

Are Your Jurors Mad or Sad? How Emotional Blunting May Influence Their Judgments in the Courtroom

BY KAREN PAGE WINTERICH

Karen Page Winterich, PhD is an Assistant Professor of Marketing at the Smeal College of Business at the Pennsylvania State University. She earned her PhD from the [University of Pittsburgh](#) and previously served on the faculty at Texas A&M University. Her research focuses on the effects of social identities and emotions on consumer judgments and decision-making.

Contrary to Dr. Spock's steady stoicism throughout the classic Star Trek series, human beings typically experience different, and sometimes strong, feelings throughout the course of a day. We may feel angry when we get cut off in traffic, experience sadness when we hear the news of a friend suffering from illness, or have a sense of pride when someone compliments us on a job well done. These everyday emotion experiences are common occurrences, but only recently have the effects of these emotions on individuals judgments and decisions been investigated; though even Aristotle (350, B.C.E/1991) suggested that emotions may influence human judgment.

Researchers generally agree that emotions can and do have a substantial impact on our decision-making, even in the context of legal judgments in which emotions may be expected to be sidelined for more rational, cognitive judgments (Blumenthal, 2005; Feigenson, 2009). Though research has provided much insight into the role of emotions in judgments, this research has tended to focus on the effect of one particular emotion experienced at a given point in time on a specific judgment or decision.¹ However, emotions may be experienced in a sequence. For instance, I may be angry upon my arrival at work because I got cut off in traffic, but subsequently may experience sadness upon finding out at work that my grant proposal will not be funded due to budget cuts. Acknowledging that the anger we experience on our way to work may subsequently influence our judgments, isn't it possible that this anger may also influence any subsequent emotion experiences? In the context of juror judgments, imagine that the prosecution, in its opening statement, elicits anger in several jurors. Then, as the defense makes its opening statement, this subset of jurors are already experiencing anger. Will any potential sadness-eliciting stimuli presented by the defense result in the same experience of sadness among the subset of jurors already experiencing anger compared with those jurors in whom the prosecution has failed to elicit anger?

This article discusses how emotion experiences may not only influence legal judgments, but may also influence subsequent emotion experiences, specifically through emotional blunting, as well as subsequent judgments. In doing so, we draw upon the appraisal-tendency framework (Lerner &

¹ We note exceptions to this which include research examining mixed emotions, or the experience of several different emotions at a given point in time. For example, Ramanathan and Williams (2007) considered how experiencing both happiness and stress result in over indulgence on subsequent choices.

Keltner, 2001) which has previously been used to understand the effect of one emotion at a given period of time on a judgment. Presenting the occurrence of emotional blunting, legal scholars, judges, and attorneys may want to consider the extent to which the emotion experiences elicited in jurors that may affect decision-making may be altered by juror's current emotional state.

What is the Appraisal-Tendency Framework?

First, the appraisal-tendency framework (ATF; Lerner & Keltner, 2000; 2001) assumes that emotions are characterized by cognitive appraisals. That is, each emotion arises from a specific set of thoughts about a situation (Ellsworth & Scherer, 2003; Lazarus, 1991). For instance, if an individual appraises a negative event (e.g., a car accident) to be controlled by other individuals (e.g., bad drivers), she will experience anger. If, however, she appraises the event to be controlled by the situation (e.g., bad weather), she will experience sadness (Smith & Ellsworth, 1985). Second, the ATF assumes these cognitive appraisals of a situation not only determine the emotion experience (i.e., anger or sadness), but they also shape perceptions of subsequent unrelated situations, which are referred to as "appraisal tendencies". In other words, emotions influence judgments and decisions through our tendencies to view a specific situation or decision in line with the set of thoughts we have from an emotion we are experiencing at that moment. For instance, an individual may experience anger after being cut off in traffic. Consequently, the appraisal tendencies activated by anger – that is, appraisals of certainty and of human control – carry over and shape subsequent perceptions. The resulting effect may be that the angry (vs. neutral) individual makes riskier judgments in subsequent settings (e.g., risk estimates for life events, Lerner & Keltner, 2001; Litvak & Lerner, 2009). However, these same appraisal tendencies – say certainty and human control if angry – may also influence subsequent emotion experiences.

How does the ATF affect Emotion Experiences?

Imagine that a parent experiences anger after hearing about a student that got into a fight with their child. Will that parent be less likely to experience sadness when they learn that a different student in their child's class is ill? Drawing from the ATF, we reason that the subsequent emotion experience of sadness will be influenced by the appraisals of the current emotion experience, anger. Specifically in the case of sadness and anger the appraisals, or characterizations of situations leading to these emotions, are contrasting. That is, anger is characterized by certainty and human control whereas sadness is characterized by situational agency, or situational circumstances beyond human control.

When the parent is experiencing anger and thinking in terms of individual, human control such that the child's behavior was caused by his argumentative nature rather than the specific situation that provoked the child, this parent is likely to have a difficult time subsequently experiencing sadness because it will be more difficult for the parent to switch from thoughts of individual, human control to that of situational control wherein any child would have reacted in the same manner given the specific situation. In such circumstances, the subsequent experience of sadness is blunted by the current experience of anger. This blocking or minimization of sadness when experiencing anger or vice versa is referred to as *emotional blunting*. Therefore, just as psychologists may understand that experiencing anger may cause individuals to perceive events more optimistically and be more punitive, anger may cause individuals to be unable to experience sadness to the same degree as those not currently experiencing anger, or otherwise in a neutral state.

1. Emotional Blunting in the Courtroom: Your emotional evidence or testimony won't elicit the juror emotion or the juror judgment you anticipated.

Given that one emotion experience can thwart a subsequent emotion experience through emotional blunting, what should legal scholars, jury consultants, and trial attorneys consider in forming legal policies, instructing jurors, and presenting their case? In considering how emotional blunting may have a role in the courtroom, it is important to recognize that there is a multi-step process that moves beyond the existing emotion-to-judgment two-step process addressed in past research. Instead, there is a three-step process: 1) existing emotion – 2) subsequent emotion – 3) judgment. Therefore, we first consider the extent to which juror emotions may be influenced and then consider how this may affect juror judgments.

A. Unanticipated Juror Emotions

Jurors may experience sadness or anger, two negative emotions that may result for a variety of reasons including viewing graphic photographs, videos, or other evidence (Adams, Neal, Titcomb, & Griffin, 2010). If a trial lawyer anticipates jurors will experience sadness or anger from the information presented at trial, they should recognize this emotion elicitation is only likely occur to the extent that jurors are not already experiencing an emotion with contrasting appraisals.

A prosecutor may attempt to elicit anger in the jury when detailing the defendant's alleged crimes. In so doing, jurors' appraisal tendencies are likely to be focused on individual control. Then, when the defense attorney attempts to elicit sadness in the jury, they will likely be less successful in this attempt than they would if the jury was currently in an emotionally neutral state. The information that the defense attorney presents to elicit sadness may be interpreted as being controlled by the individual, only heightening or maintaining the current experience of anger rather than eliciting sadness. Alternatively, jurors experiencing sadness, perhaps intentionally elicited by the defense lawyer or even from situations unrelated to the trial, may subsequently experience less anger when the prosecution presents information suggesting that the defendant not only committed the behavior but is also personally responsible for the behavior. When jurors experience sadness, their appraisals of situational control may color the interpretation of the information presented by the prosecution minimizing the experience of anger the prosecution is trying to elicit.

