



The Jury

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Pretrial Publicity and Courtroom Umami

Celia R. Lofink and Marie Mullaney, M.S.

As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn

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Do You See What I See? How a Lack of Cultural Competency May Be Affecting Your Bottom Line

Michelle Ramos-Burkhart

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Katherine James

Why Telling a Witness That It’s OK to Say They Don’t Know Is Good for Justice

Nathan Weber and Tim Perfect

The Interview-Identification-Eyewitness Factor (I-I-Eye) Method for Analyzing Eyewitness Testimony

Nell B. Pawlenko, Richard A. Wise, Martin A. Safer, and Brett Holfeld

80 iPad Apps Attorneys Love, 8 Days a Week: An App Strategy for Work, the Courtroom, and Your Personal Life

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NOTE FROM THE EDITOR

Plea for Help, Witnesses, Your Financial Bottom Line, and A Lot More!

If you scanned our home page, you've seen we need [financial help](#) from our readers. We've become a target for hackers and their fun is not at all fun for us. We have moved to a new host with much higher levels of security (naturally, at a price) and need help defraying those unexpected (and unwanted) expenses as well as moving forward with our publication.

Please read about how **YOU** can help. That '*YOU*' is not the theoretical **YOU**. It is the **YOU YOU**. If **you** like what *The Jury Expert* brings you issue after issue—help us keep bringing it with **your tax deductible donation** to the [ASTC Foundation!](#)

In this issue we have a plethora of [umami](#). That would be a '*spice bomb*' and our lead article shows you how a dash of umami can help you with a case involving ample and negative pretrial publicity. Another spicy contribution describes how cultural competency could be essential to your firm's financial bottom line. As demographics in the U.S. and in our now often global practices shift, cultural competency is no longer simply a "*nice and politically correct thing*". It's essential for your future viability. And rounding out our trio of spicy elements, we have an article on how *voir dire* has become *Voir Google*. Read about the latest in strategies and expectations in this area as well as some reactions from trial consultants.

We also have three different articles on witnesses. The first is all about truly terrified witnesses. Not just scared witnesses, but truly terrified witnesses. What do you need to do to prepare them to testify? The second advocates the incorporation of an overtly specified "*I don't know*" response into the choices eye-witnesses have when viewing suspects in a crime. According to the research, this option enhances eye-witness accuracy in identification and decreases false identification (which we all know can lead to wrongful convictions). The third article in this trio suggests the I-I-Eye model for helping jurors in cases that make it to trial assess how reliable specific eye-witness testimony really is. The last two articles feature responses from trial consultants.

And last, but certainly not least, lighten up a bit with our romp through 80 (yes, 80!) iPad apps for attorneys. A week of iPad apps for your professional and personal lives that will make you go "*Hmmm....*" and click to see the app—and often, make you grin either in recognition or mockery...or perhaps both.

As always, if you have comments or concerns or things you'd like to see us do in the future—email me and let me know! And PLEASE! [Donate to help us out!](#)

[Rita R. Handrich, PhD](#)
Editor, [The Jury Expert](#)

IN THIS ISSUE...

- 4** **Pretrial Publicity and Courtroom Umami**
Celia R. Lofink, Ph.D.
and Marie Mullaney, M.S.
- 11** **As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn**
John G. Browning, J.D.
- 20** **Do You See What I See? How a Lack of Cultural Competency May Be Affecting Your Bottom Line**
Michelle Ramos-Burkhart, J.D., LLM
- 24** **Hackers, Hosts & Help Requests**
Rita R. Handrich, PhD
- 25** **The Scared Witness: A Chapter from “Can This Witness Be Saved”**
Katherine James, MFA
- 36** **Why Telling a Witness That It’s OK to Say They Don’t Know Is Good for Justice**
Nathan Weber, Ph.D.
and Tim Perfect, Ph.D.
- 43** **The Interview-Identification-Eyewitness Factor (I-I-Eye) Method for Analyzing Eyewitness Testimony**
Nell B. Pawlenko, Ph.D., Richard A. Wise, J.D., Ph.D., Martin A. Safer, Ph.D., and Brett Holfeld, MS.
- 52** **80 iPad Apps Attorneys Love, 8 Days a Week: An App Strategy for Work, the Courtroom, and Your Personal Life**
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Pretrial Publicity and Courtroom Umami

by Celia R. Lofink and Marie Mullaney

AS LITIGATION TECHNOLOGY SUPPORT SPECIALISTS, we have a unique courtroom vantage point from our involvement with over a half dozen high-profile capital cases where there has been immense and very negative pretrial publicity. Over the past dozen years, we have sat side by side with death penalty qualified attorneys and trial teams of defense attorneys, paralegals, mitigation specialists, jury consultants, investigators and trial consultants who rally for the defendant's 'heart and hope' throughout the proceedings. We are typically brought in to help the team manage the digital evidence and assist with technology throughout the discovery phase and during trial, including presentation of the evidence. Our role as technologists also helps the teams to capture and manage the media onslaught.

We marvel at the breadth of knowledge, skills and passions assembled for these cases, and believe it to be umami^[1] in the courtroom. Just as Chef Vongerichten has realized in the kitchen, a legal team on a high profile case similarly requires their own umami bomb.^[2] They must strive for a potent combination of traditional resources and contemporary, sometimes unusual, strategies mixed together with a comprehensive and integrated

use of technology as an indispensable ingredient. Too little or too much of any single element can result somewhere between ineffective and disastrous.

This is our daily challenge. In our team role, we focus steadily on how to marry traditional litigation strategies to new technologies and methodologies. Because of the nature of these cases, this naturally includes helping the teams technically in their efforts to manage the forces of pretrial publicity.

Strategy 1: Media Management

In *State v. Komisarjevsky* (capital jury trial held in Connecticut in 2011), both traditional^{[3][4]} and pioneering strategies were employed for media management. While counsel operated under a gag order, news reporters were allowed to tweet live from the courtroom from their iPads, smartphones and laptops during the trial. Meanwhile, prior to trial, there were massive amounts of negative publicity, including over 600 "hate groups" on Facebook and 10,000 articles from newspaper coverage worldwide, as well as Twitter, blogs, and other social media coverage.

At the direction of counsel, we captured and maintained a database of this content for the defense team to use as the basis for a motion for a change of venue. Dr. Lofink testified at the venue change hearing in an effort to convey to the court the enormity of the ongoing public conversation about the defendant. She testified to not only the quantity of social media but also about patterns of coverage and the nature of the sentiments. Supporting evidence (over 4 GB at the time the motion was filed) was submitted on a computer flash drive rather than paper (estimated at 10,000+ pages). Despite this volume, the motion was denied.

Tactic:

Designate a single point of contact to respond to the media’s questions. “No comment” does not count (unless you are under a gag order) – unfortunately it implies that you are hiding something. For example, we witnessed this strategy in the *State v. Mills* case (capital case in Connecticut in 2004 resulting in a life verdict) where one attorney served as the spokesperson for the defense team.

Technical tips:

- a. Maintain a database of content for access by the team (e.g., in Komisarjevsky an extensive database for media Q&A was maintained not only for a change of venue motion, but also to keep pulse on pattern and tone of public conversations, community chatter, and venue culture).
- b. Utilize a content analysis technique of compiled pretrial data, such as that presented by Christina Studebaker, et al.^[5]. This is helpful for trial strategy, developing themes, and learning jury and venue makeup.

Strategy 2: Facts and Bytes

Tactic:

Facts should be released judiciously – it is necessary to build a like and trust with the public if possible by telling the defendant’s story in way that the public can understand. And as suggested above, having a designated spokesperson for the team is helpful to consistently compete with the many stories being told. Confirming this strategy we see the team of lawyers now representing Ariel Castro, the Cleveland suspect recently in the media accused of the kidnapping and torture of three young women for over ten years, “speaking exclusively”^[6] to an investigator. Attorney Craig Weintraub stated that, in conjunction with his client’s not guilty plea, “[t]he initial portrayal by the media has been one of a ‘monster’ and that’s not the impression that I got when I talked to him for three hours. I know that family members who have been interviewed by the media have expressed that as well.”^[7] So they begin to tell their story.

Interestingly, however, we learned that Attorney Judy Clarke,

appointed for the Boston Marathon bombing defendant, never communicates with the media^[8] and yet has achieved enormously successful results for high-profile defendants in the national media spotlight who appeared destined to receive capital punishment, e.g., Ted Kaczynski (the Unabomber) and Susan Smith.

Technical tips:

- a. Make strategic use of media from the get-go to prevent a one-way circus (including social media). Robert M. Entman and Kimberly A. Gross share insights from the Duke Lacrosse case, including a helpful table of tactics to combat pretrial publicity. They remind us that the journalists covering this infamous case received substantial criticism for the way they basically “convicted the defendants in the press.”^[9]

Lessons learned from the Duke Lacrosse Case (from Entman and Gross)^[10]

<p>1. Find ways to balance coverage and combat journalism</p>	<p>Provide alternative narratives that challenge the prosecution’s narrative and the public’s presumption about the facts. Press for new equitable ABA guidelines on contacts with the media.</p>
<p>2. Frame your media narrative early in the process</p>	<p>Get accurate information out in front of misinformation and employ all channels, including blogs, social media and other outlets on the Internet.</p>
<p>3. Recognize the role of Defendant’s race / origin</p>	<p>Voir dire on jurors’ exposure to and agreement with general stereotypes of crimes and criminals.</p>
<p>4. Encourage responsible journalism</p>	<p>Educate journalists on their professional obligations - and economic self-interests - to mitigate the unintended consequences of standard operating procedures; suggest new practices.</p>

- b. Create a story spine^[11] early on as a helpful tool to manage facts being released to the public and to maintain a bridge between the legal details and the public narrative. Once the story is drafted, the team can assess what bytes to release when and how to engage in the public conversation using a consistent storyline. See Figure 1 for an illustrative example of how a story spine can be used to build a narrative.

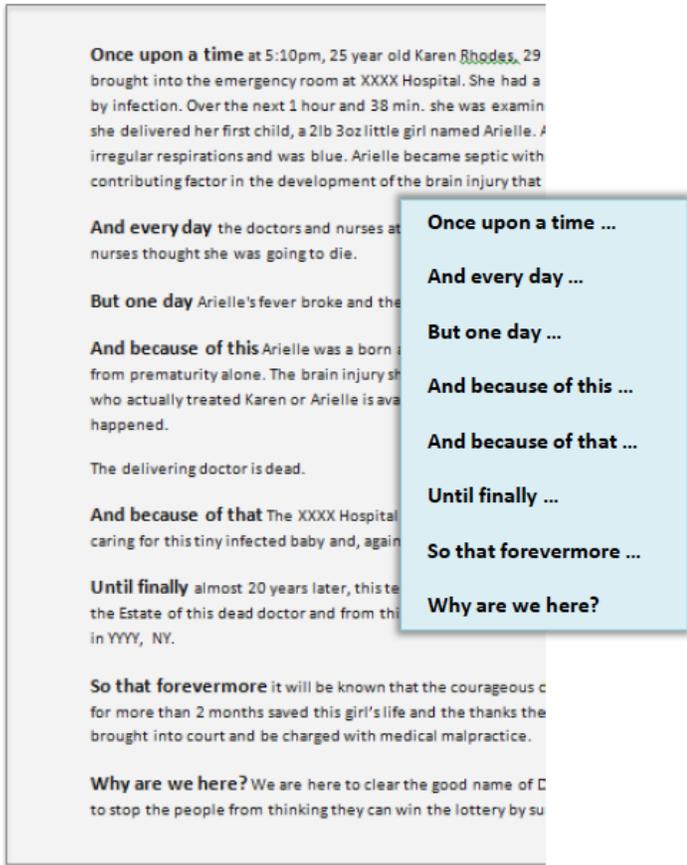


Figure 1: Example of Story Spine Format

Strategy 3: Mitigation Specialists

Tactic:

The humanizing element and comprehensive insights that the mitigation experts bring to a case are enormously important. Their social forensic skills dive deeply into early experiences, family dynamics and prepare the attorneys for the best witness testimony for the mitigation phase. We have learned to treasure their expertise.^[12]

Technical tips:

- a. Aid mitigation specialists with database support so they can more easily manage fact patterns and documents. Not only databases, but also aid in the development of charts, graphics, presentations and other visual aids.^[13]

Strategy 4: Be a Technology Enabled Team

Tactic:

Trial teams need to be able to function easily and swiftly as they are often geographically dispersed. It is imperative to take advantage of online communication tools, as well as litigation support software tools, using open source, free online

tools whenever possible. We encourage use of these tools and train our teams to combine open source ‘recipes’ of software whenever possible.

Technical tips:

- a. Screen sharing: Join.me, Skype, Google Hangout
- b. Video conferencing: Google Hangout, Skype, Facetime (Mac)
- c. Document sharing: Google Docs, Sugar Sync, Box, Dropbox
- d. Case analysis/chronology: CaseMap, TimeMap, Adobe
- e. Database prep: Summation, Concordance
- f. Graphics: PowerPoint, Adobe products (Photoshop, Illustrator)
- g. Trial presentation: TrialDirector, Sanction, PowerPoint, Keynote (Mac)

Strategy 5: Pretrial Jury Research

Tactic:

Conduct mock trials whenever possible. Often used only in capital cases or high-stakes civil litigation, the benefits of a mock trial are nothing short of phenomenal. While some naysayers may decry that information gleaned from pretrial jury research will never show what the real jury will think, our experience has been that the results are indisputably valuable. Our involvement with traditional mock trials as well as online jury research supports often astonishing benefits – from discovering previously unknown juror-defined issues to planning trial strategies to helping achieve best possible outcomes.^[14]

Technology has evolved (and is evolving!) at light speed. Attorneys and jury consultants can now get early mock juror feedback quickly and conveniently, without breaking the budget.

Technical tips:

- a. Traditional mock trial: present actual evidence and include proposed visuals in a mock trial to more closely resemble the anticipated trial proceedings and to increase the reliability of the mock jury feedback.
- b. Online jury research: make use of evolving online services such as Jury Workshop™, Micro-Mock™, Looking Glass, etc.^[15]

Strategy 6: Jury Consultants / Trial Consultants

Tactic:

Make use of jury and trial consultants early on. These advisors comprehensively help attorneys in myriad ways, from conducting jury research to witness preparation to honing the attorney's courtroom 'theater' skills. If the jury's first impression is negative, this is what a jury will remember.

A 2011 study conducted by Adam Trahan and Daniel M. Stewart^[16] analyzed former capital jurors, their impressions of defense and prosecuting attorneys' personal characteristics, and the impact these perceptions have on sentencing outcomes. Their findings showed that jurors' impressions focused on the physical appearance and personalities of the attorneys. Defense attorneys were viewed more negatively than prosecutors and significantly related to sentencing outcomes – negative impressions of defense attorneys were associated with death sentences. Trial consultants are critical guides, experts who knowledgeable coach and lead attorneys from the legal world view of their case over a bridge to the real world - and to a place where a jury will really hear them.

Technical tips:

- Use video: attorneys coached by their consultants can practice, develop, modify, change, study, and refine how they tell the story of their case as well as perfect their presentation skills – using webcams on their laptops or their iPads.
- Use emergent technologies to capture key clips of these videos for evaluation by traditional group research sets or online mock jurors.^[17]

Strategy 7: Break the Mold

Tactic:

We get it – the defense does not have the burden of proof. Nevertheless, we have seen too often that this standard seems to work against them. In post-trial interviews and in general conversation with people who have served as jurors, we hear that jurors want an explanation from the defense, however implausible. When they don't get one, they either fill in the blanks with their own version of the facts or they go with the prosecution's story.

As emphasized by Karyn Taylor in her 2008 visually-rich and example filled article entitled, "[Discover the Power of Conceptual Persuasion](#)," she presents the need for good legal graphics as essential. She states that there is only one true measure, "does it persuade the trier of fact to 'buy in' to your client's point of view?" She further details the need "to forge an *emotional* bond between fact finders and your client. That's the job that conceptual graphics are designed to do."^[18] Taylor explains that conceptual graphics "turn[] words or concepts

into memorable images."^[19]

An excellent recent example of this concept in action was defense attorney Cheney Mason's burden of proof chart utilized in the closing arguments of the Casey Anthony trial. He visually presented the high level of proof that '*beyond a reasonable doubt*' requires. (See Figure 2 below.) The burden of proof chart Mason used outlined all of the different feelings that would be encompassed under "*not guilty*," showing that even a small sliver of uncertainty would prevent a guilty verdict. He told a story, supported it visually, and gave enough of an explanation that caused the jurors to pause and return the not guilty verdict.^[20] Because prosecutors were not able to provide the jurors with sufficient evidence to prove the important link between mother and daughter, jurors were not able to produce a guilty verdict within the required standard of proof.^[21]

Technical tips:

- Arm the jurors: The defense needs to present plausible explanations or at the very least arm jurors with arguable points to withstand/persuade during deliberation room discourse. Don't leave the jury to fill in the blanks! The importance of a compelling story along with visual presentation cannot be overstated – help the jurors to remember.
- See the point: Seeing the point while hearing the point explained will engender a more complete understanding of the facts in a case. When jurors listen, they try to picture it in their minds. Using a visual aid ensures that the jurors will form the mental picture of the facts intended by the trial team.^[22]

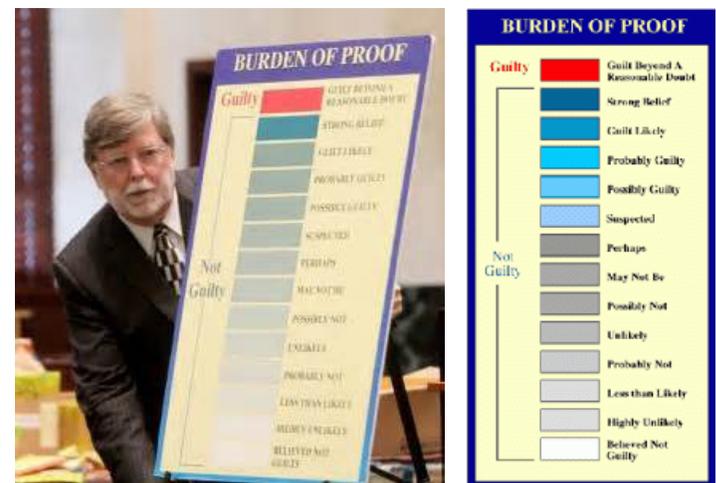


Figure 2: Visual aid used by Attorney Cheney Mason in closing argument of Casey Anthony trial

Conclusion

Potential jurors live in a new world, able to be always online with unfettered access to ubiquitous media 24/7. Confront

this by building powerful courtroom umami through various techniques – traditional and unconventional, online and offline, in-house or outsourced. Thoughtful integration of technology in combination with traditional legal strategies is essential for litigating these days, and can be the surprise factor

where there is a high level of negative pretrial publicity.

May these ‘savory strategies’ nourish your case. ☺

Illustration by Sully Ridout of [Barnes & Roberts](#)

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References

[1] Umami = savory (It is one of five basic tastes (together with sour, sweet, salty and bitter.) Umami-rich ingredients, alternatives to traditional salt or spices, open up an entire pantry of new resources for that elusive taste sensation that makes every dish memorable. Judicious use of surprising ingredients – think vinegar – can vitalize and improve flavor, making a dish remarkable and memorable.

[2] For a more powerful effect, Chef Jean-Georges Vongerichten offers what he calls “umami bombs,” dishes that pile on ingredients naturally rich in umami for an explosive taste. Source: McLaughlin, Kay, A New Taste Sensation, Wall Street Journal (12/8/2007), <<http://online.wsj.com/article/SB119706514515417586.html>>

[3] In a 1996 American University Law Review article entitled, “Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong,” Robert Hardaway and Douglas B. Tumminello argue for the creation of a uniform judicial or constitutional standard. They provide a comprehensive analysis of the history of pretrial publicity and modern court treatment, including a thoughtful critique of the circumstances test. “The totality of the circumstances test is derived from the Supreme Court’s opinion in *Irvin v. Dowd*, 366 U.S. 717 (1961). In *Irvin*, the Court defined the totality of the circumstances test as consisting of three parts: (1) an examination of the voir dire for juror hostility; (2) an examination of the general atmosphere surrounding the courtroom at the time of the trial; and (3) an examination of the length to which the trial count must go to obtain impartial jurors.” *Supra.* at 58. The authors analyze various remedies which attempt to neutralize the prejudicial effects of pretrial publicity and propose “the adoption of a specific constitutional standard that clearly sets forth procedures that must be applied by a court in a criminal case of national notoriety” particularly when courts are faced with clashing constitutional standards, e.g., free speech v. free press. They further propose the following remedies:

1. Restrain the press from publishing details of a crime, investigation and judicial proceedings.
2. Restrain the lawyers by imposing constraints on what the parties attorneys may say to the press.
3. Closure of judicial proceedings including the pretrial proceedings, the voir dire and the trial itself to the public in an effort to control the pretrial publicity. Hardaway, Robert & Tumminello, Douglas B., Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong. American University Law Review 46, no. 1 (October 1996), 39-90. <<http://digitalcommons.wcl.american.edu/aclr/vol46/iss1/2/>>

[4] In his recently published book, Eric Kasper discusses the U.S. Supreme Court decision rendered in *Sheppard v. Maxwell* (1966) which addressed “the balance between two of the Constitution’s commands: the right of a criminal defendant under the Sixth Amendment and Fourteenth Amendment’s Due Process Clause to receive a fair and impartial jury trial [] pitted against the First and Fourteenth Amendment right to the freedom of the press.” He states that, throughout the *Sheppard* decision, Justice Clark identified a “long list of potential methods for a trial judge to ensure that a jury remains impartial when there is prejudicial pretrial publicity,” including:

Suggestions from *Sheppard v. Maxwell* to address prejudicial pretrial publicity:

1. Ordering a change of venue

2. Sequestering the jury
3. Holding a short continuance until after the upcoming judicial elections
4. Limiting the number of reporters in the courtroom
5. Placing reporters farther away from counsel tables, witnesses, and jurors
6. Prohibiting the media from interviewing witnesses before and during the trial
7. Placing a gag order on the police, witnesses, and counsel for both sides
8. Warning the media to check the accuracy of their accounts
9. Declaring a mistrial and ordering a new trial Kasper, Eric T., *Impartial Justice: The Real Supreme Court Cases that Define the Constitutional Right to a Neutral and Detached Decisionmaker*, Lexington Books (2013), p. 22-26.

