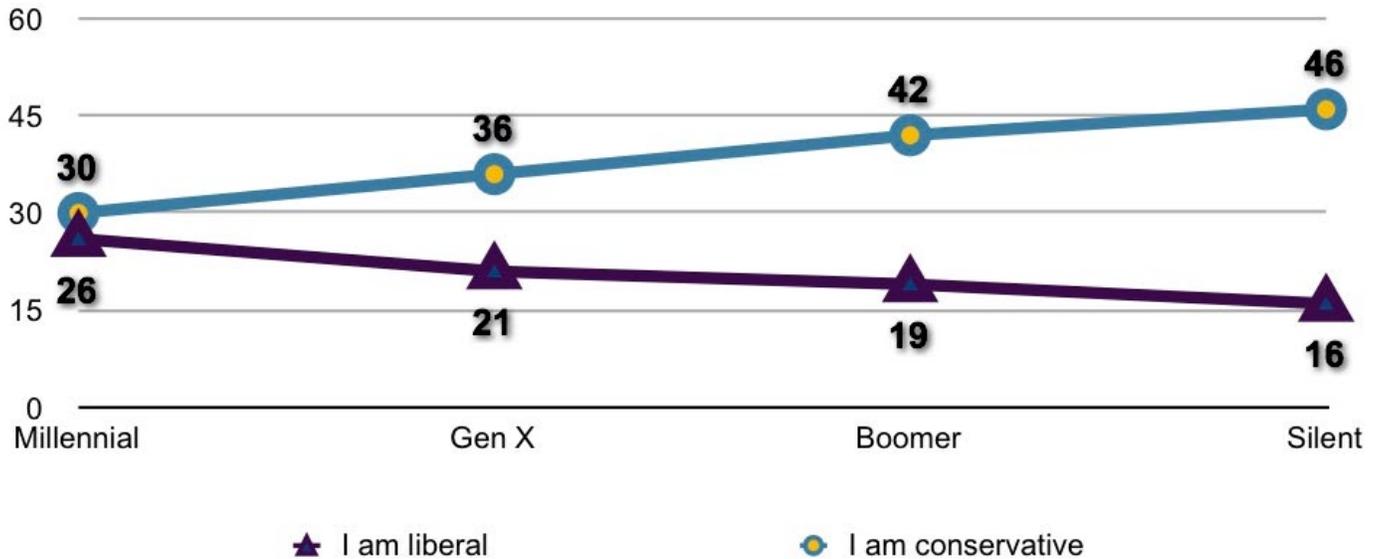
Liberal or conservative?

Akin to views on social issues, the older you are, the more likely you are to be conservative. Among all generational groups except the Millennials, the proportion of those who identify as conservative has increased since 2000. Below is the snapshot from the Pew Report of 2011.

Generational self-descriptions as liberal or conservative

[data represent percentages of people describing themselves as either liberal or conservative]

<http://pewresearch.org/pubs/2122/generation-gap-barack-obama-mitt-romney-republicans-democrats-silent-generation-millennials-genxers-baby-boomer>



Practice Implications:

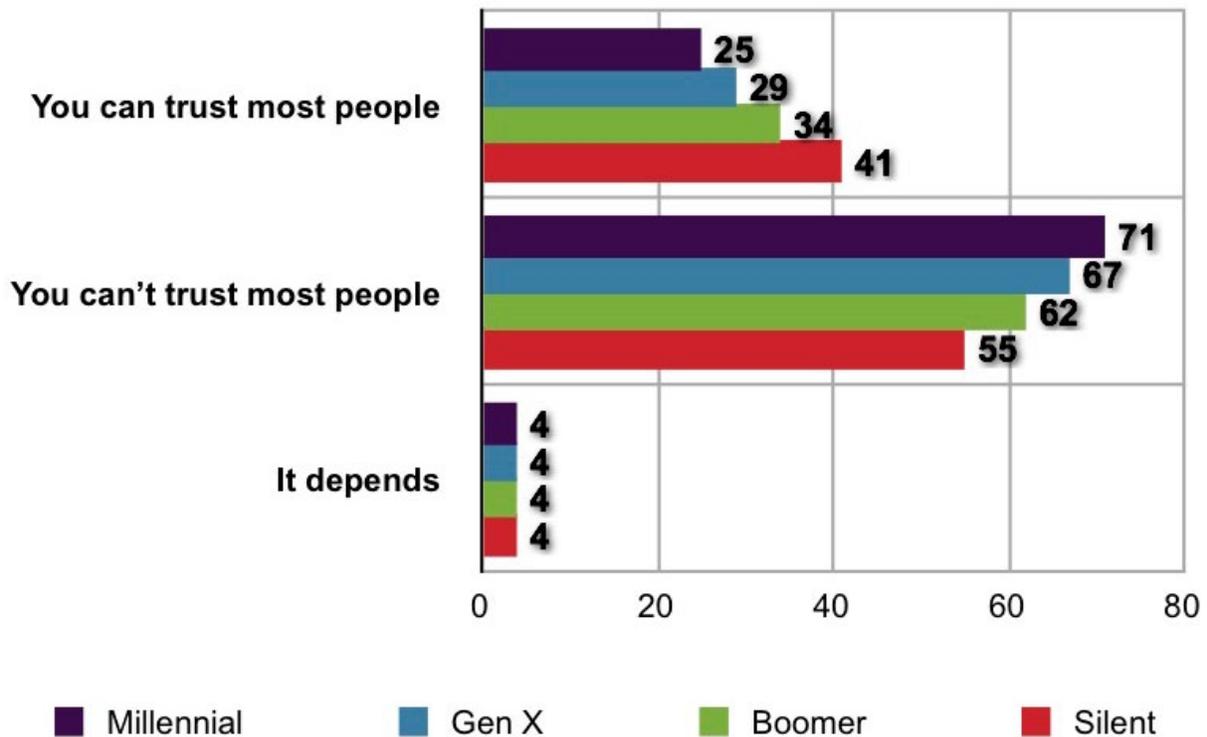
If your case has political overtones or government or authority figure involvement, you want to pay special attention to the Silent Generation members. Silents are the most politically engaged generation at the moment--and are much more engaged than they were in the 2008 elections. They are 3x more likely than Millennials to say they have given a lot of thought to the 2012 elections (and there was no difference between the two generations on this issue at this phase of the election process in 2007).

In our 2011 pretrial research, we've seen "liberal" and "conservative" labels thrown around by mock jurors in ways that mean very different things when we are in New York City than they mean when we are in North Carolina or Utah. Make sure you determine what those buzzwords mean in the specific venire. There are specific values and beliefs underlying those labels. It's in your best interest (not to mention the best interest of your client) to find out how values, beliefs and labels converge to define your case and your venire.

Trust in Others:

Poll findings regarding how readily people trust others have a counter-intuitive feel. It would make sense that tolerant people are more trusting. But, oddly, Millennials are the least trusting of the generations. In some ways, this open-minded, all-embracing generation can be closed and defensive. And the pattern holds across the generations: older people are more trusting and younger people are less trusting. The reasons can't be fully explained, but if you consider the level of cynicism and mistrust that pervaded the public conversation during the years that the Silents were young, as opposed to the progression of our society since them, it is tempting to give those formative experiences a lot of credit.

“Generally speaking, would you say that most people can be trusted or that you can't be too careful in life?”



Practice Implications:

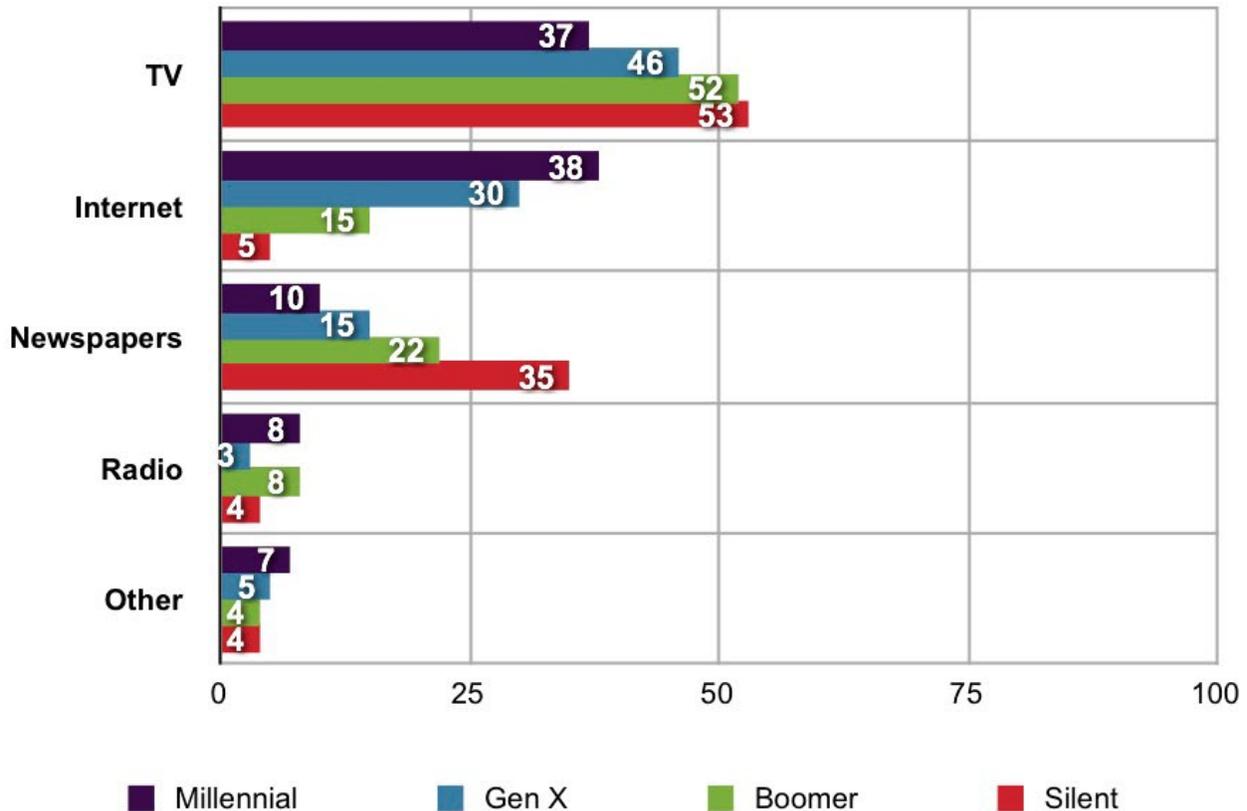
We often talk to focus groups and mock juries about how their willingness to believe someone plummets if they find out the person is a lawyer. There is generally laughter and then quick agreement that lawyers can generally not be trusted to tell the truth.