B. Unanticipated Juror Judgments

Perhaps more important than jurors' unanticipated emotion experiences is the effect that emotional blunting may have on juror judgments. Research concludes that if individuals are experiencing anger, they are likely to attribute more responsibility to an individual and make more punitive attributions than those who are not experiencing anger, even when the anger is not related to the judgment (Lerner, Goldberg, & Tetlock, 1998). Thus, if jurors are not experiencing the sadness that a lawyer anticipates due to emotional blunting (i.e., jurors are experiencing anger from the prior witness' statements or otherwise), they will also be unlikely to have the same judgments that the lawyer might expect if they were experiencing sadness as intended. That is, if the prosecutor successfully elicited juror anger, this anger could subsequently prevent jurors from feeling sadness and acknowledging

the situational factors associated with the case. This blunted sadness could thereby cause the jury to hold an innocent person wrongfully accountable for a crime because of greater perceptions of the defendant's responsibility for the crime. Moreover, this blunted sadness could result in more severe sentencing decisions by jurors.

At the same time, if the defense successfully elicits sadness in the jury in closing argument, the prosecution's subsequent attempt to elicit anger may be unsuccessful, as addressed earlier. However, this blunted anger experience also means that the jury will be less likely to hold the defendant as responsible for his/her actions and thus more likely to recommend a lesser penalty than it otherwise would (i.e., if they were not experiencing sadness but rather were in a neutral state at the time of the prosecution's closing argument). Considering the effects of emotional blunting not only on subsequent emotions but also on juror judgments, the order in which the prosecutor and defendant present evidence, question witnesses, and make opening and closing statements could have far-reaching implications.

2. Emotions Elicited Outside the Courtroom Matter Too

In addition to lawyers considering the emotional state of the jury based on information presented in the trial to determine how to best present their case based on expected juror judgments, it is also important for lawyers to consider emotional states that jurors may be experiencing from situations outside of trial. If jurors experience sadness from being sequestered or anger from how they are being treated by other jurors, these emotion experiences will also blunt the experience of subsequent emotions that are characterized by contrasting appraisals. That is, emotional blunting does not arise only in the case of subsequent emotions that are related to the situation eliciting the current emotion. Emotional blunting also occurs when the situation that presents the subsequent emotion-eliciting event is unrelated to the situation that prompted the current emotion experience.

3. Emotional Blunting Extends Beyond Anger and Sadness

Though the present research on emotional blunting examined anger blunting sadness and vice versa, lawyers, judges, and consultants should not limit their consideration of emotional blunting to these emotions. Based on the theory of emotional blunting, any emotion experience (e.g., fear, hope) may blunt the subsequent experience of any emotion (i.e., anger, pride) as long as the characteristics or appraisals of the subsequent emotion *contrast* with that of the current emotion experience. When considering emotions that may be elicited in the courtroom from trial information as well as those that may arise from situations experienced outside of the courtroom, there is an array of situations in which emotional blunting may occur.

4. Subsequent Emotion Experiences May be Augmented Too

Though the present work focused on when an emotional experience may be inhibited based on a current emotion experience, it is important to note that when the appraisals of a subsequent emotion experience are *consistent* with the current emotion experience, that emotional experience may be heightened. That is, if an individual is experiencing anger and experiences a subsequent anger-eliciting event, the anger that is experienced may be greater than if the second anger-eliciting experience occurred when one was in a neutral state. Further, if an individual is angry and subsequently is shown

very graphic images that elicit feelings of disgust, the disgust experience may be more extreme than if the individual had not been experiencing anger when exposed to the disgusting images. This effect of emotional augmentation is likely to occur because the human, individual control appraisal associated with the anger experience is consistent with the appraisal typical of experiencing disgust.

Jurors' emotional experiences, both in and out of the courtroom, may have substantial implications on the extent to which jurors may subsequently experience emotions sought by the prosecution and defense in their case presentations. More importantly, this emotional blunting will subsequently affect jurors' judgments. Additional research is necessary to investigate the extent to which emotional experiences can also augment subsequent emotion experiences and juror judgments. The need for legal scholars, trial lawyers, and jury consultants to understand emotional blunting processes is even more pressing because most people are unaware of the effect of their current emotional state on their subsequent emotion experiences and judgments. In a test of lay intuition for emotional blunting (Winterich, Han, & Lerner, 2010), people not only lacked awareness of these effects, but they also denied the possibility. Knowing the juror's base emotional state may be just as important, if not more important than the emotions that one hopes to elicit.

Based on the extension of appraisal-tendency framework to emotion experience and our research findings, we make the following recommendations for litigation advocacy:

1. *Neutralize jurors.* Do not assume jurors' emotions won't affect their judgments. If you can see that jurors are angry or sad, attempt to bring jurors to a neutral emotional state before presenting your arguments. This may be done by reporting factual, unemotional information or reminding them of everyday, unemotional events (e.g., "Most of us get up in the morning, brush our teeth, have coffee or tea and breakfast, and go to work.") before presenting critical evidence or questioning a witness.
2. *Elicit cognitions, not emotions.* When making your case, do not try to make jurors feel a specific emotion such as anger, injustice, sadness, or fear. Instead, emphasize why the defendant was or was not responsible for their behavior, *how* the situation could or could not have been controlled. If you can have the jurors hold these key beliefs in their thoughts, then these thoughts rather than emotions should guide their judgment.
3. *Raise awareness.* Tell jurors that they might be feeling lots of different emotions and these emotions may lead them to make a certain judgment. Make them aware of why they are feeling these emotions (e.g., "You just heard testimony from the victim's mother who is clearly very angry about the murder of her daughter.") and that they should refrain from using how they feel as *information* to reach their verdict (e.g., "Her anger does not make the defendant guilty"). If jurors can attribute their emotions to the heart-wrenching testimony of a witness, victim, or defendant, then they are less likely to use this emotion in making their decision.

Don't miss the trial consultant responses after the Reference list!

