



# The Jury EXPERT

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## *Intellectual Property Cases: Ten Lessons From Pre-Trial Research*

BY ELLEN BRICKMAN AND JULIE BLACKMAN

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Intellectual property cases pose special challenges – but also special opportunities – for both attorneys and jurors. The material is typically complex, and often completely new to the jurors. Attorneys and witnesses are called upon to teach this material in a way that is clear, engaging and persuasive. While this can be daunting, jurors' lack of familiarity with the material also provides an opportunity to shape their attitudes without having to overcome strong pre-existing beliefs about the topics at hand.

In over 20 years of conducting pre-trial research in intellectual property cases, we have seen many commonalities in how mock jurors and focus group respondents across the country think about such cases. We have learned a great deal from these research activities, and share some of those lessons with you here.

### **1. Context Matters to Jurors**

In mock trials and other pre-trial research, mock jurors often focus on how the actions of each party fit into historical and industry context. While jurors are supposed to decide a case based on the facts presented to them, the most common questions that we hear have to do with context: – What were other companies doing at the same time? How have the parties dealt with other companies, compared to how they are dealing with each other? Did others take licenses and, if so, how much did they pay for them? Any contextual information you can present to jurors that will bolster your case is likely to be very powerful.

## 2. A Picture Is Worth a Thousand Words

In intellectual property cases – perhaps more than most others – demonstratives can have a tremendous impact. Mock jurors cite demonstratives as helping them understand the technology at hand in ways that words alone could not. People react most positively to demonstratives that are uncluttered, well-labeled, and accompanied by a simple and clear narrative.

## 3. Simple Clear Ideas, Repeated Often, Will Always Work in Your Favor

Attorneys sometimes worry that they are oversimplifying their case, or repeating key themes or points too often. In intellectual property cases, over-simplification is rarely a problem. The material is new, jurors are learning it primarily by ear (which makes it harder to take in), and it is complex. The more you can simplify it, the better jurors will understand your case. And the more often they hear your themes, the better they will understand and like them.

Along the same lines, simple analogies work well, both in presenting your themes and in teaching your scientific material. While jurors may have a hard time understanding complex scientific and technical details, they latch on to simple themes around issues of fairness, as well as simple analogies that present parallels from daily life.

## 4. Arguments and Themes: Quality Beats Quantity

A few powerful arguments can carry the day. While it is sometimes tempting to use every possible argument in your case, jurors may perceive this as a strategy of desperation. We have heard mock jurors suggest that one party is “throwing out everything they have” to camouflage the weakness of its case. Jurors are likely to respond better to a few well-chosen strong arguments than to a myriad of weaker ones. It is also useful to remember that even a complex intellectual property case should revolve around no more than five key themes. These themes will provide an organizing rubric for jurors and allow them to understand and remember the details of the case within this framework.

## 5. Jurors Take the Burden of Proof Seriously

Frequently, we hear mock jurors say, “I believe the patent was infringed, but I don’t think they proved it.” Even in mock trials – and presumably, far more in actual trials – jurors attend carefully to the burdens of proof and hold each party to its burden. They are able to distinguish between the “preponderance of the evidence” and the “clear and convincing evidence” standards and to apply them correctly and appropriately.

## 6. The Idea of Patent Protection Is Viewed Favorably

Most mock jurors express positive sentiments about the general concept of patent protection. Typically, very strong majorities (75% or more) agree that patents are important for protecting inventors’ rights and encouraging new inventions. Similarly, very high numbers disagree that patents are old-fashioned monopolies. To the extent that we hear anti-patent sentiment, it tends to focus on the pharmaceutical industry. Some, though not most, people feel that drug companies have a moral and social responsibility to make new drugs available and keep costs down. They contrast this industry with other industries, where they do not see a moral imperative to share intellectual property.

## 7. The Presumption of Validity Is Powerful

Most mock jurors and other research participants rely on the presumption of validity. People generally assume that the Patent and Trademark Office has conducted a careful review of the patent application, and give much weight to this review, though they acknowledge the possibility that the PTO can “get it wrong.”

In some of our research activities, participants have focused on the fact that the patent is a government-issued document, and have even suggested that such a document cannot be invalidated by ordinary citizens.

## 8. Jurors Expect Professional Behavior

While mock jurors (and presumably, real jurors) know that a trial is an adversarial situation, they expect attorneys and witnesses to conduct themselves appropriately and professionally. Personal attacks or “digs” at opposing counsel or witnesses are likely to backfire; jurors are likely to hold them against whoever is advancing them.

## 9. Jurors Look for Ethical Behavior, But Accept “Business Realities” in a Competitive Market

At the same time that jurors in intellectual property cases are comparing technical specifications of multiple products, they are also focusing on questions of how fairly or unfairly each party behaved in their dealings with each other. Especially when the technology is unfamiliar and/or difficult to understand, issues of fairness can predominate in jury deliberations.

Jurors look to businesses to be fair and ethical in their dealings. However, we have observed that mock jurors are also quite pragmatic about each company’s drive to advance its own self-interest, particularly in highly competitive marketplaces. Actions that may seem problematic at first glance – such as your client continuing to do business with the company that it has just sued – are often understood by mock jurors as simply being “business realities.” Of course, this pragmatism will only go so far; once jurors perceive a business as having crossed an ethical line, they are considerably less forgiving.

## 10. Nothing Beats a “Dry Run” for Enhanced Trial Preparation

One of the most important lessons that we have learned from pre-trial research in intellectual property cases is how valuable a tool such research can be. Focus groups and mock trials, in particular, allow attorneys to test both their themes and their strategies for teaching the technology at issue. We have seen attorneys at trial adopt analogies or explanations offered by research participants, often to great effect. Listening to mock jurors explain technologies to each other opens up new ways of explaining your complex case to your jury. Listening to mock jurors grapple with new material, deliberate on the arguments, and evaluate your demonstratives is the next best thing to getting a “dry run” with your actual jurors before trial.

## *Principles in Persuasion: Beyond Characteristics of the Speaker*

BY BRAD BRADSHAW

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*"We are so clothed in rationalization and dissemblance  
that we can recognize but dimly the deep primal impulses that motivate us."*

- James Ramsey Ullman

Strictly defined, persuasion is a deliberate effort to change a person's attitude. When we talk about persuasion we tend to focus on characteristics of the speaker – credibility, likeability, expertise, trustworthiness, and so on. And speaker characteristics are important. Without those things, there can be no persuasion. However, the ability to persuade is also dependent on other factors, including how the message is framed, characteristics of the listeners, and how the listeners influence each other. This article focuses on those issues and how it all applies to litigation.

### *How the Message Is Framed*

In its most basic form, a trial consists of two people telling different versions of the same story. How each person tells the story – that is, how it is framed – plays a major role in how jurors react to the evidence.

People respond to examples. Providing examples and letting jurors come to their own conclusions strengthens their feelings on the issue because they feel like they have solved the puzzle themselves. Instead of just saying, "Steve is dependable," the attorney should provide examples of Steve's dependable behavior. For example, "Steve is the kind of guy who always arrives to work early and stays late when the boss needs him. In his six years with the company Steve has never taken a sick day."

In addition, examples provide anecdotal evidence, which trumps statistical evidence because anecdotal evidence is much more vivid. Say you are in the market for a new appliance – maybe a dishwasher. You do your homework and learn that Consumer Reports gave the best rating to a particular make and model that is within your price range. But before you pull the trigger on your new dishwasher, you find out that the reason a maintenance man has been spending so much time next door is

because the neighbor bought the same product and it has been nothing but trouble. After hearing the neighbor's horror story, would you still buy one?

We would like to think that our decisions are made based on the more reliable source (e.g., consumer satisfaction ratings) but the vividness of the anecdotal evidence creates a more lasting impression than statistics. The same is true for jurors. A corporate defendant may have the best safety rating in the industry but that rating can be rendered meaningless by the vividness of the plaintiff's experience. The most persuasive message is one that is presented as a case study and then supported by the statistic evidence, instead of the other way around.

Monetary anchors also shape the way jurors perceive the case. A monetary anchor is a numerical value that influences the perception of another (sometimes unrelated) numerical value. During deliberations, jurors use the anchor as the starting point of negotiations within the group. Anchors most often come from a number suggested by an attorney during closing arguments, but they also come from less predictable sources, such as witness testimony or even the first number mentioned during deliberations. Once the anchor is identified, jurors adjust up or down depending on how they feel about the case. Theoretically, a higher request by the plaintiff attorney will lead to a higher award. However, there is a point at which the suggested anchor will be disregarded. If the attorney asks for an amount that jurors deem unrealistic, they will completely disregard the number and the attorney's credibility is diminished.

Car dealers are the kings of monetary anchors. If the sticker price is \$30,000 you will value the car at that amount and then be thrilled if you negotiate the price down to \$27,000. If the same car has a sticker price of \$33,000 you will be happy paying \$30,000. The only thing that has changed is the anchor. Now assume the same \$30,000 car had a sticker price of \$50,000. In all likelihood you would never enter negotiations for the car because of the unrealistic starting point. Whoever listed the vehicle for \$50,000 will have lost credibility.

This principle applies to damage awards as well. Attorneys that set the starting point too high (plaintiff) or too low (defense) will lose credibility and jurors will completely disregard the number. Therefore, identifying the optimal number is critical. Jurors almost always adjust away from the anchor; as oppose to accepting the specific number. However, they rarely adjust enough to account for the influence of the anchor. By identifying the jury's threshold and accounting for the inevitable adjustment you can select an anchor that will lead jurors to the optimal award. Mock trials are one way to identify that threshold.

Interestingly, demands are viewed as more valid if the number is not a perfectly round number. Asking for \$10 million dollars seems arbitrary. Asking for slightly more (\$10.2 million) or slightly less (\$9.8 million) gives the appearance of careful consideration. That does not mean you should ask for an amount right down to the penny. Doing so seems petty and makes it more difficult for the jurors to remember your request. After all, if they cannot remember it, there's no chance they will use it as the anchor.

Finally, you should always explain how you came to your dollar figure. If it is a reasonable justification, you can shape the way jurors will discuss damages. Jurors want to know where the numbers originated. For economic damages the amount usually speaks for itself. Jurors may not agree with the cost of the life care plan or future lost wages, but at least they understand what the numbers mean. Noneconomic damages are more complicated. For the jury to accept your suggestion, you must tie it to something tangible. Just pulling random numbers out of the sky does not help the jury. They can do that on their own. For example, if economic damages are high, asking for the same amount in noneconomic damages is often effective for the plaintiff. The same is true for the defense if economic damages are low. Asking for the same amount is one logical way to put a price tag on something as ambiguous as pain and suffering.