What this means is you have a challenging audience already, and younger jurors are going to be more cynical and prone to see ‘spin’ in how you tell your case story. Your best bet is to be clear, factual, and precise in the way you present your evidence. For the cynical and mistrusting, the worst thing you can do is to overtly attempt persuasion. It will backfire. Allow the jury to come to their own conclusions--and let them know that you are trusting them to apply their judgment and see the truth.

Preferred source of information:

There is also a strong generational difference in where we turn for information.²⁰ Younger generations tend to go to the internet or television while older generations make much more use of newspapers and television. This generational difference will result in different information coming to your jurors pretrial. “Google mistrials” related to internet searches have been triggered by impulsive behavior by both the oldest and youngest jurors.

Where Generations Get News Information [Numbers are rounded]



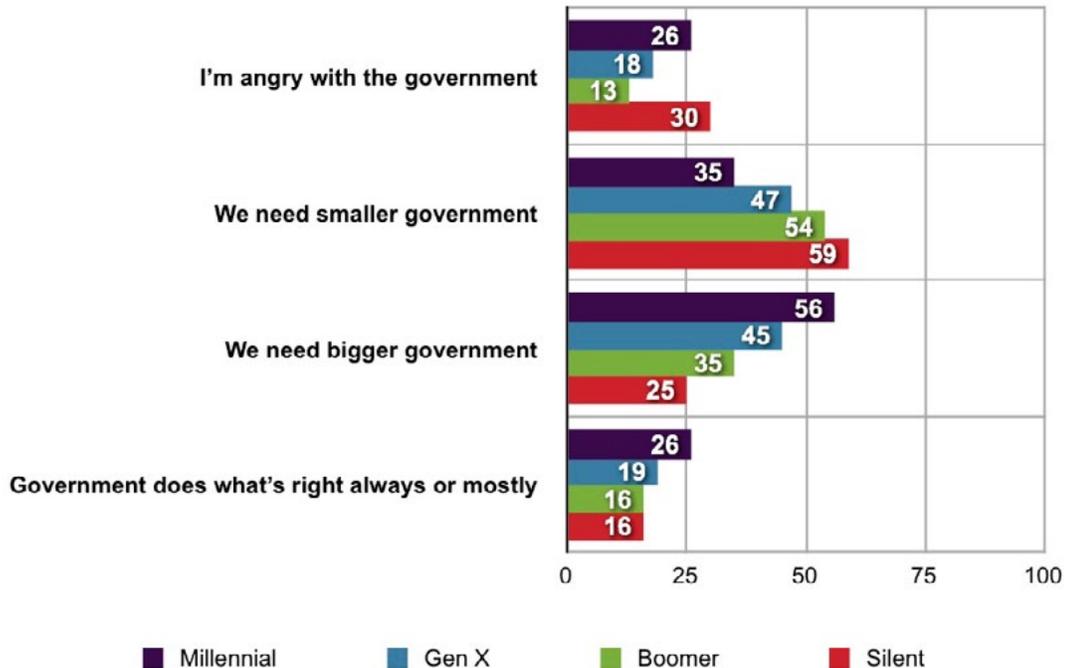
Practice Implications:

Keep track of where your potential jurors are going to seek information, and know what they are likely to find when they look there. That means the universe of what you have to cover is exponentially larger than 20 years ago. While television, newspaper and radio reporters have some guidelines on what they can and cannot say and do, the internet has highly credible looking sources that operate with no rules at all. Social media sites ensure that information travels at the speed of light. And unfortunately, most of us seek information not to inform ourselves, but to affirm ourselves. What that means is that we don't investigate to see if our information is accurate--it is read and embraced to validate pre-existing beliefs.

Anger with government:

Americans are dissatisfied with government--and for many, the feeling is anger. While most social issues variables follow a predictable generational pattern, this one is different. The Silent Generation is very angry with the government and their anger is mobilizing them politically.

Generational Anger with and Attitudes Toward the Government
 --From the 2011 Pew Report on the Generation Gap and the 2012 elections



The Silent Generation is simultaneously the happiest generation and the most negative when it comes to government. And the carefree, former flower children Boomers are the most unhappy. One aspect of this equation could be related to the Silent Generation having grown up without many of the big government programs, and not wanting to see expenditures expanded to a broader scope.

Older Americans are the most satisfied with their financial situations²¹ despite economic changes and the most likely to say their financial situation has stayed the same during the last few years.²² This is likely the case since many Silents are retired and had already downsized their living expenses prior to the economic downturn. And overall, they have lived more modestly than the subsequent generational groups. The financial portfolios of Boomers were hardest hit in terms of time remaining to plan for retirement.

Practice Implications:

Anger has been a huge theme in our 2011 pretrial research work, but it doesn't always bounce predictably. Jurors are angry at Wall Street but wary of giving verdicts that could harm large companies that "might" create jobs again. They are angry at finger-pointing rather than taking responsibility for one's actions. Yet, they often support corporations when least expected if case themes are crafted carefully.

We've seen an increasing number of "[a pox on both your houses](#)" reactions across cases ranging from divorces to contracts to patents. Jury research across the country shows that jurors are fed up with what they see as [manipulative efforts to avoid responsibility](#)--whether "you" are an individual, a corporation, a sports franchise, or the government.

Views on Environment/Energy Sources:

Historically, Americans have placed concerns for environment above economic concerns. Recently, Gallup has demonstrated [*the economy is edging out environmental concerns*](#) although short-term reversals occur when disasters hit. For example, the environment was more important after the BP Deepwater Horizon spill, and again after the tsunami-caused Japanese nuclear factory disaster. But during an ongoing economic crisis, these rushes to support the environment were short-lived (measured in weeks not months) and economic concerns again prevailed. Research is mixed over the nature and extent of a generational shift regarding matters of the environment.



Practice Implications:

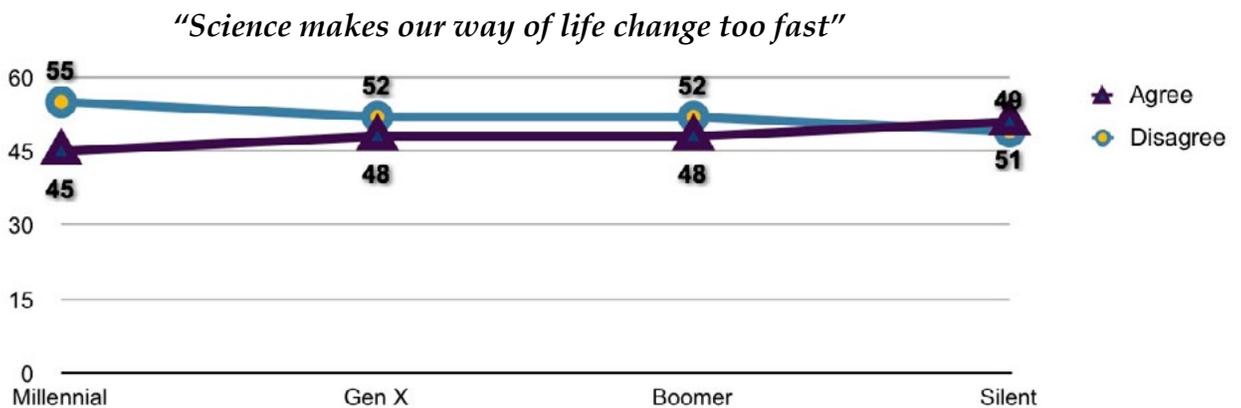
The main lesson here is, again, to avoid assumptions. The economy and the environment are tightly linked and current attitudes are fluid. The best approach is to educate yourself about existing attitudes in the venire as close to trial as possible and proceed accordingly.

Reaction to scientific findings:

The media would have us believe that the issue of climate change is a scientific debate. Yet, those of us who prepare expert witnesses to present scientific data know that jurors often [*dispute "science" simply because they disagree*](#) with it. According to the 2011 Pew Report, there is a [*decline in the past five years*](#) in the number of Americans who believe the climate is warming. Scientists haven't wavered, but the confusing and mixed messages on television and the internet (e.g., "[*Climategate*](#)") has created uncertainty.

Political affiliation seems to be predictive of whether climate change is accepted. Twice as many Democrats (and Democrat-leaning Independents) say there is solid evidence of climate warming than do Republicans (and Republican-leaning Independents). Among the Democrats there are no generational divides on this issue. But among Republicans, about half of the Millennial Republicans and Republican leaners say global warming is occurring.

When we ask generally about scientific progress²³, we see little in the way of generational differences--it seems we have to have a specific issue in mind (like global warming) to see differences that make a difference.