[5] In an article entitled, “Assessing Pretrial Publicity Effects: Integrating Content Analytic Results,” Christina Studebaker and her colleagues share a scientific approach to performing content analysis of pretrial publicity. They draw upon data sources such as legal commentary and past empirical social science research. They present their analysis technique as a systematic approach employable by both prosecution and defense when presenting arguments to the court about whether a change of venue should be granted. They share how they applied the use of their content analysis technique to efforts expended in preparation for the change of venue hearing in the case of the Oklahoma City bomber, Timothy McVeigh.

Studebaker, Christina A., Robbennolt, Jennifer K., Pathak-Sharma, Maithilee K., Penrod, Steven D., *Assessing Pretrial Publicity Effects: Integrating Content Analytic Results*, *Law and Human Behavior* (June, 2000), Vol. 24, Issue 3, pp. 317-336.

[6] Meyer, Tom, *Investigator: Castro loves daughter, will plead ‘not guilty’*, WKYC.com (May 14, 2013), <http://www.wkyc.com/news/article/299605/489/Investigator-Castro-loves-daughter-will-plead-not-guilty>

[7] *Ibid.*

[8] “In an era when defense lawyers routinely use the media to sway judges and juries, Clarke, her friends claim, is an anomaly, avoiding anything that might harm the fragile trust between her and her clients. She did not return calls from TIME to discuss her work on the Loughner case, and when she was reached in person in Phoenix, she chose not to talk at all. “Most lawyers who do this type of work talk to the media to create a counter-narrative for their client,” says Kuby. “You make them seem less evil as part of a legal strategy. Judy Clarke has always refused to do that — with fantastic results.”” Friedlander, Beau, [The Legendary Lawyer Who will Defend Loughner: Judy Clarke] (<http://www.time.com/time/nation/article/0,8599,2041943,00.html#ixzz2Ryq6d2pF>), *Time Magazine* (1/12/2011), with reporting by Adam Klawonn/Phoenix.

[9] Entman, Robert M. and Gross, Kimberly A., *Less Bad News: What Defense Advocates Can Learn from the Duke Lacrosse Case*, *The Jury Expert*, 2010, 22(3), 27-42.

[10] *Ibid.* at 33.

[11] Story spine format courtesy of Stanley Brodsky, *Principles and Practice of Trial Consultation* (2009 Guilford Press).

[12] For an excellent exploration of the importance and benefits of this role, see, Hughes, Emily, *Mitigating Death*, *Cornell Journal of Law and Public Policy*, Vol. 18:337 (2009). <<http://www.lawschool.cornell.edu/research/JLPP/upload/CJP202-2.pdf>>

[13] In *State v. Komisarjevsky*, mitigation specialist Lisa Rickert of Wisconsin was grateful for the database, document management, and visual graphic support available to her, enabling her to present her work to the defense team in a visually compelling way. Similar experiences with mitigation experts in *US v. Perez*, *US v. Gonzales*, *US v. Aquart*, as well as several ongoing cases, has proven helpful and beneficial to the trial team.

[14] *A Case Study: Jury Workshop™ Helps Maximize Case Settlement*, (2013), <<http://www.litigationsolutions.net/casestudies.html>>

Attorney Robert F. Danzi of Westbury, NY recently shared that the online jury research tool, Jury Poll™, was helpful in settlement negotiations and that it changed his damages calculations. When asked, “[w]hat did you like about the Jury Workshop™ service?” Danzi stated, “Portability. It was available on my iPad and phone so [it] was with me as I was negotiating the case. I was actually able to show select results to my adversary to counter his view on the percentage of fault he expected the jury to assign.”

[15] <http://www.juryworkshop.com>, <http://www.a2lc.com>, <http://www.lookingglassjuries.com>

[16] Trahan, A. & Stewart, D. M., Examining capital jurors’ impressions of attorneys’ personal characteristics and their impact on sentencing outcomes, *Applied Psychology in Criminal Justice*, 7(2), 93-105. (2011).

[17] <http://www.juryworkshop.com>, <http://www.a2lc.com>, <http://www.lookingglassjuries.com>

[18] Taylor, Karyn J., Discover the Power of Conceptual PersuasionSM, *The Jury Expert*, 20(4), 1-7.

[19] *Ibid.* at 2.

[20] Crumpton, Matt, Public Outrage at Casey Anthony Verdict: Understanding the Differences in the Burden of Proof from Civil to Criminal Cases, Crumpton Law LLC, <http://crumpton-law.com/public-outrage-at-casey-anthony-verdict-understanding-the-differences-in-the-burden-of-proof-from-civil-to-criminal-cases/>

[21] Alvarez, Lizette, Casey Anthony Not Guilty of Slaying of Daughter, *New York Times* newspaper, (July 5, 2011), <http://www.nytimes.com/2011/07/06/us/06casey.html?pagewanted=all&r=0>

[22] Siemer, Deanne C., Rothschild, Frank D., Stein, Edward R. & Solomon, Samuel H., *PowerPoint for Litigators*. National Institute for Trial Advocacy (2000).



As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn

by John G. Browning

Don't miss our trial consultant responses at the end of this article: Kacy Miller, Ellen Finlay, and Rosalind Greene, and a response to the consultants from the author.

I. Introduction

“SO, MR. SALINGER, based on your previous responses to my questions, if you were selected to serve on this jury, you would be able to be impartial and reserve judgment on the claims against my client, Mammoth Corp., until you’ve heard all the evidence?” Yet even as the question is leaving the lawyer’s mouth, and even as he takes in the panel member’s ostensibly reassuring response, the attorney has noted the trial consultant’s frenetic typing on a laptop and the hastily scrawled message being slid across the counsel’s table. “Check this out,” it reads, and as the consultant turns the laptop screen toward him, the lawyer observes Mr. Salinger’s Facebook page in all of its glory, replete with anti-corporate rants and indications of causes that Salinger “likes.” At least two of them castigate Mammoth Corp. for its overseas labor policies and its dismal environmental record. “Your Honor, may we approach?” the attorney begins with a glint in his eye.

Welcome to jury selection in the digital age, where voir dire is rapidly becoming “voir Google.” With over 1 billion users on Facebook worldwide, over 400 million tweets processed daily by Twitter, and 72 hours of video being uploaded to

YouTube each minute, the revolution in communication that social networking represents has provided attorneys and trial consultants with a vast digital treasure trove of information about prospective jurors. According to the 2012 Pew Internet Study, 65% of adult Americans maintain at least one social networking profile. With all of this information just a few mouseclicks away, it comes as no surprise that not only are lawyers making ever-increasing use of it in the discovery and trial phases of all kinds of cases, but also that evolving expectations of attorney competence now demand that lawyers explore social media and other online resources as a matter of course. The ABA Model Rules of Professional Conduct have been changed to reflect that competent representation now requires not only that a lawyer keep abreast of changes in the law and its practice, but also “the benefits and risks associated with technology” as well. In addition, there has been a trend among courts across the country to mandate some degree of tech proficiency by attorneys, where an attorney who doesn’t avail herself of electronic resources like Google, Facebook, and Twitter is simply not living up to her duty of providing competent representation. Use of such online platforms during jury selection is no different. The real question becomes not

whether or not to Google or Facebook the jury, but how to do so within ethical boundaries.

II. An Affirmative Duty to Research the Jury

In 2010, the Missouri Supreme Court came up with a new standard in providing competent representation in the digital age—the duty to conduct online research during the voir dire process.ⁱ During the voir dire phase of a medical malpractice trial, plaintiff's counsel inquired about whether anyone on the venire panel had ever been a party to a lawsuit.ⁱⁱ While several members of the panel were forthcoming, one prospective juror (Mims) was not. Following a defense verdict, plaintiff's counsel researched Mims on Missouri's PACER-like online database, Case.net, and learned of multiple previous lawsuits involving the juror. The trial court granted a motion for new trial based on Mims' intentional concealment of her litigation history, but the Missouri Supreme Court reversed. The court reasoned that

However, in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search . . . when, in many instances, the search could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.ⁱⁱⁱ

In light of this, the court imposed a new affirmative duty on lawyers, holding that “a party *must* use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and must present to the trial court any relevant information prior to trial.”^{iv}

The heightened technology use standard enunciated in *Johnson v. McCullough* was later codified in Missouri Supreme Court Rule 69.025, which became effective January 1, 2011. It mandates background Internet searches on potential jurors, specifically Case.net searches of a potential juror's litigation history. However, the first reported case interpreting Rule 69.025 and the *Johnson* standard would soon raise more questions about the scope and timing of such Internet searches by trial counsel.

In *Khoury v. ConAgra Foods*, the Plaintiffs were suing ConAgra for personal injury damages, claiming that Elaine Khoury suffered from a lung disease (e.g., bronchiolitis obliterans), allegedly caused by exposure to chemical vapors during her preparation and consumption of ConAgra's microwave popcorn.^v After a voir dire in which the members of the venire panel were questioned about their prior litigation history, both sides conducted searches of Missouri's automated case record service. The parties exercised both their peremptory strikes as well as their strikes for cause, and a jury was empanelled. The next morning, ConAgra's counsel brought to the court's attention that, separate and apart from litigation history

information, their Internet research had uncovered Facebook postings by one juror (Mr. Piedimonte) indicative of bias and an intentional failure to disclose information. Piedimonte, they said, was “a prolific poster for anti-corporation, organic foods.”^{vi} ConAgra moved for a mistrial or, alternatively, to strike Piedimonte from the jury. The court denied the motion for mistrial, but did strike Piedimonte from the jury and proceeded with 12 jurors and 3 (instead of 4) alternate jurors.^{vii} After a defense verdict, the Khourys appealed, arguing among other things, that the trial court erred in removing juror Piedimonte, maintaining that ConAgra's broader Internet search wasn't timely. The appellate court rejected this argument, observing that the *Johnson* standard and the subsequent Supreme Court Rule 69.025 were limited to Case.net searches of a potential juror's litigation history, not a broader search for any alleged material nondisclosure. As the court pointed out,

The rule could have similarly required “reasonable investigation” into other area of “possible bias” and could have required such “reasonable investigation” to include a search of Internet, social, and business networking sites such as Facebook, MySpace, or LinkedIn, to name a few. And, the rule could have similarly required “reasonable investigation” of potential jurors via Internet search engines such as Google or Yahoo!, to name a few. Or, the rule could have simply required a blanket “Internet search” on “any and all issues of prospective juror bias.” But, clearly, it does not.^{viii}

Although the appellate court limited itself to the plain text of the rule itself, it did acknowledge the potential in the digital age for a re-visiting of Rule 69.025, stating that “the day may come that technological advances may compel our Supreme Court to re-think the scope of required ‘reasonable investigation’ into the background of jurors that may impact challenges to the veracity of responses given in voir dire *before* the jury is empanelled.”^{ix}

III. The Perspective of Other Courts and Ethics Committees

For years, lawyers and trial consultants have made increasing use of social media platforms to vet jurors. And, in an age in which many a trial has been derailed or verdicts overturned by the online misconduct of jurors, more and more lawyers are monitoring jurors online.^x At least one court has explicitly upheld the practice of using the Internet to investigate potential jurors during voir dire. In *Carino v. Muenzen*, a New Jersey appellate court granted a new trial for a medical malpractice plaintiff whose lawyer had been prevented by the trial judge from conducting online research on the venire panel.^{xi} But what about the ethical issues involved in monitoring the social networking activities of jurors and prospective jurors? To date, only three ethics opinions have addressed this question. In New York County Lawyers' Association Committee on Professional Ethics Formal Opinion 743 (May 18, 2011), the Committee held that “passive monitoring of jurors, such as viewing a publicly available blog or Facebook page” is permissible so

long as lawyers have no direct or indirect contact with jurors during trial.^{xiii} Significantly, the NYCLA cautioned lawyers to “not act in any way by which the juror becomes aware of the monitoring.”^{xiii} The Committee, perhaps cognizant of the fact that sites like Twitter and LinkedIn allow users to view who has recently accessed their profile, reminded attorneys that access of which a juror becomes aware may very well constitute “an impermissible communication, as it might tend to influence the juror’s conduct with respect to the trial.”^{xiv} In addition, the Committee took note of the prevalence of online misconduct by jurors. It concluded that if, during monitoring of jurors’ social networking sites, a lawyer learns of juror misconduct, “the lawyer may not unilaterally act upon such knowledge to benefit the lawyer’s client, but must . . . bring such misconduct to the attention of the court, before engaging in any further significant activity in the case.”^{xv}

The second opinion, from the New York City Bar Association’s Professional Ethics Committee, agreed with the 2011 opinion from the New York County Lawyers Association, but also addressed the broader issue of what exactly constitutes an impermissible *ex parte* communication with a juror.^{xvi} “Communication,” the committee ruled, should be understood in its broadest sense. This would include not only sending a specific message, but also any notification to the person being researched that he or she has been the subject of a lawyers’ search. The paramount issue, in the eyes of the committee, is that the juror or potential juror not learn of the attorneys’ actions. As the opinion states, “The central question an attorney must answer before engaging in jury research using a particular site or service is whether her actions will cause the juror to learn of the research.”^{xvii} As the committee went on to state,

If a juror were to (i) receive a friend request (or similar invitation to share information on a social network site) as a result of an attorney’s research, or (ii) otherwise to learn of the attorney’s viewing or attempted viewing of the juror’s pages, posts, or comments that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We (the Committee) further conclude that the same attempts to research the juror might constitute a prohibited communication even if inadvertent or unintended.^{xviii}

In other words, ignorance or lack of familiarity will not be an excuse in committing such an ethical violation. This position is consistent with the trend in cases around the country, as well as the new requirement of being technologically-conversant as part of providing competent representation, to hold attorneys to a high standard insofar as technology is concerned.

The third, and most recent, ethics opinion comes from Oregon. The key holding in Oregon Ethics Opinion No. 2013-189 (February 2013) was that lawyers may always access the publicly available social networking information about parties or jurors and that neither a lawyer nor her agent may send a request to a juror to access non-public personal information on a social

networking site. The Oregon ethics committee went beyond its New York counterparts, however, by further advising that Rule 8.4(a)(3), which prohibits deceitful conduct, will not automatically preclude a lawyer from enlisting an agent to deceptively seek access to another person’s social networking profile. It holds that while a lawyer “may not engage in subterfuge designed to shield [her] identity from the person” whose profile she’s seeking to access, Oregon Rule 8.4(b) (which has no counterpart in the ABA Model Rules) creates one exception permitting lawyers “to advise clients and others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance “with other ethical provisions.” Under such “limited instances,” the Committee concluded, a lawyer “may advise or supervise another’s deception to access a person’s non-public information on social networking websites” as part of an investigation into unlawful activity. Could this language be used to justify having a trial consultant pose as someone or otherwise be deceptive in order to gain access to a juror’s privacy-restricted profile if there is a “suspicion of juror misconduct?” While the language is vague (referring only to “persons”), the better course of action would be to adhere to the opinion’s earlier mandate: “a lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so.”

Of course, there are ways to avoid making jurors aware that they are being followed on Twitter. Companies like X1 Social Discovery, for example, offer a specialized public follow feature that enables access to all the past tweets of a specific user (up to 3,200 past tweets) and any new tweets in real-time without generating a formal follow request that results in a notification to the juror you’re following. As far as concerns for jurors’ privacy go, it’s good to keep in mind that virtually all social networking sites remind their users of the public nature of what they’re sharing. As Twitter’s Terms of Service state, “What you say on Twitter may be viewed all around the world instantly. You are what you Tweet!”

Another product, Jury Scout, monitors a prospective juror’s public social media profile in order to help decide whether that individual is likely to agree or disagree with the client’s case. Jury Scout searches approximately 50 different social media sites (including not just Facebook and Twitter, but also Yelp, Pandora, and others), scouring them for information that may prove helpful in jury selection—at \$295 a search. Does the prospective juror “like” a particular TV show, band, or cause that makes him or her more likely to embrace your arguments or empathize with your client? That information can now be conveyed to the trial team in real time.

Not everyone has embraced, even cautiously, the concept of attorneys’ online investigation and/or monitoring of jurors’ social media activities. One federal court concluded that there is “no recognized right to monitor jurors’ use of social media,” and in fact opined that such efforts by lawyers could intrude

on the “safety, privacy, and protection against harassment” to which jurors are entitled and “potentially chill the willingness of jurors to participate in the democratic system of justice.”^{xxix}

The earlier discussion of *Johnson v. McCullough* illustrated the trend of lawyers being held to a higher professional standard insofar as the use of technology in juror selection is concerned. A recent case from the Kentucky Supreme Court reveals the potential dangers lurking in this area for the unwary.^{xx} In *Sluss v. Commonwealth of Kentucky*, appellant Ross Brandon Sluss had been convicted of (among other charges) murder and driving under the influence of intoxicants after crashing his pickup truck into a SUV with several passengers. One of the passengers, eleven-year old Destiny Brewer, died. The tragedy and ensuing criminal case garnered tremendous publicity, including extensive discussion online on sites like Facebook and Topix. The trial court, sensitive to the amount of attention the case had received, engaged in extensive voir dire procedures.

After his conviction, Sluss sought a new trial based on juror misconduct, arguing that two jurors (Virginia Matthews and Amy Sparkman-Haney, who was the jury foreperson) were Facebook “friends” of the victim’s mother, April Brewer. During voir dire, both Matthews and Sparkman-Haney had been silent when the jurors were asked if they knew the victim or any member of the victim’s family. Moreover, during individual voir dire, Matthews replied unequivocally that she was not on Facebook and though Sparkman-Haney acknowledged having a Facebook account and being vaguely aware that “something” had been set up in the victim’s name, she did not share anything beyond that.

While the court analyzed the nature of Facebook “friend” status and ultimately held that this fact alone would be insufficient grounds for a new trial, it was clearly more troubled by the jurors’ misstatements during voir dire, especially since it was unknown “to what extent the victim’s mother and the jurors had actually communicated, or the scope of any actual relationship they may have had.”^{xxi} In what it acknowledged was “the first time that the Court had been asked to address counsel’s investigation of jurors by use of social media,” the Kentucky Supreme Court then turned to whether or not the defense counsel should have discovered the online evidence of juror misconduct prior to the verdict.^{xxii}

The Court ultimately held that there was juror misconduct that warranted, at minimum, a hearing to determine the nature and extent of the Facebook conduct if not an actual new trial. It also excused the attorney’s failure to discover the misconduct earlier, since the jurors’ answers during voir dire had given him “little reason to think he needed to investigate a juror’s Facebook account or that he could have even done so ethically given the state of the law at the time of trial.”^{xxiii} But, the Court did go on to an extensive discussion of the ethical parameters surrounding counsel’s investigation of jurors on social media sites, referencing with approval the position advocated by the New York County Bar Association Ethics Committee. Although

it conceded that “the practice of conducting intensive internet vetting of potential jurors is becoming more commonplace,” the Court declined to go as far as the Missouri Supreme Court and impose an affirmative duty on attorneys to do so.^{xxiv} The Court observed that while much of the information being sought “is likely public,” “a reasonable attorney without guidance may not think this investigatory tactic appropriate, and it is still such a new line of inquiry that many attorneys who themselves are not yet savvy about social media may never even have thought of such inquiry.”^{xxv}

IV. Conclusion

In an age in which a few clicks of a mouse can reveal an abundance of information about prospective jurors (sometimes too much information) and in which people are revealing more than ever about themselves online, doing social media research during voir dire makes more sense than ever. Not only can you avoid having a juror with a hidden agenda sitting on your panel, but you might actually prevent a mistrial or overturned verdict on appeal. Exploring the online selves of prospective jurors has become routine in high profile cases like the Barry Bonds perjury trial, the first corruption trial of former Illinois governor Rod Blagojevich, and the murder trial of Casey Anthony in Florida (where prosecutors armed with Internet information on prospective jurors used challenges to dismiss an individual who allegedly posted the jury instructions on his Facebook page and also joked about writing a book, as well as one man who tweeted “Cops in Florida are idiots and completely useless.”). But “Facebooking the jury” isn’t just for high profile cases. Cameron County (Texas) District Attorney Armando Villalobos issued iPads to his prosecutors so that they can check out the Facebook profiles of potential jurors. And you never know what you may find. As jury consultant Jason Bloom of Dallas’ Bloom Strategic Consulting explains, “Jurors are like icebergs—only 10 percent of them is what you see in court. But you go online and sometimes you can see the rest of the juror iceberg that’s below the water line.” In criminal cases, for example, lawyers and jury consultants have used online research to reveal that a juror who had professed to having no opinion on capital punishment had actually written an op-ed piece for his local paper on the death penalty.

Lawyers are increasingly being held to a higher standard of technological proficiency and, as the use of social media platforms becomes more widespread, clients—and not just courts and ethics committees—expect lawyers to avail themselves of every technological weapon in their arsenal. Doing so in an ethical manner is imperative. ©

Illustration by Sully Ridout of [Barnes & Roberts](#)

[John G. Browning](#) is a partner in the Dallas office of Lewis Brisbois Bisgaard & Smith, where he handles a wide variety of civil litigation in state and federal courts. He is the author of "[The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law](#)," as well as two forthcoming books on social media and the law. His works in the area of social media have been cited by judges, by dozens of law reviews throughout the country, and he has been quoted as an authority on social media and the law by such publications as TIME magazine, The New York Times, Law 360, and the National Journal. He serves as an adjunct law professor at SMU Dedman School of Law and Texas Wesleyan University School of Law.

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- xix United States v. Kilpatrick, 2012 WL 3133939, at *19 (E.D. Mich. Aug. 1, 2012) (rejecting arguments made in response to arguments against the empaneling of an anonymous jury, since an anonymous jury would prevent the lawyers from monitoring the jurors' use of social media during the trial in order to determine if the jurors were engaging in online misconduct).
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We asked three trial consultants to respond to this paper. Kacy Miller, Ellen Finlay, and Rosalind Green respond below:

Kacy Miller responds:

[Kacy Miller, M.Ed](#) is the president of CourtroomLogic Consulting, a full-service trial sciences firm located in Dallas, Texas. Areas of expertise include pretrial research, theme development, witness preparation, graphic development and all aspects related to jury selection.