## *Characteristics of the Listeners*

Persuasion requires a willingness to accept an idea, which is influenced by what the person already believes. Therefore, it is easier to persuade someone when you understand that person's motivations, interests, and beliefs, and then you tailor the message to coincide with those preexisting beliefs.

The way a message is delivered should depend entirely on the audience because jurors are less likely to scrutinize information that is in line with their own values and beliefs. In almost every case there are issues in which jurors can relate, and issues in which they have no experience. Either way, the issues must be presented in a way that is understood by the least "informed" juror. For example, most jurors will not have a lot of personal experience with complex financial transactions, but they will all understand the concept of "pushing around the little guy" or "trying to get something for nothing."

To do this, you must understand your jurors. Unfortunately, the easier information is obtained from a juror, the less useful that information will be in predicting the extent to which the juror will understand your case. Demographics (i.e., any measureable characteristics of people within a society that make it possible to group them based on categories) are relatively easy to obtain but generally worthless with regard to their predictive qualities. The problem with disregarding demographics altogether is that the courts usually do not allow enough time during voir dire for the attorney to explore more valid sources of bias. That is, the attorney is not allowed to base her decision on the juror's race but often doesn't have enough time to base her decision on anything more meaningful.

Relying on stereotypes is a strategy that helps us make judgments more efficiently. The problem is that stereotypes are often misleading. We label a person in with a particular group and then assume he has all the same characteristics. From there we notice behavior that confirms the stereotype and fail to notice behavior that does not confirm the stereotype. This is known as confirmation bias. So if you believe old people are bad drivers, that stereotype will be reinforced every time you see an elderly driver going too slow or going over the curb while turning. What you do not notice are all the times that elderly drivers blend in with everyone else. This same principle can be applied to race, religion, gender - pretty much anything.

So demographics are used to make predictions about people based on stereotypes, and stereotypes are poor predictors. However, there is nothing wrong with using the stereotype to generate questions. Striking a juror because the color of his skin is both unconstitutional and unwise. The color of a person's skin does not define who that person is. However, it may be reasonable to assume that a person's perception of the world was influenced by, for example, growing up as a minority in a predominately white community. If that is somehow relevant to the case then you should ask questions about his experience as a minority. You are using information about the juror's race to ask relevant questions about his life experiences. However, any potential challenges would be based on those experiences, not his race.

Instead of using your own stereotypes to decide which jurors you do not want, find out about their stereotypes and use that as a bases for removing them. All men do not think the same. Nor do all teachers or all nurses. So striking someone for that reason is silly. Instead, you want to know which jurors believe, "All lawsuits are frivolous." Or, "All companies are greedy." Those opinions are also based on stereotypes and knowing a particular juror believes those stereotypes is valuable information.

Experienced attorneys tend to be the most prone to rely on stereotypes because they have more anecdotal evidence from past cases. “No way I will ever let another engineer sit on my jury! I got killed by an engineer that ended up being the foreperson.” It is true that engineers tend to think logically and expect things to fit together nicely. But that does not mean engineers are always bad for the plaintiff.

Stereotypes also give the impression that a particular juror will identify with your client (e.g., they share some hobby or experience). However, it is possible for a juror to have a shared interest but still be critical of your client. Risk takers, such as motorcycle riders, are a good example. On the surface, a plaintiff’s attorney might want risk takers on the jury because they would identify with the plaintiff, who is also a risk taker. But risk takers are just as likely to look at what happened to the plaintiff and say, “That’s the chance you take.” Their interests are the same but their perception of the lawsuit could be very different. If so, the juror is likely to treat the plaintiff more harshly than anyone else on the panel.

Life experiences are tied to demographics because we experience the world differently based, in part, on how we are treated by others. Since people treat us based on what they see (and, to some extent, how we let them treat us), life experiences are linked to demographics. Taking it a step further, our life experiences shape our view of the world and our view of the world shapes our behavior. When you add in other variables (e.g., values and personality), you are left with the “chicken or the egg” argument. A twenty-year veteran of the police department has lived most of his adult life within certain rules and boundaries. Does he like rules because he was a police officer or did he become a police officer because he likes rules? On some level it does not matter but it illustrates the relationship between attitudes and behavior. If you are trying to predict behavior (e.g., juror decision-making) based on the person’s attitudes, you must consider issues like values, life experiences and personality.

### *How the Listeners Influence Each Other*

Fortunately, no single juror is likely to rule over the group with an iron fist. Power and control (in the absence of physical force) is an illusion. A person has power because other people give it to him. With that power, he is in the position to influence others. If you take away the power, the ability to influence will also disappear. The people who maintain power for an extended period of time do so through cooperation of others. During deliberations, power can be earned with a strong, convincing argument. But the strength of the argument is often less important than the charisma, likability, and perceived expertise of the individual juror. The most persuasive jurors (and people in general) are those with perceived status who know how to use the cooperation of others to manipulate conditions within the group. Of course, this only works in ambiguous situations. If something is obvious, convincing people otherwise is unlikely. But how often are jury issues obvious?

In addition to the influence of the powerful, appropriate behavior within a group is largely determined by the behavior of others. This is known as social proof. For example, in some courts it is customary for everyone to stand when the jury enters the courtroom. In other courtrooms everyone remains seated. If you are new to a particular courtroom you will just do what everyone else does. Parking behavior works the same way. If you think street parking is legal but there are no other cars parked along the street you will probably keep circling until you find an area where other people have parked. All it takes is for one person to park in the street and everything changes. We cue off of the

behavior of others. To see this in action, the next time you are in a crowded area, look up at the sky. No need to point or do anything else to draw attention to yourself. Just stare. Within seconds everyone around you will be looking straight up.

Pluralistic ignorance works the same way. Since people cue off the behavior of others, you are much less likely to receive help from a group of strangers than you are from a lone stranger. For example, if your car brakes down on a small road with very little traffic, there stands a good chance that the first person to drive by will stop and offer to help. If you brake down on the busiest road in town, you are probably on your own. It is not because people driving on small rural roads are friendlier (although that may be true as well). The difference is two fold. First, on a busy road the perceived responsibility of any individual is reduced. Each person can justify not helping because there are so many others there to help. Unfortunately, everybody is saying the same thing: "Somebody should stop and help that guy." On a rural road, however, it is more difficult to diffuse that responsibility. Second, ambiguity inhibits involvement. Unless we see the car's tire blow out we really don't know why he pulled over. Maybe his kid is going to the bathroom in the woods. The ambiguity makes it easier to justify not helping.

The most disturbing consequence of conformity to the behavior of others during deliberations is situations in which more than one juror did not speak up because he thought he was alone. We have seen this happen in mock trials and have heard jurors talk about it in post-trial interviews. That is, two different jurors will say something to the effect of, "I didn't really agree with the verdict but everyone else seemed so sure that I just agreed with them." Had the two jurors known that someone else felt the same way, the verdict may have been very different.

So, a juror is less likely to speak his mind if everyone else seems to think otherwise. But, if one person agrees with him, it can open the floodgates. In that regard, jurors are like a stampeding herd. For a herd of zebras to change directions all it takes is for one zebra at the front of the pack to make a slight turn to avoid hitting a tree. That slight change has a rippling effect on all the other zebras and, suddenly, they are moving in a completely different direction. With juries, all it takes is for one person to present a new idea and it can send the entire group in a completely different direction. By encouraging jurors to stand up for what they believe during deliberations, you increase the likelihood of minority opinions being expressed.

Jurors also tend to be persuaded by information that seems to persuade others. If one juror notices another juror nodding his head in agreement while a witness is testifying, the juror will be more likely to be influenced by the witness's testimony. The same is true if the nodding comes from the gallery. If spectators seem to think something is important, jurors who notice them will pay more attention to what is being said. It is the same as canned laughter. Some television sitcoms have fake audiences. By playing an audio recording of people laughing, viewers watching on television will rate the program funnier than when there is no canned laughter.

Jurors' influence on each other can lead to group polarization, which is the tendency for arguments and decisions to be more extreme in a group than what was initially experienced as an individual. That is, opinions become more radicalized after discussing an issue. This is counterintuitive because one would think that extreme opinions would be minimized when subjected to the rigors of other opinions. Instead, extreme opinions become more extreme after learning that other people support your beliefs.

We see group polarization rather clearly when discussing politics. The more a person expresses his love or hate for a particular administration, especially around like-minded people, the stronger he feels about the issue. The validation of his opinion serves as a reinforcement of his beliefs and his beliefs become more extreme. Within the context of jury deliberations, polarization can occur for either liability or damages. If all twelve jurors agree on liability they will move forward with great confidence. Hearing that the other eleven jurors agree will reinforce each individual opinion and they polarize in that direction. However, if the jury is split on liability (say, six to six), it is likely that the two groups will polarize on opposite ends of the spectrum. Each group of six will reinforce each other within each group, driving the groups further apart, and possibly leading to a hung jury.

One possible explanation for group polarization is a phenomenon that Leon Festinger called social comparison. According to Festinger, people feel the need to evaluate their abilities and opinions. When there are no set rules or guidelines in place, they compare themselves to others. So if you take a test and receive a grade on a one to 100 scale, you have a general idea of how well you did. However, if it is an essay that is graded on a random scale, say one to 45, you will want to compare your score to others who were graded on the same scale. For most of us, if we learn that our score was lower than others, we will make the necessary adjustments on the next assignment to maintain a more desirable position within a group.

If an individual juror considers himself “middle of the road,” but then finds out his opinion is rather conservative as compared to others in the group, he will likely adjust to a more liberal position to keep himself in the middle. The problem is, like most things, shifts can be affected by arbitrary information or events. For example, people tend to speak in proportion to their status in the group. However, status is not necessarily determined by knowledge or expertise. Just because someone is quick to express his opinion does not necessarily mean he has something intelligent to say. But if the extreme opinion is expressed early in deliberations it can cause everyone else in the group to shift in that direction. According to social comparison, jurors gauge the position of others and then shift to maintain the desired position in the group.

The best way to prevent group polarization is to encourage dissenting opinions. In a group, congruent opinions are much less valuable than incongruent opinions. Unfortunately people are less likely to share an opinion if it is not in agreement with the majority. Because juries tend to be hierarchical, a small group of leaders can quickly silence dissenters. When groups make poor decisions, it is almost always because the leaders did not allow others to express their opinions freely. It is the diversity of opinions that makes group decision-making superior to individual decision-making. If there is no cognitive diversity then there is no point in having a group. Throughout history, the best leaders have been those who encourage dissenting opinions and listen to others (especially subordinates) before revealing their own position. A group that is led by a leader who is not interested in the opinion of others does not benefit from the collective knowledge of the group.

For the same reason, senior partners should get the opinions of junior associates before making their own opinion known. Doing so reduces the likelihood of conformity because of in-group pressures. If you really want to know what a subordinate thinks, get his opinion before giving your own.