Practice Implications:

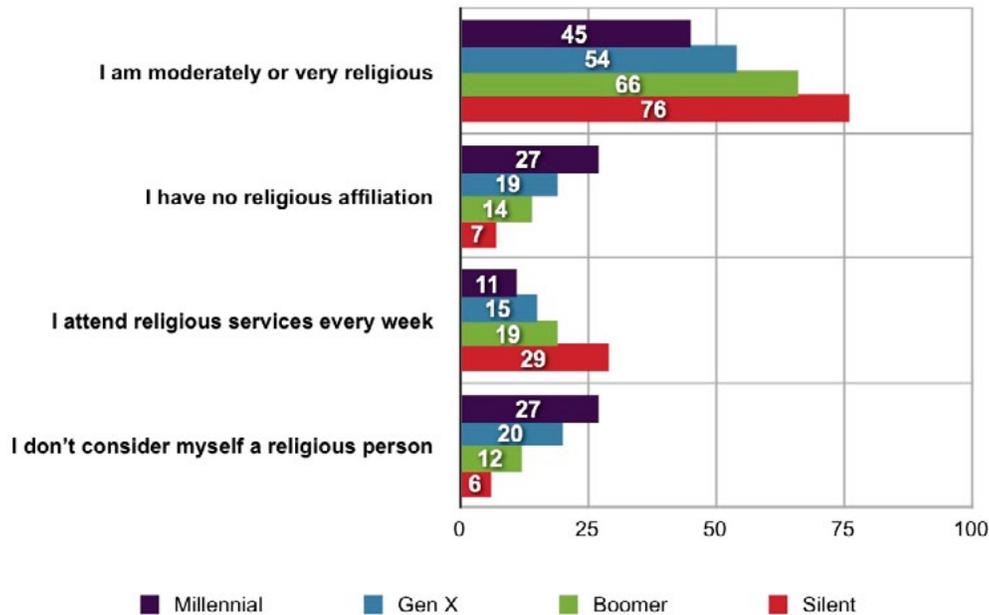
*There is a significant portion of society that fears change, and mistrusts what they can't see or touch. Scientific findings set off internal alarms if the listener disagrees with the findings. There are ways to [*decrease*](#)*

the intensity of those alarms and increase the chances of your message being heard.

Religion:

Religious affiliation (especially among young adults) has been on a downward trend since the 1970s when 13% of Boomers were not religiously affiliated. According to the *Pew Report*, in 2010, 26% of Millennials were not religiously affiliated. Nor were 21% of Generation X and 15% of the Baby Boomers. 2011 data in the following chart (from a different source) largely mirror the Pew Report.

Generational Religious Affiliations and Perspectives



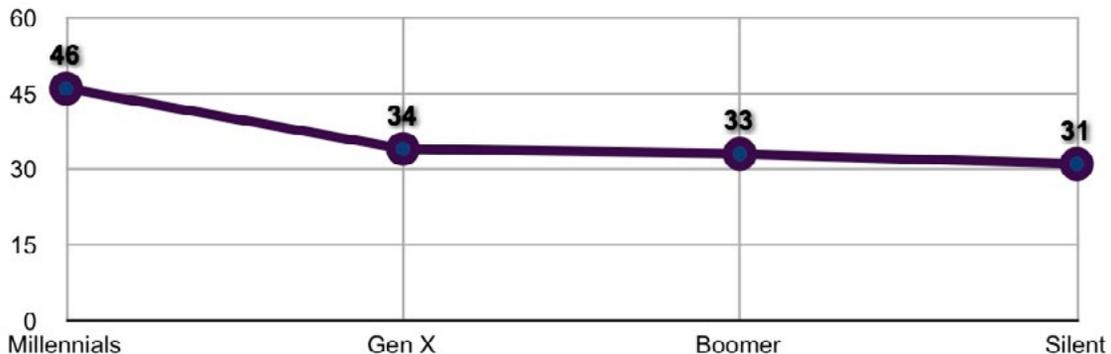
--From *American Generations (2011)*. New Strategist Publications, Inc.

Older Americans continue to be more religious than younger Americans in terms of both self-description and behavioral indicators (e.g., attending religious services).

Death penalty:

Opposition to the death penalty has been growing over the last fifteen years. Millennials are the *most opposed to the death penalty*. In other generational groups, "support outweighs opposition by nearly two-to-one with little difference between Silents, Boomers and Generation X."

More Millennials Opposed to Death Penalty for Murderers



[data reflects percentages opposing death penalty in each generation]

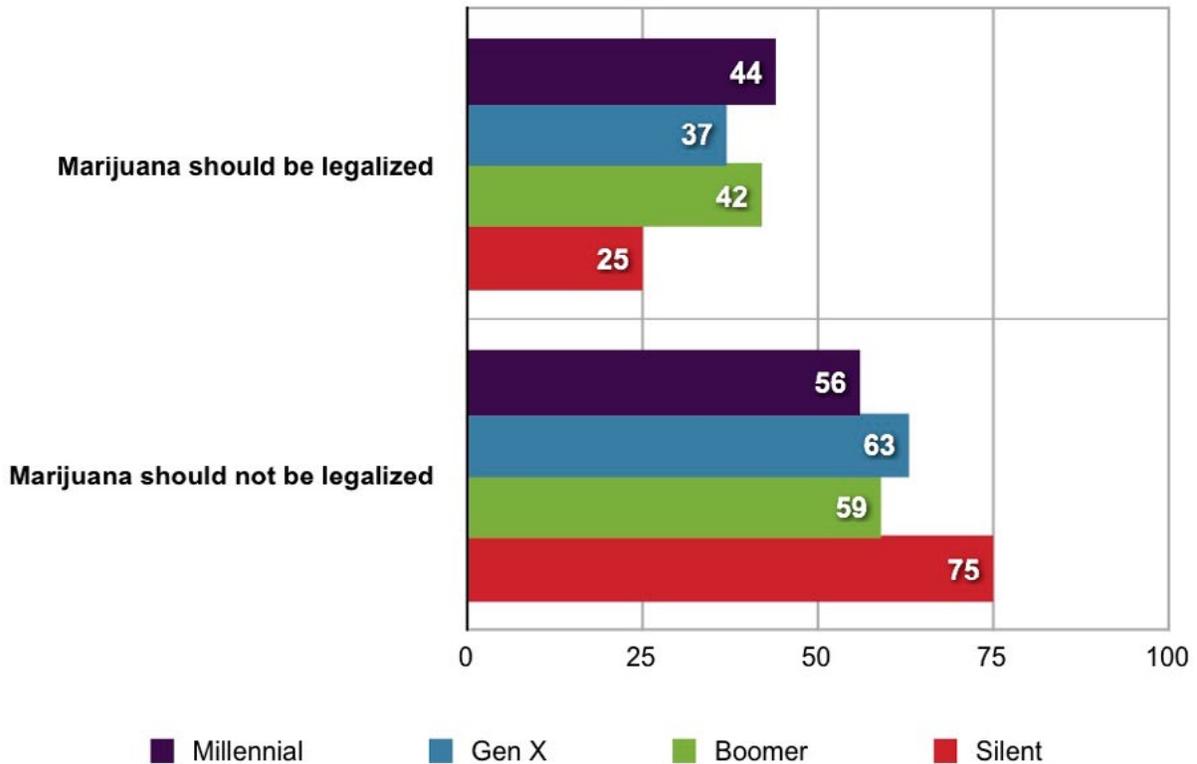
Guns and Gun Control:

There are few issues as polarizing as debates over gun control. Despite Millennial’s lack of trust in others, they are least likely to have a gun in their home and this pattern of results is typical of our overall experience in this review--the younger you are, the less likely you are to own a gun; the older you are, the more likely you are to own a gun.²⁴

Legalizing Marijuana:

Legalization of marijuana is another issue with strong debates on either side²⁵. The recent trend toward medical marijuana may indicate opinions against this issue are weakening. A recent survey shows the typical pattern with an exception--Boomers “remember when” and are more in favor of legalization than their Gen X children. When the argument becomes one of economics--citing the cost of prosecutions and jailing for minor drug offenses- the public is notably more weary of these laws.

“Do you think the use of marijuana should be made legal or not?”



Conclusion:

As you review the data we've presented here, you may be surprised there are not "more" differences between the generations.

1. There is a more liberal/tolerant focus on social issues among the Millennials and Generation X.
2. There is a concern about financial issues shared by Gen X and the Boomers.
3. The Millennials have an unprecedented rate of unemployment.
4. The Silent Generation is happiest and yet, the most angry with government.
5. There is a divide between the youngest generation (the Millennials) and the oldest generation (the Silents) that appears unbridgeable based on the Pew Report. Some of this is due to the age gap and the ever-increasing liberal perspectives of the younger generations.

So with all the press on the "slackers" and the "punks" and the "flower children" of yore--why do we not see more differences between the generations? They grew up differently. They had different formative experiences. Why is there not a bright line of difference? It could be that there is--in some instances.

As it turns out, the stereotype of the Boomer rebel/hippie/flower child actually applied to only a small, iconic segment of the Boomer population. But it's the image we retain of the 1960s generation. It's part of what we do. We put people in boxes. It makes things simpler. And often, it makes us flat out wrong.

We all use stereotypes as shortcuts to decision-making. Readers of our blog (The Jury Room) know that we rely heavily on the newly published (not the sadly dated) research literature to understand the evidence rather than to merely parrot the opinions found in the popular media. Here's a terrific (and pretty succinct) explanation of why stereotypes persist in spite of evidence to the contrary:

So, why might stereotypes persist in the face of evidence to the contrary? In fact, the stereotype and the data can both be correct simultaneously. If one considers a normal distribution of people, it would only take a small increase in numbers at either tail of the distribution to cause people to believe that one generation was different from another due to the disproportionate impact outliers have on influencing perceptions. This might occur even while the average within the generation stays the same as the other generations.²⁶

As always, knowing general information about your jurors (in this case their generation) allows you to assess attitudes and beliefs that are relevant to your case and alerts you to the importance of not relying on stereotypes alone to make decisions you then have to live with throughout trial.

References

- ⁵ American Generations. Published 2011 by New Strategist Publications, Inc.
- ⁶ Ibid.
- ⁷ Ibid.
- ⁸ Ibid.
- ⁹ Ibid.
- ¹⁰ Ibid.
- ¹¹ Ibid.
- ¹² Ibid.
- ¹³ Kotkin, J. & Cox, W. (2011). Where the Boomers Are. *Forbes*, September 12, page 26.
- ¹⁴ Baby Boomer Consumers. (2012). *Consumer Behavior*, page 242.
- ¹⁵ Millennial Consumers. (2012). *Consumer Behavior*, page 250.
- ¹⁶ Generation X Consumers. (2012). *Consumer Behavior*, page 246.88
- ¹⁷ Baby Boomer Consumers. (2012). *Consumer Behavior*, page 244.
- ¹⁸ Senior Consumers. (2012). *Consumer Behavior*, page 237.
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- ²⁰ American Generations. (2011). New Strategist Publications, Inc.
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- ²³ Ibid.
- ²⁴ American Generations. (2011). New Strategist Publications, Inc.
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- ²⁶ Gentry, W.A., Griggs, T.L., Deal, J.J., Mondore, S.P. And Cox, B.D. (2011). A comparison of generational differences in endorsement of leadership practices with actual leadership skill level. *Consulting Psychology Journal*, 63(1), 39-49.