Admit it. Every attorney, jury consultant and client wants to know as much as possible about prospective jurors before seating a panel, and thanks to Google, peeking into a juror's private life has become as easy as pie.

Facebook, Twitter, web-based news, YouTube, blogs, personal websites, professional networking sites and who knows what else have— to the chagrin of many— enabled millions to gather around an electronic water cooler. With the click of a mouse, we can learn an awful lot about a prospective juror without them ever having to utter a spoken word.

Today's jurors are connected, and by connected, we mean CONNECTED! Make no mistake: connected jurors encompass all age ranges, all demographics and all backgrounds. Gone are the days when only the more affluent jurors had access to the Internet. And the days when an actual computer and DSL line were requirements for connectivity are things of the past. Connectivity is now a 24/7 possibility. Anyone. Anywhere. Anytime.

John Browning offers some fascinating statistics on the usage of social media. Here are a few more that might give you

pause:

- More than 750 million mobile phone users access Facebook every month;
- Twitter's fastest growing age demographic is 55-64-year olds;
- YouTube reaches more 18- to 34-year old U.S. adults than any cable network; and
- 27% of total U.S. Internet time is spent on social media sites. Is it any wonder that the Internet, social media and 24/7 connectivity have become such relevant and prevalent issues in the courtroom?

I've blogged a number of times about the "Voir Google" trend (*see [When Jurors Research, Voir Google, How Voir Google Is Playing Out in the Courtroom](#)*) and wholeheartedly agree with Mr. Browning's opinion that there is a new and exciting arsenal of technological tools available to litigators. But, like any weapon in our advocacy arsenal, we are ethically and morally bound to use them with the utmost care and respect.

It's important for lawyers and jury consultants alike to stay informed and current on this ever-changing and important issue. As a jury consultant, I have a professional obligation to keep abreast of case law, jurisdictional rulings, ethical guidelines and of course, professional standards within the jury consulting community.

"Could this language be used to justify having a trial consultant pose as someone or otherwise be deceptive in order to gain access to a juror's privacy-restricted profile if there is a 'suspicion of juror misconduct?'" Regardless of how a court construes the language of the referenced ethics opinion, The American Society of Trial Consultants (ASTC) has addressed this very issue in its Professional Code of Conduct.

"...Trial Consultants shall not

use deception or falsely represent themselves to gain access to information that would not otherwise be available to them." Circling back to Mr. Browning's question about whether jury consultants could (or should) use deception to reveal potential misconduct? Although we are allowed to use social media sites to research prospective jurors, intentional deception is a big no-no. Period. End of story.

Here are a few practical tips for lawyers and their jury consultants as they navigate the uncertainties of Googling jurors.

1. **Do Your Homework Before You Google.** As evidenced by Mr. Browning and the case law he shared, there is no "magic" or "rigid" rule related to Voir Google as it relates to attorney conduct (and by proxy, jury consultant conduct). Jurisdictions around the country have ruled differently on the issue, and will likely continue to do so. What to do? Know your jurisdiction. Research the venue. Determine any preferences the trial court has for Googling jurors and/or conducting online research.

1. **Just Because Information Is Available Online Does Not Mean It's Ethical to Obtain.** Bear in mind that Googling a potential juror's litigation history or public criminal record may be considered quite different than Googling a juror's Facebook postings, Twitter "tweets" or reading her online blog. As Mr. Browning noted, the Missouri courts seemed to draw a clear distinction between the *type* of information that is searched and discovered. Be sure there are no local rules, standing orders or ethical opinions in your trial venue that allows one type of search but disallows another.

1. **Do Not "Friend", "Follow" or "Connect" with a Prospective Juror.** To me, this seems like a no-brainer, but it's worth reiterating. Although broad, ethical opinions throughout the country are pretty clear: if you're

going to research a juror, keep your distance. If the information you seek would not otherwise be available to you but for a direct or indirect communication, steer clear. This means no "friending", "following" or "connecting" with prospective jurors (or friends of prospective jurors) with the intent of gaining access to information that is typically hidden or private.

1. **Be Familiar with Built-In "Stalker Features."** "Stalker feature" is my terminology for any sort of free, built-in or paid feature available to users (i.e., jurors) that enables them to see who has viewed their profile, who is following their feed, or who has signed up for their blog. LinkedIn has this feature. Most blog and/or newsletters have this feature. Facebook and Twitter have this feature (if you "Follow" or "Like"). In fact, if jurors have personal websites and have enabled Google Analytics, they even have the ability to see which servers have accessed their websites (which should be a big red flag to attorneys who conduct research from within the four walls of the law firm and use the law firm's server).

1. **Alert the Court If You Discover Something Untoward.** *If you're unfamiliar with the Daugerdas_ tax fraud case, you may want to add that to your something-to-do-when-I-have-free-time list. For a Cliff's Note version, read our [blog post](#).* In a nutshell? Attorneys researched the jury panel and learned a little nugget that was helpful to their client, but potentially detrimental to the other side. Rather than sharing what they learned with the Court, they kept it secret. Eventually, opposing counsel discovered the nugget (after the verdict) and... well, you guessed it. Appeals were filed, and a new trial was granted. Lesson learned? If you discover something about a juror during your online research that could be construed as a threat to the integrity of the judicial process, the right to a fair and impartial jury, or the sanctity of the juror's oath, silence

is not an option.

Finally, if you're questioning on any level whether a certain search is ethical or not, it's probably best to err on the side of "not." Why risk it?

Simply ask what you're hoping to discover during good old-fashioned oral *voir dire*. 🎯

Ellen Finlay responds:

Before forming Jury Focus in 1998, [Ellen Finlay, J.D.](#), a 1986 graduate of the University of Texas School of Law, practiced law in Houston and was a shareholder in Thompson & Knight. Jury Focus provides trial consulting services throughout the U.S.

Picture this: You are sitting in a courtroom with a client when the court clerk hands you the venire list. The jurors are congregating in the hall and the clerk estimates that they will be brought into the courtroom in 15 minutes or less to begin *voir dire*. The venire list has 50 plus names. The list does not include the prospective jurors' addresses, dates of birth, levels of education, race or even names of employers. Instead, the list includes each prospective juror's name, the date he or she was issued a summons to appear for jury duty and a general reference to their job title (e.g., manager, administrative assistant, et cetera). When queried, the court clerk confirms that the judge does not believe it is appropriate to provide personal information about the prospective jurors. The clerk also informs the parties that the judge will limit each side to approximately 45 minutes of *voir dire* questioning.

The year is 2013. Welcome to just one day in the real world of jury selection.

I read Mr. Browning's survey of the current state of the law and development of professional guidelines related to the use of internet research and social media during and following jury selection and was struck yet again by the disconnect between the cases that make law in this area and the vast majority of cases that

actually get tried to a jury. For twelve years in the 1980s and 1990s, I tried lawsuits. In a few of those cases, my clients allowed me to bring either an associate or a paralegal to trial. Sometimes I was not permitted to bring anyone to assist me. Needless to say, I did not bother asking for permission to hire a jury consultant to assist with jury selection. I was lucky if another attorney from my office would come help me "eyeball" the jurors since that attorney would not be able to bill for his or her time.

Fast forward 15 years. Some things are very different. Social media did not exist when I quit trying cases. We were just beginning to use trial software. Now almost all trial attorneys use trial software. Some can even assemble and operate a projector!

Nevertheless, despite the impression created by high profile cases that involve teams of lawyers and jury consultants, most cases are still tried the old-fashioned way: one attorney and one assistant. Sometimes a junior attorney is allowed to assist at trial as well, although a number of clients still require the attorneys to choose between the junior attorney and a paralegal. By now, most trial attorneys are familiar with the concept of social media and internet research, even if they do not choose to utilize Facebook or LinkedIn themselves. But the last thing most trial attorneys think about when getting ready to start trial is whether or how to investigate potential jurors through social media web sites.

What non-trial lawyers forget is that trial attorneys are typically still doing battle over exhibits and pretrial motions right up to the time the prospective jurors walk into the courtroom for *voir dire*. It is not uncommon for trial attorneys to start trial without any directs or crosses prepared, although typically there are notes and maybe even an outline in their trial notebook. And trial attorneys often wait until the day before trial to begin the process of identifying topics to discuss during *voir dire*.

In their defense, these attorneys are often neither lazy nor procrastinators.

Instead, they are caught up in the fog of war that surrounds the beginning of most trials. They are working sixteen plus hour days. They are juggling the last minute barrage of pretrial motions, never-ending fights over exhibits and deposition offers and ongoing discovery as well as the need to actually prepare their case for presentation to a jury. And let's not forget that their other clients still expect them to return emails and phone calls about other pending cases. Witness prep gets crammed into meetings at 9 pm at night during trial. Preparation of demonstrative evidence happens while the attorneys are doodling during days of pretrial hearings prior to trial.

Let me be clear. Work is being done. Hours are being billed. It's just that most of the trial attorney's thinking and time is not devoted to strategizing about how to research prospective jurors. If you stop most trial attorneys preparing to start trial in an average case and ask them what they have done to prepare for investigating potential jurors using internet sites such as Facebook et cetera, do not be surprised if their response is either a blank stare or a look of utter confusion. And then panic.

For all the hype about whether the failure to use every research tool possible (including internet research) to delve into the minds and attitudes of the prospective / empaneled jurors may constitute malpractice, the reality is most trial attorneys do not have the resources or even the opportunity to conduct this type of research in any meaningful way. Once *voir dire* commences, they are lucky if they have an assistant to spare who can try to do some quick internet searches in a back room of the court house while *voir dire* is in full swing in the court room.

"There are 5 James Rogers. W/o an address or DOB, I can't tell which. 1. How old does he look? I has a recent bankruptcy and 1 is on LinkedIn. ???" It is even worse for the plaintiff's attorney whose forty-five minutes of questioning is concluded before he or she has an

opportunity to see the cryptic texts or emails from his or her assistant/consultant. Depending upon the court, the plaintiff attorney's time to request additional questioning of any particular juror may have passed by the time the team doing the internet research gets to problem juror no. 32.

When I read articles or opinions about whether a trial team or jury consultant conducted sufficient internet research on prospective / empaneled jurors, I can't help but wonder whether those judges and authors have lost touch with the realities of the average case and a typical voir dire. I'm still friends with the attorneys who try 95% of their cases without the assistance of a trial consultant. And I am concerned that we may inadvertently throw those attorneys "under the bus" by not taking every opportunity possible to remind ourselves and the legal profession that no two voir dires are alike. Judges have different rules and styles. Clients have different rules, views and budgets. Attorneys have different demands on their time. Sometimes the best laid plans simply don't work. It just is what it is.

While I believe it is important to identify what constitutes intrusive or unethical research on prospective/ sitting jurors, I believe it is equally important to avoid trying to suggest or proffer standards or guidelines for what constitutes a reasonable voir dire and assistance with jury selection. It seems reasonable to discuss what is "too much" and when someone has gone "too far". It is much harder to assess what is too little and I believe we should avoid going down that path. ©

Rosalind Greene responds:

Rosalind Greene, J.D. (rrg@adjuryresearch.com) is a trial consultant with Advanced Jury Research, based in Tucson, Arizona. She works on both civil and criminal cases nationwide.

She has been working on the ASTC Standards Code and specifically on standards related to online research. Her

comment focuses on the proposed language changes to the ASTC Standards Code rather than on specific practice issues surrounding use of online research.

According to George Bernard Shaw, "[t]he single biggest problem in communication is the illusion that it has taken place." Recent ethics opinions and court holdings suggest that even the illusion of communication with a juror through social media might be enough to raise ethical issues. From the perspective of a trial consultant, the ethical implications of "voir google" prompt two caveats:

1) understand that "communication" with jurors may be interpreted in the broadest sense and may include inadvertent contact; and

2) it is critical to engage in specific discussion with attorney/clients about any standards, guidelines, local rules, or case law in their particular jurisdiction regarding the use of social media for juror research or monitoring.

The Association of Trial Consultants' Professional Code provides standards and guidance in many areas common to trial consultants. The Professional Standards Committee has proposed updates to the section on Jury Selection, primarily in line with the 2012 New York City Bar Association Opinion. The Jury Selection Professional Standards already prohibit consultants from intentionally communicating or having contact with potential or seated jurors. Proposed language further instructs that "[t]rial consultants shall not use deception or falsely represent themselves to gain access to information that would not otherwise be available to them."

Unless otherwise restricted in the trial jurisdiction, trial consultants may use social media sites for juror research as long as no communication occurs between the consultant and the juror or prospective juror as a result of the research. It further notes in the Commentary: "Communication" should be interpreted broadly, including more than sending a direct

or specific message. For example, sending a "friend" request or similar invitation to share information on a social network site may constitute a prohibited communication.

Some social media sites may generate a notification to jurors when they are being researched or monitored. The act or attempted act of viewing pages, posts, or comments could also be deemed communication if the consultant was aware that his or her actions would cause the juror or prospective juror to receive a message or notification alerting them to the consultant's research.

These same attempts to research or monitor the juror or prospective juror might constitute prohibited communication even if inadvertent or unintended. Therefore, trial consultants should consider the functionality, properties, privacy settings, and policies of a website or service before conducting juror research. The ASTC Code applies to member-consultants practicing in all jurisdictions which is why our proposed language is softer than the New York City Opinion (sending a friend request or causing a notification would constitute prohibited communication in New York). So far, it looks like the New York City Opinion is well received, but these issues continue to evolve and other jurisdictions, or even the ABA may update their rules and standards differently. Our main purpose is to put consultants on alert that although the social media research of jurors is becoming very commonplace, they should carefully heed any limitations that may be controlling in their jurisdiction. While some jurisdictions, such as Missouri, now require some online research during voir dire, some judges still won't allow computers in their courtroom. Communication with local counsel, and perhaps

the court, about expectations and limitations can help avoid misunderstanding or confusion on these issues at trial.

In addition to keeping up with the emerging laws and opinions, consultants and their attorney/clients now also need to keep up with technology and how various social media sites function with respect to notifications and privacy settings. Perhaps the ASTC could create a sub-committee or task force to keep abreast of these ever changing technical aspects.

As with most ethical issues, any guidance or regulation is generally followed with a series of, “but, what ifs.....?”

What if I Facebook “Friend” a friend of a juror?

What if I, or someone I know, already is a “Friend” or “LinkedIn” but don’t actually know the prospective juror?

What if jurors change their settings or type of account after I have started monitoring?

What if the juror gets a generic notification that “someone” checked

their site or is monitoring during voir dire or trial, but it doesn’t identify me?

What if viewing a public page still generates some sort of notification?

The ASTC Professional Standards Committee will raise some of these and other related ethical dilemmas over the next several months as a catalyst for discussion among the ASTC membership. In the meantime, consultants beware of social media research which could leave a footprint or even the illusion of communication, and beware of any local or jurisdictional standards or guidelines regarding “voir google.” Communication – knowing what it is as applied to jurors, and effectively engaging in it with attorney/clients – is key. 19

John Browning replies to the trial consultants:

I agree with the comments in the response by Kacy Miller. The connected juror is a modern fact of life, and lawyers and trial consultants alike must know where the ethical boundaries are. An excellent point is the reminder to keep a keep a sensible distance from the “online juror”, while being sure to alert the court if improper activity by the juror is noted - regardless

of whether it helps your client or the other side. This echoes the cautionary message of the NY Bar Ethics Committee. And I couldn’t agree more with the comments by Rosalind Greene. Given the dangers of inadvertently “communicating” with a juror with the automatic notification features on sites like LinkedIn and Twitter, the questions raised by Rosalind and being considered by the ASTC Code are timely indeed. Jurisdictional peculiarities and notification features of particular sites must definitely be taken into consideration. Finally, as a trial lawyer for nearly 24 years who’s made the transition from “trial by yellow pad to trial by iPad,” I do identify with Ellen Finlay’s comments and I know all too well about the limited time available for most voir dire. That being said, times are changing, as are client expectations, judicial attitudes, standards of attorney competence, and yes- even juror expectations of the privacy of their online selves. While not every trial may have the need or budget for a trial consultant, those that do mandate that we have a set of ethical guidelines in place. I feel the question of how trial consultants and lawyers’ jury research practices will be governed is certainly a ripe one, and that guidance is critical for both professions. 20



Do You See What I See?

How a Lack of Cultural Competency May Be Affecting Your Bottom Line

by Michelle Ramos-Burkhart

What Is It?

FIRST LET'S DEFINE IT, are we talking about diversity, equity, equality or all of the above? While many people use these words interchangeably, for the purposes of this article let's define what exactly we mean when we say lawyers need to possess cultural competence.

Cultural competency is broader in scope than diversity. It includes the complex processing and understanding of values and worldviews. A culturally competent person will take into account individual cultural perspectives that inform people's behaviors and motivations. In effect, cultural competence is a professional skill that seeks to help with advocacy and communication across cultural experiences.

It also has been defined as "the understanding of diverse attitudes, beliefs, behaviors, practices and communication patterns, attributable to a variety of factors (race, ethnicity, religion, SES [socio-economic status], historical or social context, physical or mental ability, age, gender, sexual orientation, or generational and acculturation status)" (Frink-Hamlet, 2011).

OK, now that we have a handle on the definition of the cultural competency dynamic, now what? Why should it matter to a lawyer? How can it affect my revenue stream?

Making the Case

Our American demographics, as evidenced by the recent Presidential election, reflect that our population is significantly changing and subsequently so are the pools from which we select our jurors. Most law schools do not offer courses in cultural competency in the curriculum and as the data reflects, American law school populations themselves are simply not diverse. Once considered only an issue for public interest lawyers or marginalized populations, it is now relevant across all sectors as transactions and legal disputes move to a more global arena.

In a legal market that has witnessed the reduction of opportunities for recent law school graduates, this may seem a minor issue. However, it seems many are of the opinion that law students are better served and more employable with this skill set in hand coming out of law school.

Beyond law students, the legal field has its own set of issues to contend with on this subject matter. As of 2012 there are roughly 1,245,000 licensed lawyers in America. The most recent statistical data from the ABA in 2005 shows roughly 70% are male, a median age of 45-54 and 88% White (ABA, 2012). So, if we think this is not an important issue we are fooling ourselves. Our clients, communities, business partners and employees are not the same face as the majority of our attorney population in this country, let alone the new global marketplace.

There has been a significant shift in the cultural and racial make up in our legal arena. This is largely due to our country's changing demographics and due to the increasing practice of conducting business globally. This change has presumably also resulted in a new demographic in our juries and clientele. This is a new and different argument that disrupts perceptions and traditional findings and brings issues of racism and culture to the forefront like never before.

Does that juror of color perceive the White male attorney with a preconceived bias as a person who is seemingly advantaged and privileged?

Or, does the international client resent the lack of cultural sensitivity by the American attorney they are now required to work with on an international or global matter?

This could be a "new racism" that is important to explore and investigate and will undoubtedly contribute significantly to the psychology and legal communities.

Without question, psychological factors influence decision-making in and out of court. Because jurors rely on the same skill set for making decisions as they do in everyday life, their decisions while in court will almost always be influenced by their personal biases, emotions and beliefs. If they disagree personally with the information presented in a case, their biases and opinions will often be channeled into a decision-making response. It seems that "what jurors hear and remember about a case will inevitably be a reflection of who they are, what they value, and what their life experiences have been" (Anderson, 1996). The life experiences of our potential jurors and clients are not the same as jurors or clients of the past, nor of the majority of our attorneys.

Legal Perspectives

The ABA Presidential Initiative Commission on Diversity recently (ABA, 2010) outlined four rationales for creating greater diversity in the legal profession. I have chosen to briefly highlight the key phrases from the fuller document.

The Democratic Rationale: "A diverse bar and bench create greater trust in the mechanisms of government and the rule of law."

The Business Rationale: "Ever more frequently, clients expect and

sometimes demand lawyers who are culturally and linguistically proficient."

The Leadership Rationale: "The profession must be broadly inclusive and accessible to all."

The Demographic Rationale: "LGBT lawyers and lawyers with disabilities will rapidly increase in coming years. With respect to the nation's racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a "majority minority" country."

While these rationales are outlined comprehensively in the full document, the challenge becomes implementation and awareness to the broader legal community. When faced with specific culturally diverse situations, culturally competent people will generally behave, react and reason more effectively than those who are not (Stevens, 2009).

In the global arena, the legal industry demands lawyers possess these critical skills for success. Technology, travel and international business (once unique) is now standard business practice. The National Law Journal 250 (250 of the highest producing law firms) reports over 13% of lawyers are based in foreign offices outside the US and that number continues to grow (National Law Journal, 2011). Solo practitioners face very similar challenges. Co-workers, vendors and employees from different cultures are commonplace in today's legal business.

Within the context of a jury case, as minority populations increase it is reasonable to expect that so will the representatives who come to court when called for jury duty. This shifting demographic is directly correlated to interactions amongst jurors and attorneys. Add to this the recent proposal from California to expand the jury pool so eligible non-citizens can serve and this potential change would have even more significant effects on the face of the jury (Guthrie-Ferguson, 2013). Will cultural bias challenge the "automatic credibility" of our trial lawyers, thereby challenging our existing research about how jurors perceive attorneys? (Hahn & Clayton, 1996) While the North American attorney population is reflecting some racial and gender change, that change is not nearly at the pace of the larger population. More and more business is being conducted globally and traveling across cultural barriers—will our lawyers be ready?

Scientific Perspectives

Modern psychology and specifically that of social psychology shows justice and law rest on the idea that people acting in the capacity of juror will do so with fairness and in an unbiased fashion. We know this is not always the case. Cognitive theory and its sub areas of stereotyping, critical race theory, social cognitive theory, attribution theory and situational leniency theory provide the theoretical background for evaluation and analysis of this topic. A juror bias scale (JBS) was developed by psychologists almost fifty years ago to measure biases pretrial amongst jurors (Shaw & Wright, 1964). Researchers continued

to pursue this idea of minimizing bias in a potential jury in (among many other publications) [1983](#), [1998](#), [2003](#), and [2005](#). Today, most researchers, scholars and legal professionals recognize the perfectly unbiased jury is basically impossible to construct. However, empirical scientific evidence can lend to a comprehensive pre-trial preparation and thus, the continuing efforts of academic researchers.