References

- Adams, D. Neal, T. Titcomb, C. & Griffin, M. (2010, March). *Let emotions be the judge: Graphic evidence and need for affect in legal decision-making*. Poster session presented the annual meeting of the American Psychology-Law Society, Vancouver, British Columbia, Canada.
- Aristotle. (350 B.C.E./1991). *On Rhetoric*. Trans. George Kennedy. New York: Oxford Publishing.
- Blumenthal, J. A. (2005). Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications. *Law & Psychology Review*, 29, 1-28.
- Ellsworth, P. C. & Scherer, K. R. (2003). Appraisal processes in emotion. In R. J. Davidson, H. H. Goldsmith & K. R. Scherer (Eds.), *Handbook of the affective sciences* (pp. 572-595), New York, Oxford University Press.
- Feigenson, N. (2009). Emotional influences on judgments of legal blame: How they happen, should they happen, and what to do about it. In B. Bornstein & R. Wiener (Eds.), *Emotion and the Law, Nebraska Symposium on Motivation* (Vol. 56, pp. 45-96). New York, NY: Springer.
- Lazarus, R. S. (1991). *Emotion and adaptation*. London: Oxford University Press.
- Lerner, J. S., Goldberg, J. H., & Tetlock, P. E., (1998). Sober second thought: The effects of accountability, anger, and authoritarianism on attributions of responsibility. *Personality and Social Psychology Bulletin*, 24, 563-574.
- Lerner, J. S., & Keltner, D. (2000). Beyond valence: Toward a model of emotion-specific influences on judgment and choice. *Cognition and Emotion*, 14, 473-493.
- Lerner, J. S., & Keltner, D. (2001). Fear, anger, and risk. *Journal of Personality and Social Psychology*, 81, 146-159.
- Litvak, P. & Lerner, J. S. (2009). Cognitive bias. In D. Sander & K. Scherer (Eds.), *The Oxford Companion to the Affective Sciences*. New York: Oxford University.
- Ramanathan, S. & Williams, P. (2007). Immediate and Delayed Emotional Consequences of Indulgence: The Moderating Influence of Personality Type on Mixed Emotions. *Journal of Consumer Research*, 34 (August), 212-223.
- Smith, C.A., & Ellsworth, P.C. (1985). Patterns of cognitive appraisal in emotion. *Journal of Personality and Social Psychology*, 48, 813-838.
- Winterich, K. P., Han, S. & Lerner, J. S. (2010). Now That I'm Sad, It's Hard to Be Mad: The Role of Cognitive Appraisals in Emotional Blunting. *Personality and Social Psychology Bulletin*, 36 (November), 1467-83.

We asked three trial consultants to respond to Karen Winterich's article on Emotional Blunting. On the following pages, Katherine James, Susie Macpherson and Tammy Metzger offer their thoughts.

Katherine James responds:

Katherine James is a trial consultant who specializes in witness preparation and attorney training. She partners with Alan Blumenthal at [ACT of Communication](#).

This interesting and insightful article puts science behind a concept many of us have been working with for a long time. Thank heavens for Winterich! We now have a reference when explaining to attorneys why they must:

- Choose the right emotional state that they want for the jurors and don't try to switch it up too quickly if they are going first.
- Either embrace or neutralize the emotion in the courtroom if they go second.

For example, many plaintiff's lawyers want to make jurors angry for liability and sad for damages. Common wisdom says that an angry jury is better than a sad jury for the plaintiffs...and now we have a study to back up that theory. Winterich has also given us a good basis for keeping jurors angry rather than trying to switch them to sadness when discussing damages.

In the same light, many civil defense lawyers want to stand up and solemnly say, in essence, "Don't feel what you are feeling - there is another side to this story." Winterich's work shows us that this, too, is not possible. Finding a neutral segue with which to start, say, a defense opening, is not easy. Especially at a time when emotions are riding high.

The term "emotional blunting" is very descriptive. As soon as I read this article, I was able to use the term and the research to help an attorney as we were crafting an opening. Thank you, Karen Winterich.

“Knowing the emotional base states of the jurors may be just as, if not more, important as the emotions one hopes to elicit.”

A COMMENT ON WINTERICH BY SUSIE MACPHERSON

Susan Macpherson is a founding member and Vice President of National Jury Project's Midwest regional office located in Minneapolis. She has been conducting jury research since 1976, and has advised attorneys across the country on complex commercial, antitrust, intellectual property, class action, and criminal cases.

The best advice in this article might be overlooked because it is not included in their formal recommendations: “Knowing the emotional base states of the jurors may be just as, if not more, important as the emotions one hopes to elicit.” Jurors do not come into the courtroom as emotional blank slates, or with slates that can be wiped clean when the judge explains that they must be impartial. Each juror’s view of the arguments and evidence is determined in part by the emotional response it triggers, and as the authors suggest that response can be blunted by the individual juror’s emotional base state. That is why it is essential to identify in voir dire the jurors who are already angry or hostile.

Many people are unhappy when they report for jury duty, and in jury selections for longer trials, it is not unusual to see people who appear to be downright angry. The challenge is to sort out those who display what the authors refer to as augmented anger from those merely irritated at the significant disruption of serving on a longer trial. As discussed in the article, jurors in the former category are predisposed to make punitive judgments. In a criminal trial, a juror’s anger is obviously more likely to have a negative influence on judgments about the defendant and defense arguments. However, in a civil trial, a base state of anger may influence judgments about either plaintiff or the defendant depending who the juror sees as being (more) unreasonable.

Given the inherent limitations of voir dire, it is often difficult to assess emotional base states. But as a growing number of jurors experience unemployment, foreclosure, and bankruptcy, it becomes more important to do so. In my experience, the best clues are going to come from tone and content of jurors’ narrative responses to open-ended questions and carefully observing patterns of nonverbal behavior. Asking a juror to talk about his/her home life and occupation will often provide a better indication of emotional base than questions probing attitudes and opinions on issues relevant to the case. Jurors let their guard down when talking about themselves because they don’t have to sort out the socially desirable answer, and because biographical responses usually elicit longer narrative responses. We look for evidence of underlying anger that leaks through, such as clipped or terse speech and vocal tension, as a juror describes what she likes and dislikes about her job and explains in more detail what is involved in doing her job. When using a written questionnaire, this is one reason to consider leaving off some of the basic background questions and asking those questions during voir dire.

The authors’ recommendations to “neutralize jurors” and “elicit cognitions, not emotions”

seem curiously at odds with their earlier discussion of how emotion influences juror judgments. No support is provided for the concept of a “neutral” state or for being able to separate cognition from emotion. That aside, these two recommendations seem to stem from the assumption that jurors’ judgments at trial are the product of a serial decision making process (the “three step process”), rather than the process of constructing a story as a framework for decision making. The story model of juror decision making explains why blunted emotional responses, which undoubtedly occur, do not necessarily determine how jurors ultimately decide the case.

The authors’ third recommendation, to raise awareness, is an effective and underutilized approach for attorneys, as well as judges, who are anticipating arguments, testimony, and other evidence that will trigger strong emotional responses. The traditional approach is to tell jurors to “set aside” and essentially ignore their emotional responses. That instruction may fit the requirement of impartiality, but does not fit the reality of how jurors process what they see, hear, and feel during trial. If the goal is to reduce the impact of emotional responses on decision making, it is more effective to encourage jurors to do the opposite; that is, pay close attention and actively monitor how their emotional reactions are influencing their judgments during trial. Forewarning has been shown to reduce the impact of subsequent emotional appeals because it encourages the listener to be looking for more subtle appeals or triggers that might otherwise escape their notice. That said, the greatest benefit of such a forewarning in the context of a jury trial may be that it encourages jurors to discuss this issue during their deliberations and call each other on decisions that appear to be driven by emotions rather than evidence.

Tammy R. Metzger Responds to Winterich:

Tammy Metzger, J.D., M.A. is based in Orange County, California and offers litigation support and MCLE trial advocacy workshops nationwide. She worked in-house at a plaintiff products liability firm for five years, with prosecutors at the local, state and federal levels and at UC Santa Barbara as a researcher and instructor.

The appraisal-tendency framework (ATF) sheds light on tried and true trial practices, including two newer, effective trial approaches: *Rules of the Road*, by Rick Friedman & Patrick Malone and *Reptile*, by David Ball & Don Keenan. This mechanism helps explain juror decision-making in surprising verdicts, which I describe in two case studies. Utilizing the ATF can help attorneys optimally sequence evidence and make their strongest points when jurors are most open to reconsider their assessments. It also clarifies how jurors perceive risk, causation, blame, and guilt. I believe the ATF offers enormous potential for advancing communication strategies.