Image credits: [Four generations of men](#), [Employment defined](#), [Tech Wizards](#), [Earth in space](#).

Road Warrior Tips

Like many of you, we travel all the time. And we have secrets that help us get around faster, more comfortably and tips on what to make sure and carry with you in the air, on the ground or even, underground!

Thanks to the generosity of these frequent flyers – these trial consultant secrets can be yours as well. As we collect additional secrets, we'll add them here (check the Road Warrior category before you head out).

National Travel: [alphabetized by state]

Nevada, Las Vegas:

Very often the cab lines in Las Vegas are HORRIBLE. If there is a convention in town you can literally wait an hour for a cab and the lines can stretch around the building. There is a trick. Get one of the luggage porters that are employed by the airport to haul your bags out for you (even a briefcase). They take you to the FRONT of the cab line. Worst case, you will wait behind one or two people. This can save a lot of time for a tip of \$5 or \$10 bucks. [submitted by [Tara Trask of Tara Trask and Associates](#)]



New York, NYC:

I really like [hopstop.com](#). Great for big city metro info. You can use it on your handheld and it tells you how to get where you are going via metro lines. For NYC, it even says “go south toward Houston” or whatever to direct you when you come out on the street from the subway. I use it in NYC on the subways all the time. LOVE subways. [submitted by [Tara Trask of Tara Trask and Associates](#)]

North Carolina, Asheville:

Asheville is lovely but the taxis at the airport are often dirty and rundown and I was sure the driver I had was going to communicate his tuberculosis to me as he spit phlegm into a plastic cup. Then I found [Marvels Upscale Transportation](#). The same price as the dirty cabs with a wonderfully clean town car and a charming and personable driver! [submitted by Rita Handrich of [Keene Trial Consulting](#)]

International Travel: [alphabetized by country]

Japan, Tokyo:

If traveling to Tokyo - you'll be flying into Narita, which is well outside of Tokyo. Like Dulles and DC here, only worse. Best way into Central Tokyo is to use the “Airport Limousine Bus” - and not a taxi. It's a much cheaper, and nicer ride. [submitted by Bruce A. Beal of [Beal Research](#)]

Things to Carry With You: [alphabetized by product name]

A playful attitude:

I play a kind of Pollyanna Glad Game with the myriad of hotels I spend time in. I have learned a trick to no longer being angry and resentful over the fact that the place that I am to lay my weary head for the night or week or whatever has a boisterous convention group in it. I do this in one of two ways:

1. I use the knowledge I get from staying with them for a show I am writing. For example, I just finished a short play partially based on the experience of staying in a hotel where a junior beauty pageant was taking place (think *Toddlers and Tiaras* meets me in the lobby). Another consultant and I stayed in a hotel recently in the midwest where upon entering we were greeted by a convention of Elvis impersonators and a very bewildered wedding party. You know I am using that one for something.
2. Instead of pretending that I am not with the convention, I pretend that I am. I discovered this trick while staying at the same hotel as an NRA Convention once where it just seemed...well... safer to have everyone around me believe that I actually was carrying a concealed weapon. It is fun to be an IT genius, a Financial Planner, an auditor, an office supplies regional manager, a quilter, etc. So far it has only backfired on me once when a desperate woman in New Orleans ran up to me shouting, "Are you the Port Of San Francisco???" and I blew my cover by saying without thinking, "Darling - how could you? I've really worked damned hard to keep the weight off." [submitted by Katherine James of [ACT of Communication](#)]

Belkin Power Cube:

Always travel with a power strip, or even better, the [Belkin power cube with USB ports](#). Great for charging multiple objects, like computer, phone, iPad, et cetera. [submitted by Paul Sceptur of [Sceptur Trial Consulting](#)]

Divers Alert Network:

What do scuba diving and trial consulting have in common? Travel, and the potential for illness or injury while traveling. Membership in the [Divers Alert Network](#) is \$35/year and includes (as quoted from the website): "DAN TravelAssist®. As a DAN Member, you automatically receive DAN TravelAssist and up to \$100,000 of evacuation assistance coverage. This benefit is effective for both diving and nondiving medical emergencies. Evacuation coverage begins when you travel on a trip at least 50 miles (80 km) from home and call the DAN Emergency Hotline (+1-919-684-9111) for assistance or evacuation." Check www.dan.org for more info - you might just want to start diving too! [submitted by David Fauss of [Magnus Research Consultants](#)]

Google Translate:

[Google Translate](#) is a Google app that will translate between any 2 of dozens of languages, include a speech out load option. [submitted by Bruce A. Beal of [Beal Research](#)]

Taxi Magic:

iPhone app - [Taxi Magic](#). Need the phone number of a taxi, this app appears to know how to find them most anywhere. [submitted by David Fauss of [Magnus Research Consultants](#)]

Image Credit: [Road Warrior](#)

The Use of Technology in Witness Preparation: Is the iPad2 for You?

BY JOHN D. GILLELAND

Dr. John Gilleland has assisted with the witness preparation efforts for hundreds of witnesses during his 24 years in jury consulting. He is a senior jury consultant at [TrialGraphix](#), a litigation consulting firm specializing in jury consulting, graphic design, presentation technologies, and trial preparation solutions.

The world seems to bow down to Apple for mobile technology these days (isn't there an app for just about everything?). The situation is no different for jury consultants involved in helping lawyers prepare for trial. There are multiple jury selection apps on the market for the iPad and iPad2 (reviewed previously in *The Jury; Is It Time for the iPad to Replace Paper Notes in Voir Dire?*), and at TrialGraphix, in the past year we've also been using the iPad2 for the video recording of witness preparation sessions.

Video recording witness preparation sessions

Witness preparation consultants have been using video-recorded feedback with witnesses for generations – letting the witness see themselves and their sometimes problematic shifts in body language and demeanor as the questioning unfolds. I am “seasoned” enough to remember the days of bringing actual television monitors to prep sessions because the lawyers had no audiovisual equipment available at their firms. And when lawyers did have televisions available (and eventually monitors), there was always the issue of being able to properly hook your video camera up for the playback portion of the witness preparation session. In such situations there was always the fear of whether your video equipment would be compatible with the equipment present in the lawyer's office – so typically, you brought along your own playback device to play it safe.

Of course, with the leaps forward in video equipment during the 1990s and the advent of the personal camcorder, toting a tripod, camcorder, cables, and, yes, still the occasional playback monitor to the preparation session became somewhat easier. There was even a stretch there where we utilized a little converter box and played the recorded video back through the laptop, allowing you to do away with the cumbersome monitor hookup altogether.

Nowadays almost all law firm conference rooms come equipped with large flat-screen monitors or built-in LCD projectors that ease the playback process and the ubiquitous USB or HDMI connections between camera and monitor/computer abound, making the technology side of witness preparation fairly easy to manage. But there are the smaller or remote law offices, the hotel conference rooms to which the witnesses are often summoned for preparation meetings, and the spontaneous last-minute witness work sessions in war rooms that still require the full complement of video equipment if video feedback is to be a portion of the witness preparation efforts. So even in the modern era, the “extras” required for taping and then connecting your video equipment for playback remain pretty much the same as they were 15 years ago: tripod, camera, monitor, microphones, and the proper jacks and associated cabling.

The iPad2

The introduction of the Internet tablet has changed the game for a relatively popular format of our witness preparation efforts – a single attorney putting the witness through a mock direct/cross.

With its roughly 10-inch screen and front and back video camera capabilities, the iPad2 allows you the opportunity to not only easily capture the witness’ image directly to a computer file while observing the shoot on the main screen, but to then flip the iPad2 around and immediately play back the recorded session for the witness and attorney. All in all, when the witness preparation session involves only the jury consultant, the witness, and the attorney, the process is quite seamless and truly requires almost nothing more than your iPad2.

The only needed add-on in terms of equipment is a stand of some sort to hold the iPad2 in a vertical position during the video capture – not as easy as it sounds though, as when the iPad2 first debuted, the choices of stands were quite limited. Cases and covers developed for the iPad2 all seemed to offer various display angles only, as if Apple had never considered that users might want to actually shoot “steady” or stabilized video with the device.

At TrialGraphix, we found and selected a stand by Rocketfish that holds the iPad2 in four arms that also actually rotate on a vertical support beam, allowing you to easily switch from portrait to landscape orientation ([Rocketfish™ Stand for Apple™ iPad™](#)). This iPad2 stand also has a swivel base, so once you finish your video capture, you can simply spin the iPad2 around to face the witness/attorney during playback. In the past six months, other vertical stand options have started to appear as the aftermarket matures, including tripod mounts that can attach to the iPad2 (and then to the tripod of your choice) and other third-party devices claiming to achieve a vertical orientation for both video and photo capture.



Although the built-in microphone on the iPad2 is fairly sensitive, we still recommend having the witness positioned at the end of the table with the iPad2 in its stand approximately three feet away (the video camera has no zoom capability) and the questioning attorney(s) also positioned at the nearby table corner(s). The microphone is quite capable of picking up voices within this approximately five-foot range, and keeping the questioners close by also assists with the audio quality during the playback (even at full volume, the playback capabilities require you to be relatively close to the iPad2 to follow the video content).