Legal scholars and practicing attorneys often shy away from or disregard psychological scientific studies, even though there is no question the information garnered and its applicability to their day in and day out practice holds great potential for improving the legal landscape. The persuasion strategies identified in these studies are tools that, if used effectively, can have significant impact on attitudes, behaviors and outcomes in the various roles and multiple channels in our day-to-day lives both in and out of court.

As demands for cultural competency increase how does the impact effect not just work environment but the financial bottom line for law firms in this new era? There is benefit at many levels that can be implemented from theory to practice.

From Theory to Practice

The goals of cultural competence are simple.

- The reason to become culturally competent is to effectively deliver services in a cross-cultural arenas, as well broaden financial opportunities for firms in business transactions.
- Lawyers can accomplish this by improving their awareness skills and increasing their personal cultural knowledge.
- Law firms and legal organizations must work to hire and train culturally skilled and knowledgeable people.
- Cultural competence is a personal. Everyone has a culture and everyone should consider culturally competent service in his or her transactions and practice.
- Consider “*cultural audits*” which include observation in client intakes, presentation style review, open/closing statement evaluation, in house hiring and employee practices and other business analysis to identify where

cultural competency efforts need to be focused. Additional steps to consider taken from a report at the Commonwealth Fund (Wu & Martinez, 2006) suggests the following:

1. *Community representation and feedback is essential at all stages of implementation.*
2. *Cultural competency must be integrated into all levels of the business.*
3. *Changes made should be manageable, measurable and sustainable.*
4. *Making the business case for undertaking cultural competency initiatives is critical for long-term sustainability.*
5. *Commitment from leadership is a key factor to success.*
6. *Ongoing staff training is crucial.* Strategies in implementing cultural competence should begin with an internal recognition about in-group differences and then move to out-group differences. Nuanced understandings of cultural experiences, preferences and differences will help prevent stereotyping and over generalization about a particular group or culture.

Conclusion

Cultural competency is not about saying or doing everything right. Instead it is about heightening our awareness, broadening our sensitivities and being a good world citizen. Our actions will speak for themselves and efforts that are made to genuinely listen and understand one another will build trust which is the foundation of any great relationship, legal or otherwise.

If doing the right thing is not incentive enough, perhaps consider what implementing these practices can mean to your bottom line. If you aren't seriously looking at these issues in your firm and your competition is, you risk losing employees, clients and revenue. Cultural competency is here to stay, so consider leading the field by taking proactive steps to embrace the new paradigm. 🎯

Illustration by Sully Ridout of [Barnes & Roberts](#)

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Hackers, Hosts & Help Requests

by Rita R. Handrich

The *Jury Expert* needs your help! In the past few months our website been repeatedly hacked and ultimately we had to make a host change to increase security to our site. The good news is we are important enough to attract hackers. The bad news is their handiwork is very expensive to repair and transferring hosts is an additional expense.

We've worked hard since May, 2008 to bring you six issues a year of practical, relevant articles to improve your litigation advocacy. We do it for free. We want to be able to keep doing it. But we need some help to keep going. It is simply a financial reality for us.

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The Scared Witness

A Chapter from “Can This Witness Be Saved”

by Katherine James

“I’m Truly Terrified.”

*The Phone Call I’ve Had Lots Of Times

Lawyer

She’s scared.

Me

That’s okay. I’ve done “scared” before.

Lawyer

Not like this.

Me

Okay...what’s the problem? Why is she so scared?

Lawyer

What happened to her was pretty scary – but – I don’t think that is it.

Me

What is “it”?

Lawyer

She won’t tell me.

Me

What makes you think she'll tell me?

Lawyer

I don't. You are my "leave no stone unturned" move for the company she works for.

Me

That makes me feel all warm and fuzzy. See you Thursday.

"I'm Truly Terrified" – Part One

I always love the drive from the airport to this attorney's office. Jazz music on the rental car radio, colorful fall woods whooshing by my window as I climb up the foothill where the small city is nestled – no traffic. The city is a little sleepy, always tranquil and makes me relaxed and happy. This is due in no small part to the wonderful attorney with whom I work here. He is super bright, loads of fun, has great cases to work on, and his clients like him and trust him. And the town – the town itself just makes me kick back and relax. "How could anyone live here and not just glide through their day?" I think.

I arrive at his office. It is late afternoon. Beautiful leaves are gently falling from the trees. I sing a little jazz tune in my head as I walk up to the front door. It is "The Autumn Leaves" – but I am singing it in broken French. Just like Jessie and Lois and I used to do in the 7th grade in our best Charles Aznavour impersonations. The great attorney's receptionist greets me like a long lost relative – how can you not love working in The South? "Miss Katherine!" she crows. She then whispers, "Sit down. He's going to come out and explain everything." The door to the conference room opens. The great attorney greets me loudly from the open doorway with the kind of bravado that his receptionist did. "Katherine! It is so good to see you!" He then carefully closes the door and crosses to me. He looks apologetic. He whispers, "I'm going to have to ask you to turn around and fly home. Julia refuses to work with you. She is terrified."

The first task: Finding the "Why?"

In my experience there is only one reason not to be fearful of facing a legal event as a witness: questionable mental health.

The first question I ask in a preparation session is almost always, "What questions or concerns do you have about having your deposition taken (or whatever legal event this witness is facing)?" When the witness says, "Why should I have any concerns? I can't wait!" my antennae go up. "Danger, Will Robinson," I think, quoting the old television show **Lost In Space** to myself. "We might have a crazy one on our hands."

Let's face it. What sane adult wants to sit in a room with a lawyer who doesn't have his or her best interest at heart but who is allowed to ask him or her questions for six hours? Or in a courtroom being examined by that person in public for all the world to see?

I have met a handful of them and they were all nuts. Totally bonkers. One of them was a major executive in an energy company, another was high up in the banking industry, another was in the middle of a messy 900 million dollar divorce and a couple were accused of crimes, in jail, and awaiting trial.

However, most of the people who answer the question saying that they have "no concerns" actually do upon further reflection. Or if they don't realize it immediately, at some point during our witness preparation sessions they fess up to the inner turmoil they have been experiencing for weeks. This is one of the first things that distinguishes "normally" scared witnesses from "truly terrified" witnesses. The "normally" scared don't live and breathe deep seated terror from deep within that is triggered by the process of preparing for, say, having a deposition taken.

The truly terrified witnesses know they are truly terrified. What's more, they tell you that they are scared immediately.

Again, I am not talking about "normally" scared witnesses. They are, for the most part, scared for good reason. They can, with good reason, be scared of the process ("I can't stand not being in control!" for example). Also, with good reason, they can be scared about a particular issue or fact in this case (the contract wasn't signed, the light was changing from green to red, they had already been warned about that SEC rule before, they don't want to go to prison). Those are all "normal" fears.

The truly terrified are scared for no material or logical reason that you can necessarily associate with the facts of this case. Here's the tricky part – on first blush, the words they use may seem like they are "normally" scared to you. Here are four examples (from the many I have heard) in a chart of what truly terrified witnesses have answered to the question "What questions or concerns do you have about having your deposition taken?" See how the words to these answers don't give you a clue as to whether or not

they are “truly terrified” or just “normally” scared?:

What Four Different Potentially Truly Terrified Witnesses Say:
1. “I’m scared.”
2. “I’m anxious.”
3. “I’m terrified.”
4. “I’m paralyzed with fear.”

Here is the part where many attorneys screw up. Not because they are bad attorneys, but because they don’t understand that their next job is to find out why the witness is scared. They believe that their job is to “reassure” a scared witness. They are operating under the delusion that all scared witnesses are created equal. They are unaware that these answers point to the potential that this witness is truly terrified. Here are four of the unsuccessful rejoinders I have heard attorneys intone in response to the fear witnesses have expressed. I have added them to the chart:

What Potentially Truly Terrified Witnesses Say:	What Well Meaning Attorneys Say Back:
1. “I’m scared.”	“Don’t be scared. I’ll be sitting right next to you.”
2. “I’m anxious.”	“That’s a perfectly understandable and common response.”
3. “I’m terrified.”	“Me, too.”
4. “I’m paralyzed with fear.”	“No one’s ever died from having her deposition taken.”

I find that the attorneys are not making these responses to be un-reassuring. On the contrary, they are each saying the exact thing that would assure that attorney if the attorney were afraid. Let’s look at that in a chart:

What Potentially Truly Terrified Witnesses Say:	What Well Meaning Attorneys Say Back:	What Well Meaning Attorneys Are Thinking:
1. “I’m scared.”	“Don’t be scared. I’ll be sitting right next to you.”	“It would scare me to death to think that I could be facing that idiot on the other side alone if I were the witness.”
2. “I’m anxious.”	“That’s a perfectly understandable and common response.”	“I find it so reassuring that modern psychology has a good explanation for the phenomenon of fear.”
3. “I’m terrified.”	“Me, too.”	“She might as well know now that we only have a 50/50 shot at winning this thing.”
4. “I’m paralyzed with fear.”	“No one’s ever died from having her deposition taken.”	“If you tell me I have to man up, then by golly I man up and you will, too.”

Of course if the shoe were on the other foot, the attorney would be assured by the rejoinder. However, often times this rejoinder has the opposite affect. Let’s add to our chart what the witness is thinking while the well meaning attorney has just happily

reassured himself or herself:

What Potentially Truly Terrified Witnesses Say:	What Well Meaning Attorneys Say Back:	What Well Meaning Attorneys Are Thinking:	What Potentially Truly Terrified Witnesses Now Think:
1. "I'm scared."	"Don't be scared. I'll be sitting right next to you."	"It would scare me to death to think that I could be facing that idiot on the other side alone if I were the witness."	"Like when my mother sat there when I got my wisdom teeth extracted? I'm so screwed."
2. "I'm anxious."	"That's a perfectly understandable and common response."	"I find it so reassuring that modern psychology has a good explanation for the phenomenon of fear."	"Oh my God. I need Dr. Phil and I got one of those laboratory psychologists who chops the heads off of rats."
3. "I'm terrified."	"Me, too."	"She might as well know now that we only have a 50/50 shot at winning this thing."	"Now I totally don't trust anything you are ever going to say to me about anything ever again."
4. "I'm paralyzed with fear."	"No one's ever died from having her deposition taken."	"If you tell me I have to man up, then by golly I man up and you will, too."	"There's a first time for everything. No matter what, we are settling this thing before my depo is taken. Period."

But do the witnesses say that? Rarely. Here's what they say in the room with their out loud voices:

What Potentially Truly Terrified Witnesses Say:	What Well Meaning Attorneys Say Back:	What Well Meaning Attorneys Are Thinking:	What Potentially Truly Terrified Witnesses Now Think:	What Potentially Truly Terrified Witnesses Say in Response:
1. "I'm scared."	"Don't be scared. I'll be sitting right next to you."	"It would scare me to death to think that I could be facing that idiot on the other side alone if I were the witness."	"Like when my mother sat there when I got my wisdom teeth extracted? I'm so screwed."	"Oh. Good."
2. "I'm anxious."	"That's a perfectly understandable and common response."	"I find it so reassuring that modern psychology has a good explanation for the phenomenon of fear."	"Oh my God. I need Dr. Phil and I got one of those laboratory psychologists who chops the heads off of rats."	"Great."
3. "I'm terrified."	"Me, too."	"She might as well know now that we only have a 50/50 shot at winning this thing."	"Now I totally don't trust anything you are ever going to say to me about anything ever again."	"Oh."
4. "I'm paralyzed with fear."	"No one's ever died from having her deposition taken."	"If you tell me I have to man up, then by golly I man up and you will, too."	"There's a first time for everything. No matter what, we are settling this thing before my depo is taken. Period."	"Huh."

Here is what is devastatingly bad about the last column. The attorney may never recover. I'm not just talking about this preparation session. I'm talking about the entire relationship with this witness and the success and failure of whatever the legal event is at hand. The attorney will "go on" to the next "step" in his or her witness preparation list. There will be a giant check mark next to "fix scared" in the legal pad that lives in the attorney's mind, the title of which is "witness preparation". But it is an illusion the attorney has in thinking that he or she "fixed" a "normally" scared witness. And if the witness is "normally" scared, maybe it worked or maybe not. But if instead of a "normally" scared witness you have a "truly terrified" one, you are in big trouble. Like the iceberg, the abject terror is 90% hidden...waiting to sink the Titanic of the case.

There is one and only one response that has a prayer of beginning to be successful with every "normally" scared witness you meet...and is the only hope you have of starting to figure out if this witness is "truly terrified". It is a three-letter word with a question mark at the end of it and it goes like this:

What Potentially Truly Terrified Witnesses Say:	Only Attorney Response:
1. "I'm scared."	"Why?"
2. "I'm anxious."	"Why?"
3. "I'm terrified."	"Why?"
4. "I'm paralyzed with fear."	"Why?"

There will be an initial answer to this "Why?" It needs to be explored. It needs to be followed up. It needs a series of follow up questions that exhaust it more thoroughly than you have ever exhausted a witness you were deposing about a subject matter in a deposition.

How come? Let's start with the obvious - because there are millions of reasons to be scared. You need to figure out which one belongs to this witness. You need to deal with a specific fear that is showing up in the legal setting for which you are preparing this witness. And, ultimately, you need to determine is it "normal"? Or is it "truly terrified"?

Think of it as a differential diagnosis in Western Medicine. If you went to your doctor and said, "My head has hurt for three days," you would not expect your doctor to say, "So does mine. See ya." Nor would you expect your doctor to say, "Here, take two of these. You'll be fine." No - your doctor needs to figure out if you are allergic to dust, your new hat is too tight, you are getting hereditary migraines like your Aunt Sal or if you have a brain tumor.

You are the witness preparation doctor for your witness. Fear in a witness is a symptom - it is not a disease. It is up to you to figure out what disease is being signaled by the symptom. Only then, like a good doctor, can you begin to develop a cure or way of dealing with the disease - be it "normal" fear or "true terror" and hopefully control the symptom.

What are the diseases that are heralded by fear?

Let's look at four of the many possibilities in our chart following the attorney's asking "Why?" to our four witnesses.

What Potentially Truly Terrified Witnesses Say:	Only Attorney Response:	Potentially Truly Terrified Witness Insight:
1. "I'm scared."	"Why?"	"I'm never going to remember everything you want me to remember."
2. "I'm anxious."	"Why?"	"This reminds me of school."

3. "I'm terrified."	"Why?"	"What if I get emotional?"
4. "I'm paralyzed with fear."	"Why?"	"I don't know."

Now, again, it is very tempting for an attorney to reassure the fear with what the attorney thinks will "solve". It works sometimes on "normally" scared people, but it often acts as the equivalent of a doctor sending a patient home with "take two of these" when that patient turns out to have a brain tumor (is a "truly terrified" witness):

What Potentially Truly Terrified Witnesses Say:	Only Attorney Response:	Potentially Truly Terrified Witness Insight:	Mistaken Attorney "Solve"
1. "I'm scared."	"Why?"	"I'm never going to remember everything you want me to remember."	"Did I give you the impression that you have to remember everything? I'm sorry!"
2. "I'm anxious."	"Why?"	"This reminds me of school."	"This isn't like school at all. All your answers to all the questions will be right."
3. "I'm terrified."	"Why?"	"What if I get emotional?"	"That's okay. I expect you to get emotional. That's a good thing."
4. "I'm paralyzed with fear."	"Why?"	"I don't know."	"Well...free floating anxiety is pretty common for witnesses. You aren't alone."

What is the problem with the fourth column? On the one hand, absolutely nothing. These responses are "just fine" if, indeed, that's exactly the disease that is causing the fear in the witness. And that is exactly "the" solve for many "normally" scared witnesses with whom you are dealing.

I think of it as a "Lucky Guess" of what the disease is that is causing a "normal" fear. Here they are:

What Potentially Truly Terrified Witnesses Say:	Only Attorney Response:	Potentially Truly Terrified Witness Insight:	Mistaken Attorney "Solve"	Lucky Guess Disease
1. "I'm scared."	"Why?"	"I'm never going to remember everything you want me to remember."	"Did I give you the impression that you have to remember everything? I'm sorry!"	Witness mistakenly believes that the deposition is a "memory contest".
2. "I'm anxious."	"Why?"	"This reminds me of school."	"This isn't like school at all. All your answers to all the questions will be right."	Witness mistakenly believes that all deposition questions have perfect answers that aren't already in the witness' head.

3. "I'm terrified."	"Why?"	"What if I get emotional?"	"That's okay. I expect you to get emotional. That's a good thing."	Witness mistakenly believes that crying during the deposition is going to lose the case OR that the witness should cry constantly through the deposition.
4. "I'm paralyzed with fear."	"Why?"	"I don't know."	"Well...free floating anxiety is pretty common for witnesses. You aren't alone."	Witness is nervous just like every sane witness is nervous.

BUT – none of these witnesses have been diagnosed yet. In fact, these very well intentioned attorney responses might have the same “iceberg” effect that the totally “self assuring” attorney comments made before. You are going to need a minimum of one more round of digging deeper to get an idea of where this disease that is showing up with the “fear” symptom might lie:

What Potentially Truly Terrified Witnesses Say:	Only Attorney Response:	Potentially Truly Terrified Witness Insight:	Attorney “Digging Deeper”
1. "I'm scared."	"Why?"	"I'm never going to remember everything you want me to remember."	"What's going to happen if you don't remember?"
2. "I'm anxious."	"Why?"	"This reminds me of school."	"What about this reminds you of school?"
3. "I'm terrified."	"Why?"	"What if I get emotional?"	"What about expressing your emotions is...wow...what's the word for it?"
4. "I'm paralyzed with fear."	"Why?"	"I don't know."	"Ever felt this way before?"

Look what you might discover by “Digging Deeper”:

What Potentially Truly Terrified Witnesses Say:	Only Attorney Response:	Potentially Truly Terrified Witness Insight:	Attorney “Digging Deeper”	Potentially Truly Terrified Witness Insight:
1. "I'm scared."	"Why?"	"I'm never going to remember everything you want me to remember."	"What's going to happen if you don't remember?"	"Everyone's going to know that I've got a little bit of dementia starting."

2. "I'm anxious."	"Why?"	"This reminds me of school."	"What about this reminds you of school?"	"The part where I had to repeat the second grade."
3. "I'm terrified."	"Why?"	"What if I get emotional?"	"What about expressing your emotions is...wow... what's the word for it?"	"Weak."
4. "I'm paralyzed with fear."	"Why?"	"I don't know."	"Ever felt this way before?"	"All the time."

Do you see how we are only beginning to scratch the surface with each of these four witnesses of what disease is presenting the symptom of fear? And even if all four of them turn out to be "normally" scared, look at the great insight you have into the potential fear-based pitfalls they might have as you prepare them for what lies ahead.

"Call Me Terrified" – Part Two

If I am going to drive back to the airport I am going to need to pee. That's a lie. If I am going to do anything at all, including taking a deep breath, I am going to need to pee. I walk back toward the ladies' room very, very slowly so as not to have an "accident". But the ladies room is locked. Running into the empty men's room and locking that door is a "no brainer" for me. I make it. One good hand scrubbing and I am ready to hit the road. As I open the door to the men's room, I poke my head out, checking to see that it is "safe" and that no one has seen me. For some reason, explaining to genteel Southerners why I liberate men's rooms under duress is always awkward for me, so I find it best to not come out until the coast is clear.

Opposite me, peering out of the women's room, seeing if the coast is clear, is another woman. She is clearly the occupant of the ladies' room whose presence didn't allow me in. Our eyes meet. She looks shocked to see me. Of course I know why. Would Scarlett O'Hara pee in the same place as Rhett Butler? I say, "I'm sorry! I couldn't help it. I had to pee so badly and you were in the ladies' room." She trembles. Words come out of her mouth one at a time. They seem to shake as she timidly gets out each one. She painfully pushes them out of her quivering mouth one at a time, "You... scared... me... to... death." I pour out, "I am so sorry! I didn't mean to! Please forgive me!" She looks as if she might start to cry. Instead she kind of smiles in a bizarre way. "Not... now... before... the... idea ... of... you... scared... me." Now I'm confused. "You mean women who use men's bathrooms?" I ask. "No... you... the... witness... coach. When he told me you were here I sneaked out of the back door of the conference room so you wouldn't see me." It is my turn to be stunned into silence. "Julia?" I inquire softly. She nods her head. "Still scared of me?" I ask. She shakes her head "no". It is really crazy. I don't want to blow it with her. And here we are having this conversation with our heads still sticking out of the bathroom doors. But clearly if we are going to work together or if I am going to go back to The City of Angels I am going to have to get more than my head out of this bathroom. I get an idea. "How about if we both come out at the same time?" I say softly. She laughs a funny little laugh at the absurdity of it all and we open our doors simultaneously and come out. "Randy says I should go home. And I'm willing to go home... but... can I try to help you first?" She looks sad and lost. The smile and laugh are gone. She shakes and steels herself. She nods her head. Together, silently, we walk back down the hallway and to the conference room. I open the door for Julia, and we both go in. Randy is gathering up notebooks and papers and yellow pads. I know these are his well-researched and organized materials for our preparation session. No one is ever better prepped for prep than he is. He looks up, completely startled to see us. "I thought you both went home!" he exclaims. The effect of an even slightly raised voice on Julia is like that of a blistering desert wind on a hothouse flower. "Julia decided it would be okay to give me a shot at helping her."