Dr. Winterich and her colleagues have taken an important step towards understanding how emotions affect subsequent emotions and verdicts. They provide us with a better understanding of how jurors become angry or empathetic, i.e., want to punish or help. (Empathy is often related to sadness, which is discussed below.) I was impressed with the authors' robust statistical analyses in the original journal publication (Winterich, Han & Lerner, "Now That I'm Sad, It's Hard to Be Mad: The Role of Cognitive Appraisals in Emotional Blunting," *Personality and Social Psychology Bulletin*, 2010, 36, 1467-1483). By integrating these findings with knowledge from other fields and utilizing additional methods to measure emotion and decision-making, mock trial research provides unique insight into the human mind and practical, powerful applications for attorneys.

EMOTIONS AND THEIR COGNITIVE APPRAISALS

Research from the neurosciences tells us that all judgments are a blend of emotion and reason and that without input from our unconscious, emotional "primitive brain," people are unable to make the most mundane decisions. (See *How We Decide*, by Jonah Lehrer (2009), for a good overview of recent neuroscience research.) Emotional reasoning provides seasoned attorneys with their courtroom instincts. But in novel situations, such as jury service, emotions can lead to befuddling verdicts.

Even the most experienced experts can be led astray by snap judgments. Conversely, thinking too much causes us to focus on variables that don't really matter. (See *id.* at 142). A critical function of our rational mind is to make sure that our emotional judgments are properly applied to a given situation. By understanding how emotions interact and affect decisions, attorneys can help jurors make better decisions and mitigate reasoning errors.

Anger Motivates People to Punish, Seek Revenge and Exert Control

Trial consultants have known that angry jurors are more punitive towards criminal defendants, and they return larger verdicts in civil cases. Our observations have provided a richer basis for explaining how anger motivates people to punish, seek revenge, and exert control. With Dr. Winterich's research, we can further clarify that anger interferes with jurors' ability to feel sadness and to empathize with criminal and civil defendants, which can result in harsher verdicts.

Anger tells us that something needs to change. Anger is energy directed outward when there is interference with a goal, an unfair loss, mistreatment, a threat, social norms are violated, a lack of justice, a sense that something shouldn't happen, etc. Anger drives us to overcome obstacles and control our environment so we can reach our goals, instead of fearfully anticipating pain or sadly accepting a loss.

There is a strong physiological response associated with anger, as we instinctively prepare to fight, which may be why it takes so long for anger to dissipate. Long ago, anger protected us from threats of physical harm, but today it usually protects threats to our ego, i.e., our sense of self and our values.

Anger, a "Secondary Emotion," Masks Other Emotions

The function of anger is often to mask our first emotion so that we appear strong, instead of wounded, scared, or otherwise weak. Psychologists call anger a "secondary emotion" because it almost always follows an initial emotion. Thus anger is not one distinct emotion and there will be somewhat different cognitive appraisals. The main features of anger are similar and it often suppresses sadness. Thus, a well-designed experiment should be able to highlight the mechanisms by which anger blunts sadness. And I agree with the Dr. Winterich's findings, that the converse is also true. Sadness, characterized by losses that are out of individual human control, can diminish anger, where there is blame or a way to remedy the situation.

All of us have experienced the fatigue of sadness and know firsthand that we are less likely to then feel or sustain a high-energy emotion, such as anger. This is because we generally conserve energy when we do not know what to do, by not getting angry about things out of our control or not worrying (*Reptile* elaborates on this). Consequently, we do not prepare to act, and we try to ignore the issue.

Emotions can combine and coexist together or alternate in rapid succession, whereas certain combinations, such as sadness and anger, can interfere with each other. Our emotions are usually unconscious, where they direct our attention, which drives learning, memory and problem-solving.

APPLICATIONS TO TRIAL ADVOCACY

The ATF mechanism is constantly at work, during trials and in our daily lives. Case Study 2 discusses this blunting of anger in a benzene case, after defense attorneys pointed out to jurors that they, like the plaintiffs, are unavoidably exposed to the same chemicals that gave rise to the plaintiffs' lawsuit. Jurors are less inclined to want to punish a defendant when no action is required, i.e., when expending energy will not return a benefit.

The emotional risk calculation occurs in the unconscious mind, where thinking is done in black and white, and risks are not distinguished by severity. Therefore, jurors assume that if the benzene off-gassing from the courtroom walls (out of their control) is nothing to worry about, then the benzene that the plaintiff was exposed to is similarly nothing to get angry about because nothing could have been done to protect the plaintiff's (or the jurors') safety. (See *Gut Feelings: the Intelligence of the Unconscious*, by Gerd Gigerenzer (2007), which explains decision-making heuristics; i.e., "rules of thumb," often unconscious.)

Pointing out other exposures also reduces jurors' certainty that the defendant's product actually caused the harm, which also reduces anger and the desire to punish (although jurors in Case Study 2 assumed causation, as described below). Conversely, Case Study 1 discusses a trial where jurors' extreme anger towards the defendant actually resulted in a defense verdict, probably because their anger blunted jurors' ability to empathize with the plaintiff.

Rules and Reptile Approaches Activate Cognitive Appraisals for Anger

The *Rules of the Road* and *Reptile* are two, well-known, effective trial advocacy approaches that activate cognitive appraisals for anger: certainty, external human control, and a bad outcome. I believe this anger is mostly unconscious, where it drives verdicts by motivating jurors to punish and exert control over their environment, to stay safe, achieve goals, help others, etc.

Reptile approaches focus on community safety and emphasize how the defendant's unnecessary

actions (and similar actions by others) endanger members of an entire community. This activates cognitive appraisals of certainty (with so many people at risk) and outside control, which both increase anger. As described below, anger and fear are closely related emotions and fear causes people to impose higher standards of care on parties that control bad outcomes.

The *Rules of the Road* approach helps attorneys define relevant, clear rule violations, thereby increasing jurors' certainty of fault. Rules can come from industry standards, product labeling, statutes, contracts, jury instructions, expert testimony, procedures manuals, professional literature, ethical codes, common sense, etc. (*Rules* at p32.) The Rules approach gives jurors a sense of certainty, whereas many legal standards are fuzzy.

I wholeheartedly agree with the premise stated on page 1 of *Rules of the Road*: "The defense wields three weapons to defeat plaintiffs' cases that should be won: Complexity, Confusion and Ambiguity." The ATF and other research summarized above help explain why this is true. Certainty and outside control activate anger, which subsequently increases jurors' certainty of their judgments and results in larger verdicts.

This certainty leads to more plaintiff verdicts and higher damages awards, in part, because it is activating an anger appraisal. The methods explained in *Rules of the Road* also activate outside control appraisals in a way that elicits anger, without appearing overtly emotional or manipulative. Jurors are probably not consciously aware of the emotions activated by the *Rules* and *Reptile* approaches; nonetheless, these emotions motivate jurors to control and punish behaviors that wouldn't otherwise cause them concern.

The Rules within a Reptile Framework Prompts Motivating Anger

One of the reasons *Reptile* and *Rules* approaches work well together is because they both activate the same cognitive appraisals for anger, certainty and outside control. I believe this sense of certainty transfers (via an appraisal tendency) into greater juror conviction of their own judgment, which results in larger verdicts.