A couple of other things you might want to consider before you run out and buy an iPad2 as an equipment business expense:

- As long as the viewing audience is limited to the consultant, the witness, and the attorney, the size of the screen and volume level are acceptable during the video review with the witness. But be forewarned that larger audiences will require outputting to external monitors or screens for a proper viewing by all, and therefore require additional connectors and viewing equipment (perhaps defeating the appeal of this otherwise minimalistic variation of witness preparation).
- Although video geeks are somewhat appalled at the relatively low number of megapixels offered by the iPad2 cameras (competing tablets typically offer much higher camera resolution), in our opinion the video quality is just fine for this limited purpose of providing immediate feedback to the witness. If this level of quality would trouble you, stick with the traditional camcorder. To our eyes, there is no graininess or pixelation on playback with the iPad2, even when you choose to output the playback via VGA to an LCD projector or connect through HDMI to an external monitor or computer (both of these converters/dongles for the iPad2 are available at your favorite Apple store or reseller).
- The iPad2 captures video to the QuickTime movie format (MOV extension), which generates fairly large media files (one 32-minute segment I shot translated into a whopping 3.5 gigabyte MOV file). In addition, without getting into the debate here over the wisdom of preserving witness preparation video – possibly for use at a mock jury exercise or for the later review by those unable to attend the working witness session – pulling the video off of the iPad2 is not as simple as one might like. Apple requires the use of iTunes for “synching” the content of your iPad2 to your computer, which can be quite cumbersome. But also note that third-party programs are available that will allow you to peek at your iPad2 content and grab the files you need (we have used Cucusoft; Cucusoft iPod to Computer Transfer), and with the advent of Cloud and Dropbox applications, the transfer of data between mobile devices is becoming simpler every day.
- While shooting the video, the consultant can see a time stamp running on the iPad2 viewing screen, allowing you to make note of sections you’d like to review with the witness (e.g., from the 18- to 21-minute mark of a 32-minute video). But alas, during playback, there is no such visible time stamp, just a total running time of the entire video file. This requires sliding the video bar to the approximate spot you want (in this example, just over half way through the video to get to the 18th minute) and doing some “hunt and peck” work to find the segment you are looking to replay. Not the most efficient process.
- If you can live with these side issues, the iPad2 may be the device for you for your most basic witness preparation sessions. By our reckoning, a significant number of our witness prep engagements fit the simplistic description given above – just one or two attorneys participating in the questioning, no outside observers, no plan to preserve the video for later use, no editing needs, no large-screen playback needs – making the iPad2 a joy to work with for this purpose. You’ll find that the iPad2 and the stand are all you really need.

But what about more elaborate witness preparation sessions?

Obviously, the simplistic format described above does not cover all types of witness preparation exercises, and changing just a few of the exercise parameters (e.g., adding a few more clients or other observers) necessitates the use of even more technology – changing most everything in terms of additional equipment you’ll need to bring along.

Is the iPad2 still up to the task? Yes. But the real question is do you gain anything with the use of the iPad2 over the traditional camera setup typically utilized for more extensive witness preparation sessions?

At one recent set of witness preparation sessions held at a law firm, we had multiple questioners, additional observing attorneys who were involved in the case, client representatives present, and even other witnesses who were sitting in as they awaited their turns in the hot seat (one witness per day, but some of them testifying in multiple proceedings, so we even had members of other trial teams dropping in and out).

Although we could have still required the questioning attorneys to sit near the iPad2 for proper audio capture, it was decided to add microphones – allowing them to essentially spread out and sit where they pleased. The other obviously needed change was the addition of a large external monitor for playback of the witness video in a manner that all could observe during the feedback portion of the session.

The first week was in a conference room with an HDMI-ready monitor, and the second week in a room with a built-in LCD projector (i.e., VGA output needed), so we had the opportunity to test the iPad2 setup in both of the more complex equipment scenarios most consultants will typically face.

iPad2 Specifications

The iPad2 has but one output port, where one would typically insert a headset for listening to the content stored on the device (more on this later). To make use of other output playback devices the iPad2 uses dongles, or attachments, that plug into the power input section of the device, the proprietary power connection that Apple utilizes across the board for its portable products (i.e., iPhones, iPods, iTouches).

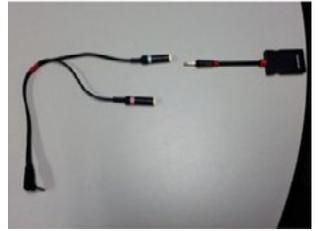
In the case of the available HDMI converter, the dongle splits into a power source and an HDMI connection, allowing you to output your witness preparation session to an HDMI playback device while your iPad2 remains powered (you’ll need an HDMI cord of significant length to make sure you can reach the output device). However, the VGA dongle made by Apple is for VGA output only, so while you are playing back your digital file the iPad2 will be running on battery power – not truly a big deal given the relatively long battery life of the device (you can also keep the iPad2 plugged in while recording and then switch to battery only when you attach the VGA cable for output). But note that when using a VGA for the video output, you’ll also need an audio cord running from the headset port on the iPad2 to your LCD/computer output device if you are planning on playing back the audio portion during the review. (Again, don’t forget to pack both a VGA cord and an audio cord of sufficient lengths to easily reach your output device.)

As for the use of microphones (for quality input) and speakers (for quality sound during playback), you are forced to work with the one available headset port offered by the iPad2, commonly known as the headset jack (mentioned earlier). Here the techies of the world come to the rescue.

Just as the iPhone can be tricked into allowing both audio output and microphone input during a typical phone call (with headsets that set impedance levels which allow audio to go in both direc-

tions), there are splitters available in the aftermarket that attach to the iPad2 and provide for both a microphone input and a speaker output ([KM-IPHONE-2TRS](#)). Using such a splitter opens up the iPad2 for more elaborate setup needs.

Then adding an additional microphone splitter to the audio-in microphone portion of the referenced splitter device allows you to attach two different audio sources for input to the iPad2: one for the questioner and one for the witness ([Monster iSplitter 1000 Y-Splitter for iPod and iPhone](#)). See photo of both the adaptor and then the microphone splitter at the right. Speakers (not shown) would be attached to the other end of the original splitter and microphones would attach to the two inputs on the open end of the rectangular box on the microphone splitter.



Although these can be either table mics, lavaliers, or even wireless mics, we prefer the powered and wired lavalier variety of microphone, with 20-foot cords, allowing the questioner to sit virtually anywhere they want in the conference room. The witness is obviously stuck with sitting approximately three to four feet in front of the iPad2 in its stand, as again, this is a static shot with no zoom capability, and this is the distance that will most properly frame the desired shot of the witness.

The speaker output arm of the first (original) splitter can then be attached to small powered speakers for boosted audio during playback – small because we assume the overall goal is still to make the witness preparation equipment setup lightweight and portable.

Your iPad2 will now look like it has grown multiple arms. The power port will have a dongle attached leading to the playback device (HDMI or VGA) while the headset jack will have a splitter for both microphones and speakers – and the microphone arm of the splitter will be split again to allow one microphone heading to the questioner and another to the witness.

For the technophobes among us, such an array of wiring and cables may seem daunting (you also have to get your playback device to accept and display the incoming signal from the iPad2), but it is really just a series of logical inputs and outputs once you have all of the basic equipment in hand.

So is it worth it? The video camera you've been using for years would also require similar input and output capabilities if you're planning on a more complicated witness preparation session – one with a larger audience. If you're bringing along a tripod or stand, HDMI and VGA converters, various splitters, and microphones and speakers, do you really gain any advantage if your "camera" happens to be an iPad2 versus a small but powerful camcorder? Probably not.

I would also be remiss if I didn't point out that other tablets might be better suited to this witness preparation application than Apple's iPad2 (the Samsung Galaxy and Motorola Xoom come to mind). These tablets offer higher resolution cameras than the iPad2 as well as USB output connections, allowing you to play back, transfer, and therefore work with the video you shoot in a much simpler way. A USB connection would also allow you to either play back the video immediately on your laptop or more easily output the video from there to a monitor via VGA or HDMI connections leading from your computer.

Does the iPad2 bring a straightforward benefit to the art of witness preparation in simple or small-scale situations? Unquestionably, as I am more than a little happy to be jumping on a plane and heading to a witness preparation session with just an iPad2 and stand added to my laptop carry-on bag.

Is it the end all and be all for the more elaborate witness preparation sessions? Not in our eyes. In these instances you'll be carrying or shipping an extra equipment bag anyway for all of your peripherals, and whether your camera happens to be a tablet or a small camcorder really won't make a great deal of difference.

Some will love the use of tablets for shooting witness preparation sessions, and some will undoubtedly hate it. Although in my opinion, it is fairly hard to see how anything could be easier when faced with a small-scale, simple witness preparation setting.

Business Development for Attorneys: Using Trial Consultants with End Clients

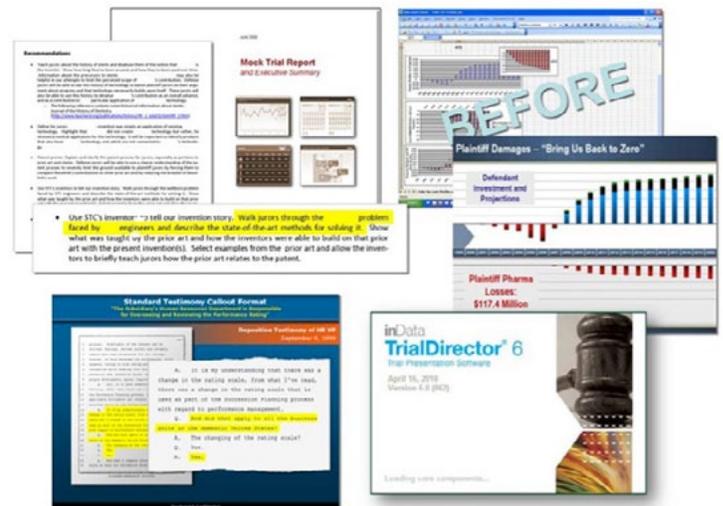
BY SUANN INGLE AND NANCY GEENEN

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

Nancy Geenen, M.A. Ed. and J.D., has over 24 years of law firm experience as a trial attorney, trying commercial and intellectual property cases in the United States and for the United Nations in Geneva, Switzerland. Nancy works with trial teams on mock exercises, trial themes and strategies. Nancy develops law firm training programs to train attorneys to communicate effectively and persuasively in both formal and informal settings.