I ask Julia, "Why are you afraid?" She says, "Because of what they did to me." "Which they?" I ask. She trembles and shakes and blinks back tears. "Is it too hard to say?" I ask. She nods. "Should Randy tell me?" I ask. She nods. Randy says, "Julia is in charge of sending out shipments for her company. Her company has a contract with a delivery service. The contract says that the delivery service is to charge her company on a per package basis. Every day there are a different number of packages that her company sends out – sometimes as few as one, never more than ten. Every day, the same two men from the delivery service –" I can see that Julia is shaking even harder. "Are you okay, Julia?" I ask. She shakes her head "no." "Should Randy stop telling me the story?" I ask. She looks at me, trembling. She pauses. She shakes her head "no". "Okay, then – go ahead, Randy." I say. I turn my eyes to her. I will listen to him, but I am looking at her. I

want to make sure that “keep talking” is what she was really telling me with the trembling and the head shaking. Randy looks at her and gently asks, “Are you sure? I’m going to tell her what you told me. Stop me if I get anything wrong. . .okay?” Julia looks at him, trembling, and nods. She then turns to me and our eyeballs are locked. We listen to Randy’s words together. I am saying to her with my eyes, “I am here for you.” Randy continues the tale. “Then, one day, the men from the delivery service come into the her office without knocking. They say that from now on no matter how few or how many packages they are picking up, there is a new deal that trumps the contract her company had yesterday, and thought was in effect for two more years. Instead of a per package charge, there will be a flat monthly charge. They hand her a new contract and tell her to sign it. She looks at the bottom line and sees that the monthly amount is three times the amount she has ever paid on a per package basis. She calls the delivery service office and asks to speak with the person in charge. The person in charge tells her that she had better just accept the changes, sign the new contract, ‘Or Else’ and hangs up on her. The delivery service men start moving toward her—“ Julia’s eyes drop from mine and she starts to cry. I look at Randy and he looks at me. Fighting our instincts to bathe her in reassuring words we are silent. She cries, trembles, and finally looks up at me where my eyes are waiting for hers. “Just like my dad and my brothers, “ she whispers.

Once you have an understanding of the nature of the “why” of the “truly terrified”, you need to be willing to center the prep around the way the terror manifests itself. In this case, Julia had been traumatized as a child and then re-traumatized in the same way as an adult. It was truly terrifying. And this means that you may very well have to change up the order and methodology of how you are going to conduct this session.

I remind myself of this all the time. I am a big believer in learning by doing – that is, role-playing. With the terrified, I curb my tendency to jump to teaching through role-playing as soon as possible. Some “truly terrified” people need to “talk things out” more than they need to role-play. Some need to role-play more than they need to “talk things out”. Some need demonstration of how to act. Some need constant reassurance. Just because I like to prepare witnesses by launching into role-playing within a short time of meeting them doesn’t mean that is right for every witness. Especially those who are “truly terrified”.

Even when role-playing, the rules change with the terrified witness. Often times with other witnesses, a segment of role-playing will involve a subject matter or a document or some other content related way of determining content. For example, when dealing with deposition preparation, the attorney will question the witness thoroughly on one topic, let’s say the document marked “39” and the events that lead up to that document, and the events that came out of that document. I think of it as a perfect “bite” of a case in which a witness can learn both form and content. Most attorneys think in terms of a document, or an event, or a troubling fact in the case. Most attorneys are very content driven.

Being content driven in witness preparation for a “truly terrified” witness can be lethal. Instead, looking for the visible and auditory outward signs of the terror, at whatever point it comes in the questioning process is vital. It doesn’t matter if you have one more question on this topic or a dozen. Some visible and auditory outward signs of terror are obvious to anyone. For example, the witness has a look of abject terror on his or her face. But there are visible and auditory outward signs of fear that are not necessarily obvious:

- the witness stops breathing after what you think is an “easy” content question.
- the witness stops answering questions.
- the witness starts to shake slightly.
- the witness just sits there as if in another world.
- the witness’ voice changes pitch.
- the witness’ voice sounds detached
- you can see on the witness’ face that he or she literally didn’t hear your voice – has tuned not only you, but the whole room out.
- the witness’ posture sinks down further and further and they start looking at their hands.

Stop the role-play cold. Sometimes it is just to check in to see if further exploration is needed at this moment to figure out if this is “truly terrified” or “normal” scared behavior or something else – like the need to use the restroom. I say, “Hey – are you okay?” The witness will either say “Yes” or “No”. If the witness says “Yes” but continue to manifest either the verbal or non-verbal signs of terror it is time to stop and talk about it. If the witness says “No”, it is time to test to the heart of the fear to find out if it is

“normal” or “truly terrified”. I say, “You’re scared right now, aren’t you? I can see it. What’s going through your mind?” This is another step in the process of “centering the prep around the ‘why’ of the fear”.

Lets take some concrete examples of the manifestation of fear that completely interfere with a witness’ ability to truthfully answer a question in deposition I’ve heard over the years. Think about three standard answers that you expect your witness to say as truthful responses to at least some of the questions posed by opposing counsel:

“I don’t understand the question.”

“I don’t know that answer.”

“I don’t remember right now.”

The craziest things pop out of the “normally” scared on occasion, but often from the “truly terrified” witness’ mouth. Answers that have nothing to do with the truth when one of the above answers is the truth to the question posed. Many attorneys will concentrate on how the answer is wrong from the point of view of content:

The Answer You Expect the Witness to Give to the Question Posed:	An Example of an Untruthful Answer to the Question Posed Instead:	A Content-based Critique By the Attorney:
“I don’t understand the question.”	“I guess so.”	“Wait – I used three vocabulary words you couldn’t possibly understand and I asked at least three questions instead of only one. My question wasn’t understandable. That’s why the answer is ‘I don’t understand the question.’”
“I don’t know that answer.”	“Possibly.”	“Hey – you couldn’t possibly know because you weren’t there. That’s why the answer is ‘I don’t know.’”
“I don’t remember right now.”	“That sounds right.”	“You don’t remember. So when you don’t remember, just say that you don’t remember. Got it?”

Now, here are those same three examples, but handled with the “fear” as the center point of the preparation rather than the “content”.

The Answer You Expect the Witness to Give to the Question Posed:	On the Visible or Auditory Manifest of Terror, You Might Say:	The Potentially Truly Terrified Witness’ Answer: the “Why”:
“I don’t understand the question.”	“Uh-oh. You’ve stopped breathing. How come?”	“Just before I flunked second grade, I got more and more scared because I didn’t understand the questions. Every time I don’t understand one of the questions I get scared.”
“I don’t know that answer.”	“You have that look on your face again – the one when you told me it’s like you can see the lawyer’s lips moving but you can’t hear the words. What’s going on?”	“My dad would ask me a question that I didn’t know the answer to and when I said, ‘I don’t know’ he’d hit me.”
“I don’t remember right now.”	“I can see on your face that you don’t remember. Why are you afraid to say it?”	“I’ve lost my words. That’s what happens with the dementia. I can’t remember and I get so scared that someone is going to find out and I’ll lose everything.”

We have talked about Julia's terror of being raised by a father and two older brothers who used her as a punching bag. We have talked about the story of how the men from the delivery service literally forced her to sign the contract. She is clearly manifesting all kinds of PTSD symptoms. I ask, "Randy – what is our demand for emotional distress in this one?" At this point I have completely forgotten that this is a business dispute over a contract. She looks up at me. She is shaking and her voice is trembling and she is barely speaking over a whisper. But she says, "No. This isn't about what they did to me. This is about them honoring the real contract." Brilliant. Randy and I are both blown away. I take a deep breath. I say, "You know you are going to be scared the whole time. Every minute of your deposition you will be terrified." She says, "Yes, I know." "Want me to show you how to get through it?" I ask. Randy and I both wait as she considers. It takes a long time. She is shaky. She is scared. She looks at me and in a quivering whisper says, "Yes." I say, "We are going to role-play. Randy is going to play the lawyer taking your deposition. Whenever I see you get scared you and I are going to pause and figure out what to do next." She nods. I gather up my wits and my intuition. I say to Randy "Go!" and he asks, "Did you read the contract before you signed it?" She is frozen, trembling. I say, "Why did you freeze?" She says, "Because something popped into my head." I ask, "What popped into your head?" She says, "If I say what pops into my head, something bad will happen to me." I say, "Why?" She says, "Every time I did that with my dad and brothers they... they..." I gently turn her and have her look in my eyes. "Just tell me. Tell me what popped into your head. Not your dad and brothers, not the lawyer who represents the delivery service guys – just me." She nods. I tell Randy, "Ask her again!" Randy asks in a really mean tone, "Did you read the contract before you signed it?" She looks into my eyes. I say, "Inhale, exhale, inhale and tell me." She inhales and exhales shaking. She inhales and in an unsteady whisper stutters, "Wh-i-ich contract?" Eureka! Randy and I are thrilled. "Perfect!" I say to her. I am smiling and nodding and reassuring her. "Ready for another one?" She nods. Randy switches up his demeanor, thinking that being "nice" might throw her off. "The one you signed this past March." She looks at me. I say, "Inhale, exhale, inhale and..." She says, "One what?" Wow! Her instincts aren't going to let her answer a question that isn't complete! "Good girl!" I exclaim. Randy, adopting yet another attitude seen in some lawyers, that of intellectual superiority says, "Did you read the most recent contract you signed with the Delivery Service this past March?" She looks at me. I nod, and inhale. She joins me – she inhales and exhales. We then inhale and she says to me, "I couldn't. No time." Randy then follows up with something he is convinced her father might have said, "What do you mean you didn't have time?" She looks at me. She inhales and exhales all on her own and starts to shake like crazy. I just look at her, steady as a rock. She inhales, and whispers

in a terrified rasp, "He said if I didn't sign it by the time he counted to ten I'd be sorry." "Julia," I say, "Are you willing to breathe and speak the words that pop into your head just like you are doing right now no matter what?" She blinks at me and nods. "You know I won't be there," I say. "Instead of me I want you to talk to the court reporter." "Will she look at me like you are looking at me?" she inquires. My heart sinks. Dang it, of course she won't. Will that throw the whole thing off? "No, she won't," I say hesitantly. "That's a relief," Julia sighs. "It's harder when you look right at me like that." Randy and I have to giggle at me for just one moment. "Julia!" I say, "I thought it was all about me!" "No," she whispers. "It's about them. Because what they did isn't right." I knew she "had" it. "That's it," I said to Randy. "We don't have to torture her by practicing any more."

It is the evening of the day on which Julia's depo is taken. I, of course, am second guessing myself about our "lack" of rehearsing and role-playing for more than like five minutes. The phone rings. It's Randy. I ask him all the burning questions in my head:

"Did Julia ever get her voice above a rasp-y whisper?"

"No".

"Did she ever stop shaking?"

"Absolutely not."

"Did she ever look less than completely terrified?"

"Never."

There is a pause. Somehow until that moment I thought that if she did the routine over and over again for the six hours of the depo she would magically conquer fear. Randy can barely contain his glee as he chortles, "Was she able to breathe, trust her inner voice, turn to the court reporter and answer every question asked of her by the turkey who represented the Delivery Service? Did she do it over and over again despite the fact that everyone in the room knew she was truly terrified? God love her, she sure did. There is very little in life that is as compelling as watching someone who is truly terrified speak truth to an oppressor." He sighs, "She would have been great in front of a jury."

"Would have been?" I ask.

"Apparently the Delivery Service felt the same way," Randy crows. "They settled for everything we had asked for and then some as soon as her depo was over." 🍷

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Why Telling a Witness That It's OK to Say They Don't Know Is Good for Justice

by Nathan Weber and Tim Perfect

Don't miss our trial consultant responses at the end of this article: Jonathan Vallano & Steve Charman, Jessica Boyle

WHEN A WITNESS IS ASKED to make an identification decision, the stakes are high. The correct identification of a guilty offender can lead to a successful conviction, whilst the incorrect ID of an innocent suspect can contribute to a miscarriage of justice. Given that the Innocence Project analysis of over 300 DNA-based exonerations has shown that around three-quarters of these wrongful convictions involved mistaken eyewitness evidence^[1], it is clear that we need to help witnesses to make the right decision. But how can we do this?

Here we discuss a solution that has been known to psychology research (and TV quiz-show producers) for many years. To illustrate, imagine you are asked a difficult question from memory (without using the internet!), such as *Who was the guitarist on Elvis Presley's "Sun Sessions" album?(*)* If you answer the question and get it right you win a cash prize of \$10,000, but if your answer is wrong you lose the same sum. Alternately you could choose not to answer, without reward or penalty. What would you do? For difficult questions like this, the common response is to opt out of answering. That is, for most people the risk of an error is too great to justify a guess, but for

some (perhaps Elvis devotees) their knowledge means that the risk is lower, and they will be confident in their ability to win the cash prize. And most likely they would be right to take the risk with the question.

Exactly the same argument can be applied to the costs and benefits of making a lineup identification decision. The witness has the potential benefit of identifying the bad guy, at the potential cost of falsely accusing someone innocent. However, witnesses rarely opt out of this decision, even when they should. That is, even when their memory can't support a good decision, they still make one. For some people, this is an avoidable mistake. Just as we would advocate that someone shouldn't risk their cash trying to answer a question on a topic they know nothing about, so we argue that a witness who doesn't have a good memory shouldn't be committing to an identification decision. They need to be reminded that it is OK to say "don't know".

In the sections below we describe our recent experiments looking at the consequences of telling witnesses that it is OK to say don't know. But we start by asking a very obvious question:

Why Hasn't Anyone Looked at "Don't Know" Responses Before?

Actually they have – a study in 1980 by Warnick and Sanders^[2] demonstrated some of the potential benefits we describe below, but it was largely ignored. We believe that the reason for this inattention to don't know options in identification decisions is the result of two powerful assumptions made by the legal community and by eyewitness scientists.

The first assumption is that an identification task already has an implied "don't know" option. There is nothing to prevent a witness from saying that they "don't know" when asked to make an identification. If this is the case, then adding a don't know option can't be of any use. We disagree with this assumption, because we know that people are notoriously bad at determining the options available to them. We also know that standard lineup instructions do not explicitly tell people that it is OK to say don't know^[3]. As our data show, unless the option to respond "don't know" is explicitly brought to the witness's attention, they are unlikely to use it. Warnick and Sanders found something similar over 30 years ago.

The second assumption is that an uncertain-witness, that is someone who finds it difficult to positively identify a single individual from a lineup, will choose not to identify anyone. This assumption is bolstered by the standard lineup instructions given to witnesses that emphasise that the offender may or may not be present, and that it is important to exculpate the innocent as well as incriminate the guilty. If witnesses are following these instructions, and identifying a single individual only when reasonably certain of the match to their memory of the perpetrator, then there would be no need to tell people that it is OK to say don't know. Identification decisions would not then be made by uncertain witnesses.

A wealth of studies show that this assumption is false. Witnesses tend to pick, even when uncertain. Warning witnesses that the perpetrator may not be in the lineup does reduce this tendency^[4], but not to zero. Many people still pick when they shouldn't.

Because we were sceptical about the assumptions about lineup choices, we ran two studies to look at the effectiveness of explicitly telling witnesses it is OK to say don't know. We believed that this was likely to result in better decisions, and our studies were designed to measure just how much better they were. However, we knew that encouraging people to say "don't know" only makes sense if people can judge when they do or do not know the correct answer. Previous research shows that providing a don't know option does reduce errors quite a bit, but to a lesser extent it can also reduce the number of correct answers given^[5]. This happens because people aren't perfectly able to determine when they should answer or not. This is potentially a big concern for law enforcement. Whilst it is desirable to increase the accuracy of lineup identification decisions, this benefit cannot be outweighed by too great a reduction in the number of identification decisions. Thus,

offering a don't know option has the potential to reduce willingness to pick, with the danger that it may help free the guilty.

So, to summarise, our research programme had three aims. The first was to see whether witnesses are aware of the option to say "don't know" if they want to. Then we were interested in the two outcomes of explicitly offering a don't know option. How much did it improve the quality of decisions made, and how much did it reduce the quantity of decisions made?

Our Research

We conducted two large experiments funded by the Australian Research Council's Discovery Project^[6] scheme. In both, our witnesses viewed a video clip of a crime and, after a delay, completed an identification procedure. Experiment 1 tested 420 witnesses using showups^[7] (i.e., presentation of a single photograph) and Experiment 2 tested 439 witnesses using 6-person simultaneous lineups^[8]. Half of the identification procedures included the offender (i.e., they were "target present") and the other half an innocent suspect ("target absent"). Witnesses were always warned that the offender may or may not be present and were told of the importance of responding appropriately.

In Experiment 1, participants were randomly allocated to one of three different showup conditions. In the standard showup condition participants were required to indicate whether or not the photograph depicted the offender by clicking a "Yes" or "No" button on the computer screen. In the "Don't know" condition participants made the same "Yes" or "No" decision but also had the explicit option to click a button labelled "Don't know". Finally, participants in the "Own words" condition were asked to indicate whether or not the photograph was of the offender by typing their response into a text box using whatever words they wanted.

We included this own-words condition to see how often witnesses would spontaneously say that they don't know. The answer is almost never. Only 2% (of 139) of those who answered in their own words wrote down "don't know" or anything equivalent. In contrast, when explicitly provided with a "don't know" button 19% (of the 140) participants chose to use it. In other words, telling people it is OK to say don't know increases the likelihood that they will take up the option almost ten-fold. This answers our first question. Although a don't know option may be implicit when people are asked to make an identification, witnesses tend not to use it.

Having established that witnesses don't spontaneously use a "don't know" option, we now turn our attention to the question of whether they should be made explicitly aware of this option. To do this, we compared the *accuracy* of decisions made and the *number* of correct decisions made when the don't know option was or was not available.

How Much Does Allowing People to Say “Don’t Know” Improve Accuracy?

There are two ways a witness can give a correct answer: they can correctly identify the perpetrator if they are present, or they can correctly conclude the perpetrator is not-present if the suspect is innocent. Consequently, we looked at the accuracy of identification decisions and rejections separately for both experiments. Figure 1 displays the percentage of correct decisions of each type elicited following standard instructions or instructions that involved an explicit don’t know response as a valid option. The figure provides a striking and consistent answer to our question: For every type of lineup and every decision (identification or rejection), accuracy is improved by the inclusion of an explicit option to respond *don’t know*.

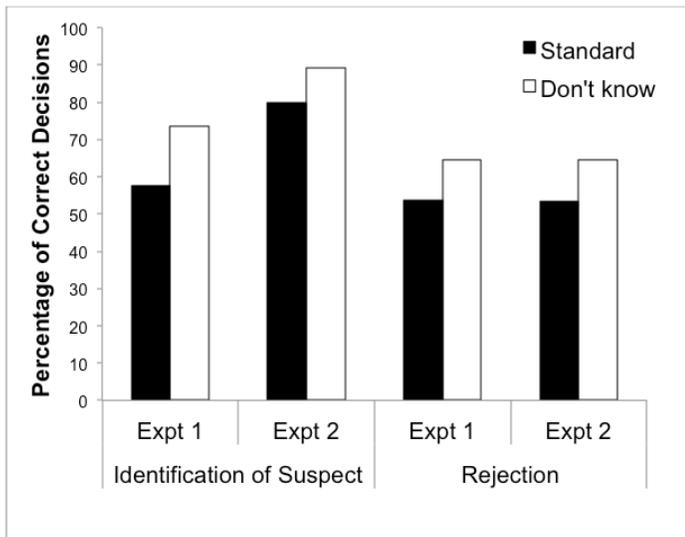


Figure 1. The percentage of correct decisions (identification or rejection) from showups (Experiment 1) and lineups (Experiment 2) under standard instructions and with an explicit “don’t know” option.

How Much Does Allowing People to Say “Don’t Know” Reduce Quantity?

Having established that a higher proportion of answers are correct if some witnesses opt out of a decision, the next question we asked was how many correct decisions were lost. These results are displayed in Figure 2. Again, the results are striking. For identification decisions where the suspect is guilty, there was no loss of correct decisions. Thus, for identification decisions, offering a don’t know option reduced the number of errors, but it didn’t reduce the number of correct responses at all.

The picture was more mixed for rejection decisions. For the show-up study (Experiment 1), once again, there was no reduction in the number of correct rejection decisions despite the increase in accuracy. However, for the lineup study (Experiment 2), offering a don’t know option reduced the number of correct rejections. We believe that this effect

is of little importance: these are witness decisions to reject a lineup, and so are not decisions that are likely to end up in court. Moreover, the outcome is largely the same in both cases: the suspect is not picked either because the witness rejects the lineup, or says that they can’t decide. We do not believe that such errors would be regarded as dangerous in the courtroom.

So, we now have a clear answer to our final question: The don’t know option did not meaningfully reduce the quantity of correct identifications of a guilty suspect from either identification procedure, nor did it reduce the quantity of correct rejections of an innocent suspect presented in showups. However, the don’t know option did reduce the number of innocent suspects who were correctly rejected, but only by shifting a clear rejection to a don’t know decision.

How can it be that we have increased the quality of decisions without any meaningful impact upon the amount of useful evidence obtained? The answer is surprisingly simple. A subset of witnesses have correctly realised that they are unable to make a meaningful judgement. Normal procedures encourage them to make a decision when they shouldn’t, and they are generally wrong. Offering them a way of opting out enables them to avoid this error, leaving the field clear for those who are making better-informed decisions.

Isn’t This Just Like Asking for Confidence?

If the aim is to identify and exclude those who are not very sure, then you may be wondering what is new here. Aren’t witnesses who make decisions regularly asked how sure they are? This is the case, but we think that there are two advantages of offering a don’t know option over simply asking for a confidence judgement. The most important is that a confidence judgement occurs after the decision, and we know that a process of confirmation bias occurs once a decision is made. People tend to focus on evidence to support their decision and play down factors that contradict their decision^[9]. As a result they can become increasingly convinced about their choice. For example, Jennifer Thompson who infamously misidentified Ronald Cotton as her rapist took between 4 and 5 minutes to make her first identification decision, and yet ultimately reported absolute certainty that she had picked the right person. Her subsequent confidence clearly didn’t reflect how difficult she had found the identification. Would the outcome have been different if she had been offered a don’t know option?

A second problem with a confidence judgement is that it is open to reinterpretation: What are the police or courts to do with the knowledge that a witness picked the suspect with “moderate” confidence, or with confidence rated at “50%” (or that it took 5 minutes)? In contrast, the selection or rejection of a don’t know option is unambiguous: The witness has declared that they can, or cannot, make a decision and this can’t be challenged by reinterpreting the meaning of “moderate”, or what “50% confident” means, or whether 5 minutes is a long

time to make a decision.