## *The Art of Rehearsing for the Courtroom*

BY SUANN INGLE AND NANCY GEENEN

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Somewhere along the continuum between the IBM Selectric and the iPad, courtroom presentations have moved from a formal debate podium to multi-media entertainment. Many courtrooms are wired like television studios and the medium may easily overshadow the message. As a result, rehearsal is more important than ever. Emerging, sophisticated technology has resulted in the “never quite complete” presentation because trial teams have the ability to make last minute changes “on the fly.” The advances in courtroom presentation technology have had an unintended consequence: attorneys fail to adequately rehearse the delivery of the presentation.

Few trial attorneys would dispute the notion that time spent rehearsing opening statements, mock trial presentations, and witness examinations is time well spent. But the most successful, experienced practitioners know that the actual time needed for effective, productive rehearsal sessions, is time that is difficult to schedule and time for which clients are loathe to pay. Additionally, rehearsal time is often sacrificed in the chaos of pre-trial activities such as jury instructions, in limine motions, client management, and settlement discussions. Rehearsing important presentations is a time-management issue and a trial priority. Excuses abound: “I never rehearse, because I’m only good when I’m on,” or “I don’t have enough time for this” or “I’m best when I’m winging it” or “I know this stuff cold; who needs to rehearse?” Rehearsals are about delivery of content so that delivery does not stand in the way of the message. Rehearsals in private, with colleagues, in front of a camera, and with presentation technology are the key to successful delivery of a winning style. This article outlines methods to effectively rehearse for effective courtroom presentations.

### *Rehearse is a Verb*

The Oxford American Dictionary defines rehearse: “1. Practice (a play, recital, etc.) for later public performance. 2. Hold a rehearsal. 3. Train.” Rehearsal is about speaking out loud: essentially “re-HEAR-ing.” Repetition and familiarity permit the brain to harmonize the key points throughout preparation of the presentation. Now that judges are imposing timing constraints at trial, rehearsals involve a stopwatch component as well as work on volume, clarity, pacing, and tone. Having participated in many previews, read-throughs, walk-throughs, run-throughs, practice sessions, dry-runs, and trial runs, there are reliably sound methods for effective rehearsal. The very fact that trial teams refer to this vital stage of trial preparation by so many different names is perhaps the clearest indication that the perception of its value is just as varied.

### *The Past is Prologue*

In the late 80s, big poster boards, used to visually support an attorney’s remarks or witness testimony, were the result of developed black and white film onto which large sheets of color film were hand cut and applied. The boards were finalized, approved and assembled days before an opening to accommodate print production and assembly schedules. Similarly, slide carousel presentations were the result of designing content on photographic slide film, then cut and mounted within folding plastic frames, and then dropped into the carousel of the slide projector. These two state-of-the-art technologies (at the time) had the often overlooked advantage of creating the perfect scene for finalizing content while waiting for the slides or exhibit boards to be developed and delivered. After delivery of the slides and boards, trial teams rehearsed the delivery and coordination of the spoken word and visual content. Last minute changes on the first day of trial were not contemplated. Despite the wow factor of current technology, content still drives the heart of a presentation and that content is best served by a rehearsal process that polishes, tests, clarifies and perfects the spoken word with the medium.

### *Timing Dictates Rehearsal Purpose*

Each rehearsal should build upon the prior practice segment and feedback. The early “recitals” are likely to be alone, in front of mirror, paper in hand, or even in the shower. The written scripts are the opportunity to hone the overall theme of the trial. Whether hand-written or digitally recorded, the early sessions are opportunities to improve upon the spoken content. One of the most common mistakes is that attorneys use the full script as the norm. It is exhausting to repeatedly rehearse a 60- or 90-minute presentation. Like actors in a play, attorneys are well advised to work on segments of the full presentation in short sessions with a defined purpose. Breaking the presentation into smaller thematic segments maintains a consistent level of performance and training. Also, rehearsing the transitions between segments is an often overlooked opportunity to refocus the audience on the overall theme of the case.

Current expectations for dynamic visuals have resulted in the need for another kind of rehearsal, the mechanical dry-run. It is where the lead attorney (not associates who guess what the “boss” wants to see) choreographs the spoken and visual performance. The lead attorney is both director and actor during these “choreographing” sessions; making decisions about which visuals to use, when to bring a visual up on the screen, and the transitions between thematic segments of the presentation. This process often results in reorganizing of key themes, thoughts and strategies for a more cohesive delivery.

Finally, full-length rehearsals should be used sparingly. Rehearsal of the full presentation requires energy and focus. Experienced attorneys expect to spend up to 4 hours in a full dress rehearsal of a ninety-minute opening statement.

### *Assemble the Right Test-Audience*

After the content of an opening statement has essentially been written, edited, and vetted, it is ready for rehearsal sessions. Well-meaning associates might boost and soothe the ego, but often lack the experience to provide constructive feedback on presentation delivery. Ask experienced colleagues to attend and comment on the shorter practice sessions. Give each listener the permission to critique the performance and the content and ask for a written summary of the key points. Include non-lawyers, who also have no vested income in your feelings (i.e., avoid secretaries, parents, kids), in the audience.

Willingness to ask for, accept, and implement feedback is important throughout the process. For example, a lead trial attorney stays in the room for feedback during the early rehearsals, listening attentively and making on the spot improvements in her presentation. As the opening statement day draws nearer, she leaves the room after rehearsals to permit an unfiltered critique of her performance. Another senior trial attorney facilitates the feedback session, analyzing comments, and objectively using follow up questions to clarify the feedback on key points. This follow up analysis is then shared with the lead attorney in a private session that includes the trial consultant to achieve an effective and efficient result from the rehearsal.

### *Tackle the Demon that is Procrastination*

When the BIG deadline is looming (opening statements for example), there’s nothing more counter-productive than failing to delegate tasks to the rest of the trial team. Most practitioners know to break large, intimidating tasks down to small, digestible bites to mark progress and complete the overall preparation of the case. Literally clearing a desktop, figuratively clears the mind. Reviewing trial textbooks or articles about the mechanics of oral presentations may break open a whole stream of consciousness that leads to an eloquent and persuasive delivery. Setting aside private time for reading the script out loud as opposed to doing other pretrial tasks creates space for final touch-ups.

There is often a reluctance to rehearse until everything is “perfect,” and “ready to go.” The main point of rehearsing at the early stages is to develop and refine presentation methodology. Waiting until the presentation is complete wastes good practice opportunities and causes unnecessary frustration and delay later in the trial preparation schedule. Many attorneys have wasted a rehearsal by shutting

it down when the visuals weren't perfect the first time. Remember the old adage, "a picture is worth a thousand words"? In the courtroom, "a picture represents a thousand words, but the attorney must choose those words wisely".

Experienced trial attorneys make it look easy. Rest assured, those attorneys are the ones who rehearse the most, privately and publicly. "Off the cuff" is a romantic ideal, but is not a method for experienced trial attorneys. Attorneys who do not rehearse use the stress-related adrenaline rush as a means of creating energy for last minute preparation. Feverishly finalizing content and supporting visuals throughout the night does not produce a persuasive performance. The best presentations hit the mark within two days of the opening. The lead attorney is able to "rest" the night before and manage the "peak" during the actual opening. A by-product of a timely final rehearsal is the luxury of editing. "If I had more time, I'd write a shorter note," applies here. Like it or not, the attention span of most juries are simply shorter and segmented. Teaching in 15-minute segments is most effective for any subject matter. Rehearsal of visuals, physical position and style of delivery all combine to punctuate and substantiate a compelling performance.

Though not a common problem among time-pressed attorneys, over-rehearsing deserves some mention. Rehearsing when tired or weary from subject matter familiarity produces a mechanical performance that lacks conviction and emotion. The audience is never engaged when the attorney is just "going through the 'motions.'"

### *The Art of Rehearsing is about Training*

Put simply, elite runners put in miles of training. Commitment to a training schedule requires purpose and drive. The discipline to use 5, 10, or 20-mile training runs is as important as diet, strength training, equipment and rest. Come race day, these runners, can trust the training and focus on peak performance. The same can be said for trial teams who apply this training discipline to the trial preparation schedule. Formal rehearsal schedules represent the final training regimen leading up to trial. Rehearsals are about speaking out loud with a focus on timing and delivery. Rehearse privately and with an audience. Rehearse in front of a camera and review the recording. Rehearse early and often with your trial consultant to review the demonstratives and exhibits timed to your script. Rehearse out loud with a test audience to hone the delivery. Well-rehearsed attorneys plant both feet firmly on the floor and confidently speak the tried and tested words that resonate with the jury in an easy and persuasive style.

## *Vocal Pitch in the Courtroom*

BY JESSICA A. BOYLE AND STANLEY L. BRODSKY

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Think of the best and worst voices you hear and of the impact they make on you. At their very best, some voices soothe and comfort, giving a sense of warmth, confidence, and mastery by the speaker. At their worst, some voices serve to irritate and leave the listener with a sense of distance, derision and disdain of the speaker. In a 2001 poll conducted by the Center for Voice Disorders at Wake Forest University, the best United States voices were identified as James Earl Jones, Sean Connery, Julia Roberts and Katie Couric. The worst voices at the time were those of Fran Drescher, Roseanne Barr, Gilbert Gottfried, Joan Rivers, and Howard Stern (Marcucci, 2002). Fran Drescher's voice merits special attention, in part because she succeeded professionally with a raspy and nasal voice and a laugh that has been described as like, "the sound of a Buick with an empty gas tank cold-cranking on a winter morning" (Marx, 2012, p. 19).

What is it about these and other voices that lead listeners to feel bad or good about the speaker? Although there are many ways of approaching the subject, the attention here is addressed to one component of voice quality: vocal pitch.

## *Voice as Cue*

Many aspects of the human voice are nonverbal communication cues. Strain, jitter, shimmer, pitch, loudness, and nasality are some of the variables that impact a listener's perception of a speaker's voice. As a nonverbal communication cue, voice has been shown to make a difference in people's perceptions of speakers (Tigue, Borak, O'Connor, Schandl & Feinberg, in press). In an investigation of voice quality, DeGroot and Motowidlo (1999) videotaped and audiotaped male and female job applicants and measured viewers' responses to the applicants' visual and vocal cues. For ratings of interview and job performance, participants relied more strongly on vocal rather than visual cues. That is, not only are qualities of the voice important in our judgments of others, in some situations they may prove to be more influential than visual information. Guerrero and Hecht (2008) argue that a vocal attractiveness stereotype exists among listeners. People tend to believe that, "what sounds beautiful is good" (p.155). Other empirical explorations of the attractive voice stereotype have found that attractive voices make a person seem more powerful, strong, assertive and dominant (Guerrero & Hecht, 2008).