After years of client work, we have developed specific ideas for enhancing the unique triad of lead counsel, trial consultant, and end client in order to benefit all concerned and to proffer the best advocacy and trial practice possible. We describe the processes we use during phases of trial preparation, trial and post-trial events to assist trial counsel and trial teams. This article explores often-overlooked opportunities to solidify the bond between litigation counsel and end client, especially the in-house counsel.

There are numerous relationship-enhancing moments that play out between litigators and the trial consulting team while on the path to trial. Perhaps surprisingly, these moments may have little to do with mock jury research, demonstrative charts, presentation technology, statistical data or strategic recommendations. Such moments may well serve the attorney's relationship with the client.

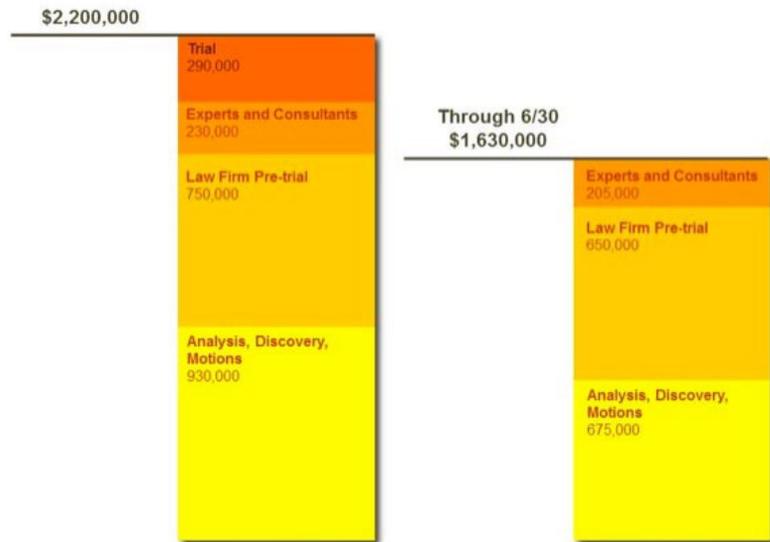


Clockwise from upper left: mock trial report excerpt, expert demonstrative development, trial presentation software, testimony highlights

Two days before a scheduled opening in a trade secret theft trial, the trial judge continued the trial for six months because one of the four defendants decided to testify against the other three. The plaintiff had completed mock jury research, prepared themes and strategies based on the results, and conducted extensive witness-preparation sessions. The legal team and the trial consultants reacted quickly and turned a disappointing delay into an opportunity to show the end client that: a) the opening statement was ready, b) the matter was on budget to date, c) some pretrial tasks would necessarily be redone if and when trial started, and finally, d) the delay presented opportunities to evaluate the trial strategy and settlement position.

The trial consultant recommended that lead trial counsel quickly set up a meeting with the law firm relationship partner, in-house counsel, the CFO and the COO at company headquarters. Without charge to the client, lead trial counsel and consultant flew across country and presented highlights of the opening statement, the current case status and budget, and strategic options for next steps. After just 20 minutes of presentation, the CFO called the Chairman of the Board to attend as well. The 60 minute presentation evolved into a half day working session with all attendees participating. The visuals that accompanied lead counsel's presentation served to help substantiate the enormous amount of work done by the law firm preparing for a trial that now might not go forward and for which the company was about to be billed.

T R I A L B U D G E T



Excerpt from presentation to in-house counsel, CFO and Chairman

The relationship partner's presence bolstered the law firm's commitment to the C-Suite executives and helped in-house counsel look good in front of her superiors. Lead trial counsel was afforded the opportunity to lay out the trial strategies and possible options for resolution of the matter. Feeling confident in the trial team and with the information necessary to make informed decisions, the C-Suite executives debated the scenarios and strategies in real time and decided together to forge ahead to trial.

This example is admittedly one of unique opportunity, but illustrates how a nimble response to inevitable surprises can inspire renewed trust and confidence in a legal team.

As corporations become more trial savvy and cost conscious, law firms are best advised to prepare for unique presentation scenarios for which the attorney might want to use trial consultants. In this article, we discuss opportunities at the initial beauty contest, in pre-trial research, at trial, and after trial has concluded.

The Beauty Contest

The first opportunity is the initial beauty contest or pitch presentation for a new case. Attorneys headed to trial have long been advised to bring in trial consultants early in a case. Seasoned trial consultants have access to similar, past examples of cases that add a secret weapon to a legal team's arsenal and help to perfect an on-point pitch presentation that may even include a sample of an opening statement. Whether in the context of a long standing law firm client with a case that needs to go to trial, or because a new opportunity has arisen, litigators will benefit from tapping the resources a trial consulting firm has to offer. Often trial consultants are eager to partner (many times with gratis services) with legal teams as early as possible because it helps improve the consultant's ability to serve the trial attorneys effectively. The opportunity to "test drive" a consulting team with little obligation and cost is very appealing to the trial attorney and the end client.



Excerpts from law firm pitch presentation for trial work, all of which were publicly available and prepared by the trial consultant for the pitch team

Pre-Trial Research

Once an exercise has been scheduled, the opportunities to seal relationships and boost confidence in a legal team continue. Inviting in-house counsel to rehearsals (for both the "good" and opposing side) is often a very good way to let law firm clients peek through the keyhole and watch the legal team at work. Many, many lawyers overlook this opportunity because they either do not like to rehearse or do not take the time to rehearse. Often, too little time is spent on the "adversary" side of a mock trial. Trial consultants will help prepare the adversary case. The process of doing so yields case strengths and weaknesses even before the client case strategy is tested and the data analyzed. Hearing a trial consultant supply substantive input on attorney presentations and watching lawyers implement them is reassuring to the end client.

Trial consultants also help manage expectations by educating the end-client representative on the value of "losing" a mock trial. This instills further faith in the legal and consulting teams as they prepare a best case scenario for trial. Trial consultants provide valuable reassurance to client representatives during mock trial preparation and during the exercise, when mock trial counsel need "space"



View from client observation room (from left:) mock plaintiff presentation, mock defendant presentation, mock deliberation group

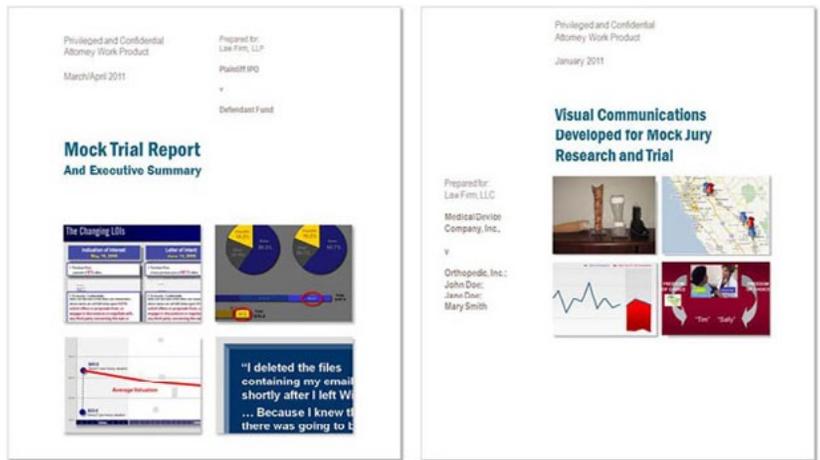
from well-meaning clients. The trial consultant is in the unique position to affirm in-house counsel's choice of legal team by highlighting the performance as favorable (when appropriate) in the context of the many legal teams to which they have been exposed. Well placed comments such as "he's got presence" or "she connects well with the jurors on this point," or "he's done his homework," go a long way with end-clients watching an exercise for the first time.

A serendipitous benefit to any pre-trial research exercise is, of course, attorney training. A November 19, 2011 New York Times article entitled, "[*What They Don't Teach Law Students: Lawyering*](#)" cites a growing need for law firms to address practical skills among new attorneys. As a result, many firms are dedicating time and budgets to attorney training, and yet, end clients are sensitive to paying for such training. As social scientists and psychologists, many jury consultants are natural teachers. Participating in a mock trial provides associates exposure to consultants who likely have more experience in preparing for trial and who may provide tips and tools for trial preparation and strategy. The trial consultant can alleviate some of the training pressure felt by the lead trial attorney while preparing the case for trial. Together with the lead attorney, the trial consultant provides invaluable, timely direction to the less experienced team members that will ultimately benefit the way the case is tried in court.

Once jury research exercises are completed and the data analyzed, the trial consultant generates and delivers a complex report. The report is thumbed through upon arrival and often filed away until the trial attorney makes time to pore through it with focus and attention. Seasoned trial consultants offer, and in some cases, insist upon an in-person meeting with the trial team to review the report, the research exercise data's implications, and the recommended strategies. This post-report meeting not only provides another opportunity for the end-client to be present and participate, but allows for substantive questions that arise after reflection on the data and consulting team's recommendations. What results is yet another opportunity for the trial consulting team to align with the trial team and end client on mission and purpose as trial strategy comes together.

The entire process of developing and conducting mock exercises marks a certain milestone in case preparation. Memorializing these events by distributing post-exercise booklets prepared by the visual communications team (sent separately from the report) that include the mock presentations developed serves a number of purposes. It puts an additional "deliverable" in front of the trial team and end client. Clients are often surprised at how much effort it takes to put on both sides of a case for a mock exercise, but seeing hard copies of the presentation helps substantiate the costs. The exercise booklet is a tangible starting place to develop further presentation ideas with easy reference. Finally, the trial team has its own record of the effort and experience, regardless of whether the trial goes forward.

The end client may then combine the report and recommendation with other critical information to update the senior management, general counsel, and board members. As described in the introduction to this article, the trial consultant can help trial and in-house counsel provide meaningful status descriptions that arm the C-Suite executives with information to approve “go-forward” strategy decisions. Inclusion of the in-house counsel both instills confidence in and reflects the competencies of the trial team.