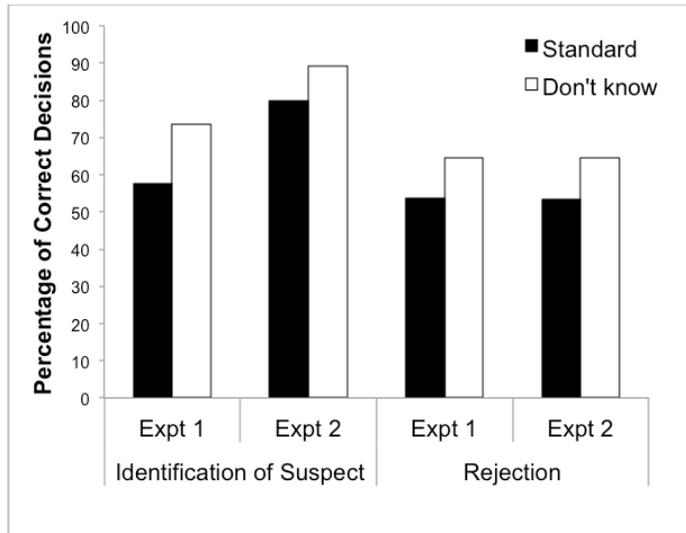


Figure 2. The percentage of identification procedures eliciting correct decisions under standard instructions and with an explicit don't know option.

Conclusions

Obviously, two studies, even with results as clear as these, don't provide a final scientific answer to a question. As always, more real-world research is needed to establish the generality and usefulness of our findings. Nevertheless, we believe that there are two important take-home messages from our work. The first is that witnesses making an identification decision don't know that it is OK to admit that they can't make a decision. A consequence of this is that some witnesses are making avoidable errors. The second message is that in order to avoid such errors, all witnesses need to be explicitly told that it is OK to say "don't know". The result is better quality of evidence, at relatively little cost, which can only be good for justice. ☺

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We asked three trial consultants to respond to this paper. Jonathan Vallano & Steve Charman, and Jessica Boyle respond below.

Vallano and Charman respond:

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Steve Charman, Ph.D. (<http://psychology.fiu.edu/faculty/stephen-charman>) is an Associate Professor of Legal Psychology at Florida International University in Miami, FL. He studies eyewitness memory as it pertains to lineup identification performance, and provides expert testimony in criminal cases involving eyewitnesses.

Weber and Perfect's article provides initial support for the benefits of explicitly informing eyewitnesses that they can respond "I don't know" when presented with a police lineup. Beyond enhancing eyewitness accuracy, the inclusion of a 'don't know' option can reduce the inherent suggestibility in police lineups by not forcing witnesses to render a judgment regarding whether the perpetrator is in the police lineup. There is also an easily overlooked benefit of allowing witnesses to opt out of a decision with a 'don't know' response: Witnesses not given that explicit option who tend to guess may become 'spoiled' for any future lineups if they identify a lineup filler. In contrast, the credibility of a witness who responds 'don't know' is preserved, and the witness can be shown additional lineups. Thus, the addition of this simple and easy to implement option enhances the administration of justice.

At first glance, an "I don't know" response may be interpreted by law enforcement as uninformative. Interestingly, however,

Wells and Olson (2002) have shown that a 'don't know' response actually has exonerating value: Witnesses are more likely to respond 'don't know' when the suspect is innocent rather than guilty. In fact, this makes sense: A 'don't know' response indicates that the witness lacked a strong enough recognition experience when viewing the lineup to make an identification, and thus suggests that the suspect is innocent.

The second author of this response has also recently collected data supporting this perspective (Kekessie & Charman, in preparation). In this study, we replicated Weber and Perfect's results: Giving witnesses the explicit option of a 'don't know' response when making a lineup decision decreased false identifications without a loss in correct identifications, thus increasing the overall diagnosticity of lineup identifications. Importantly, witnesses who responded 'don't know' were more likely to have viewed a target absent, rather than target present, lineup, again demonstrating the exonerating value of a 'don't know' response. Instead of thinking of a 'don't know' response as uninformative then, we should regard it as evidence (albeit somewhat weak evidence) that the suspect is innocent.

Implications for Research and the Legal System

As noted by Weber and Perfect, few researchers have specifically examined this topic. Despite the preliminary findings of an explicit 'don't know' option reducing false identifications with no concomitant reduction in correct identifications, we caution readers from drawing sweeping conclusions regarding the benefits of including a 'don't know' option.

As a parallel, consider the early research exploring the benefits of simultaneous and sequential lineups, which initially

concluded that sequential lineups were superior to simultaneous lineups (sequential lineups reduced false identifications without reducing correct identifications; Lindsay & Wells, 1985). However, later research demonstrated that sequential lineups may not be universally positive, as meta-analyses showed that these lineups also reduced the number of correct lineup identifications in target-present lineups (Stebly, Dysart, & Wells, 2012).

In fact, it is the rule, rather than the exception, for lineup manipulations that decrease false identifications to also decrease correct identifications (Clark, 2012). It is therefore highly important to replicate and extend these initial promising findings before concluding that an explicit 'don't know' option comes at no cost. We recommend, for instance, that future research delve deeper into the motivational and cognitive mechanisms underlying witness's identification decisions in the presence of this option. That is, how much implicit pressure does the lineup itself place on the witness to make a decision? If this pressure motivates witnesses to make some type of decision in a lineup, under what conditions does the 'don't know' option effectively alleviate or fail to alleviate this pressure? Perhaps, for instance, an explicit 'don't know' option fails to be beneficial under conditions in which there are strong cues to the witness that s/he should identify someone. (It should be noted, however, that Charman and Kekessie, in preparation, included a condition in which witnesses were given biased lineup instructions that strongly suggested the witness should identify someone; even in this condition, the 'don't know' option decreased false identifications without affecting correct identifications, a finding that perhaps speaks to the robustness of the effect).

Although the discussed research provides

strong evidence that including a “don’t know” option would reduce miscarriages of justice, it is unclear how the legal community would receive this option. It is possible that police officers would be resistant to employ this option, as they may be unsure of how to interpret a ‘don’t know’ response. It may be difficult to determine what steps to take upon obtaining a “don’t know” decision:

Do law enforcement subsequently administer the same or a different lineup, and most importantly, what happens to the status of the investigation?

Similarly, what will district attorneys make of a “don’t know” selection—will this selection frustrate prosecutors by discouraging the continued pursuit of the already identified suspect?

Moreover, little is known regarding the likelihood of a “don’t know” selection reaching the courtroom, and if so, how legal decision-makers (e.g., judges and jurors) will perceive this selection. It is highly likely that legal decision-makers may equate ‘don’t know’ with uncertainty and not appreciate the diagnostic value of this response.

Finally, we recommend that trial consultants use this information to inform litigators about how the absence of the ‘don’t know’ option may affect an eyewitness’s lineup identification accuracy. Whenever possible, litigation consultants should also advocate for the inclusion of best practices such as these within the jurisdictions they practice. ●

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Jessica Boyle responds:

Jessica Boyle, MA is a doctoral student studying Clinical Psychology with a concentration in Psychology and Law at the University of Alabama in Tuscaloosa, AL. Jessica conducts research within the University of Alabama’s [Witness Research Lab](#) under the supervision of Dr. Stanley Brodsky.

Solving Eyewitness Inaccuracy: Usefulness for the Jury Box

Mistaken eyewitness identification is a significant problem in the United States legal system. Wells and Quinlivan (2009) caution, “mistaken identification is the primary cause of conviction of the innocent” (p. 1). There is a large body of empirical research concentrating on the psychology of suspect misidentification. It is not uncommon for attorneys and expert witnesses to explain research findings surrounding this issue in the courtroom in order to help triers of fact evaluate evidence. A recent study by Weber and Perfect (2012) contribute to a smaller body of literature examining just how eyewitness identification procedures can be improved to prevent misidentification. Despite the limited data that exists surrounding the usefulness of the “I don’t know” option during lineup identifications, preliminary results are promising. Weber and Perfect (2012) assert that more studies are needed to corroborate the strength of the “I don’t know” option in

investigative proceedings. Still, attorneys may be wise to utilize information gleaned from this study and others in certain case proceedings that rely heavily on witness identification evidence. Attorneys promote justice by equipping jurors with the most thorough picture of eyewitness identification evidence as possible.

Eyewitness identification accuracy was questioned in a systematic fashion starting in the 1970s (Wells and Quinlivan, 2009). This body of research tends to go in one of two directions. Researchers either attempt to uncover the mental processes involved in suspect identification and misidentification (e.g., Clark, Marshall & Rosenthal, 2009) or they seek to uncover tools to prevent the problem in the first place. Research examining the psychology of misidentification shows that witnesses are frequently compelled to identify suspects, even when they are less than confident in their ability to do so. A number of factors contribute to this problem. For instance, eyewitnesses may pick a suspect due to a desire to please law enforcement agents, whom they see in a position of authority (Greene & Heilbrun, 2011). Another frequently cited problem is the suggestive or improper administration of the identification task (Charman & Wells, 2008; Wells & Quinlivan, 2009). According to Weber and Perfect (2012) confirmation bias poses a significant threat to identification accuracy as well because once identifiers have chosen a subject, they will selectively concentrate on information that favors their decision, while rejecting the information that does not support their decision. These factors work alone or in conjunction and pose a risk to identification accuracy and the implementation of justice within our legal system.

While we do know a great deal about why suspect misidentification occurs, a much more limited number of studies have identified useful techniques that work to prevent the problem in the first place (e.g. Warnick & Sander, 1980; Sauerland, Sagana, & Sporer, 2011). Weber and Perfect’s (2012) research seeks to cancel out eyewitnesses that are

ill equipped to make sound decisions during the identification process. In their study, mock eyewitnesses are given the explicit option to opt out of the identification task if they do not feel confident in their decision-making ability. Similar to research conducted over 30 years prior, it was found that giving an explicit “I don’t know” option tends to cancel out misidentifications and improve identification accuracy overall. Additionally, the opt-out option posed little threat to the quantity of reliable participant decisions.

Interestingly, Weber and Perfect (2008) are not the first to look at the potential benefit of giving witnesses an “I don’t know” option. Warnick and Sanders (1980) identified many of the same strengths of giving the “I don’t know” option, however their findings were dismissed due to the fact that people think eyewitnesses already know they have an “I don’t know” option. Previous research shows that time and again, multiple factors may compel an unsure witness to still identify a subject in a lineup. Through Weber and Perfect’s (2012) use of the “own words” experimental condition, they’ve shown that people will rarely, if ever, exercise their right to opt out of identifying a subject unless they are explicitly instructed that they may do so.

Weber and Perfect (2012) do a good job of identifying the current limitations of their research and acknowledge that more work can be done in laying out the benefits of utilizing an explicit “I don’t know” option. Although research thus far is limited, this does not mean that the information gleaned from the study by

Weber and Perfect (2012) and others (e.g., Warnick & Sanders, 1980) should not be cited and explained in the courtroom, particularly in cases where unnecessarily heavy weight may be given to eyewitness identification evidence. It may be worth the investment in time and money to hire a jury consultant or other expert that can aid attorneys in developing the language to explain the limitations of eyewitness identification evidence to jurors. If someone is identified as the perpetrator of a crime, an attorney could explore the circumstances surrounding the lineup proceedings. If an “I don’t know” option was not given to the witness, this may weaken the reliability of the evidence in the jury’s mind. It may also be worthwhile to explore factors that could potentially compel a witness to identify a suspect when they are less than certain about their decision-making ability.

Weber and Perfect’s (2012) study not only contributes to a wealth of knowledge available to attorneys for litigation advocacy, it takes the issue of eyewitness identification accuracy one step further by offering a concrete solution and procedure to law enforcement in their enhancement of the criminal system. The more tools we have to improve the accuracy of evidence presented at trial, the better for justice. Empirical studies surrounding the limitations and potential improvements of eyewitness evidence provide more information surrounding complicated psychological issues that can be imparted to the jury. Jurors are then better equipped to handle such issues and can more thoughtfully engage in deliberation and decision-making processes. ©

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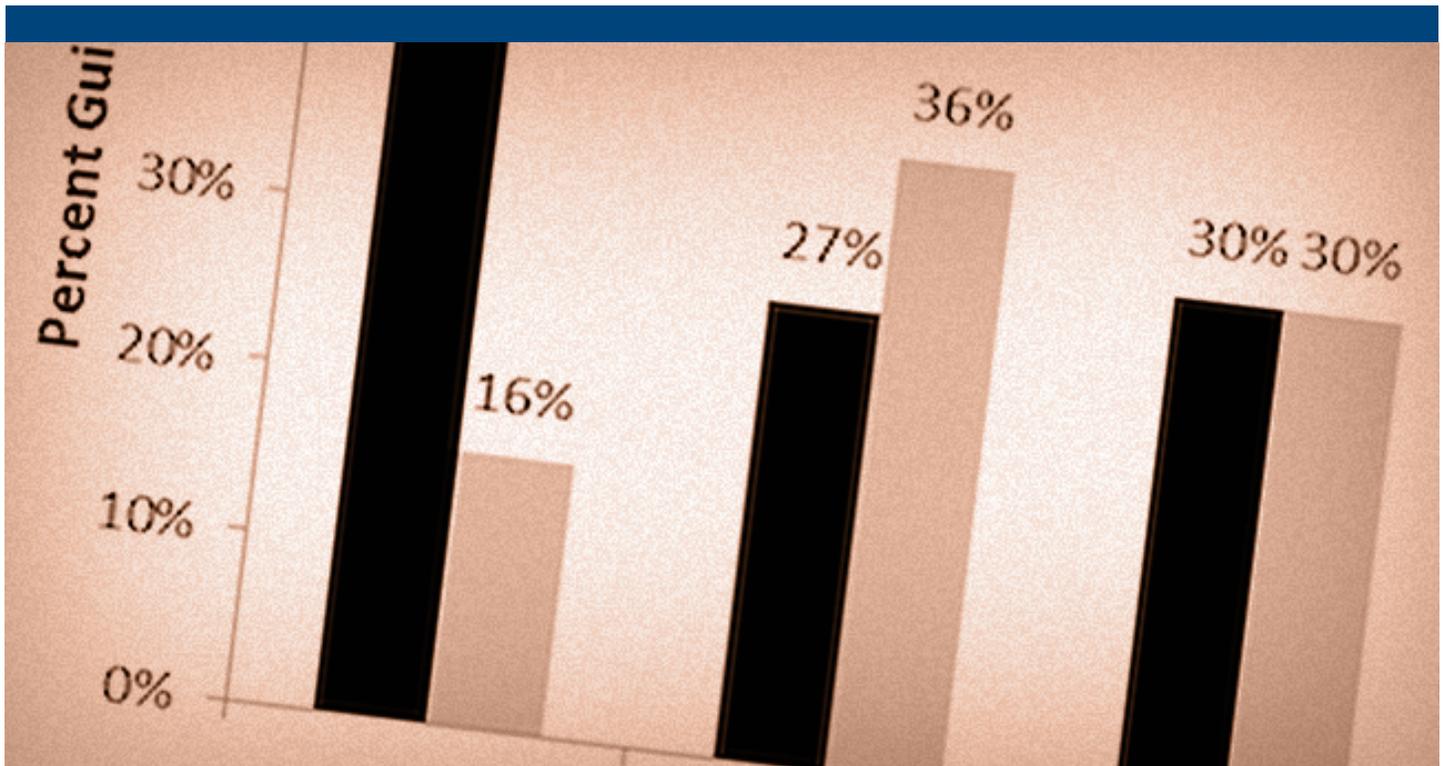
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The Interview-Identification-Eyewitness Factor (I-I-Eye) Method for Analyzing Eyewitness Testimony

by Nell B. Pawlenko, Richard A. Wise, Martin A. Shafer, and Brett Holfeld

Don't miss our trial consultant responses at the end of this article: Roy Arranda and Rita Handrich

EYEWITNESS ERROR is the leading cause of wrongful felony convictions. For example, eyewitness error played a role in 72% of the 302 DNA exoneration cases, and it is estimated that one-third of eyewitnesses make an erroneous identification (APA, 2011; Innocence Project, 2013). In this article, we discuss why jurors and legal professionals have difficulty evaluating eyewitness testimony. We also describe the I-I-Eye method for analyzing eyewitness testimony, and a scientific study of the I-I-Eye method that shows it can improve jurors' ability to assess eyewitness accuracy.

Jurors have trouble differentiating accurate from inaccurate eyewitnesses. For instance, studies of staged crimes show that mock jurors cannot distinguish between accurate and inaccurate eyewitnesses (Wells, Lindsay, & Ferguson, 1979). There are several reasons why jurors have difficulty. First, they have limited knowledge of eyewitness factors (Schmechel, O'Toole, Easterly, & Loftus, 2006). Second, they tend to rely on factors that are poor predictors of accuracy such as the eyewitness's confidence at trial (Wells et al., 1998). In fact, eyewitness confidence is generally the most important factor that jurors use in evaluating eyewitness accuracy even though

it has little probative value in assessing accuracy by the time of trial.

Third, jurors tend to ignore factors that are good predictors of accuracy such as whether the perpetrator used a weapon and most significantly how the police conducted the eyewitness interviews and identification procedures in the case (Shaw, Garcia, & McClure, 1999). These system variables are particularly important in assessing eyewitness accuracy because the police can generally control how they conduct the eyewitness interviews and identification procedures and can usually create an objective record of them by videotaping them. In contrast, the criminal justice system cannot control the eyewitness factors at the crime scene (i.e., the estimator variables,) and it usually must rely on the subjective reports of the eyewitness in evaluating them. Moreover, information supplied to the eyewitness after the crime (i.e., post-event information) and suggestion can influence eyewitness reports of estimator variables. Lastly, jurors have difficulty assessing eyewitness accuracy because even if they were knowledgeable about eyewitness factors they would have difficulty integrating their knowledge into the facts of a criminal case. Even experts

have difficulty applying their knowledge to the facts of a case (Cutler & Penrod, 1995).

Law enforcement officers, prosecutors, defense attorneys, and judges also have limited knowledge of eyewitness testimony (Wise, Pawlenko, Safer, & Meyer, 2009; Wise & Safer, 2004; Wise, Safer, & Maro, 2011). Accordingly, legal professionals often lack the knowledge necessary to help jurors evaluate eyewitness accuracy. In addition, legal safeguards such as voir dire, cross-examination, closing arguments, and jury instructions, are ineffective in educating jurors about eyewitness factors. Even expert testimony about eyewitness accuracy is generally ineffective because it usually causes jurors to disbelieve all eyewitnesses rather than helping them differentiate between accurate and inaccurate eyewitnesses (Leippe & Eisenstadt, 2009; Matire & Kemp, 2011).

The I-I-Eye Method

To address these problems, Professor Wise developed the interview-identification-eyewitness factor (I-I-Eye) method for analyzing eyewitness accuracy (Wise, Fishman, & Safer, 2009). The I-I-Eye method consists of four steps. First, you assess whether the eyewitness interviews were properly conducted by determining if law enforcement (a) obtained the maximum amount of accurate information from the eyewitness; (b) contaminated the eyewitness's memory with post-event information; or (c) artificially increased the eyewitness's confidence. Second, you determine if the identification procedures were properly conducted. The I-I-Eye method provides scientific guidelines, for assessing whether the eyewitness interviews and identification procedures were properly conducted. If there was substantial bias in how the eyewitness interviews and identification procedures were conducted, you should assume that the eyewitness testimony is inaccurate unless an exception applies. The exceptions include if the eyewitness conditions at the crime scene were unusually good or if there is substantial corroborating evidence of the accuracy of the eyewitness testimony.

If proper procedures were followed or an exception applies, you proceed to step 3 and consider the eyewitness factors at the crime scene. The eyewitness factors at the crime scene are divided into three types: factors pertaining to the eyewitness (e.g., the eyewitness's view of the perpetrator), the perpetrator (e.g., the perpetrator used a weapon), and the crime (e.g., the lighting at the crime scene). Finally, you answer questions about the eyewitness testimony in the case that helps you assess its likely accuracy.

In summary, the I-I-Eye method helps identify and organize the many different types of eyewitness factors that affect accuracy. Even more importantly it provides a framework for applying the relevant eyewitness factors to the facts of a case. Thus it specifies the order in which the different kinds of eyewitness factors should be evaluated, provides scientific standards for evaluating them, and asks summary questions

that help the evaluator arrive at a conclusion about the likely accuracy of the eyewitness testimony. Finally, because the I-I-Eye method supplies a framework for applying the eyewitness factors to the facts of a case, it may cause jurors and legal professionals to rely more on good predictors of accuracy when evaluating eyewitness testimony such as whether the police followed proper eyewitness procedures. It may also discourage them from relying on poor predictors of accuracy such as an eyewitness's confidence at trial. A form is available in the appendix to this article to help you apply the I-I-Eye method to eyewitness testimony in criminal cases (Wise et al., 2009, p. 513; Wise & Safer, 2012; p. 34 Wise, Safer, & Cushman, 2011, p. 39).

We conducted a study to determine if the I-I-Eye method could improve mock jurors' ability to assess eyewitness accuracy (Pawlenko, Safer, Wise, & Holfeld, 2013).

A Scientific Test of the I-I-Eye Method^[1]

Participants

Participants were 293 psychology students from three universities (60.5% female, 39.5% male). Two of the universities are private urban, east-coast universities and the third is a public, Midwestern university.

Procedure

Participants were randomly assigned to one of six groups. The groups differed in two ways: First, each group received one of three teaching aids: the jury duty aid, the *Neil v. Biggers* aid, or the I-I-Eye aid (see below). Second, each group received either a trial transcript that contained strong eyewitness testimony or weak eyewitness testimony (see below).

Participants first viewed one of the three teaching aids that were presented on 24 PowerPoint slides. The participants then read one of two 27-page trial transcripts containing either strong or weak eyewitness testimony. Next, participants completed a questionnaire where they entered their verdicts in the case, gave reasons for their verdicts, and answered other questions about the case.

Teaching Aids

Participants received one of three teaching aids:

Jury Duty Aid

The jury duty aid (hereafter 'JD') was one of two control aids. It provided participants with the kinds of information that they might receive if they were a juror in a criminal case such as the importance of remaining fair and impartial, considering all the evidence before rendering a verdict, et cetera.

Neil v. Biggers Aid

The Neil v. Biggers aid (hereafter 'NvB') was the second control condition. It described the five eyewitness factors that the Supreme Court said jurors should consider when evaluating eyewitness accuracy: (i) the eyewitness's view of the perpetrator during the crime; (ii) the length of time between the crime and identification procedure; (iii) the eyewitness's confidence in their identification at the time of the lineup; (iv) the accuracy of the eyewitness's prior description of the perpetrator; and (v) the amount of attention the eyewitness paid to the crime. The NvB aid also gave a rationale for each of the five factors (*Neil v. Biggers*, 1972; *Manson v. Brathwaite*, 1977).

