

News

From The Mental Edge

Volume 12, No. 2

The Newsletter of Uncommon Sense

Winter 2007

LAWYERS ARE FROM MARS; JURORS ARE FROM VENUS

- By Samuel H. Solomon
Reprinted with permission from author.

Everyone has been stunned by certain jury verdicts. Sometimes these can be written off to sensationalized and oversimplified media accounts or to misunderstanding of the law's nuances. But verdicts that shock experienced attorneys — those are a different matter. Even the trial lawyers themselves can be taken aback. How does this happen?

A trial is a story told through witnesses and documentary evidence, and narrated by attorneys and the judge. The substantive law, and rules of procedure and evidence, shape the adversaries' cases and jury instructions. This is the lens through which the lawyers perceive and evaluate the facts of the case and the proper outcome. The outcome, however, is decided by jurors. Our jury system asks a group of lay people, preferably with varied backgrounds and education, to decide on the cred-

continued on page 15

BEGINNING OF THE END

- by Eric Oliver

*"It's not about where the client is.
It's about where they left him!"
- Mo Levine*

The old school test of whether a plaintiff lawyer should take a case was whether you could see yourself making the closing argument on first hearing the facts. In truth, most advocates imagine that argument either way, and at various times all the way through the discovery, development and delivery process of any case that makes its way to trial. While contemporary appreciation of juror (or judge) decision making tends to confirm it is the rare case that has a chance to be tipped by a closing argument, the moment is usually still packed with meaning for all present.

So, as the lawyer stands ready to hand the case off to the jurors, assuming he or she believes the lessons of research and empirical observation about the *lack* of judgment-changing influence a closing argument supposedly carries, what is he or she to think. What will do the most good? What harm can be done? What difference can it actually make?

It turns out, much as the colloquial myth about "winning" a case in voir dire or opening isn't exactly true, so is the analytical myth about not winning a case in closing. In both situations, it is true that a home run moment is not very often in the cards. But, you can do a great deal to lose a case in all three

continued on page 10

Publisher's Notes

While it may seem a stretch, the articles in this issue all really do have a common thread. They each take on, in very different ways, the very valuable task of reminding trial professionals that any efforts made to anticipate and adopt the perspective of the *receiver* of a message are efforts well-taken. On the other hand, assuming your message, like the case facts, can speak for itself in much the same way for anyone who hears it is pretty much always a big mistake.

There are multiple factors that can influence the receipt of any message for the people hearing and seeing it's delivery. In Kacy Miller's piece, the frequently overlooked and underrated influence of the group is reviewed and compared with the impact of other filters operating on the minds of legal decision makers in the jury box. My friend and colleague Sam Solomon takes on the task of sketching out some of the map of cognitive and perceptual mechanics operating on the legal decision making process behind the conscious scenes, for lay jurors. Both Sam and Kacy remind us that acting like we expect each juror to meet the lawyer at his or her model of the world is rarely a successful persuasive choice.

Amy Pardieck makes her second appearance in these pages with a piece on a specific topic in the pantheon of personal (juror, judge, attorney) biases that rarely gets the attention it deserves, based on its observable impacts. And, rather than just recommending striking all who hold it, she suggests some practical ways of *utilizing* juror bias. Finally, my piece, recently delivered to a convention of attorneys from the plaintiff's bar, concentrates a little on the needs of the jurors, from their perspective, as the lawyer's job ends and theirs ratchets up into a higher gear. Enjoy! -E.O.

A TOUCHY TOPIC ON THE RISE

– By Amy Pardieck
Reprinted with permission

For some people, it is “couch potato” syndrome. For others, it’s “big bones”. For many, it’s a source of tension and it is visible everywhere.

Overweight and obesity are significant issues in this country and, as a result, also in our courtrooms. More than 58 million Americans are overweight. More than 40 million are obese. Nearly 3 million have been clinically diagnosed as morbidly obese. Overweight and obesity rates have reached epidemic proportions. The National Center for Health Statistics reported the prevalence of overweight in adults increased from 55.9% to 64.5% between 1988 and 1994. During that same period, the prevalence of obesity increased from 22.9% to 30.5%. The topic confronts us daily. Through personal experiences, observations in public, and the media, we are inundated with reminders about weight.

With all the direct and indirect contact with this topic, jurors walk into

courtrooms with very strong preconceptions about the overweight or obese party whose side they are there to judge. Many attorneys have experienced the hard way that jurors tend to be less than friendly to their overweight or obese clients. Even heavy jurors will not necessarily give a heavy party to a lawsuit a break when it comes to weight. Why?