### *The Lower Vocal Pitch Preference*

Pitch is one aspect of vocal tone. It is described as the vocally produced musical note, or how high or low a voice sounds (Behrman, 2007; Leathers, 1997; Guerrero & Hecht, 2008). Pitch is measured in Hertz (Hz), which specifies the fundamental frequency, or the rate at which vocal folds vibrate (Breedlove, Watson and Rosenzweig, 2010). Breedlove et al. (2010) noted that frequency and pitch are not the same thing. Frequency describes a biomechanical process whereas pitch is an individual's sensory experience of this process. Most humans can detect small changes in frequency over the audible range of 20 Hz to 20,000 Hz. A person's ability to detect changes in frequency is measured as the minimal discriminable frequency difference between two stimuli. The detectable difference is approximately 2 Hz for tones as high as 2000 Hz (Breedlove, Watson & Rosenzweig, 2010). Published norms for fundamental frequencies in speech indicate that men's habitual mean speaking frequency while reading aloud is 115 Hz. Women's habitual mean speaking frequency while reading is significantly higher at 215 Hz (Behrman, 2007).

Empirical investigations of vocal qualities show that manipulations of vocal pitch level can have a significant impact on how listeners perceive and judge a speaker (Tigue et al., in press; Ko, Judd & Stapel, 2009). In two experiments, Ko et al. (2009) examined how vocal cues influence listener judgments of speaker traits. In the first experiment, participants assigned to an audio condition listened to voices belonging to mock job applicants read resumés. Participants were asked to form opinions about the applicants' warmth and competence. Vocal femininity of job applicant was negatively associated with competence ratings. Vocal femininity was positively associated with warmth ratings, but the strength of the vocal femininity effect was far more pronounced for competence ratings than for warmth ratings. In the second experiment, the bias against applicants with feminine voices was replicated in the competency ratings, even when scenarios regarding applicants' past behavior were introduced to the participants as competing information. The negative effect of vocal femininity on ratings of job applicant competence may have been due to an overall preference for lower-pitched voices among the participants. Overall, studies indicate that lower pitch voices, as compared to higher pitch voices, are more likely to be associated with attractiveness, dominance, maturity, honesty and other positive judgments from listeners (Imhof, 2010; O'Hair & Cody, 1987; Tigue et al., in press).

### *Deceptive Versus Honest Vocal Pitch*

One reason that listeners tend to prefer lower voices is because higher pitch voices are more commonly associated with deception (Ekman & Friesen, 1976; O'Hair & Cody, 1987). Experiments that analyze vocal pitch during instances of deception versus instances of truth support this notion. The idea is that as speakers deceive, they become psychologically aroused in certain ways that tend to put stress on vocal features, leading to an increase in pitch (Ekman & Friesen, 1976). Ekman and Friesen (1976) conducted an experiment utilizing 16 different nursing students as participants. All participants watched pleasant video stimuli, as well as a video depicting victims of amputations and burns. The second video stimulus was designed to arouse negative feelings in the participant. In the honest interview condition, participants described their frank feelings about the film. In the deceptive interview condition, participants were instructed to hide their negative emotions and convince the interviewer that they had seen another pleasant film. These interviews were recorded and researchers measured the nursing students' pitch by exposing the audio to a speech analysis computer program. In the deceptive interview condition, the speech analysis data indicated significant increases in voice pitch.

O'Hair and Cody (1987) studied variations in vocal pitch measurements as they relate to prepared and spontaneous lying behavior in both men and women. The researchers included sex differences as a predictive factor of vocal stress during lying. Their participants were exposed to a simulated pre-employment interview and told to either lie or be truthful when certain questions were asked. Unknown to the participants, a follow-up question was asked that allowed researchers to study the spontaneous vocal behavior of both liars and truth-tellers as they reacted to unexpected questions. No significant difference in vocal stress scores were uncovered in participants' spontaneous lies as compared to their truthful responses. Women, however, did demonstrate higher vocal stress scores in their prepared lies as compared to truthful answers (O'Hair & Cody, 1987). This research shows that prepared lies may cause more vocal stress than spontaneous lies. Further, this effect may be more pronounced in females. People associate higher pitch voices with dishonesty; empirical investigations of this stereotype have shown that there is some truth to this view, particularly when it comes to feminine voices (O'Hair & Cody, 1987).

#### *Lower Pitch Voices and the Attribution of Positive Speaker Characteristics*

Lower pitch voices are associated with different speaker personality characteristics than higher pitch voices (Imhof, 2010; Ko et al., 2009, Tigue, et al., in press). Imhof (2010) isolated vocal pitch in order to test how this variable impacts listeners' judgments of the people speaking. Participant listeners were presented with technologically manipulated voices of low and high frequency and instructed to assess personality as well as physical attributes of the people behind the voices. In general, higher voices were associated with youthfulness. Participants indicated that they were more desirous to meet people with higher pitch voices, as compared to lower pitch voices. Higher pitch voices were more likely to be associated with agreeableness. Decreased conscientiousness and lower emotional stability were also ascribed more often to higher pitch voices. People speaking with a lower pitch voice were said to be more sociable and relaxed. Pitch was judged differently between male and female voices. Women with low voices were seen as more agreeable than women with high voices; however, men with lower voices were perceived as less agreeable than men with higher voices. In other words, there is not necessarily a one-to-one relation between pitch and socially desirable traits.

In an examination of vocal pitch and voting-related perceptions, Tigue et al. (in press) obtained vocal recordings of nine different United States presidents and technically manipulated each recording to produce a low and high pitch condition for each president. Participants listened to audio recordings, ascribed personality traits to the voices, and indicated for which candidates they were more likely to vote. The men with lower pitch voices were more likely to have positive personality traits ascribed to them. These traits included attractiveness, dominance, intelligence, trustworthiness and other qualities typical of a good leader. Further, vocal pitch exerted an important influence on voting behavior with the participants significantly more likely to vote for candidates with lower voices (Tigue et al., in press).

### *Implications for the Courtroom*

1. Attorneys and trial consultants would be well served to attend with care to the voice quality and vocal pitch of key witnesses. There is a possibility that triers of fact will be influenced negatively by higher pitch voices. Given available time for training and trials of substantial importance, efforts by attorneys, trial consultants, or communication experts to retrain such witnesses may be a worthwhile investment.
2. When trial consultants or attorneys do prepare witnesses to modify voice pitch, a caution is in order not to overdo it. Witnesses should seek to use the lower range of their normal and comfortable voices in testimony, with a special emphasis on dropping towards the slightly lower range when responding to demanding and aggressive cross examination questions.
3. Similar advice may be extended to attorneys in their opening and closing arguments. For attorneys with decidedly abrasive or high pitch voices, systematic consultation by professionals may help modify voice pitch. By itself, feedback on voice pitch and quality may start the process. Given the regular need for positive appraisal by triers of facts and clients in the courtroom, this kind of pointed effort to gain insight into voice qualities and associated modifications may yield worthwhile payoffs.
4. As both witnesses and attorneys seek to modify their voice pitch, some caveats are in order. First, stay natural. Straining to produce an effect has the potential for backfiring. Next, make dropping to lower ranges an automatic and background process. If it is automatic, it will not distract focus from the substantive and probative issues at hand. Next, small differences in pitch can make a big difference in credibility. It would be seen as phony if comedian Gilbert Gottfried were to try to speak like actor Sam Elliott. A final caution is to promote pitch change to occur in inverse proportion to importance of the statements. That is, speakers should intentionally produce lower pitched statements with important issues.

### *Conclusion*

The application of voice quality and pitch training to the courtroom is new. Although the research data and our own personal observations may seem promising, we advise that users move in small steps. Nevertheless, for persons who have elevated vocal pitch, this area of attention is worth the process of self-examination and possible pitch modifications.

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## *Road Warrior Tips*

*We began the Road Warrior Tips feature in our last issue of The Jury Expert and we have a lot more! Here, they are listed as we received them. For a complete list, sorted by category or geographical area of the country, visit the [Road Warrior Tips page](#) on our website!*

### *Orlando, Florida*

This tip submitted by Tara Trask of [Tara Trask and Associates](#).

Orlando security is very slow. They have one of those “Clear” lanes, which I thought didn’t exist anymore, but other than that, no frequent flyer or First Class lines. Prepare for a 20 or 30-minute wait at the Orlando security lines.

### *Traveling Faster, Easier and with Less Frustration*

This tip submitted by Doug Keene of [Keene Trial Consulting](#).

The “Trusted Traveler” [known as PreCheck for domestic travel] program of the TSA has re-opened (for a while, at least) for new registrants. It is a program that allows people who are deemed to be ‘low security risk’ to register. It provides access to special lanes at airport security checkpoints, and you don’t have to deal with having shoes, belts, liquids, computers, etc. hauled out and placed back in your luggage. It is more like it was before 9/11. There are also options that facilitate driving through border checkpoints into Canada and Mexico, as well as returning international travelers. I just registered, and was conditionally admitted. Now I have to go through a fingerprinting and photographing process at one of their airport centers, and I am good to the standard security lanes. I anticipate that give me back dozens of hours each year.

Note: Not all airports make use of this program. Generally, the bigger the airport the more likely it is to be in the system. By the end of 2012, it will have expanded to 35 airports. Austin is not in it, but most of the airports I fly to are involved, so I will benefit on the return flights. For program information and included airports, go to [this website](#).

This tip submitted by John Gilleland of [TrialGraphix](#).

Leave the taxi door hanging open as you go to retrieve your items from the trunk. It helps to stop the driver from taking off (because he's forgotten you have trunk items -- it has happened to me), and also forms the habit of taking one last look inside the cab for things you may have left on the seat or floor when you do eventually close the door.

This tip submitted by Steve Perkel of [Archer Law](#).

Another thing that I do when flying, especially overseas, is to make a color copy of my U.S. Passport, driver's license and flight information including the paper documentation for electronic tickets. I tuck all of these together in the lining of my suitcase and in my backpack/briefcase. I also bring a copy of my most recent eyeglass prescription with me as I have been in the unenviable position of having lost my glasses when canoeing on a combination business and vacation trip.

This tip submitted by Debra Worthington, [Auburn University](#).

I love coffee, but don't want to spill it on me while sitting in that airplane or have it go cold. Holding it while someone tries to crawl over to his or her seat is no fun either. I bought a great little thermos from Nissan Thermos (JmL350P) and take it pretty much everywhere with me. It's vacuum insulated and comes with a tea infuser for people who are discriminating tea drinkers. I like it because the top screws on and prevents spillage. I've had it for five years and have dropped it, kicked it, and bounced it down a set of steps and it's still going strong. More importantly, it really keeps my coffee hot for hours. I fill it up at the airport and have good coffee, or at least better coffee, than is typically served on the plane. It easily slides in the pocket in from of my seat. And, I've never had a problem getting it through security.