I-I-Eye Aid

The I-I-Eye aid instructed participants when assessing eyewitness accuracy to first evaluate the eyewitness interview, then the identification procedure, and lastly the eyewitness factors at the crime scene. The I-I-Eye aid also gave participants examples of factors they should consider when evaluating the interview (e.g., open-ended questions vs. closed ended or leading questions), the identification procedure (e.g., line administrator did not know the suspect's identity vs. the lineup administrator knew the suspect's identity), and the eyewitness factors at the crime scene (e.g., same race vs. cross-race identification). The I-I-Eye aid emphasized to the participants the importance of conducting proper eyewitness interviews and identification procedures.

Trial Transcripts

The participants read a trial transcript concerning a convenience store robbery and murder of the sales clerk that contained either strong or weak eyewitness testimony. The transcripts were modified versions of an existing transcript so they would not favor the I-I-Eye aid. Consequently, the I-I-Eye aid discussed eyewitness factors that were not mentioned in the transcripts (e.g., cross-racial identifications).

In both the strong and weak eyewitness transcripts, the sole eyewitness and a detective testified for the prosecution and the defendant's girlfriend provided an alibi for the defendant. The defendant did not testify, and all witnesses underwent direct and cross-examination. Both transcripts contained identical opening statements, closing arguments, and jury instructions.

Eyewitness Factors in the Transcripts

The strong and weak eyewitness transcripts had identical eyewitness factors at the crime scene (i.e., estimator variables). Consequently, in both transcripts the eyewitness testified that (a) she could see the perpetrator because the store was well lit; (b) she paid attention to the crimes, (c) she observed the perpetrator for two minutes; (d) she was standing about 15-20 feet from the perpetrator; (e) she experienced stress during the crimes, (f) she was the same race as the perpetrator, (g) she saw the perpetrator's handgun; and (h) she noticed that the

perpetrator was wearing a baseball cap.

To make the transcripts more realistic, they also contained several identical eyewitness factors that related to the interview and the photo array (i.e., system variables). Accordingly, the eyewitness factors in the strong eyewitness transcript were not completely strong and the eyewitness factors in the weak transcript were not completely weak. For example, in both transcripts the police conducted the photo array three weeks after the crime, the eyewitness viewed only one lineup, and the eyewitness immediately and confidently identified the defendant from the photo array.

The strong and weak eyewitness transcripts differed on four eyewitness factors for the interview and seven eyewitness factors for the photo array. The police conducting the eyewitness interview and photo array in the strong eyewitness transcript followed proper procedures for these eleven eyewitness factors, but they did not follow proper procedures for these eleven eyewitness factors in the weak eyewitness transcript. Consequently, the eyewitness testimony in the strong eyewitness transcript was more likely to be accurate than the eyewitness testimony in the weak eyewitness transcript.

For instance, in the strong eyewitness transcripts the detective conducted the interview in a quiet room without distractions, asked the eyewitness if she heard media reports of the crime, and requested the eyewitness not to discuss the crime with others and to avoid media accounts of the crime. In the weak eyewitness transcript, the detective conducted the interview in his busy office, did not inquire if the eyewitness had heard media accounts of the crime, and did not warn the eyewitness not to speak to others about the crime and to avoid media reports of the crime. In addition, in the strong eyewitness transcript, the detective asked about the color of the perpetrator's hair, but did not suggest it was a particular color. The detective also did not comment about the eyewitness's view of the perpetrator. In contrast, in the weak eyewitness transcript, the detective asked if the perpetrator's hair was blond (a leading question), and commented that the eyewitness must have had a good view of the perpetrator.

In the photo array in the strong eyewitness transcript, the detective matched the foils to the eyewitness's description of the perpetrator and used seven foils. The detective had another officer (who did not know the identity of the suspect) conduct the photo array (i.e., a double-blind, photo array), and he used a sequential photo array (i.e., a photo array where the photos are presented individually rather than all at once, which reduces erroneous identifications). In addition, the officer who conducted the photo array used proper cautionary instructions including warning the eyewitness that the perpetrator may not be in the photo array. He also took a statement of the eyewitness's confidence in her identification immediately after the lineup and prior to any feedback. In the weak eyewitness transcript, the detective conducted a five-person, simultaneous photo array (i.e., all the pictures were presented at one time),

and instructed the eyewitness to choose the photo that “looked familiar.” The detective chose four foils that matched the perpetrator’s photo and informed the eyewitness after she identified the suspect that she selected “the guy they thought it was.”

Results and Discussion

The percentage of participants rendering guilty verdicts for each aid condition for the strong and weak eyewitness transcripts were I-I-Eye aid (55% for strong and 16% for weak), NvB aid (27% for strong and 36% for weak), and J.D. aid (30% for strong and 30% for weak; see Figure 1). Statistical tests indicated that only the I-I-Eye group could discriminate between the strong and weak eyewitness transcripts. The I-I-Eye group rendered significantly more guilty verdicts for the strong eyewitness transcript than both of the control groups. The I-I-Eye group also had significantly fewer guilty verdicts for the weak eyewitness transcript than the NvB group and the combined NvB and JD groups but not than the JD group.

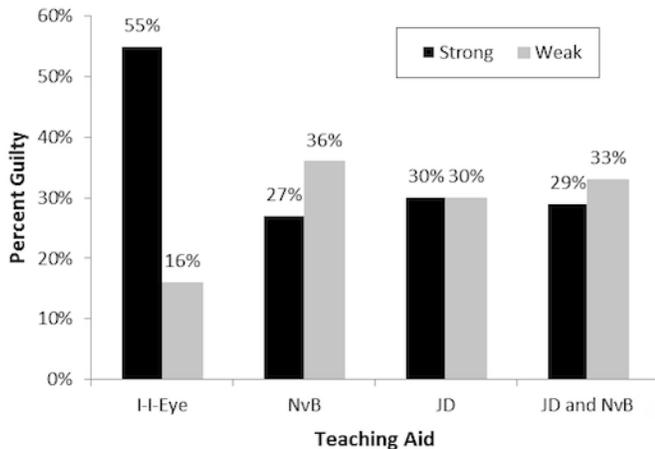


Figure 1. Percentage of guilty verdicts by transcript type (strong, weak) among the three teaching aid conditions and the combined control groups.

The participants gave reasons for their verdicts. The I-I-Eye group was much more likely than the control groups to mention how the interview and identification procedures were conducted as a reason for their verdicts. In contrast, the two control groups were more likely to cite an absence of forensic evidence such as blood or fingerprints as a reason for their verdicts, even though the absence of forensic evidence was not mentioned in the transcripts. Lastly, the I-I-Eye group was more knowledgeable about the relevant eyewitness factors in the transcripts than participants in the control groups.

In summary, the I-I-Eye aid, unlike the control aids, appeared to sensitize the participants to the eyewitness factors in the case. Thus only the participants in the I-I-Eye group were able to distinguish between the weak and strong eyewitness transcripts.

These results may have occurred because the I-I-Eye method provided participants with a comprehensive framework for analyzing eyewitness testimony. Accordingly, it may not only have helped participants identify and organize the many different types of eyewitness factors in the transcripts, but it may also have helped them to apply the eyewitness factors to the facts of the cases.

Other Studies of the I-I-Eye Method

In a second experiment, that included both eyewitness evidence and circumstantial evidence, only the I-I-Eye group was able to discriminate between the strong and weak eyewitness testimony (Murphy, Safer, Wise, & Holfeld, 2013). In a third study, the I-I-Eye method improved the effectiveness of eyewitness expert testimony (Wise & Kehn, in preparation).

How Prosecutors and Defense Attorneys Can Use the I-I-Eye Method

There are several ways that prosecutors and defense attorneys can use the I-I-Eye method to evaluate the eyewitness evidence in criminal cases. Prosecutors can use the I-I-Eye method to determine if the eyewitness testimony in a case is sufficiently reliable to indict a defendant. Prosecutors can also use the I-I-Eye method to help them decide if they should offer a plea bargain in a case or take a case to trial. Defense attorneys can apply the I-I-Eye method to help them determine if they should recommend a plea bargain to their clients. In addition, the I-I-Eye method can assist defense attorneys in deciding if they should file a motion to suppress an identification or hire an eyewitness expert to testify at trial. For instance, they may want to file a motion to suppress or hire an eyewitness expert if there was substantial bias in how the eyewitness interviews or identification procedures were conducted or if the eyewitness conditions at the crime scene were poor.

Prosecutors and defense attorneys can also use the I-I-Eye method at hearings on motions to suppress an identification and in criminal trials. For example, it can assist them in preparing their opening statements and closing arguments that pertain to the eyewitness testimony in a case. Prosecutors and defense attorneys can use the I-I-Eye method to help them prepare direct and cross-examinations of eyewitnesses, law enforcement officers, and eyewitness experts. Moreover, as previously stated, an eyewitness expert’s use of the I-I-Eye method may improve the effectiveness of eyewitness expert’s testimony. Attorneys can use the I-I-Eye method to draft jury instructions concerning the eyewitness testimony in a criminal case. The I-I-Eye method can help prosecutors and defense attorneys address any other eyewitness issues that arise in the course of a criminal case. The I-I-Eye method may also decrease jurors’ expectation that prosecutors should introduce forensic evidence in every criminal case.

On appeal, the I-I-Eye method can assist defense attorneys in determining what assignments of errors and arguments they

should make about the eyewitness testimony in their appellate briefs and during oral argument. Prosecutors can use the I-I-Eye method on appeal to help them refute in their brief and at oral argument that the eyewitness testimony in the case was unreliable or that the refusal of the trial court to admit eyewitness expert testimony constituted prejudicial error. The I-I-Eye method may also benefit law enforcement officers and judges as well as jurors and attorneys (Wise & Safer, 2012; Wise, Safer, & Cushman, 2011). Lastly, the I-I-Eye method appears relatively easy to learn and is inexpensive to use.

Footnote

^[1]We are grateful to the editors of Applied Cognitive Psychology for giving us permission to publish this nontechnical version of the Pawlenko et al. (in press) article. Nell B. Pawlenko conducted

research on the I-I-Eye method to fulfill the requirements for a doctoral dissertation at Catholic University of America. Her research was supported in part by an American Psychology-Law Society grants-in-aid dissertation award. The authors thank Marissa Cormier, Eileen Curtaeyne, and Angelica Wittstruck for their help in collecting and coding the data in her study. We thank the American Judges Association, the Connecticut Law Review, and the National Association of Criminal Defense Lawyers for giving us permission to publish the form for applying the I-I-Eye method to the facts of a criminal case. We also thank Ryan Murphy for allowing us to include his research on the I-I-Eye method in this article. ©

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Appendix

Form for Evaluating the Accuracy of Eyewitness Testimony

I. Eyewitness Interview (Evaluate separately each interview of an eyewitness.)

A. Factors That Indicate the Interview Was Complete, Fair, and Did Not Increase Eyewitness Confidence.

1. List Factors that Indicate the Interview Obtained the Maximum Amount of Information from the Eyewitness:

1. List Factors that Indicate the Interview Was Fair and Did Not Contaminate the Eyewitness's Memory of the Crime:

1. List factors that Indicate the Interview Did Not Increase Eyewitness Confidence:

B. Factors that Indicated the Interview Was Incomplete, Biased, and Increased the Eyewitness's Confidence

1. List Factors that Indicate the Interview Did Not Obtain the Maximum Amount of Information from the Eyewitness:

1. List Factors that Indicate the Interview Was Biased and Contaminated the Eyewitness's Memory of the Crime:

1. List Factors that Indicate the Interview Increased the Eyewitness's Confidence

II. Identification Procedures (Conduct a separate analysis for each identification procedure)

A. List Factors that Indicate the Identification Procedure Was Fair and Impartial:

B. List Factors that Indicate the Identification Procedure Was Biased.

If the interviews and identification procedures were substantially fair and unbiased or an exception applies (e.g., the eyewitness knew the perpetrator prior to the crime or had prolonged, repeated exposure to the perpetrator, or there is reliable, valid corroborating evidence of the accuracy of the eyewitness testimony) go onto Part III. If an interview or identification procedure was significantly unfair and biased and no exception applies and it likely affected the accuracy of the eyewitness testimony and identification, the eyewitness testimony or any subsequent identification of the defendant by the eyewitness has no probative value and should not be considered in the determination of the defendant's guilt.

III. Eyewitness Factors during the Crime That Likely Affected Identification Accuracy

A. List Eyewitness Factors During the Crime that Likely Increased Eyewitness Accuracy:

B. List Eyewitness Factors During the Crime that Likely Decreased Eyewitness Accuracy:

IV. Conclusions

1. Was the maximum amount of information obtained from the eyewitness during the interviews?

1. ____ yes 2. ____ no

1. Was a statement of the eyewitness's confidence in the accuracy of the identification obtained prior to any feedback?

1. ____ yes 2. ____ no

1. Is there a high, medium, or low probability that the eyewitness testimony was accurate?

1. ____ high 2. ____ medium 3. ____ low

D. Is there a high, medium, or low probability that the eyewitness identification was accurate?

1. ____ high 2. ____ medium 3. ____ low

We asked two trial consultants to respond to this paper. Roy Aranda and Rita Handrich respond below.

Roy Aranda responds:

[Roy Aranda, Psy.D., J.D.](#) (Suffolk County Psychological Association's 2013 Psychologist of the Year) is a forensic psychologist with offices in N.Y. and Long Island. He has been involved in several high profile cases including traveling to Cuba and Puerto Rico and testifies frequently in criminal and civil cases throughout New York State.

Pawlenko, Wise, Safer, and Holfeld have tackled a thorny issue that comes up often enough in trials: eyewitness error. Drawing upon a wealth of research, they note that eyewitness error is the leading

cause of wrongful convictions.

The premise of the article is that, given the propensity for erroneous identification by eyewitness, in some cases of large magnitude such as, "*eyewitness error played a role in 72% of the 302 DNA exoneration cases*", it becomes essential – in the pursuit of justice – that jurors successfully distinguish accurate from erroneous identifications.

Before there can be an intervention – any intervention – as a threshold measure, "consumers" must have an accurate, empirically-driven basis to understand the nature of the problem. We cannot manipulate variables that impact the accuracy of eyewitness identification in

the eyewitnesses in a meaningful way at trial. We can, however, recognize variables that affect jurors' ability to assess eyewitness accuracy and put them to good use to help them decrease mistakes in judging eyewitness testimony.

Pawlenko, Wise, Safer, and Holfeld identify the following crucial factors:

- Jurors have limited knowledge of eyewitness factors.
- Jurors tend to rely on factors that are poor predictors of accuracy (e.g. heavy reliance on eyewitness confidence despite limited probative value.)
- Jurors tend to ignore factors that

are good predictors of accuracy (e.g. whether the perpetrator used a weapon; how the police conducted the eyewitness interviews and identification procedures in the case). These system variables provide a baseline to proceed to the next step: who are the “players” in need of an “intervention?”

Jurors exclusively? The answer is no. Pawlenko, Wise, Safer, and Holfeld point out that prosecutors, defense attorneys, and judges too are “guilty” of lacking knowledge about the pitfalls of eyewitness testimony.

Knowing what the problem is regarding eyewitness testimony and who the “players” are in a trial, the third step is, what can we do about it?

The authors note traditional legal safeguards consisting of admonitions by the judge, voir dire, cross examination, closing arguments, jury instructions and even expert testimony on eyewitness accuracy are of limited efficacy in rooting out inaccurate eyewitnesses.

The interview-identification-eyewitness factor (I-I-Eye) method for analyzing eyewitness accuracy was developed to help tackle the problem of ferreting out unreliable eyewitness testimony. The 4-step method was field-tested recently using a subject population of 293 students from three universities.

The authors delved into what the I-I-Eye method consists of in the article and compared its efficacy to two controls under two conditions: the Jury Duty Aid and Neil v. Biggers Aid followed by exposure to a transcript of strong eyewitness trial testimony or weak eyewitness trial testimony.

Three I-I-Eye method studies provided promising results, namely that the I-I-Eye method improved the effectiveness of distinguishing strong and weak eyewitness testimony.

Returning to the formula, Problem-Who-Solution, the question to ask is, can the I-I-Eye method make a niche in

the world of trials? Time and research will tell.

Pawlenko, Wise, Safer, and Holfeld propose several ways in which the I-I-Eye method that is relatively easy to learn and inexpensive to use can find its way into the courtroom:

- Prosecutors can use the I-I-Eye method to determine if the eyewitness testimony in a case is sufficiently reliable to indict a defendant.
- Prosecutors can use the I-I-Eye method to help them decide if they should offer a plea bargain in a case or take a case to trial.
- Defense attorneys can apply the I-I-Eye method to help them determine if they should recommend a plea bargain to their clients.
- The I-I-Eye method can assist defense attorneys in deciding if they should file a motion to suppress an eyewitness identification or hire an eyewitness expert to testify at trial.
- Prosecutors and defense attorneys can also use the I-I-Eye method at hearings on motions to suppress an eyewitness identification and in criminal trials.
- The I-I-Eye method can assist defense attorneys and prosecutors in preparing their opening statements and closing arguments that pertain to the eyewitness testimony in a case.
- Prosecutors and defense attorneys can use the I-I-Eye method to help them prepare direct and cross-examinations of eyewitnesses, law enforcement officers, and eyewitness experts.
- The I-I-Eye method can be used by prosecutors and defense attorneys to draft jury instructions concerning the eyewitness testimony.
- The I-I-Eye method can be used on appeal to weigh in on the reliability of eyewitness testimony. Of course, all of these applications need to be empirically assessed. At first blush, the

notion that a well-defined method, rooted in science, that is relatively easy to learn and inexpensive to use can have a significant impact in the unwieldy world of eyewitness testimony is nothing short of psycholegally exciting.

Pawlenko, Wise, Safer, and Holfeld confined their comments to criminal cases. Perhaps some of the tenets of the I-I-Eye method, modified to suit the system needs in different contexts, can be used in other non-criminal legal proceedings that make use of eyewitnesses and rely on their testimony.

For instance, as a hypothetical, in a negligence proceeding involving a car accident:

- Were eyewitness interviews properly conducted by a police officer at the scene, by investigators, at a deposition, et cetera?
- Was eyewitness memory contaminated with post-event information?
- Was eyewitness confidence artificially increased? And so on...¹⁰

Rita Handrich responds:

Rita Handrich is a senior trial consultant and Research Director with Keene Trial Consulting and a frequent contributor to their firm blog, [The Jury Room](#). She is also Editor of The Jury Expert.

A Better Mousetrap? I-I-Eye Model for Helping Us Assess the Accuracy of Eyewitness Testimony

I first read the research this article is based on early this year when [Doug Keene blogged on it for our firm blog](#). I found it fascinating then and that has not changed. I was especially intrigued by the research since I read it after we worked on a civil [wrongful conviction case](#) where this sort of model for assessing eyewitness accuracy would have saved a lot of pain and loss for an innocent man if it had been used successfully.

As we prepared for work on that case, we wrote an article for *The Jury Expert* on [false confessions and the mystery of why they occur](#). The voluminous research on that topic was very disturbing. It was even more disturbing to watch as almost every trend documented in the literature occurred along the way in our wrongful convictions case. So, for me, the idea that there is an inexpensive and effective way to teach jurors (and those who come before) how to assess the accuracy of specific eyewitness testimony is a tantalizing one.

I still don't know if expert [training] testimony on the I-I-Eye model would be allowed in court, but it would be intriguing if it were. While the authors stress that more research is needed (and of course it is), this model offers an opportunity to increase just outcomes for those falsely accused (and then wrongfully convicted). Even better, the authors' recommendation that this model be used prior to the decision to go to trial could short-circuit the snow-balling of errors that occur in wrongful conviction cases. It's a wonderful thought.

As I looked at this article again, [Jason Barnes](#), our Associate Editor, suggested two videos that illustrate the difficulty the eyewitness faces. Both are from the BBC and both are true-to-life examples of how we really do not pay attention and thus have to simply make details

up to cover our lack of attention. It isn't like we lie on purpose. We simply have [a habit of trying to "fill in the blanks"](#) in our memories and once we tell our story once, we re-tell that same version again so that the story is not really what we saw—it is simply our [re-creation of what we said we saw](#) when first asked to reconstruct the [faulty] memory.

Take a look at these two BBC videos of eyewitness examples:

Can you spot the murderer?
http://youtu.be/v_QbTX2qS10

Never forget a face?
<http://youtu.be/7JlzeUh5rts>

If you did better than the witnesses in these videos, remember you were warned that something was about to happen that would make these onlookers into eyewitnesses. In real-life, we don't have that sort of warning. There is often chaos and fear in the moment that distracts us—like in the first video. Or, as in the second video, there is nothing out of the ordinary and we simply go back to our lives and thinking about where we are going, what we will have for dinner, that cookie in the bakery window calling out to us, or a work project challenging us with complex wrinkles. When we are asked to then recall the event in detail, we are often stumped. But we don't want to be and so we desperately struggle to

recall specifics.

Another good video is this TED talk (courtesy of NPR) from Scott Fraser. It's a terrific example of how our minds fill-in-the-blanks of holes in our memories. And a horrific example of how a man lost twenty years of his life through well-intentioned but simply false eyewitness testimony. As Fraser tells us, *"the accuracy of our memories is not measured either by how vivid they are nor how certain we are that they are correct."*

Can eyewitnesses create memories?
http://www.ted.com/talks/scott_fraser_the_problem_with_eyewitness_testimony.html

Eyewitnesses want to do the right thing. They want to get it right. So very often, though, they simply don't. The I-I-Eye model offers one of the best options I've seen to help us sort out when we should not rely on eyewitness testimony and when, perhaps, it makes sense to do so. I hope this group keeps working on the I-I-Eye model and that it will soon be at a place where law enforcement and our criminal justice system will use it and the courts will not think twice about letting experts teach jurors how to make decisions based on science rather than on the jurors' perception of the eyewitness' seeming confidence and certainty. ©



80 iPad Apps Attorneys Love, 8 Days a Week: An App Strategy for Work, the Courtroom, and Your Personal Life

by Alison K. Bennett

YOU'VE SEEN LIST AFTER LIST of “best of” apps, so let’s have a little fun with it this time. We’ve identified 80 iPad apps you can use in your professional and personal life, and we introduce them to you by following a couple of fictional law partners through their adventures for a week to see how they put their tablets to use. So, let’s get started with John Frugalis and Agnes Smith. Both were early adopters of iPad technology. John prefers free or less expensive versions of apps when possible, while Agnes is all about efficiency and doesn’t mind shelling out a few bucks for a little technological peace of mind.