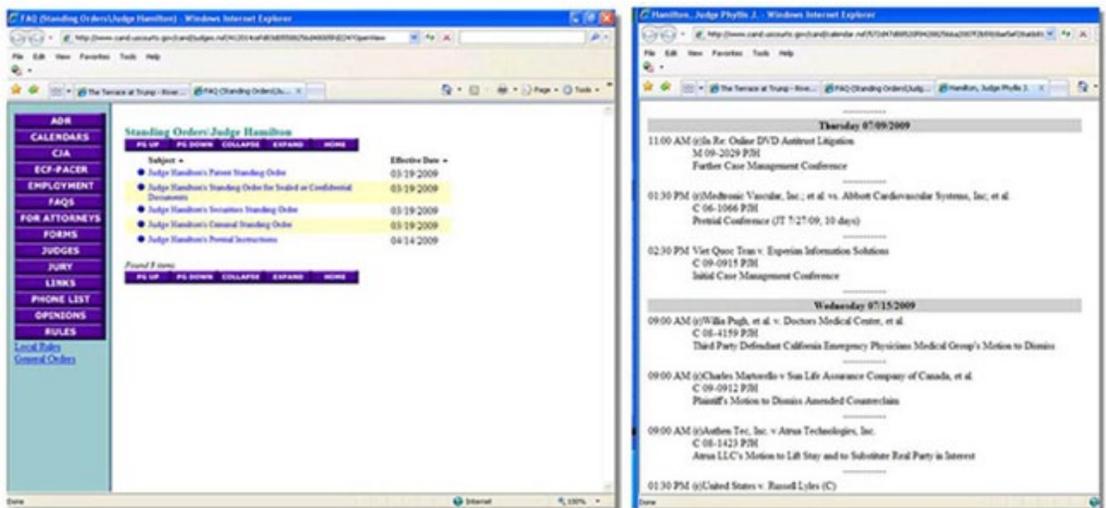


Cover of mock trial report, cover of commemorative booklet containing the graphics work

Trial

As the trial date nears, witness preparation sessions provide in-house counsel (who are likely juggling a number of other unrelated responsibilities aside from managing the litigation) with practical input that boosts confidence in the legal team yet again. Jury consultants and presentation consultants are often present during these witness preparation sessions and know what works in front of juries based on mock jury feedback and hundreds of hours in court. If the client is also a witness, there are calming, confidence-enhancing things a trial consultant may do or say to keep trial preparation moving in the right direction. The relationship between end client and consultant continues right into other pretrial activities, jury selection, and opening statements.

During trial, the end client may not have a working understanding of impact of many early trial activities in the courtroom. Trial consultants are often asked to become interpreters and filters for the end client during in limine motions or argument over jury instructions. Consultants are often in a position to watch the press and provide updates to legal team (to disseminate as they wish) in the context of pre-trial research or past similar matters as they either observe trial or monitor the daily transcript.



Screen grabs from online information available about judges and courtroom calendar

Post-Trial Events

It behooves an attorney to stay in touch with the trial consultant (and vice versa) after a trial is completed. Win or lose, the trial consultant provides another avenue for the trial team to maintain and foster end client relationships. If, for instance, the team has secured a victory, custom designing a tombstone or Lucite block enclosing the verdict form (or other creative keepsake that would look good on a desk) is a great way to keep the law firm name and trial consulting team name in front of the client.

Most trial consultants move quickly to the next trial, often working with ten or more trial teams and end-clients in a calendar year. Mock jury research and presentation development projects are intense situations where the team spends a good deal of time together. It is not uncommon for a trial consultant to get an inquiry, “you know a good attorney who....?”. And, it is certainly not uncommon for attorneys to ask around, “You know a good jury consultant or graphics person for my case?” Recommendations and referrals are best when the reference source has first-person experience with a particular lawyer or consultant. Unless there is consistent, top of mind communication from the trial consultant, attorneys who truly admired the work from the year before may not have the trial consultant reference information handy. In-house counsel often make the final decision on whether the trial consultant is a valuable member of the trial team. Trial attorneys who stay in touch with the work of the favored trial consultant will have an easier time persuading the end client to make this investment in the case.

Applying the steps outlined in this article creates a “value add” contribution that engenders a desire to reunite the team for future work. The unique, three-way relationship between jury consultants, legal counsel and corporate representatives, played right, will turn a single engagement into a win-win-win scenario for all.



Sample of a winning verdict form embedded in Lucite

In Law as in Life, the Power of Context

BY SAM SOMMERS

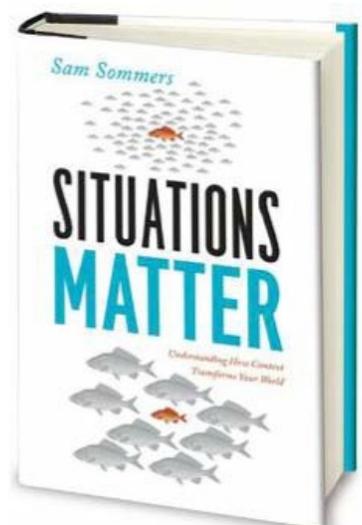
Samuel R. Sommers, Ph.D., is associate professor of psychology at Tufts University in Medford, MA. His research specialties sit at the intersection of experimental psychology and law. He has published over two-dozen articles on topics including jury decision-making, jury selection, and general issues related to race and the legal system. He has consulted as an expert in multiple criminal cases, including capital trials in California, Massachusetts, New Hampshire, North Carolina, Oregon, and Texas. His new general-audience book on the psychology of everyday life, [Situations Matter: Understanding How Context Transforms Your World](#), was released in December 2011. He blogs on the science of daily interaction for [Psychology Today](#) and can be followed on Twitter [here](#).

Editor's Note. Sam Sommers has written several articles for The Jury Expert on his research. When his new book published in late December, 2011 we asked him to write a piece for us on how context matters in everyday life and in the courtroom. We are grateful to Sam for taking time at the beginning of an academic semester and in the throes of book release media requests (he's hoping for a Daily Show visit) to write this brief article for us.

Human nature is surprisingly context-dependent. That is to say, situational factors exert a dramatic influence on people's cognitive, attitudinal, and behavioral tendencies—how we think, what we feel, and what we do.

This is a conclusion that should hardly come as news to trial consultants or attorneys or the litigants with whom they work. After all, much of trial strategy involves explicit consideration of how context can best be manipulated to the advantage of one side or the other. *What questions and question wording will elicit the most useful information during jury selection? Which order of witnesses would be most persuasive? What framing of these data will be most accessible for jurors?* Questions like these are, essentially, questions about context.

But while the effective attorney and consultant must be keenly aware of the power of situations to shape perception and judgment, the average layperson typically overlooks the role of context in daily life. This is the focus of my new book, entitled [Situations Matter: Understanding How Context Transforms Your World](#). The book was written for a general audience and explores the influence of context on a wide range of domains including be-



havior in crowds, self-perception, gender differences, sexual attraction, and racial prejudice. For each of these aspects of human nature, the same lesson emerges from the scientific data: while our actual tendencies are transformed by context, we typically overlook this power of situations, instead relying on assumptions regarding supposedly stable personalities.

As just one example, consider our knee-jerk tendency to blame bad behavior on “bad apples.” So we hear about, say, the tourist who dies while riding the subway, with hours lapsing before anyone intervenes or even notices that something is amiss. Our reaction when reading this story in the newspaper? To indict the other train passengers (or maybe even city dwellers everywhere) as abnormally apathetic and callous human beings.

But lost in this fixation on personality is much of the true nature of human nature. Our typical reaction to the indifference of subway commuters overlooks the ordinary circumstances that render all people less likely to get involved in the affairs of others. Like the diffusion of personal responsibility that happens in crowds: Studies indicate that even in emergencies, we’re less likely to intervene when we are part of a large group than in more intimate settings. In fact, just visualizing a crowd decreases the likelihood that we help.

What does any of this have to do with trial consulting, litigation advocacy or courtroom proceedings more generally? Especially since I proposed above that given the nature of their work, trial consultants should be more aware than most people of the impact of context on human nature? Well, at the end of the day, consultants and litigators direct their efforts toward winning over the hearts and minds of lay jurors, often through working with lay witnesses. Accordingly, this blind spot in people’s general perceptual tendencies – this inclination to look past context and instead see those around us in more dispositional, personality-centric terms – is one that trial consultants and trial attorneys ignore at their own peril.

In fact, here are three specific examples of how people’s tendency to overlook context plays a role in how jurors may view your case:

1. Eyewitness Memory. That eyewitness memory is not always what it’s cracked up to be has been demonstrated by decades of research findings. But the persuasiveness to jurors of a confident eyewitness is also well-documented. The compelling nature of eyewitness testimony owes, in large part, to jurors’ relative insensitivity to context.

When jurors see a confident eyewitness take the stand and state with near 100% certainty that the person she saw during the incident in question is now seated directly in front of her in the courtroom, that’s powerful stuff. A variety of life experiences have taught us that confident people are usually confident because they’re right. Especially in a setting like the courtroom where the stakes are high and – in many instances, at least – the witness has no motivation to lie.

Alas, when it comes to eyewitnesses, confidence turns out to be malleable. Information learned after making an identification – whether through conversations with fellow witnesses, media accounts, or even just an assumption that when a case proceeds to trial it must be because the prosecution thinks the witness picked the right person – can inflate an eyewitness’s confidence. As someone who has started to do some expert witness consultation in criminal matters, I’ve now seen several cases in which a tentative identification during a photo array morphs months later into 95-100% eyewitness certainty on the stand. Absent preventative efforts from the trial attorney (perhaps including an expert witness), jurors are likely to look right past the circumstances that inflate eyewitness confidence and simply see a confident eyewitness.