This tip submitted by Steve Perkel of [Archer Law](#).

Having been in a hotel during a hurricane when the power was lost and the emergency lighting was inadequate, I learned never to travel without a flashlight. Now, with the ubiquitous presence of smart phones and a plethora of free or low-cost apps, I use my Flashlight application on my cell phone to light the way.

This tip submitted by Debra Worthington, [Auburn University](#).

Many hotels still provide you with a shower cap (although I've never used them for this). Snag them and use them to slip over your shoes to help keep your clothes clean.

## *Avoiding Germs and Other [Disgusting] Creatures Hidden in your Hotel Room*

This tip submitted by Kristin Fitzgerald of [ZMF](#).

I read somewhere to always pack a Ziploc or other clear plastic bag to go over the remote control. It's supposed to be one of the most germy, disgusting items in the room. The travel expert said put the bag over it and then you don't have to worry about touching it.

This tip submitted by Andy Sheldon of [SheldonSinrich](#).

A friend who had recently done some work for a major exterminating company gave me these instructions. When entering your hotel room, take your luggage straight to the bathroom and set it all in the middle of the tile floor. Then go directly to the bed and pull back the covers all the way down to the mattress. Carefully examine the beading around the mattress to see if you see any of the little irritating bugs. If you find any, call the front desk and ask for another room. When we were in Manhattan recently, the Ritz made the headlines with an infestation. It seems no hotel is immune.

## *Putting that Cellphone Camera to Good Use!*

These tips submitted by Debra Worthington, [Auburn University](#).

Don't want to forget what level you parked on in that parking garage? A quick snapshot can take care of that problem.

Have you been in and out of one too many hotels this week? Hotels don't have room keys anymore with the room number conveniently inscribed on it (thank goodness). But that swipe card may not help you remember if you were in Room 1114 or 1141. Take a quick shot of your room number or send yourself a text.

If you run a lot of mock trials, you end up in a lot of venues. Later, you're trying to remember what it looked like or whether it was the place with the column inconveniently placed right in the line of site of your video equipment. Take a quick snap or two, tagged the photo with when, where, or any other comments, then text or email them to yourself.

You've probably seen this done elsewhere, but if you're traveling, it's a fun and easy thing to do for those of you with smaller children at home. Take a small stuffed animal or other toy (their choice). And take shots of it in fun or weird places as you travel. Email or attach them to a text and send them home. Seeing Ginger the Horse doing a handstand on the window ledge at your hotel or looking out a taxi window while you're stuck in traffic only takes a moment, but can make your child's (or niece or nephew's) day. If you're really busy, just do it once during your trip.

## *Eating Well on the Road*

This tip submitted by Leslie Ellis of [TrialGraphix](#).

The GoHow app for Android, iPhone and Blackberry is pretty awesome. It provides flight tracking information, including departure and arrival gates, what's around the gate (restaurants, services, etc.), and transportation and directions to and from each airport. You can find, ahead of time, the best place to grab a salad during your 20-minute layover or while you're running to your gate. It's come in very handy.

This tip submitted by Dan Dugan, [Trial Science Inc.](#)

I try to control my diet pretty strictly, but the road makes it very hard. On the road my hours tend to be long, time zones change eating times, long flights with no in-flight food makes me tend to eat what I can, when I can. Also, client invitations to go out with them for meals or drinks create more pressures on the whole eating-thing.

I have started to Google map some health food stores for places near my hotel in advance of my trip. I then try to go a little early (like catch a flight that gets in an hour earlier than one I would have chosen) and go to that store and stock up on some items that are part of my regimen. Then, if I know I am working long hours, I can take some good food with me. If a client wants to go out, it is fine because I can order a salad or something light while I am with them knowing I have some reserves back at the hotel. When I do not think about meals in advance like that, I find myself at the mercy of the "we'll bring in sandwiches" offer, which, as kind and as thoughtful as that might be, usually does not fit my vegetarian and cycling-racing life. By being more mindful of meal challenges and being more proactive, I have been much more successful keeping up my energy levels on the road and not having to compromise how I want to live.

## *Harming Children: Uncovering and Overcoming Bias When Defending Sex Crimes against Children*

BY BETH BOCHNAK

*Beth Bochnak, MA<sup>1</sup> is the President of NJP Litigation Consulting/East, in Madison, NJ. She does primarily criminal defense, including capital work, but also plaintiff employment and personal injury. Her other specialty is witness preparation and evaluation. For more information please visit [NJP's website](#).*

If you frequently work on criminal defense cases where violence is alleged, you tend to develop a peculiar worldview, where nothing is really shocking anymore. Years ago, the National Jury Project<sup>2</sup> was working on a book about representing women who killed their abusers (*Women's Self Defense Cases: Theory and Practice, Michie, 1981*). My next door neighbor, a psychologist, later told me she would eavesdrop from her kitchen while I sat in my backyard, talking about these murder cases with a fellow consultant. She was horrified by how casually we could discuss such topics as dismemberment and torture.

Certain crimes are so offensive and upsetting to people that they can't even imagine someone charged with such a crime being worthy of defending. In doing capital work, I've found there are three kinds of cases in which jurors indicate they would be most inclined to give the death penalty: Killing a police officer; killing a child; harming a child. Rape comes in fourth. They will give this response even after being told that the death penalty doesn't apply except for murder.

In any criminal case, jurors have a hard time accepting the presumption of innocence.<sup>3</sup> When someone is charged with a sex crime against a child, potential jurors have even greater difficulty accepting the presumption of innocence. The challenge for the consultant – and attorney representing someone charged with such a crime – is overcoming the jurors' visceral response in order to ensure a fair trial for the defendant. I've found it is sometimes difficult for attorneys and consultants to overcome their own visceral response as well.

Most of the time, I have no problem working closely with defendants charged with the most heinous crimes; separating the crime from the person. However, like jurors, when children are involved, I have a harder time. When incest is alleged, it is harder still. The presumption of innocence in factually disturbing cases is difficult for all of us, but without it, our defendants don't have a chance of a fair trial. I have a pretty good idea what most jurors will be thinking coming into a case when incest is alleged: "This crime is too awful for anyone to lie about." The trick in voir dire will be to find those people, and get rid of them.

The best way to unearth these jurors is with a supplemental juror questionnaire. As has been said in many previous articles, a questionnaire promotes honesty by providing the jurors a private way to recount their exposure to sex abuse.<sup>4</sup> If you do a little online demographic homework, and include it in your motion/memo, it will be easier to convince the judge that a questionnaire is needed in a particular case. You don't need to find specific mentions of incest to show the judge the likely number of potential jurors who have been exposed to sex crimes. FBI Crime Statistics and state or county level sex abuse statistics will help illustrate how widespread is the problem of child sex abuse and incest in your jurisdiction. Local or state websites for anti-rape groups can also provide relevant data.<sup>5</sup>

In your memo, include the pertinent data. For example:

The use of a supplemental questionnaire is particularly appropriate in this case because it involves allegations of [CHARGES].

Child sexual abuse is unfortunately fairly prevalent in American society. National statistics from the Bureau of Justice Statistics report that 67% of all sexual assault victims reported to law enforcement agencies were between 12 and 18 years of age. Of the alleged offenders in that age category, 24.3% were family members of their victims; 66% were acquaintances of their victims (Snyder, H., National Center for Juvenile Justice, July 2000, NCJ 182990). Thus, a number of jurors in the panel can be expected to have personal knowledge of, or experience with, sexual abuse.

Mr. \_\_\_\_\_ is entitled to inquire into the experiences of prospective jurors concerning this subject in order to determine whether they, or persons close to them (including family members), have ever been the victim of sexual misconduct. It is necessary to evaluate juror attitudes and experiences on this subject because of their potential to produce predisposition or prejudice, which could easily affect their ability to decide this case fairly and impartially. This is information that the attorney for the Defendant must have in order to determine whether prejudice exists which would justify a cause challenge or, in the alternative, to intelligently exercise peremptory challenges.

Child sexual abuse and assault is obviously a very private and potentially painful subject. Parents have difficulty talking to their own children about sexual matters in the comfort of their own homes. Many potential jurors will have great difficulty talking candidly about such experiences in front of other jurors. They are likely to feel embarrassed and possibly resentful if they are compelled to answer such questions in front of others. In fact, some may not be willing to come forward publicly with such information, in spite of their oath. The use of a confidential supplemental questionnaire would protect and respect the privacy of potential jurors and, at the same time, meet the needs of the attorneys for the parties.

Defendant has also requested that those prospective jurors who state that either they, persons in their family, or persons they are close to, have been the victim of physical or sexual misconduct be questioned about this matter out of the hearing of the panel of prospective jurors. Individual sequestered voir dire on this subject would avoid unnecessary embarrassment and would further protect their privacy concerning this very personal and sensitive topic. These steps would meet the requirements of Standard 7(c) of the ABA Standards Relating to Juror Use and Management, which requires reasonable protection of juror privacy. (A copy of the Standards is attached as Appendix 1).<sup>6</sup>

Finally, the proposed supplemental questionnaire would also increase the efficiency of the voir dire process. The questionnaire covers some other basic demographic information which would otherwise be part of the oral voir dire – information about crime victim status, knowledge of law enforcement or other law related personnel, and specific knowledge of witnesses and parties. This too is consistent with Standard 7(a) of the ABA Standards Relating to Juror Use and Management which advises that such information be made available to the attorneys for the parties prior to the commencement of the voir dire process.

Including these questions on the supplemental questionnaire will save additional time. Follow-up questions, based on responses to the questionnaire, can be pursued in an efficient manner to complete the voir dire process.

Defendant volunteers to do the necessary photocopying and distribution of the completed questionnaires to the attorneys for the Prosecution if the Court wishes. This will minimize the expense and burden on the Court’s personnel.

For these reasons, Defendant requests that his motion be granted.

As you can see, you have to be creative in thinking about the kinds of issues and the types of documentation that could help to persuade a judge of the importance of questioning in a certain area and the reasons why a questionnaire would be the best way to do so.

If you know of any questionnaires which have been used in the same or nearby jurisdictions, cite them by case. It could be helpful to discuss any similarities in the cases or, if you know any of the parties, anecdotal information about how the process worked.

In a previous article<sup>7</sup> published in *The Jury Expert*, NJP trial consultant Diane Wiley described many considerations in deciding questionnaire length. Many judges, especially in state courts where more extensive voir dire is permitted, are unfriendly to the idea of a questionnaire. While it might be wonderful to ask as many questions as you think necessary, a 3-page questionnaire can be effective and is more likely to be allowed. In 3 pages you can learn basic juror information as well as experience and attitudes about sexual abuse.

Obviously, your questions should be tailored to your specific case facts and issues. What follows are some questions about juror’s attitudes and experience that have been effective in the past. For the sake of brevity, we have omitted the 3 lines of space after questions that call for a written response.