David Ball suggested that I distinguish motivating anger (certainty and outside control appraisals) from impotent anger (probably avoidance appraisal). In *Emotional Awareness* (2008), the Dalai Lama and Dr. Paul Ekman define anger as avoidance, i.e., pushing away an obstacle. They also briefly distinguish an aspect of motivating anger, speculating it is a product of individual intelligence, resilience and vitality. David's advice is more practical:

IMPOTENT (Static) VERSUS MOTIVATING (Dynamic) ANGER:

There are (at least) two kinds of anger: impotent anger, which is anger in the face of a situation you can do nothing about; and motivating anger, which is anger in the face of a situation you can do something about. Use of the Rules in a Reptilian advocacy framework quickly turns the former into the latter by showing that the danger was not an inadvertent "mistake" or "error" -- but was, rather, a knowing and volitional act. As a result, a verdict against the defendant is seen to decrease the chances that other people or companies will violate the same rules. This is an unlikely result when the bad act is seen as inadvertent, which creates impotent not motivating anger, because you "you can't fix inadvertent" so there's nothing to be motivated to do. Many plaintiff's attorneys make the error of thinking that anger is enough; it's far better when the anger moves from impotent to motivational, and the most fool-proof way to accomplish that is by means of the Rules with a Reptile framework. There are other ways to do it but none as reliable.

The "Rules within a Reptilian" approach does not scare jurors; instead it enables them to make themselves safer -- with motivating anger usually (not always) as the catalyst. The result is the emotional change from anger to such emotions as pleasure, satisfaction, revenge

fulfilled, pride and a sense of importance, etc. Hard stuff for a defense to fight.

All this is well beyond the theory stage; the neuroscience folks have seen it, and the string of verdicts (along with what jurors say afterwards) over the past 30 months shows that properly done, the defense is usually powerless to derail it.

I think all these views on anger are correct and that the Rules and Reptile approaches are the products of intelligence, resilience and vitality. They are also blueprints to further direct intelligent, vital energy. Like appraisal tendencies, I think the converse is also true, that when attorneys utilize these approaches, it augments their own motivating anger, which helps focus and energize their efforts. The attorneys, in turn, transfer this motivating anger to the jury as certainty (in their judgment) and a strong desire to control the defendant's behavior, which empowers juries to return larger verdicts.

Lead Characters are Blamed for Controlling Bad Outcomes

Another common trial strategy, framing the case around the other party, may be more fully understood through the ATF lens. People tend to blame the lead character in the story for causing the bad outcome because that person is perceived as having control over the situation. Accordingly, both sides focus on the other party, opening their story and keeping attention directed there until jurors have attributed blame. Now there is evidence that this framing alone augments angry emotions because it activates cognitive appraisals of external human control and certainty (the jurors already know what happened to the plaintiff).

Anger Limits Our Ability to Consider Opposing Information

Once jurors are angry, it is difficult to get them to reconsider who is to blame. Emotions limit our ability to consider contradictory evidence that challenges that emotion. The limbic system overrides the rational, conscious mind, thereby sustaining the emotion and its bias. It is unclear how long this information filtering effect persists, probably through the refractory period of emotions, when we discount or ignore knowledge (new and known) that challenges the activated emotion.

The duration of the refractory period varies from seconds to hours, possibly days for very strong emotions, and begins again each time the emotion is reactivated. (See *Emotions Revealed*, by Dr. Paul Ekman (2003), an excellent introduction to emotions and facial expressions.) This may go on until the issue that's creating the emotion is resolved, e.g., when there's a verdict. Strong emotions reduce the windows of opportunity to persuade.

Anger Causes People to Accept Higher Risks

The role of cause and effect of emotions and cognitive appraisals can be reversed, where emotions actually cause the cognitive appraisals. Winterich et al. discuss "appraisal tendencies," giving the example of the woman, who was angry at the driver who cut her off, later making riskier judgments regarding unrelated matters because the cognitive appraisals of human control and certainty were activated. This would lead an angry person to view risk in a more optimistic way, i.e., accepting higher risks because she assumes that she controls her health.

Cumulative Effects of Emotions Arising from Events Outside the Courtroom

Dr. Winterich also pointed out that emotions can accumulate, where the feelings jurors bring into the courtroom can augment their reactions to testimony. Since jurors' lives are often impacted by trial, they may be angry or anxious. People expect that jury duty will be frustrating, but if jurors start to blame an attorney for taking far too long to present the client's case, this may trigger additional anger towards that attorney, whose client may be unfairly punished.

Practice Tip: the attorney can mitigate displaced anger by humbly and sincerely apologizing to

the jury for possibly frustrating them, and asking them to direct that frustration towards the attorney herself and not the innocent client. Whenever possible, attorneys should also emphasize to jurors that they are trying to save time.

Fear Increases Jurors' Perceptions of Situational Causation, Outside Their Control

Fearful people are more risk-averse and more likely to attribute causation to things outside of their control, whereas angry and happy people are more risk-seeking and more likely to assume they control their health. (Like anger, happiness is also associated with certainty and individual control, but with a positive outcome.) Research also shows that fearful people think things through more systematically whereas happy and angry people rely more on heuristics.

Since this process is outside of our conscious awareness, it may be hard to believe that our emotions can influence judgments about our safety in such an illogical way; however, other research has confirmed this effect. (See Han, Lerner & Keltner, "Feelings and Consumer Decision-making: The Appraisal-Tendency Framework," *Journal of Consumer Psychology*, 17(3), 2007, 158-168.) Study participants were asked to hold their faces into prototypic expressions of sadness and anger, which created the target emotions.

Simply holding sad or angry facial expressions affected people's perceptions of the cause of a negative event. People making sad faces were more likely to attribute the cause of negative events to situational causes, while people making angry faces were more likely to perceive human causes and attribute blame to others. The same effect on risk-assessment was observed by showing participants subliminal images of sad and happy faces. (See Yang & Tong, "The effects of subliminal anger and sadness primes on agency appraisals," *Emotion*, 10(6), 2010, 915-922.)

***Case Study 1 - Medical Malpractice
Anger Reduces Jurors' Ability to Empathize***

Strong emotions can produce surprising results. A recent wrongful death case provides more evidence of juror anger blunting their ability to feel sadness, which is closely related to sympathy and is sometimes a component of compassion. In this case, an 88-year-old woman died a painful, prolonged death due to an improper medical procedure, resulting in the doctor surrendering his medical license.

The jury was so angry with the defendant that several jurors ran up to the plaintiff's attorney afterwards and asked him to look into filing criminal charges against the doctor. These same jurors had just returned a defense verdict! There was a disconnect; they did not feel an attachment to this woman's family, probably because they were so angry. They explained that the decedent was old and the negligence probably didn't kill her. (See Don Keenan's Reptile Superstar blog on Tommy Hastings at <http://www.keenantrialblog.com>. Click on "Older Entries.")

As seen in this instance, anger is a double-edged sword that is dangerous to both sides because anger limits jurors' ability to analyze problems, is contagious and motivates strong action, not just to punish but also to control. When we add the findings of Dr. Winterich's research, that anger can blunt sadness, we can also infer that it can blunt empathy for an injured person or innocent defendant. If jurors are angry for an extended period of time, be it from testimony or frustrations from their own impacted lives, they may fall into an angry mood that interferes with their ability to empathize and remain open to testimony. This state may last for days or perhaps the length of the trial.