Jurors also have a hard time putting themselves in the shoes of eyewitnesses. Ask your average layperson if he would be able to identify someone seen during the commission of a crime, and he'll answer in the affirmative. In the hypothetical, it seems like an easy task: you see a face and pick it out later. But we tend to underestimate the aspects of the situation that would work against us as actual eyewitnesses: the stress of being caught up in a potentially dangerous incident; the limited viewing opportunity and otherwise poor viewing conditions often afforded eyewitnesses; the pressure felt to make an identification so as not to throw a wrench in the momentum of the investigation.

Quite simply, lay intuitions regarding eyewitness memory don't give nearly enough credit to the power of context to shape the eyewitnessing experience. When going up against eyewitness evidence in trying a case, this is a blind spot that consultants and litigants must address directly.

2. Confessions. A similar story can be told for how jurors perceive confession evidence. In more than one-quarter of DNA exonerations, a false confession played some role in the original, erroneous conviction. Why? Because of the mentality that confessions always come from people who know they're guilty – the assumption that no one would ever confess to something they hadn't done.

Except we know from research that there are contextual factors that make a false confession more likely. Overt, blatant forms of coercion, obviously. But also less readily evident factors such as the fabrication of incriminating evidence (which, of course, police are allowed to do during an interrogation). And anything that might render a suspect's memory for the events in question less than crystal clear.

In my book, I tell the story of Marty Tankleff, who at age 17 was convicted of the murder of his parents on Long Island, largely based on a confession that he immediately retracted. Eventually, he was freed thanks to DNA evidence, but not until spending half of his life in prison. Marty's so-called confession came while still in shock at having discovered his parents' dead bodies, and after hours of interrogation without a lawyer. Finally, after having been lied to and told that his hair was found in his dead mother's hands and that his father had emerged from a coma before dying just long enough to finger him as the culprit, Marty relented briefly and said, "Yeah, I did it."

Those four words sealed Tankleff's fate with the jury, even though he almost immediately retracted them and never did sign the written confession statement. And even though forensic evidence was inconsistent with the theory that Marty had stabbed and bludgeoned his parents to death, and another suspect who owed half-a-million dollars to Marty's father suddenly fled the state after the murders and checked himself into a spa under an assumed name.

Again, all because jurors were unable to grasp the power of the situation in which Marty Tankleff had found himself during the interrogation. Research suggests that these jurors were not unique: in a study by Saul Kassin and Holly Sukel at Williams College, mock jurors were to evaluate the summary transcript of an interrogation in which a detective obtained a murder confession by yelling and waving his gun in a threatening manner. Respondents recognized that the confession wasn't voluntary. They reported that it wouldn't affect their judgment of the trial. They claimed that they'd disregard it entirely. And then, when asked to render a verdict, they were still four times more likely to think the defendant was guilty than were other mock juries never told about a confession.

3. Racial Bias. As with other aspects of human nature, we often think about racial bias in dispositional terms. Our default tendency is the “bad apple” view of racism, in which the only actions we are willing to label as discriminatory are those exhibited by individuals harboring racial animus or ill intent.

For example, at a societal level, our discourse on the issue of race has settled into a familiar and futile rut: We typically steer clear of the topic until a high-profile incident raises allegations of dispositional racism. These allegations are inevitably followed by immediate denials. Debate then shifts to evaluating the evidence provided by the accused, presumably to prove how fair-minded his or her character really is (e.g., the touting of good intention, past philanthropy, or even simply having a few Black friends). These debates go nowhere, as proving dispositional racism or discriminatory intent is nearly impossible when no one wants to admit to such a disposition or intent.

Or, indeed, when the parties in question genuinely harbor no negative intent, as we know can be the case with contemporary forms of bias. Field studies reveal that job résumés with a Black-sounding name receive 2/3 the number of callbacks as résumés with a White-sounding name, even though few who work in human resources intentionally contribute to this disparity. And recent class action suits assert that borrower fees (and sometimes rates) are often set higher for non-White applicants versus White applicants, though, again, absent systematically pernicious intent among brokers.

So in the discrimination lawsuit, civil rights action, capital punishment appeal, or other case that hinges on questions of bias, it is this “bad apple” view of discrimination with which consultants and litigants must wrestle. The default assumption of most jurors (and judges) remains discrimination = bad intent. Accordingly, when the individuals in question come off as well-meaning people – or when the organization/institution in question has in place praise-worthy diversity-based initiatives or training – the default judgment will often be that no discrimination could have occurred.

In short, research on ongoing racial disparities in society illustrates that we have clearly not reached the post-racial utopia that some have proposed of late. But we have continued on a trajectory toward a dispositional view of racial bias, one in which many laypeople assume that bias only comes from bad people – or, at least, people who consciously harbor bad and biased beliefs. That there are a variety of contextual factors that renders disparate outcomes more likely – such as subjectivity of evaluations and total discretion in a decision processes – is a conclusion not readily apparent to many who make decisions in cases such as these.

Conclusion

To close, my argument, here and in the book, is that learning to appreciate the power of context has the potential to make you a more effective person, in domains personal as well as professional. I would not be surprised if offering this conclusion to an audience of trial consultants and trial attorneys is, in many respects, preaching to the converted. But a refresher course never hurts, particularly when one’s professional days are spent thinking about how best to frame messages presented to a lay audience. While people’s general neglect of the power of context can pose challenges for the mundane interactions of daily life, in the high-stakes legal arena, it becomes a glaring blind spot that trial consultants and litigants simply can’t afford to overlook.

Image Credit: [*Situations Matter*](#)



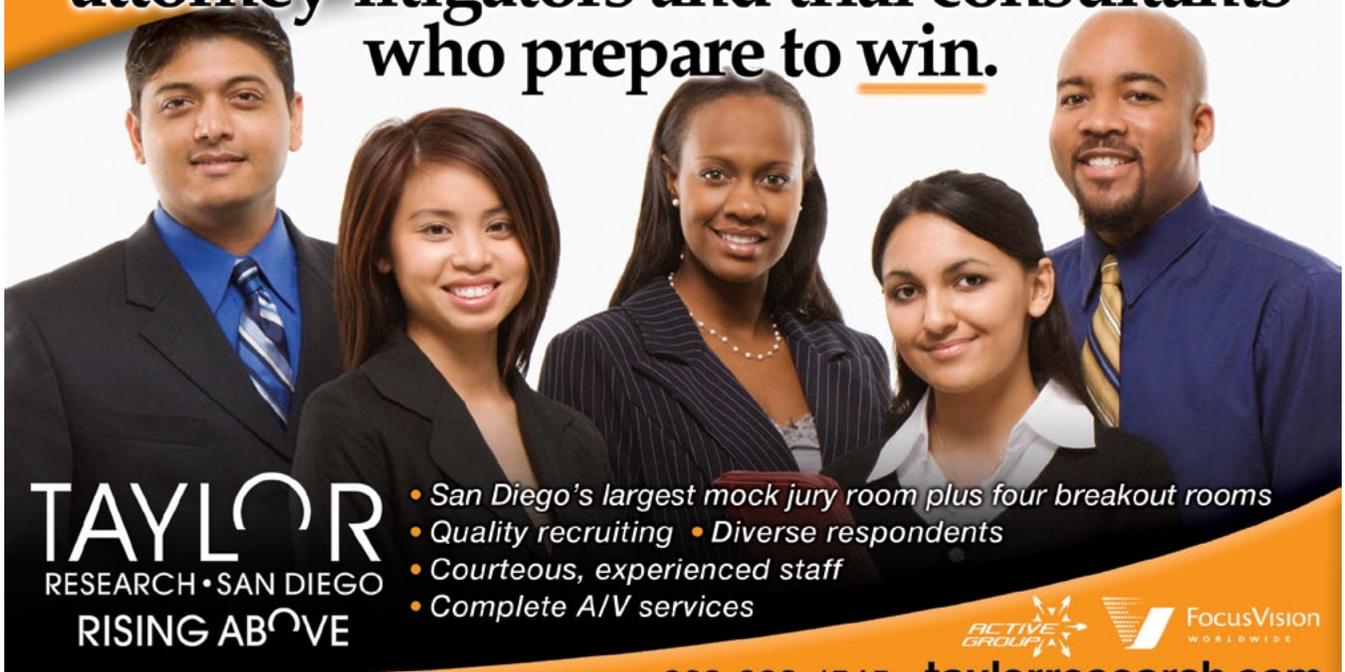
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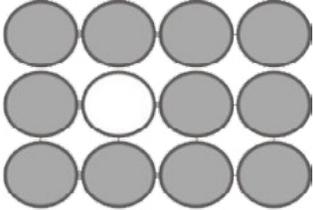
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The Jury

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*A Note From the Editor:
Sensitive Topics, Morality, Technology, and Client Services*

Those are just a few of the topics we cover in this issue. The Jury Expert continues to surprise me because of our trial consultant authors who constantly think of new ideas and topics to cover. I am grateful to the authors in this issue and in past issues for making this publication look so good!

One of the things I especially love about trial consulting is the opportunity to work with other curious people. We all want to understand ‘how’ potential jurors come to their conclusions even when they can’t articulate the ‘why’ for us. The strategies we use to identify the ‘how’ is what I think of as the ‘art’ of trial consulting. Most of our projects are based on between 12 and 48 mock jurors – so we can’t really predict outcomes using statistical software. The sample sizes (12-48) are simply too small. That’s why you’ll hear us talking about themes, attitudes, beliefs, values and trends that emerge as mock jurors struggle with your case story.

Our research is qualitative. We apply our knowledge of the science (as it continues to emerge) and draw on our experiences in the trenches to further help in understanding the results of pretrial research. And that’s really what The Jury Expert is all about – the art and the science of litigation advocacy. Our goal is for you to see no fluff in our pages – just good solid information presented in plain English by experienced consultants who share their hard-earned wisdom issue after issue after issue.

Whether it’s how to talk about taboo topics, using emerging technologies, ways to use trial consultants effectively, thinking about the importance of context, or understanding generations – we want to bring you specific, practical and fresh information. Let me know if you want something addressed in a future issue!

*Rita R. Handrich, Ph.D.
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A M E R I C A N S O C I E T Y O F T R I A L C O N S U L T A N T S



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