1. Have you or any relatives or friends ever worked with adults or young people who have been physically or sexually abused?  YES  NO

IF YES, please tell us about that:

2. Do you or anyone close to you work in a job where you are mandated to report sexual abuse if you suspect it has occurred?  YES  NO

IF YES, have you ever reported anyone?  YES  NO

3. Have you, any family members or friends ever been sexually assaulted or had any unwanted physical or sexual contact, including any sexual behavior that you or they believed was inap

appropriate?  YES  NO

IF YES, was this:  You  spouse/partner  child  family  friend

IF YES, please explain and include whether anyone was told about the abuse and when:

4. Have you ever suspected that someone you know was being or had been sexually abused?  
 YES  NO

IF YES: What did you do?

5. The defendant in this case, \_\_\_\_\_, is charged with aggravated sexual assault for sexually abusing his daughter from ages \_\_\_\_\_. Is there anything about a case involving sexual abuse of a child that would affect your ability to serve as a juror?  YES  NO

IF YES, please explain:

6. Under the law a person who is charged with a crime is presumed to be innocent. How difficult would it be for you to presume innocent a person who is charged with sexual assaulting his daughter?

Very difficult  Somewhat difficult  Not too difficult  Not difficult at all

Please explain:

For me, question 6 is the key. With a decent judge, you should be able successfully to challenge for cause anybody who does not answer “not difficult at all” because they can’t accept the presumption of innocence. If necessary, the follow up question would be, “why do you feel that way?” Then ask, “how will you be able to presume that \_\_\_\_\_ is innocent, given your feelings about this?” By framing the question in terms of your case facts, you are not requiring the juror to admit s/he doesn’t believe in the presumption of innocence at all, only to admit that s/he can’t be fair to your client because the charges are too upsetting.

Without a questionnaire, a similar question series in voir dire for Question #6 above would be:

1. A young woman is going to come into this courtroom, swear an oath to tell the truth, and say that her father repeatedly had sex with her from ages \_\_\_-\_\_\_. That’s going to happen.

a. Because that’s going to happen, I’m going to show you a statement and ask you to rate whether you agree or disagree with the statement. I’ll ask you to pick a number on a scale of 1-10. You’ll get a gut feeling right away about what your number is. Keep that number in your mind and I’ll ask you about that gut feeling. (The judge may not allow you to use a graphic, in which case you give the same instruction but give the statement aloud, demonstrating with your hands the difference between numbers 1 and 10 and give the definition of each. I’ve seen it done both ways and it works.)

b. IT IS POSSIBLE FOR A YOUNG WOMAN TO FALSELY ACCUSE HER FATHER OF HAVING SEX WITH HER FOR \_\_\_\_\_ YEARS.

- i. CHART – 1 Agree (it’s possible) – 10 Disagree (that’s not possible)
    - 1. How many of you are 1-3?
    - 2. How many of you are 7-10?
    - 3. How many of you are 10?
  - ii. Why do you think IT IS NOT POSSIBLE?
  - iii. Why do you think IT IS POSSIBLE?
- c. Why would a young woman falsely accuse her father of this?

Again, the argument can be made that anyone self-rated 7-10 should be excused for cause. At best you get rid of any juror who cannot accept the presumption of innocence in this type of case. At worst, you know your strikes. In any event, whether you ask about case specific presumption of innocence in a questionnaire or in voir dire, the answers will help you decide your strikes.

In defending cases alleging sex crimes against children, there is going to be bias. The trick is to get jurors to think about their biases, and admit to them. Some jurors will be able to overcome them and some will not. The questions posed above are designed to help jurors think seriously about whether or not they can be fair.

### *References*

1. Beth Bochnak is the President of NJP Litigation Consulting/East.
2. Now called NJP Litigation Consulting
3. Research conducted by the National Jury Project among juror eligible respondents in trial jurisdictions throughout the country over the last 30 years has consistently shown that: 16% - 45% agree “If the government brings someone to trial that person is probably guilty.” 30% - 62% agree “Defendants should prove their innocence.”
4. For a full discussion of supplemental juror questionnaires, see *Jurywork: Systematic Techniques*, NJP Litigation Consulting, West Publication, 2<sup>nd</sup> ed. Updated annually.
5. For example: Cityrating.com provides rape statistics for states and cities; [Federal Bureau of Investigation Uniform Crime Reports](http://www.fbi.gov/stats-services/crimestats) (FBI.gov/stats-services/crimestats); Rainn.org provides statistics on victims of sex crimes nationally; local area crime statistics can be found through Google, key words “sex crime statistics” for your area.
6. Wiley, *Jury Expert*, Vol. 23, Issue 6.
7. If possible, make a chart with that statement and the numbers 1 (agree that it’s possible) to 10 (disagree that it’s possible) to show the jurors.

## *A Book Review: Thinking, Fast and Slow* *By Daniel Kahneman [499 Pages Farrar, Straus and Giroux]*

REVIEWED BY STEVEN E. PERKEL

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### *A Big Book Filled With Big Ideas*

What do you do when someone recommends you read and review a book that has received accolades from the New York Times, the Wall Street Journal, Nature and The Guardian newspaper in the UK, to mention only a few in a lengthy list of respected publications? My first response was feeling excitement punctuated by the thought, *this must be some special book, I should check out what it has to say.*

I got in the car and drove to my favorite bookstore, went first to the coffee bar and ordered a large Café Americano, then found the book and grabbed it off the shelf. I felt the heft of its thickness in my hand, opened it to the 499<sup>th</sup> page, the last page in the Index. Just then, before reading a single word, everything slowed down. My thinking automatically shifted to the deadline for submitting the review, the time I had already committed to other projects and the reality that I had to get everything done before going on vacation in ten days. At that precise moment a familiar discomfort emerged linked to the private thought, *perhaps I have bitten off more than I can chew. I also felt a bit lethargic.*

Despite these disquieting thoughts and feelings, with the book in hand I picked up the coffee and added a nut and chocolate chip granola bar to my order. I sat down and dove into the Introduction of *Thinking, Fast and Slow* by psychologist and winner of a Nobel Prize for Economic Sciences, Daniel Kahneman.

A little while later, I got it; I had an explanation of why my energy, excitement and drive to read this book shifted to feeling more like a chore than a choice. System 1 was having it out with System 2. I learned that as I did the work of reading and thinking about what I read energy was being depleted. I also learned the granola bar, loaded with complex carbs that would become glucose, was just what my brain would have ordered if it had the capacity to do so.

In *Thinking, Fast and Slow* Kahneman offers readers a lucid description of how the human mind works as he explains two ways of thinking he calls System 1 and System 2. System 1 is emotional, im

mediate and intuitive. System 2 is logical, more critical than System 1; it is slow in comparison to System 1. System 2 is an energy hog and is lazy.

Should you read *Thinking, Fast and Slow* many of the terms used by Kahneman including anchoring, framing, loss aversion, as well as, outcome and hindsight biases, will be familiar. What is unique and fun about this book is the ways in which Kahneman illustrates his ideas and lessons using puzzles, optical illusions, and experiments that he and his colleagues have conducted over a period of many years.

*Thinking, Fast and Slow* is a big book filled with many big ideas. Kahneman, a cognitive psychologist thoughtfully organized the book into five parts each of which has several short chapters. Part 1 explains the characters of his story, System 1 and System 2. The author even goes so far as to identify System 1 as the hero and System 2 as a lazy controller of the limited energy we have available when we think or solve problems. He describes attention and the effort it requires in a chapter that includes a discussion of memory, time pressure and the costs we incur when tasks involve conflicts and a need to suppress a natural tendency. An example that resonated with me was how hard it is to inhibit emotional responses to a stirring film. I could only imagine how exhausting it is for jurors hearing an emotionally gripping matter and the effort it takes to remain fact focused.

Kahneman demonstrates the importance of timing, energy and food as he describes research that was done in Israel with a sample of Israeli parole judges. These judges spend the entire day reading applications for parole. The cases are presented randomly and very little time is spent on any single case (6 minutes). While only 35% of the applications for parole are approved, the approval rate escalates to 65% after each of three meal breaks the judges take during the day. The approval rate drops to just about zero immediately before the next meal. The explanation for this pattern was that the judges were tired and hungry and thus tended to fall back to easier default positions. How do you think you might use this information when you help your next client organize and time their arguments to a jury or judge?

Part 1 also includes a chapter about the power of stories that have associative coherence and how priming influences decision-making. "Cognitive Ease" includes a discussion of the impact of having to attend to an issue that is somewhere on a continuum that has Cognitive Strain at one end and Cognitive Ease at the other. Examples of this include reading or processing material printed in an obscure font, faint colors or complicated language. The chart on page 60 is not to be missed and should immediately be followed by turning to page 62 to read "How To Write A Persuasive Message" by reducing cognitive strain; I promise you, you will not be sorry.

Chapters 6, 7, 8 respectively address norms, surprises and causes, jumping to conclusions, and how judgment occurs. I think Chapter 9 contains important information for our profession and practice. When confronted with a question that is too hard to answer or a problem that is too hard to solve, System 1, Kahneman's hero, will find a related question that is simpler and will use it to answer the more challenging question. Kahneman calls this substitution but we might call it nullification. Chapter 9 continues with a discussion of the use of heuristic questions that people use to arrive at answers to hard questions. One of the examples he gives is:

***Target Question***

How should financial advisors who prey on the elderly be punished?

***Heuristic Question***

How much anger do I feel when I think of financial predators?

The remainder of Chapter 9 expands upon heuristics and perceptions, and ends with a summary of the characteristics of System 1 and is the prelude for Part 2.

Part 2 of *Thinking, Fast and Slow* discusses heuristics and biases in greater detail and provides a warning about drawing inferences from casual observations including stereotypes. One example of erroneous reasoning is embodied in the reporting of the results of a research exercise that involved a story of a woman sitting on a New York subway car reading the New York Times. Respondents were asked to guess whether she had a PhD or didn't go to college at all. The common response is to pick the PhD even though the data does not support this conclusion. Why? Because at any given time the number of people without PhDs riding the New York subways is far greater than the number of PhDs. What were the heuristic cues that led to the reported but wrong answer to the question?

But the tour de force about heuristics is the story of Linda, a fictitious woman. In this experiment done with Kahneman's dear friend and collaborator, Amos Tversky (who died in 1996 at the age of 59), a group of people were given the following description of Linda:

Linda is thirty-one years old, single, outspoken and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in antinuclear demonstrations.

After being given the description of Linda, the group was asked to choose from a list of seven outcomes for Linda the one they believed was most likely. The results of the experiment defied logic, demonstrated a System 2 error and led to a simpler experimental question:

Which alternative is more probable?