***Case Study 2 - Products Liability
Jurors Follow Their Innate, Emotional Sense of Morality and Fault***

In every trial, jurors decide cases with their own emotional sense of morality and fault, rather than following legal standards to arrive at their verdicts. Moreover, strong emotions often lead jurors to parse factual dichotomies and impose burdens of proof to unreasonably favor one side over the other.

During a benzene litigation conference in New York City, I noticed that every time warning

labels were shown to mock jurors, they reacted negatively to the plaintiff even though plaintiff's attorneys were making clear, strong points regarding the warning defect legal issue. (This was measured via perception analyzer dials that record jurors' self-reported moment-to-moment positive or negative affect throughout the trial.)

The fact pattern was set up to demonstrate effective direct and cross-examination of live experts, so causation was a disputed issue. This strict liability case did not legally depend on negligence or fault; however, the jurors assumed causation without discussion and focused on fault instead.

The jurors agreed that the labels should have included more information, that the defendants knew that their solvents caused cancer and that the solvents caused Plaintiff's cancer--well beyond the factual findings required to find liability. However, the jurors returned a defense verdict and said they would not award any damages to the plaintiff, even though they strongly favored the plaintiff and blamed the defendants after closing arguments. During deliberations, jurors blamed the employer for being mostly at fault.

The Structure of the Verdict Form and Deliberations Will Affect Jurors' Judgments

During deliberations, the jurors changed their feeling judgments, which are often difficult to explain because they are formed in the unconscious. To explain our feeling judgments, we invent rationalizations that can sometimes be easily challenged. Jurors can arrive at different verdicts depending on whether they begin deliberations by simply voting for which side they favor or explaining what evidence was most important to them. Trial research has also shown that general verdict forms can increase findings of liability because these feeling judgments tend to favor the plaintiffs more than the defense. Special verdict forms, which require that jurors answer specific fact questions, result in more defense verdicts.

Practice Tip: to protect favorable jurors' feeling judgments, attorneys should arm them with concisely worded arguments and rebuttals. (See Practice Tips section below for more information.)

Soon after deliberations commenced in Case Study 2 and before a vote on which side jurors generally favored, a juror brought up the fact that the plaintiff did not wear gloves. This elicited much discussion and eventually strong agreement from other jurors that the plaintiff should have worn gloves. Since the discussions centered on what the plaintiff and his employer did wrong, they were blamed instead of the defendants. Jurors did not know how to argue against this point or reframe the discussions to another issue.

If the discussion had begun with a vote as to which side jurors generally favored, they would have seen that about 12 of the 16 jurors favored the plaintiff (some votes will change due to group dynamics). This would probably have resulted in jurors changing the focus to facts that supported the plaintiff, such as the inadequate label--facts under the defendants' *control*.

Anger and blame (control) are closely dependent upon each other, with intensity of anger correlated with intensity of agency appraisal (See Harmon-Jones, "Anger and the Behavioral Approach System," *Personality and Individual Differences*, 35, 995-1005.) Hence, the more jurors believe a party controlled the bad outcome, the angrier they become and want to punish that behavior. The angrier they are, the more they assign blame and the less open jurors are to opposing information. It's a positive feedback that can lead to extreme verdicts.

Uncertainty Regarding Rule Violations Led to Defense Verdict

Jurors want clear boundaries that delineate right from wrong, and they will rely on bright-line rules, even when they are irrelevant. Jurors will gravitate towards familiar, objective standards, such as Occupational Safety and Health Administration (OSHA) regulations, to determine if any parties are at fault.

It's very likely there would have been a different outcome had the plaintiff's attorneys

coordinated a *Rules of the Road* strategy and presented alternative standards, i.e., evidence of unambiguous, certain examples. For example, a labeling expert could explain to jurors what information is required on product labels, compare defendants' labels with warnings on similar solvents and reconstruct defendants' label-making process, including information that was intentionally omitted.

Fear Caused Jurors to Assume Causation

I believe that fear of the warning labels caused jurors to assume causation in this example. Although the labels lacked required cancer and benzene warnings, two displayed a fire symbol and read "DANGER! HARMFUL OR FATAL IF SWALLOWED. EXTREMELY FLAMMABLE." I noticed that these simple labels scared several mock jurors and probably affected others on an unconscious level. As explained earlier, fear drives people to assume there are greater risks outside of their control. When in a state of fear, people assume a dangerous product must have caused the known injury. Only one of these 16 jurors questioned whether the solvents caused Plaintiff's cancer during deliberations, and this one juror dialed in neutral reactions throughout most of the trial and then strongly sided with the plaintiff after the medical causation experts testified.

Fear Can Also Raise the De Facto Standard of Care for the Party in Control

I also think the dangerous-looking labels, which warned consumers to avoid skin contact, caused jurors to attribute more fault to the plaintiff and his employer for causing Plaintiff's cancer. In deliberations, jurors blamed the plaintiff for not wearing gloves, presumably because jurors believed they (as reasonable people) would have protected themselves from cancer by wearing gloves to avoid skin contact with the products that warned it was *flammable* and possibly lethal if *ingested*.

This doesn't rationally make sense, especially since this was a strict liability case, not negligence. But the untrained, unconscious, feeling mind does not distinguish varying levels and types of risk, nor complicated legal standards. It uses simple rules of thumb and recognizes that "FATAL" is something to be avoided. While fearful, jurors are more likely to apply their risk-averse standard of care onto the party they deem most in control of the bad outcome: in this case, the plaintiff who used the solvents without gloves.

Practice Tip: sequence evidence that might scare jurors after evidence of what the other party did to control the bad outcome. Also, avoid showing evidence of your client's control while jurors are still in the refractory period of fear, when they are more likely to impose a higher standard of care.

Lack of Anger Reduces Punishment

After assuming causation, where fault was not at issue, jurors had to go through mental gymnastics to get through the verdict form and find for the defense. In the post-deliberation debriefing, jurors said they would award nothing to Plaintiff, a likeable actor. At first, I thought this was due to unclear rule violations and a lack of empathy from the fear of the labels, but it probably was not. The \$0 damages reaction was too extreme for too many jurors, and the fear would have dissipated by the time jurors were asked to decide a hypothetical award, had they decided for the plaintiff. I think jurors refused to punish an "invisible" chemical company because they *liked* it, or perhaps I should say *him*.

After I wrote a post-trial analysis of this surprising verdict, *Dissection of a Defense Verdict in a Benzene Lymphoma Trial*, one of the defense attorneys, Ted Ray of ExxonMobil, contacted me (and permitted me to quote him). He explained the defense had coordinated their efforts and actually planned and executed the mechanisms I described, as an experiment. Their "experiment" seems to have been partly based on their trial instincts, i.e., their intuition, not a reasoned, deductive application. Therefore, Ted was interested in my analysis of how their framing worked, and we both learned quite a bit from the mock trial and our communications. (I also inferred that Richard Gabriel, a talented trial consultant, contributed new ideas for their experiment, which Ted wanted to understand more completely.)

Practice Tip: plaintiffs' attorneys should clearly and repeatedly define the civil burden of proof throughout the trial or jurors will impose a much higher burden of proof, approaching the criminal standard. Also, other legal standards, such as "substantial factor," must be clearly defined or jurors will impose civil standards (or higher) for that element.