Most of the apps John and Agnes use are iPad native, which means they were written for the iPad, although some are optimized for the iPhone 5, but are compatible with iPad. If you prefer to simply read about the apps, there is a guide available for download.^[1]

Sunday

- John and Agnes prepare for a busy week. Agnes prepares to travel back to Memphis, TN for a trial, while John goes to

their firm to continue preparation for a local trial. They both consult [Asana](#) (Free), a robust time management program that keeps their practice and personal lives on track. Like many of their apps, Asana syncs to their iPhones, so their lists are always up to date.

- John and Agnes have been receiving ongoing updates from [Yammer](#) (Free) by Microsoft, relating conversations and status updates on open projects and firm business. Yammer can be used as a sort of Facebook for business and works well in concert with apps like Asana to record conversations in one place so that they are easier to track. Agnes adds a couple of posts about their office IT project and uploads a document she found online that she believes will be helpful.
- Agnes consults her [Packing Pro](#) (\$2.99) “Pre-Trip To Do” list, and begins packing with her customized “Trial Trip” packing list, checking items off as she packs them.
- Agnes notices she is low on toothpaste while packing, so she scans its barcode to add it to [Grocery IQ](#) (Free). What Agnes loves about Grocery IQ is it syncs to her iPhone, so

the list is with her all the time, and her family can contribute items they need as well. Since the list is available to all family members, Agnes can also delegate the list to other family members as needed.

- Agnes gets a real time flight alert from [WorldMate Gold](#) (\$99.99 yr) and double checks her itinerary for the whole week. As a road warrior, Agnes finds this full-featured travel app invaluable. John does not travel quite as often as Agnes, and would never pay that much for a travel app, so he uses [TripIt](#) (Free). He especially likes that when he updates his travel arrangements, it will automatically email his assistant and his spouse.
- Before driving to the airport, Agnes takes a quick look at [FlightBoard](#) (\$3.99). FlightBoard looks like an actual flight board at the airport, so it is easy for her to find her flight, terminal and gate information.
- Once Agnes gets to the airport, she checks [GateGuru](#) (Free), for real-time security line wait times and to find out what restaurants, stores and amenities are close to her gate.
- When John begins work, he starts the timer on [OfficeTime](#) (\$7.99), to track his time. He has already set up the trial and types of billable hours in the program, so when he is finished with the billing cycle, or trial, he emails the information to his assistant and only has to review the final bill instead of creating it. John estimates this app alone has given him back several days a year.
- John begins his afternoon by going through his trial notebook, which he put together in [Circus Ponies Notebook](#) (\$29.99). Once John got over the name of the app, he came to appreciate its value in organizing all of his paperwork for trial. He also likes the voice annotation feature and the ability to annotate documents.
- John then prepares to work with his main witness, referring to her information in [iTestimony](#) (\$9.99). John will update her profile after the meeting and assign a paralegal to take notes on her testimony at trial.
- John then reviews his witness' deposition transcript in [Documents by Readdle](#) (Free), one of his go-to apps. John uses Documents by Readdle to read and mark depositions and trial transcripts. Important pages can be tabbed and documents can be annotated. In addition, it is a media player, so the app serves as a file manager, a viewer app, and a media player all in one.
- Occasionally John gets a transcript in TXT format, and when that happens, he prefers to use the [TranscriptPad](#) (\$49.99) app, although it killed him to pay that much for it. However, he does enjoy the scrolling feature, which allows him to scroll through the text at an adjustable speed, like a teleprompter.

- John reviews his email and downloads a WordPerfect document. Since John doesn't have WordPerfect on his iPad, he uses the [WordPerfect Viewer](#) (\$5.99). He then uses [Office²HD](#) (\$7.99), which opens the Excel spreadsheet received from his accountant and allows him to review it, edit it if necessary and sync it to his [Dropbox](#) (Free: 2GB) cloud storage account before sending his approval. Office²HD meets John's needs, including his need for a lower price, but Agnes prefers the more expensive [Documents To Go Premium](#) (\$16.99) for her document review and editing needs. She prefers the ability to sync her laptop computer's documents with the free Documents to Go Premium desktop application.
- When John sends his approval for the Excel spreadsheet with further instructions to his accountant, he uses [iTrackMail](#) (Free/Pro \$4.99) to make sure his accountant receives it. Five minutes later, he receives a push alert to let him know it has been opened, so he can check that task off his list.
- After arriving in Memphis, Agnes takes a taxi from the airport. While in the taxi, she gets a phone call from a law school buddy, who is putting together a reunion later in the year. Her friend has set up a private Facebook Group to organize the reunion. Agnes is not a big fan of [Facebook](#) (Free), but likes the idea of a private group that will never post to her feed and will allow the group to upload information for the reunion for fast feedback, so she agrees to accept the invitation.
- When she arrives at the hotel, she enters the taxi expense information in [Xpense Tracker](#) (Free), including taking a picture of the receipt and clipping it to the entry. When her entries from the trip are complete, she will only have to email the information file for the whole trip to her assistant from her iPad, which will include the pictures of receipts.
- Agnes has arrived a few hours early, so she checks in at her hotel and consults [AroundMe](#) (Free) for a nearby restaurant for lunch. She books a taxi on [TaxiMagic](#) (Free), and sets off.
- While at the restaurant, Agnes has an idea for the timeline in her Opening Statement, so she takes out her iPad and sketches on [Notability](#) (\$1.99). Agnes likes Notability for a number of reasons, including using it to record and take notes at CLEs. Not only does Notability provide a quick way to organize her notes, but she can click on her outline from the CLE and instantly go to the audio from the time when she typed or wrote that particular word. This is invaluable for revisiting key points.
- Agnes heads to the war room to begin work. When she arrives, she starts her timer on OfficeTime, and then learns her graphics consultant will be arriving on a later flight than expected. Agnes conferences with her graphics consultant and another team member about demonstratives for Opening Statement using [GotoMeeting](#) (Free app/

Service \$49 month). Agnes updates the Opening Statement timeline with the sketch she made on Notability, which she emails to the graphics consultant.

- Agnes then updates the timeline of events on [Timestream](#) (\$9.99), which she discovered when her son used it to do a timeline project for a history class. Agnes, a visual person, uses the timeline as a prompt for Opening Statement, to make sure she has covered all her points. Timestream was also very helpful when she first met with her clients about the case, as she was able to enter important dates quickly as she was learning about case facts, allowing her to record key points and make sure they were not lost during trial preparation due to the sheer number of documents.
- As John is working with witnesses, he needs to ask a non-English speaking witness a question but realizes the translator has left. [Google Translate](#) (Free) helps him ask the question and understand the response.
- After a long day, Agnes returns to hotel room too late to see her favorite show, “*The Good Wife*,” so she watches it on [SlingPlayer](#) (Free/Slingbox Hardware \$179.99). The Slingbox hardware is discreetly attached to the TV in her office at home, so no one at home even knows she is using it. With Slingbox, Agnes is able to access anything on her DVR from anywhere in the world that has Wi-Fi, including her recent trip to Moscow. She can also stream live TV, which led to a recent humorous incident with her daughter. Her daughter was staying up late one night in Agnes’ office – without permission - watching the Disney Channel. She became convinced Agnes knew what she was doing when the channel suddenly changed when Agnes turned on SlingPlayer while she was in another state. This stopped the late night viewing.
- After watching “*The Good Wife*,” Agnes peruses her favorite news app, [Flipboard](#) (Free). Agnes loves Flipboard’s latest feature, which gives her the ability to browse the news and “clip” articles into custom magazines. She has even used this feature to create her own “magazine” of articles for a client who is interested in educational policy.
- When John returns home late that evening, he goes straight to bed. To relax, he pulls up [White Noise](#) (Free), which plays the sound of a vacuum cleaner, which has a strangely relaxing effect on him. Although a creature of habit, John sometimes takes a walk on the wild side and mixes it up with other sounds, such as crickets chirping or beach waves crashing.

Monday

- Agnes starts the day by listening to inspiring TED talk on her [TED](#) (Free) app by Andrew Stanton, about “[The Clues to a Great Story](#).” This inspires a thought for Opening Statement, which Agnes adds to her outline in [Pages](#) (\$9.99). Agnes

enjoys using Pages because it syncs effortlessly across all her Apple devices, so she always has important documents available. Pages also takes advantage of her iPad’s Retina Display, allowing her to lower the font size and still be able to see more of the document, clearly.

- After a restful night’s sleep, John reviews his pre-trial motions. He decides to add one last citation, using his [Lexis Advance HD](#) (Free) app. Although this app requires a Lexis Advance subscription, his firm provides it, so John uses it often.
- When John finds the citation he is looking for, he annotates his motion and double checks it with [Fastcase](#) (Free) app, which shows the most cited case with a single click, and includes cases, statutes, regulations, court rules, and constitutions. Fastcase also provides access to a newspaper archive, legal forms and a one-stop PACER search of federal filings – all for free. Free is a price John is willing to pay, so he uses this app quite a bit, especially for searching most state statutes. He checks the program to see if there is a better citation than the result from Lexis Advance HD, then annotates his motion and sends it to his assistant to be printed.
- Agnes also has a copy of Fastcase, but she relies more on her favorite reference app, [RuleBook](#) (Free/In app purchases up to \$62). The in-app purchases for The BlueBook, court rules and other legal authorities cost a little money, but in return her rulebook is always current, any passages she has highlighted stay highlighted year after year, and she does not have to keep up with a paper copy of federal or state court rules or keep track of paper updates. The app data is also completely downloadable, so she does not have to have Wi-Fi to access it.
- Before Agnes leaves for the courthouse, she reviews her trial notebook in [TabLit: Trial Notebook](#) (\$69.99). Although this app was more expensive than the Circus Ponies app John typically uses, it was designed for attorneys and meets her need for organization better. Agnes keeps her examination outlines, her examination checklists, evidentiary checklists, and case contacts in it. Best of all, in the near future, she will be able to collaborate and share her trial notebook with colleagues and her legal assistant, which should save everyone a lot of time.
- Agnes meets with her courtroom technician, to make sure their Dropbox files are synced for her [TrialDirector](#) (Free app/Syncs with \$695.00 per license software) files. Agnes chose to use TrialDirector for this trial because she has several video deposition clips she would like to use, and in her experience, TrialDirector is more reliable with video deposition clips. Agnes likes having her files synced with her courtroom technician to use in trial preparation and also to have a backup in the unlikely event her courtroom technician is unable to attend trial.

- Agnes then meets with her trial consultant to make sure they are ready for jury selection, using [iJuror](#) (\$19.99). This app allows the trial consultant to quickly record juror information, color-code the jurors for an easy visual reference, record individual and group responses to *voir dire* questions, assess the importance of responses, rank jurors, track which jurors have not spoken yet, and best of all, sync all data with trial team members who have the app through Bluetooth.
- iJuror is particularly useful when Agnes tries cases where a supplemental juror questionnaire is completed and provided to the trial team in advance of trial. When that happens, the trial consultant can utilize the iJuror in-app purchase, Juror Scoring (\$4.99), to pre-rate jurors. This information is updated during *voir dire*, but it is useful to have a sense of where each potential juror might stand with regard to the facts of the case, going in to jury selection.
- Finally, Agnes appreciates the social media search function in iJuror. With an iPad that has cellular capabilities or access to courtroom Wi-Fi, iJuror allows a team member to search a juror on Spokeo, Pipl, LinkedIn, Facebook, Google+ and Google. This feature is best used before trial, but a dedicated team member can research most panel members in the strike zone in a reasonable amount of time during trial as well. It can also be used to research the seated jurors and update their information for reference during trial, after jury selection.
- Agnes also assigns a paralegal to record juror responses on [Jury Notepad](#) (\$4.99), with special attention to comments made related to challenges for cause. When the paralegal is finished entering data, she transfers it to Agnes and other team members for use in iJuror.
- For his jury selection, John prefers the traditional sticky note method of collecting data for jury selection, using [iJuror Stickers](#) (\$4.99). The venire panel for John's trial is not very large, and he has very limited time to track information, so this app works best for him for this trial. John mainly uses it instead of sticky notes because he then has easy access to the data later, if needed.
- When John arrives at his trial, he sets up his iPad to use [TrialPad](#) (\$89.99), which is much less expensive than TrialDirector and allows him to display images and exhibits using a projector or a monitor. He can also make multiple callouts from documents or depositions, and highlight, annotate, redact and zoom in his documents, or view them side-by-side to compare pages. Since he does not anticipate using any video deposition clips at this short trial, it is the best solution for him for this trial. He also appreciates the whiteboard tool that allows him to draw freehand, as not all courtrooms have a whiteboard.
- After trial, Agnes reviews a witness transcript using [Westlaw](#)

[Case Notebook Portable E-Transcript](#) (Free). Agnes finds this app useful for transcripts provided in the E-Transcript PTX format. It allows highlighting and notes, and updates with the desktop version of Westlaw Case Notebook.

- After visiting with the trial team, Agnes retires to her room and reviews her checklist for Tuesday on Asana and then goes to Yammer, where she uploads a [Keynote](#) (\$9.99) presentation and assigns an associate to review and update it for a speech she has to give the following week. Agnes finds Keynote easy to use and full of templates that make her presentation look unique, as well as animations that look more professional to her. She also finds it easier to use for editing photos and video than other apps, and easier to embed charts from her favorite spreadsheet app, [Numbers](#) (\$9.99).
- Late in the evening, Agnes retires to her room and relaxes by browsing a few magazines on [Next Issue](#) (Free app/\$9.99 per month), which is essentially a "Netflix for Magazines." For the monthly fee, Agnes has unlimited access to over 85 top magazines, although sometimes at the expense of sleep.

Tuesday

- John begins his morning by referencing [Black's Law Dictionary](#) (\$54.99). This reference provides definitions for 45,000 legal terms, alternate spellings or equivalent expressions for more than 5,300 terms, and audio pronunciations for more than 7,000 legal terms. John likes it for the "Word of the Day" feature. When in trial, John likes to look at the "Word of the Day" and work it into a bench conference at some point during the day. It is an intellectual exercise that he looks forward to at each trial. He laments the fact that he cannot use most of the words in his [Words With Friends](#) (Free) game, and has thought about developing his own version of the game for attorneys.
- Before John leaves for the courthouse, he takes a few minutes to review demonstratives for his trial next week. Because the files are large, his graphics consultant shares them with [Cubby](#) (Free: 5GB). John annotates the files using Documents by Readdle, then saves the changes to the Cubby and sends a text message to his graphics consultant to let him know they are ready.
- Agnes checks her Dropbox app to see if it is reaching its space limit due to the iJuror files from trial. It is nearing its limit, so she uses [Airfile](#) (Free/Pro: \$4.99) to move some docs not related to the trial quickly to her account on [Box](#) (Free: 5GB), to free up space. Agnes has an Airfile Pro account, which allows her to move files among her Dropbox, Box, SugarSync, GoogleDrive and SkyDrive accounts.
- As Agnes enters the taxi, she gets a call from her worried paralegal about the weather. Agnes observes ominous looking clouds, so she updates the location area in [Storm](#)

[Shield](#) (\$4.99) to Memphis. Agnes appreciates Storm Shield because it will not bother her unless there is a severe weather warning in her immediate area. This app has also alerted her with a radio announcement at night, which woke her up one night in time to unplug her electronics before a severe thunderstorm. Agnes notices there are not any alerts for her area, sees only minor rainclouds on the app's radar, so she reassures her paralegal and they go to court.

- During his lunch break, John makes some edits on his paper copy of the Jury Charge. He has a question about the way a particular question is worded, but does not have time to type it and send it to an associate for a quick review. He decides to use [Genius Scan](#) (Free) to make a PDF of the document and sends it to the associate in a matter of minutes.
- During lunch, John receives a request for a document that resides on his desktop computer. He uses [LogMeIn](#) (Free) to find the document on his computer at work and emails it.
- John's trial ends with a victory. John stops by the office on his way to the victory dinner, reads over some notes he has been taking in [Evernote](#) (Free: Basic/Premium \$45 yr), pens a brief blog of takeaways and uploads it on [WordPress](#) (Free). Evernote is John's favorite app to save ideas, in the form of written notes, pictures, to-do lists, and recorded voice reminders. It syncs across all of his devices – computer, laptop, iPhone and of course, his iPad – so his ideas are never far away.

Wednesday

- After lunch, new evidence comes to light in Agnes' trial, and the judge strongly suggests an immediate mediation. Agnes decides to use a new app called [Picture It Settled Lite](#) (Free) in the negotiations, to help her calculate future offers based on the concession rates of both parties. The case settles, and Agnes makes a note to investigate the full enterprise software in the future to help her make strategic decisions based on deep data and predictive analytics, as well as the behavior of negotiators in thousands of cases. Supposedly, it will give her an edge in negotiations by helping predict what her opponent will do.
- Agnes gathers her things and returns to the airport. While waiting for her flight, she decides to read her guilty pleasure, [Wild About Trial](#) (Free). Wild About Trial provides the latest news about high profile trials, and detailed information about previous ones. After reading about one such trial, Agnes posts her thoughts about it on [Twitter](#) (Free), adding the trial's hashtag so others following the trial will see her comment.
- On the plane, Agnes relaxes and listens to her favorite new book on [Audible](#) (Free: Book costs vary). While listening, she does a little shopping using the plane's Wi-Fi and [RoboForm Everywhere](#) (\$9.95), her password manager and

web form filler, to effortlessly log in to her favorite sites quickly.

- Agnes, who has not taken a nap in 20 years, then browses a few legal blogs and posts on her [LinkedIn](#) (Free) Groups, and sends articles and a short video to [Pocket](#) (Free), for later reading and viewing. Pocket syncs with her computer and iPhone, so she will have it available when she has a few minutes to read.
- Agnes stops by the office briefly on the way home and discusses possibly using [Prezi](#) (Free) instead of Keynote with her assistant. She appreciates how Prezi's web-based platform moves beyond slides and could allow her to create an entire presentation on a single canvas, or one giant picture, rather than a series of slides. She decides to experiment with it for a speech the next month.
- She then uses [SlideShark](#) (Free) to consult with an attorney on a PowerPoint for a joint CLE to be given next month.

Thursday

- John turns his attention to next week's trial. He decides to use [JuryPad](#) (\$24.99) for this selection, as it works well for a large panel and he will have to enter juror data quickly on his Mac to export to his iPad. In addition, the trial is located out of state in an unfamiliar city with multiple suburbs, and JuryPad allows him to virtually tour a juror's neighborhood, if needed. Occasionally John tries a product liability, personal injury, medical malpractice or wrongful death case with animations graphics, video, and medical illustrations. For those types of trials, he uses [TrialTouch](#) (Free app/In app purchase required based on time needed), but for this one, JuryPad will do.
- Agnes uses [GPS by Telenav](#) (Free) to drive to a client meeting, 45 minutes from her office.
- Being unfamiliar with the area, she uses [BestParking](#) (Free) to find the best parking around her client's office complex.
- During the meeting, Agnes' left leg starts tingling, so she consults [iTriage](#) (Free) to see what might be going on. She decides she will not die before the meeting ends and soldiers on but considers booking an appointment, which she could do through the app as well.
- After the meeting, Agnes stops by a networking happy hour and meets a couple of potential clients. Once in her car, Agnes uses [Scanner Pro](#) (\$6.99) to photograph the cards, then files them in Evernote for future reference.
- John is chagrined to learn he has a CLE deadline on the horizon, so he consults [CLE Mobile](#) (Free/CLE course costs vary) to download a CLE by West LegalEd Center, from over 4,500 CLE courses. John is delighted to find he gets a

course free for signing up, so he watches it on his iPad and turns in his credit. Done.

- Back at home, wondering why she is suddenly tired, Agnes puts on her [Zeo Sleep Manager](#) (Free app/Hardware \$129.75) headband and turns on her iPad to track her sleep and make sure she is getting her REM sleep.

Friday

- John starts writing a journal article using the articles and web clippings saved in Pocket, and academic research articles organized in his [Papers](#) (App \$14.99/Software \$79.99) database. Papers has revolutionized his writing because now all of his research articles are organized and available to him on his iPad.
- Agnes uses [LinkedIn Card Munch](#) (Free) to convert her business cards into address book contacts, then adds them as connections on LinkedIn.
- Agnes pulls up [Shortlytics](#) (Free) to review statistics from her social media posts from the week before. She then uses that information to draft LinkedIn, Facebook and Twitter posts based on topics that received the most attention.
- Agnes reviews the articles she has saved for the week in both Pocket and Flipboard, then drafts and schedules a number of Twitter and Facebook posts for the following week on [HootSuite](#) (Free). She once again uses Shortlytics to shorten and customize the label of her posts, using her Bitly account.

- Both leave the office satisfied, after a long but productive week.

Saturday

- John begins the morning by taking his weekly health measurements with his cool Withings gadgets. First, he takes his blood pressure with the [Withings Blood Pressure Monitor](#) (Free app/Hardware \$129.95), and steps on his [Withings Wi-Fi scale](#) (Free app/Hardware \$149.95) for his weight. This data automatically uploads into his [Withings Health Mate](#) (Free), allowing him to track his health and note trends. He also shows this information to his doctor during his physical.
- John then grills some steaks for lunch using his [iGrill](#) (Free/Hardware \$79.99) app and hardware, resulting in delicious steaks, grilled to perfection.
- Agnes, after enjoying a wonderful morning with her family, relaxes on the porch while reading a deliciously thought-provoking article on [Longform](#) (\$2.99). Longform's editors compile longer articles from respected publications to allow readers the pleasure of an in-depth read on various interesting topics.
- Agnes and John both smile, contemplating how difficult and dull life was in the Dark Ages, before iPad.

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References

^[i]<http://bit.ly/1051xaJ> or <http://bit.ly/ipadappsattorneys>