Linda is a bank teller.

Linda is a bank teller and is active in the feminist movement.

Take a moment and answer the question yourself. Did you choose the first or second outcome? When groups of undergraduate psychology students at several major universities had this simple problem posed to them 85% to 90% chose the second outcome, which is illogical. Kahneman reports he asked a graduate student the same question and she responded similarly. When he told her that she made an error in her logic she explained herself by saying that she thought Kahneman was just asking for her opinion. Do you know why the second outcome for Linda is incorrect? Read Chapter 15 to learn all about it.

Chapter 16 provides insights into statistical reasoning compared to stereotypic causes that people use in decision-making. Chapter 17 and 18 are readable romps through the fact that over time all events regress toward the mean, a manageable conversation about regression and the problems both System 1 and System 2 create and encounter trying to deal with statistical regression and intuitive predictions. Kahneman, also with wonderful humor and wisdom, shares his favorite equations, which gave me pause to smile and think. Here they are for your thinking pleasure:

Success = talent + luck

Great success = a little more talent + a lot of luck

Part 3 of *Thinking, Fast and Slow* addresses the issue of overconfidence in chapters entitled “The Illusion of Understanding,” “The Illusion of Validity,” “Intuition vs. Formulas,” “Expert Intuition: Can We Trust It,” “The Outside View” and “The Engine of Capitalism.” Kahneman states that the content of Part 3 was influenced by the work of Nassim Taleb the author of *The Black Swan*. Each of these chapters explores how we have confidence in what we think we know and the difficulty we have realizing how uncertain life and the world in which we live really are.

The idea that stories of the past, flawed or accurate, shape a person’s worldview and their expectations for the future is an important theme in Chapter 19. Using Taleb’s term, *narrative fallacy*, Kahneman describes what makes an explanatory story compelling: simplicity; concreteness rather than abstractness; to make a story resonate with legitimacy assign larger roles to talent, stupidity and intentions rather than luck. Compelling stories focus on a few striking events that happened instead of the many events that did not happen. The human mind has real trouble dealing with things that did not occur.

Kahneman points out the impact of recent events that register as relevant are likely to become candidates for important elements in a causal narrative. The importance and impact of the *halo effect* is discussed in some detail in this part of the book. Kahneman reports that the halo effect helps keep stories simple, valid and therefore viable. Using the history of Google™ to illustrate the power of narratives and the halo effect, Kahneman evokes the WYSIATI (what you see is all there is) rule that he discusses earlier in the book. He also discusses the impact of outcome and hindsight bias as elements in decision-making.

Malpractice litigation and research done in California related to a bridge in Duluth, Minnesota are mentioned in the context of outcome and hindsight biases. The impact of the halo effect on business writing and managerial mythology are also discussed and are interesting examples of how we overestimate the value of the patterns we see and underestimate the importance of luck.

Chapter 20 addresses cognitive illusions supported by our tendencies to attribute positive outcomes to skill. The examples Kahneman provides in this chapter may cause you to question the faith you have previously placed in financial advisors and the credibility of pundits. The impact of a culture of professionalism and expertise may also be called into question. For me, the most important take-aways from Chapter 20 addressed issues of predictability: “errors of prediction are inevitable because the world is unpredictable and that high subjective confidence is not to be trusted as an indicator of accuracy (low confidence may be more informative)”. Applying Kahneman’s observations about predictions may be somewhat humbling but I think I will recall them as I consider my own work with clients.

Intuition, algorithmic decision-making and the trustworthiness of expert intuition are discussed in Chapters 21 and 22. The literature and research on decision-making seems to point to algorithms as being more reliable than intuition in a variety of arenas. As he does in other chapters, Kahneman challenges readers to apply his observations and what the research shows. If you are about to hire someone, the suggested methodology suggested at the end of Chapter 21 will interest you.

Have you ever heard an experienced trial lawyer say she develops and chooses case themes, selects jurors and frames expert testimony based on intuition, experience and a sense of knowing? Sure you have. What you may not be familiar with is RPD: Recognition-primed decision-making. RPD is a model developed by Gary Klein, a leader of the Naturalistic Decision Making movement. Kahneman and Klein were adversaries over theories about bias and heuristics and decision-making. But through a clever and committed research effort they became adversarial collaborators trying to answer the following question: *When can you trust an experienced professional who claims to have an intuition?*

The result of the collaboration and the answer to the question was the paper, *Conditions for Intuitive Expertise: A Failure to Disagree*, that Kahneman and Klein wrote.

RPD, which is a two-phase process, according to Kahneman involves both System 1 and System 2. In Phase 1 a tentative plan automatically emerges as a result of associative memory – clearly a System 1 activity. Phase 2 of RPD is a deliberative process in which the tentative System 1 plan is played out mentally to test its workability using memories that have been acquired over time as rubrics. In the end, when answering the question they posed for their collaboration, Kahneman and Klein agreed that intuition is not a reliable guide to determine the validity of the confidence an expert demonstrates. That does not solve the problem regarding claims made by experts in everyday life. Kahneman helps resolve this problem by pointing out that skilled experts have likely met two conditions that enable them to offer opinions: first they have been in environments that are sufficiently regular to be predictable and have had opportunities to learn about predictable events through prolonged practice.

In the conclusion of *Expert Intuition: When Can We Trust It?*, Kahneman discusses emotional learning, the role conditioning can play in mental activation, the importance of valid/invalid cues and winds the chapter up reveling in the areas of intellectual agreement that he and Klein discovered even while they remained as emotionally different as day and night.

Providing insight about expert intuition is followed by observations that people are loss averse: that is, we hate to lose more than we like to win. Kahneman also addresses the endowment effect, which causes people to exaggerate the value of things they have as compared to what they do not have. The endowment effect and loss aversion may provide partial explanations for the behavior we see when litigants are trying to negotiate the settlement of a case.

Moving closer to completion of the reading, thinking and writing exercise, we come across “Bad Events!” Here, where Kahneman’s story has neuroscience, evolutionary history and the hero of the book, System 1, coming together, we learn that the human brain has the capacity to react immediately to threats, real or symbolic. The sensitivity and reactivity to threats, according to Kahneman, extends to processing statements of opinions we strongly disagree with. Think about how this universal capacity could be useful in pre-trial research that tests particular themes, demonstratives and witness testimony and you will log another reason to read *Thinking, Fast and Slow*.

While this may sound like a bit of an overstatement, *Thinking, Fast and Slow* has insights for everyone, including our colleagues who think golf is a metaphor for life. You know who you are. Applying loss aversion and prospect theory to analyze putting, two economists at the University of Pennsylvania meticulously analyzed 2.5 million putts to answer a single prediction: golfers try a little harder when putting for par than when putting for birdie. After examining 2.5 million putts, they concluded they were right. Players who were putting for par were more successful than players putting for a birdie. Why is this study important to us? The answer does not emerge from the specific findings of the research but the study is a compelling case for using a theory to aid thinking and decision-making. After all, a theory is good only if it has predictive value in real life. This becomes especially important since we all keep mental accounts to help us manage opportunity, loss and regrets. Of course, System 1 will formulate and present you with theories based on intuition, memory and experience while System 2 will ask that you be more critical to determine the validity of System 1 propositions.

Loss aversion and the law is a very small part of the book, but it concludes with the following gem: “if people who lose suffer more than people who merely fail to gain, they may also deserve more protection from the law.” Similarly the chapter on rare events demonstrates the value of vivid descrip

tion as a factor in choice making and the use of whole numbers rather than percentages in capital cases. Kahneman asserts that a good defense attorney wishing to cast doubt on DNA evidence will not use “the chance of a false match is 0.1%.” Instead, the attorney will more likely favor the statement, “A false match occurs in 1 of 1000 capital cases.” The latter statement invites finders of fact to wonder if the person on trial is the 1 person in a thousand. Which statement would the prosecutor favor?

*Thinking, Fast and Slow* completes the journey Kahneman invited us to accompany him on by discussing recent research. Should you choose to read this book you will learn about the never-ending dance between the “experiencing self” and the “remembering self”. Kahneman points out that he, like all of us, is his remembering self, and that his experiencing self, which does his living, is like a stranger to him. Issues of quality of life, well-being and positive psychology are also discussed in Part 5 of the book. The final chapter, “Conclusions” addresses the differences between the experiencing self and the remembering self, the role of agents in classical and behavioral economics, and the interactions between System 1 and System 2. There is also a bonus for readers in Appendices A and B, which contain two articles Kahneman wrote with Amos Tversky. These two articles are some of the foundations of behavioral economics, prospect theory and framing effects. While they are important seminal works, they are also accessible.

Finally, if you like to think about thinking, I think you should read *Thinking, Fast and Slow*. But, I warn you, while I found myself rushing through my first reading, I firmly believe that this book should be consumed slowly and in a manner that arouses a multitude of ideas, questions and conversations – just like great food arouses a multitude of tastes, smells and textures.

## *Weird Science: How Misperceptions of Litigation Consulting Can Drive Juror Cynicism*

BY KEN BRODA-BAHM

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On March 1<sup>st</sup>, 2012, I wrote a post in our blog, [Persuasive Litigator](#), taking aim at one author's tortured view of the process of "Scientific Jury Selection," and the author's subsequent question, "[Can I use science to get out of jury duty?](#)" Since the essay appeared in Slate, a national on-line publication, and was based on a number of substantial misunderstandings of the litigation consultant's role during jury selection, I focused my response on correcting the record and explaining and justifying what a consultant actually does during jury selection.

But after sending that post into the world, I was struck by a larger thought: How is it, I wondered, that an author so focused on questioning the honesty and integrity of social scientists working in litigation would end up coaching his readers to make false statements to get out of jury duty? And what ties those two thoughts together?

The answer, I believe, is cynicism. If this potential juror believes the game is rigged due to the interference of questionable science, then that becomes a permission slip of sorts to opt out of the process by whatever means necessary. Psychologically, a panelist might feel greater cognitive consistency and comfort in resorting to unfair means to get out of a process if they believe that the process isn't fair to begin with. So in that way, the assumed lack of scruples on the part of trial consultants allows Mr. Warner, the Slate writer, to comfortably tell potential jurors to perjure themselves by claiming to have a bias that they don't in fact have. That is, in fact, how he ends the article.

That explanation may be at the root of this one article, but it also points to a larger problem: Many believe that the deck is stacked, and those armed with a little bit of knowledge about social scientists in the field may think that we are the ones stacking the deck. That casual attention, when

combined with popular perceptions of “bad verdicts” like the recent Casey Anthony decision, can lead to a number of toxic assumptions, suggesting that juries are capricious and unqualified. And if juries are just pawns in the hands of powerful lawyers and high-priced consultants, then what is the point of supporting the jury system through an oath, through honest voir dire, and through time in trial?