Emotional Framing Can Drive Decision-Making

Ted wrote that they intended to create an "emotional frame" of the chemical companies as innocent criminal defendants--who should be exonerated. And that this is "a very noble function!" He added that their factual framing was to distinguish benzene from the "real product," defendants' solvents (the benzene content was minimal). I had written about the various effects of this framing, but now I understand another aspect of the "Not-Our-Benzene" defense (because it clearly was). As previously mentioned, jurors were told that they are unavoidably exposed to benzene throughout their lives. They did not feel that they had the ability to protect themselves from this threat, so they did not get angry with the defendants.

Interestingly, jurors *lowered* the defendants' de facto standard of care regarding the warning labels. Not one of these educated jurors challenged the foreperson when he unjustifiably said, "We would love to know if your product is going to kill us. But if you don't have to tell us, I don't expect you to tell us." Two other jurors actively argued for this assertion, and others seemed to also support it. I think this was because the jurors didn't think about how labels are created and that the defendants *control* that process. Jurors also said they thought OSHA regulated the labels and product formulation, which is incorrect. Thus jurors did not get angry with the defendants for their failure to warn because jurors didn't understand what defendants did wrong, according to their individual moral standards.

Anger and Fear Inhibit Compassion

I think the \$0 damages in Case Study 2 makes it pretty clear that jurors lacked compassion for the plaintiff. Compassion is on the opposite spectrum of the control appraisal as fear, where fear is characterized by situational, outside influences and compassion is within the individual's human control. But I think another cognitive appraisal may be at work, and perhaps another mechanism entirely, since compassion is not technically an emotion, but a state of readiness for action, based on emotional or cognitive empathy.

We can identify additional cognitive appraisals by reading Buddhist teachings on emotions. Mindfulness techniques permit greater awareness of our emotions, and Buddhist philosophy explains how emotions combine and inhibit subsequent emotions. For example, Buddhists believe that anger and fear are very similar, largely defined as an aversion or a repulsion to an object or person. Attachment is its opposite, an attraction. Therefore, fear and anger block our ability to empathize with others. This is important because anger, fear and compassion are the strongest emotional factors that drive jury verdicts.

PRACTICE TIPS

Focus on Other Party's Control and What "Should" Have Been

Just as you fight bias by presenting evidence that contradicts the elements behind that bias (e.g., irresponsible teenage driver assumption refuted by evidence of good grades), you have to present additional facts that challenge the cognitive appraisals that are activated by emotion. In Case Study 2, jurors responded most favorably to plaintiff's closing when the defendants' knowledge and *control* of their products was emphasized.

This point was not legally or rationally as important as many others, such as the fact that the labels didn't inform consumers how to protect themselves from cancer. But it shifted jurors' attention back to defendants' control, which made them (momentarily) blame defendants. Focusing on defendants' control probably also angered jurors and motivated them to punish the defendants. If

defendants' knowledge and control had been emphasized throughout the trial, I think there would have been a verdict for the plaintiff. Similarly, having a label expert talk about how the labels *should* have been written would focus the story on who had control. Thinking in terms of how things *should* be also makes us angry and motivates action to affect change, such as arguing for your side.

Greater Certainty Leads to Larger Verdicts

The more certain jurors are of causation and fault, the greater the verdict. Jurors are absolutely confused by legal definitions and the verdict form. They do not understand *substantial factor, defective, significant, knowingly, negligence, reasonable, malice, etc.* Any ambiguity and confusion diminishes the certainty appraisal required for anger. You must simplify your case so that everything is easy to understand.

Attorneys already know that simplicity is best, but they still slip back into using unnecessary jargon and otherwise complicating their cases. Trials invariably confuse jurors, but it is critically important that your Rules are clear. For example, in Case Study 2, a labeling expert should specify what must be on a label, with concrete examples.

Sequence your *Rules* testimony after clear evidence, rather than anything that is confusing, preferably regarding something that is certain and controlled by outside, human influences. (The *Rules of the Road* explains how to do this well.) This sense of certainty (and control) is cumulative and will cause jurors to form a greater appraisal of certainty. This sense of certainty and anger can transfer, as an appraisal tendency, into larger verdicts.

Fortify Favorable Jurors' Feeling Judgments

Feeling personality types have difficulty defending their emotional judgments, so attorneys should arm them with concisely worded arguments and rebuttals to expected counter-arguments. In closing, walk jurors through the verdict form, show them how to apply the law to the facts and clearly explain all legal terms. List your favorable facts and give jurors time to also write them down. Specify the verdict form question numbers to which these facts pertain. Also give your jurors short answers, talking points with just 5 or 6 words, to rebut expected arguments. Say it slowly, so they write it down. (If no one is writing, try to settle the case.) You should conduct focus groups before trial so you know which facts and arguments jurors will find most compelling.

Repeatedly Distinguish the Civil v. Criminal Burdens of Proof

It is worth repeating that plaintiffs' attorneys should clearly and repeatedly define the civil burden of proof throughout the trial or jurors will impose a much higher burden of proof, approaching the criminal standard. Since many jurors will use their emotional reasoning and do this unconsciously, you will have to repeat this many times to overcome their internal sense of fairness. (See *David Ball on Damages 3*, by David Ball (2011), for a good preponderance technique, as well as a thorough list of motivations and excellent trial advice.)

LIMITATIONS AND AREAS OF IMPROVEMENT

There are some limitations to keep in mind when applying these emotional blunting research findings. For example, Dr. Winterich's original journal publication noted that there is a strong dispositional tendency to their findings. In their second study, these emotional blunting effects were only seen in people who scored low on tests that measure motivation. People who are more likely to move towards their goals did not report measurably diminished anger after first experiencing sadness. Since leaders tend to be more driven, happy people, they might simply prefer an emotional state other than sadness.

Another limitation is the type of data used. Most cognitive appraisal research is based on college students' subjective, self-reports of their emotions. This is problematic for several reasons. We often do not realize we are emotional until others point it out to us, and we tend to forget the details

that triggered the primary emotion that anger masks. We usually only recall one emotion, even though multiple emotion centers can be firing away in the unconscious simultaneously, as seen in functional neuroimaging scans. In fact, emotions can alternate rapidly and blend into one facial expression.

Additional Cognitive Appraisals for Anger

There are varieties of anger with differing sets of cognitive appraisals, so our understanding of what generates anger is still developing. A better understanding of anger and how it relates to other emotions, as well as additional research methods, is necessary to develop a more complete knowledge of what causes anger.

Facial Expressions May Add More Insight Than Self-Reports

Most of us are unaware of what we are feeling until after we have communicated it via facial expressions, voice and other body language; we might then notice others reacting to our emotional displays. Dr. Paul Ekman's work on facial expressions provides objective means to code displayed emotions. Also, many trial consultants are trained to read facial expressions, even momentary "micro-expressions" that are often not consciously experienced. These characterizations of emotion probably offer more insight than self-reports.

Dials Measure Overall Positive or Negative Affect (Valence)

Another way to improve the measurement of emotions is via perception analyzer dials, which record overall positive or negative affect moment-by-moment, i.e., visceral reactions to a trial or focus group discussion. When used properly, these numeric dials can capture the context of unexpected emotional responses that are a window into our unconscious selves.