I don’t want to overstate my case here. While the [decline of the jury trial](#) has many causes, popular cynicism about the jury trial plays a role in, at least, dampening the enthusiasm for a resurgence. It is here that legal organizations can and should be doing more to educate. The [American Society of Trial Consultants](#), for example, needs to do more to teach lawyers, the media, and the public about what trial consultants do, and our role in promoting the most cherished goals of the uniquely American jury system: promoting a fair trial by more effectively identifying and eliminating bias. Using all of the tools of professional visibility – including publications like this one but also press releases, conference presentations, CLE’s, blogging, and tweeting – the ASTC has the opportunity to tell the more accurate story of the relevance and value of social science in a legal realm.

My post regarding Warner’s attack on Scientific Jury Selection is an admittedly modest step in that direction. The original post appears below:

### ***Don’t Mistake the Purpose of “Scientific Jury Selection”***

(Originally Published in [Persuasive Litigator](#), March 1, 2012)

The word “science” conjures up all kinds of images, and many of those images don’t quite match the realities. One context in which scientific perceptions are at a mismatch with reality is the area of jury selection. A week ago, Joel Warner wrote an article for Slate, the online magazine, that began with the question, “[Why do so many people want to get out of jury duty?](#)” Casting a skeptical glance at the notion of scientific jury selection, Warner then broadened his critique to the jury consulting profession as a whole: “Since even the practitioners of scientific jury selection are reluctant to emphasize the science of what they do, some folks think it is time to get rid of the business altogether.” Being one of those folks, Warner then suggested eliminating the peremptory challenge as a way to reduce the incentive for dealing with jury selection experts.

The suspicion illustrated in the Slate piece, and amplified in its comments, is that our legal system has been hijacked by a dubious form of science. The article, however, is founded on a number of significant misconceptions about both the purposes and the methods that are applied when a consultant is involved in jury selection. Because some attorneys, particularly those who have never used a consultant, might have the same misconceptions, I wanted to take a closer look at exactly what a communication or psychology expert does in court, and what we mean and don’t mean by “scientific jury selection.”

I typically avoid the phrase “scientific jury selection,” not for Warner’s attributed reason of being reluctant to emphasize the science of what I do, but because I know that the phrase is often subject to caricature and misunderstanding. In practice, the activities of someone in my line of work vary dramatically from the [Grisham-esque Hollywood image](#) referenced in Slate’s title and boil down to more prosaic activities of profile, analysis, and recommendations. The profile is a carefully constructed list of attributes -- some demographics and experiences, but mostly attitudes - that general research and case-specific mock trials and focus groups tell us are likely to identify a potential juror that is a higher

risk for our side. The analysis is a careful tracking and weighting of everything we learn from potential jurors: the attitudes and other information that they share in surveys and oral questioning. The recommendations then apply that information to an attorney's decision to challenge a potential juror for cause or to exercise a strike.

I've written in [greater detail](#) about these activities in prior posts, but the important reminder is that none of these are radical departures from the traditional trial process, but are instead just ways of helping the attorney do what the attorney is supposed to be doing already -- namely targeting and eliminating bias so their client gets a fair shake from the jury.

To be more specific, there are a number of misconceptions in the *Slate essay*.

**Misperception One: Scientific Jury Selection Is Hard Science.** When average people think of science, they may think of test tubes, precise measures, and solid maxims and proof. For example, when CSI matches a blood sample, then it is a match! The *Slate* article seems to be relying on those perceptions in making comments like "the jury box turns out to be a lousy laboratory for the study of human behavior." However, the popular image, as well as the "laboratory" language is drawn from the physical sciences, or hard sciences. Jury selection, on the other hand, swings from another branch of the scientific tree.

**Reality: Scientific Jury Selection Is Social Science.** The techniques applied are still "scientific" in the sense that they are methodical and replicable, but prone to the subjectivities of human interpretation and judgment. That is not a limitation or a reason to see social science as "soft," but is instead a realistic concession to the fact that we are dealing with individual attitudes and group dynamics. For example, Mr. Warner argues that "to truly understand how group dynamics play out leading up to a verdict, researchers would need access to jury deliberations, and that's strictly off-limits in real trials." Yes, but that is precisely the reason why mock trials and the close observation of those deliberations play such a central role in developing recommendations for trial preparation.

**Misperception Two: Scientific Jury Selection Aims to Determine Trial Results.** The article refers to industry critic Neil Kressel in order to argue that, "The preponderance of academic researchers agree that it is extremely difficult to figure out how a jury is going to decide." Yes, but so do a preponderance of litigation consultants. The implication from Warner is that since you can't know with certainty how a jury will decide, an analytic approach to jury selection is worthless. But that presumes that the goal of jury selection is to decide the case. Put simply, it isn't.

**Reality: Scientific Jury Selection Aims to Reduce Bias.** The entire reason that the courts allow a voir dire process in the first place is to reduce bias and promote an environment where the facts win out. As Warner notes, lawyers and consultants don't get to "pick" juries, they get to "unpick" them by exercising challenges and strikes. That means that there is no opportunity to "stack" juries, but instead only an opportunity to "unstack" them by eliminating those who pose the greatest risk of bringing a bias to the decision. The article notes, "there's something disconcerting about an expert being able to calculate how they're going to decide a case based on their gender, background, and other characteristics," but we aren't calculating how they'll decide, we are estimating the risk of bias. And it isn't generally based on gender or background, but on expressed attitudes about issues that bear on the case. Psychologists

have known for many decades that, even in the social sciences, it is possible to measure bias in reliable ways, and I've [written in the past](#) on ways consultants apply this approach as well.

**Misperception Three: Scientific Jury Selection Pollutes the Goals and Ethics of Trial.** Central to Slate's critique, and most critiques of jury consulting, is the idea that it is somehow a foreign toxin that corrupts the pure ideals of justice. As another critic, law professor Franklin Strier, notes, "It's either expensive or a waste of time if its ineffective, or if it is effective, then it is unfair." The claim of unfairness assumes that jury selection assistance introduces an extra legal element into the process that skews the results. But if what consultants are actually doing is more effectively eliminating jurors with the most evident biases, then it is hard to see where the unfairness is.

**Reality: Scientific Jury Selection Encourages a Focus on the Legally Appropriate Factors of Bias.** Think about how jury selection occurred before the invasion of the social scientists: Attorneys would often rely on what they could most easily see -- race, gender, age, education -- factors that we now know generally bear little reliable relationship to bias. By involving someone who actually works with and measures attitudes for a living, attorneys are taking a step toward focusing more effectively on actual bias and not stereotype. And that is exactly what the legal system is supposed to be focusing on all along.

Of course, the ultimate irony is that all of this criticism comes in the context of an article on how to get out of jury duty. The questions on the ethics of trial consulting are coming from someone who uses the platform of a national publication in order to coach perjury. Mr. Warner's advice when you're under oath is to simply "be biased" and "say you can't be fair and impartial," and then hold your ground when the judge questions you. Effective, maybe. Honest and helpful to the process, no. Litigation consultants, on the other hand, do tend to be honest about both the benefits and limitations of their methods, and helpful to the process as that process is designed to operate. Warner makes a fair point when he calls trial consultants "unregulated and certification-devoid." Many of us have long argued for professional certification and we are getting there. But in the meantime, the American Society of Trial Consultants (mentioned by Warner) has a professional code including [standards and practice guidelines](#) for jury selection (not mentioned by Warner) that bear on many of the problems that he and other critics see. Conducted properly and conveyed honestly, the involvement of a social scientist improves the process and keeps it focused where the law says it ought to be focused: the reduction of bias.

## References

[Warner, Joel \(Feb. 22, 2012\)](#). Runaway Juror: Can I Use Science to Get Out of Jury Duty? Slate. URL: [http://www.slate.com/articles/health\\_and\\_science/science/2012/02/the\\_science\\_of\\_getting\\_out\\_of\\_jury\\_duty.html](http://www.slate.com/articles/health_and_science/science/2012/02/the_science_of_getting_out_of_jury_duty.html)

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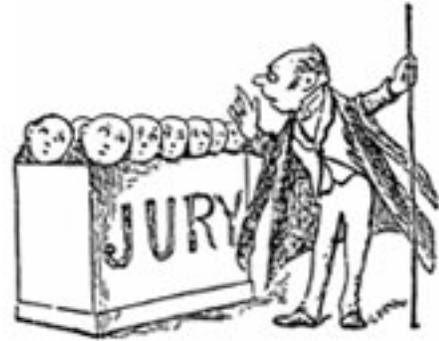
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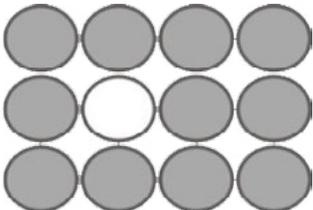
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*Iris, Tulips, Last Minute Scrambles & Gratitude*

For those of you who read The Jury Expert, our hope is that you do not see what is often a last minute scramble behind the scenes to assemble an issue filled with practical advice and jargon-free explanations of the latest research with relevance to litigation advocacy. This time, I want to pull aside the curtain a bit and expose we members of the American Society of Trial Consultants for what we are – at least when it comes to The Jury Expert.

As Editor of this publication, I juggle the demands of work as a trial consultant with the constant need for articles to fill upcoming issues and the wish to maintain some semblance of a life outside of work and editing. This endeavor is complicated by the fact that, by definition, the life and schedule of trial consultants across the country are pretty constantly in flux. Trials are continued. Research is rescheduled. Schedules clear suddenly and are refilled with jury selection or trial attendance. You know the drill. What that can mean for The Jury Expert is that suddenly, without warning, a full roster of articles is suddenly pulled, put off, or rethought as lives are balanced and optional activity minimized in efforts to make schedules workable. This time when it happened, I actually had a dream that in place of three missing articles I had published three different recipes for variations of meatloaf! I awoke with my heart pounding and sent a “help me please!” message to organization members.

And here is where you will see what ASTC members are like. Within half an hour, I had four offers to write for this March issue despite the fact that the deadline was completely unreasonable. As my mother’s transplanted midwestern irises rise to bloom in the arid soils of the Texas Hill Country and we see tulips and daffodils amidst the bluebells that herald spring here in Central Texas – I am grateful for spring and I am especially grateful for trial consultants who drink coffee with extra caffeine to stay up late and write for us about rehearsing mock trials; those who read huge [Harry Potter sized] books right before vacation to write reviews for us; those who write about persuasion in general and the myths of scientific jury selection; and those who offer to write about novel topics like vocal pitch. It is in this pulling together, making heroic efforts, expressing caring for the profession, and losing sleep to respond to the needs of the group that our trial consultants show their character. I am grateful and I am touched. And with that, we hope you enjoy the hard-won fruits of our labors in these pages.

*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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