TRAIN YOUR COURTROOM INSTINCTS

Trial attorneys continually adapt to unexpected facts, court rulings, jurors' moods, and all the other surprises that necessitate changing the best-laid plans. Seasoned trial lawyers have developed solid courtroom instincts by training their emotional brain, the "supercomputer" of the mind. This is achieved through extensive preparation, thoughtful analyses, and receiving quality feedback soon enough for your unconscious to associate it with the appropriate technique.

Most of us are resistant to change our opinions, but watch what happens when you prime people in various ways, such as subtly affirming their importance, focusing the story on the other party or redirecting their attention to another topic with contrasting cognitive appraisers. Suddenly, jurors are willing to change their mind because they are not trying to defend their sense of self or their current emotional state. You can see this immediately in real-time, during trial advocacy workshops.

Observing graphical displays of jurors' moment-to-moment reactions in a mock trial is also a great way for attorneys to practice *Rules of the Road*, *Reptile*, *Damages*, and *Polarizing the Case* techniques. It's fascinating, fun and useful. The benefits you reap will be shared by your client.

How to Participate in Workshops and Learn More

I enjoy collaborating with attorneys, trial consultants, and academic scholars, so if you are interested in my workshops and research, please contact me and I will share information with you, including the paper mentioned in Case Study 2, *Dissection of a Defense Verdict in a Benzene Lymphoma Trial*.

You can also visit www.JuriSense.com for more information, including free, online MCLE webinars and mock trial workshop opportunities. The mock trial fact patterns and workbooks can also be customized for groups, such as consumer attorneys, bar associations and law schools. The State Bar of California has pre-approved MCLE credit for these workshops (MCLE Multiple Activity Provider 14856) and I will apply for MCLE credit in any state.

Karen Winterich replies to the trial consultant perspectives:

I read the responses by James, Metzger, and Macpherson with great interest. I am very appreciative of these informative and supportive comments, particularly as they provide important practical and legal perspectives for the consideration of emotional blunting among jurors. I am delighted that this work may provide controlled empirical support for existing phenomenon that attorneys have been observing. At the same time, I am intrigued by the additional questions raised regarding the role of emotion in jury decisions and the extent to which such emotional impacts can and should be controlled, corrected, or accounted for.

For example, Macpherson raises an important point regarding the role that the emotional baseline of jurors may play. Though not mentioned in my original article published herein, the research (Winterich, Han, & Lerner 2010) did control for participants' baseline emotions. The study accounted for the fact that participants may enter the research with a strong emotional state, similar to the way jurors may enter a trial. Indeed, though most effects of baseline emotion were nonsignificant, accounting for baseline emotion strengthened the effect of emotional blunting. Given these findings with student participants who may tend to enter a research study with reasonably neutral emotions, it is very important to consider the effect of baseline emotions of jurors who may be far more likely to enter the jury process in an angry rather than neutral state, as Macpherson notes. In doing so, it is unlikely that self-report would be the most effective method of determining juror's baselines for a variety of reasons such as misidentification as well as socially desirable responding (Deiner, 2009; Frijda, 1991). As such, it is important for lawyers to be trained to use facial expressions (Ekman, 1993) and other behavioral cues during jury selection.

Macpherson also raises an issue that is in need of additional research in jury decision-making and emotional psychology more broadly: what is a neutral state? To date, there is limited understanding of what determines and characterizes a neutral state relative to a positive or negative affective state (Brendl & Higgins, 1996). Given the uncertainty of a clear neutral state, raising jurors' awareness of the effect of emotions on their decision-making is an even more important process.

Additionally, I am pleased to hear that James and Metzger believe this work may be useful in explaining juror decision-making. I found the applications to trial advocacy by Metzger to be very interesting and informative and hope they will aid in the application of this research in the courtroom. Though I believe the emotional blunting effects tested to date would hold for other emotions with contrasting appraisal tendencies, empirical research should provide further support, perhaps focusing on the effects for fear or emotions related to compassion given the critical role of fear and compassion in jury verdicts noted by Metzger. In considering these effects, it is important to recognize that fear differs from anger in cognitive appraisals of situational control and certainty as well as differing from sadness in levels of uncertainty (Smith & Ellsworth 1985).

From these insightful commentaries, I am optimistic that this research will be beneficial to lawyers attempting to better understand the role of emotions in juror decision-making. At the same time, additional research should continue to explore the effects of emotional blunting, incorporating a larger range of emotions, on juror decision-making as well as investigate effective methods for determining jurors' emotional baselines and employing a neutral state. Many thanks to Dr. Handrich and The Jury Expert for providing the opportunity for this exchange which, hopefully, will ultimately benefit juror decision-making.

References

- Brendl, C. M. & Higgins, E. T. (1996). Principles of Judging Valence: What Makes Events Positive or Negative. *Advances in Experimental Social Psychology*, 28, 95-160.
- Diener, E. (2000). Subjective well-being: the science of happiness and a proposal for a national index. *American Psychologist* 55, 34-43.
- Ekman, P. (1993). Facial expression and emotion *American Psychologist*, 48, 384-392.
- Frijda, N. H. (1991). Labeling one's emotions. Paper presented at the meeting of the International Society for Research on Emotions, Saarbrücken, Germany
- Smith, C. A., & Ellsworth, P. C. (1985). Patterns of cognitive appraisal in emotion. *Journal of Personality and Social Psychology*, 48, 813-838.
- Winterich, K. P., Han, S. & Lerner, J. S. (2010). Now That I'm Sad, It's Hard to Be Mad: The Role of Cognitive Appraisals in Emotional Blunting. *Personality and Social Psychology Bulletin*, 36, 1467-1483.

A Note From the Editor

Race, gender, tears, rage, damages, communication, economy and emotion!

You cannot run the gamut of topics anymore than that! And that's what we have for you in the May 2011 issue of The Jury Expert! As trial consultants, we see the good, the bad, and the ugly. We are privy to the secrets, the dysfunction, the illicit wishes and wants of the parties and the anger and frustration of both litigants and lawyers. And that results in work that is sometimes exhausting but always invigorating and interesting.

You may have expected a piece in this issue about the way our heroes fall and how jurors [and the general public] respond. We think that topic is way too predictable for The Jury Expert. So instead, what you will see is emerging work on how the race and gender of the trial lawyer is related to the ultimate verdict for criminal defendants. (It isn't pretty.) And then you'll find lots more including some original research on damages and entitlement, product liability, juror emotions, and finally, narrative persuasion.

We are, naturally, attuned to the economy and your desires to save some money. So we have two pieces on how to save money on pre-trial research and on witness preparation. Why? Why, because we care about you and want to help.

You could help us too! Our authors work hard on their articles for The Jury Expert! You like reading them. So read. Enjoy. Gather nuggets. AND then become real—by writing a comment on our website or on your own blog so our authors know you are out there appreciating their hard work.

Next time you see us it will be in the dog days of summer. So enjoy this breath of spring and know that, before too long at all, "we'll be back".

Rita R. Handrich, Ph.D.
 Editor, The Jury Expert
Twitter.com/thejuryexpert

A M E R I C A N S O C I E T Y O F T R I A L C O N S U L T A N T S



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Editors

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

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

Jason Barnes — Associate Editor
jbarnes@barnesandrobarts.com

Jason Schwartz — Assistant Editor
jschwartz@zmf.com

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