Weight is not the problem. Our post-verdict interviews and focus groups have shown the problem lies in jurors’ unconscious associations triggered by simply seeing an overweight or obese person, especially one coming to them for a favorable verdict. The associations are mostly negative. They include sadness, anger, tragedy, punishment, distance, passivity, laziness, etc. These are jurors’ perceptions of your client before either side has uttered its first word in the courtroom. They are based on visceral reactions to seeing an overweight or obese person simply sitting at counsel table. Decision makers

cannot help but instantly start projecting their personal meanings about weight onto your client.

Attorneys are often understandably suspicious about the importance of weight in jurors’ evaluations of their client. “After all, so many people are overweight or obese, what’s the big deal? Our client is no different.” This may ring true for those who have done focus groups, asked dozens of questions and based their case story on what people *said*. These legal professionals are relying on what people consciously *think*, rather than on what they *mean*. This is a mistake. When focus group participants are asked direct questions about their beliefs and preferences, they give conscious answers to justify unconscious decisions. Even the most sensitive rarely come close to actually knowing *why* we do the things we do. Participants answer honestly, but their answers are a product of cognitive deliberation. The danger lies in assuming these cognitive answers contain all there is to know about someone without appreciating the meanings behind the spoken words. Attorneys, who make such assumptions, tend to turn spoken words into intelligent arguments that have little connection to the unconscious forces behind them. As a result, jurors sit and listen to a rational, logical case presentation, while looking at a fat client who did not become rationally, logically overweight or obese. If overweight and obesity could be cognitively explained away, the statistics would look very different. But they do not. “Overweight and obesity” is now a term of art, and “fat” is used here purposefully, without intending to be derogatory, to reflect the common parlance of many jurors.

As with other prejudices, we discriminate against fat people and marginalize the morbidly obese, particularly women.

“In the GOPAC speech, McCain even reprised Bush’s false choice about the alternatives: ‘Some on both the left and right argue that our advocacy of democratic values in Iraq and elsewhere is reckless and vain, that freedom only works for wealthy nations and Western Cultures.’

That’s not really the issue. The issue is whether it is in the interest of the United States to be forcefully seeking to change other countries, governments and cultures. According to Bush and McCain, our security requires it.

Another view is that our global pushiness makes us more of a terrorist target and reduces our ability to do the things to isolate and disrupt the terrorists that truly threaten us.”

– **Columnist, Robert Robb**

continued on page 4

FOLLOWING THE LEADER, OF 6 OR 12

Lawyers should pay attention to the impact of group dynamics in the jury deliberation room.

– By Kacy Miller

Reprinted from the *National Law Journal* - January 31, 2005

While every juror has a vote in the deliberation room, not all votes are created equal. There have been hundreds—if not thousands—of articles authored on the topic of jury selection. Typically, these articles focus on developing rapport with the panel, communicating case themes and identifying juror attitudes—all critical aspects of jury selection. However, one of the most frequently overlooked elements of jury selection pertains to the role of group dynamics. At the end of the day, a group of complete strangers will deliberate over the fate of your client, and one of the most powerful elements in their decision-making process will involve how the group members interact with each other.

When working with attorneys on voir dire and jury selection strategies, consultants are frequently asked about the composition of an ideal jury panel: Do we want men? What age range is best? What about minorities? Should we strike anyone with parents in a nursing home? Do we want teachers? There is no conclusive answer. Jury selection is an art, not a science. A juror should be evaluated as a complete person.

If we try to place jurors in predefined boxes according to demographics or answers to a specific voir dire query, then we are disregarding the very essence of that juror. No two individuals are alike: we are shaped by our life experiences, our values, our knowledge and our perception of how the world works. This is what makes the world so dynamic, and it's precisely why jury selection is so difficult. It's impossible to predict human behavior with 100% accuracy, but it is possible to apply the findings of psychological and pretrial research to help minimize the guesswork.

The underlying influence of group

dynamics is usually not recognized by jurors, at least not on a conscious level; most are oblivious to the social forces driving their deliberations. The ultimate task of the impaneled jury is to reach a verdict that all can live with, and this is no easy feat considering that each juror brings a unique perspective to the process. The American jury represents a very rare group because it is formed involuntarily. The court dictates who will be a part of the group and who will not; jurors don't really have a choice in the matter. Unlike most naturally formed groups, there is no guarantee that selected jurors will have any commonalities but for having to deliberate and render a verdict. Despite inherent differences, jurors must interact and influence each other until they reach an agreement—whether majority or unanimous—and each juror's communication style, personality, leadership ability and role within the group will drive the process.

A deliberation group relies on interaction and communication among the jurors in order to reach a consensus; within a short amount of time, leaders and followers begin to emerge. The word "leader," does not necessarily refer to the jury foreperson. Rather, it can apply to any group member who is vocal, respected, articulate and influential. Although jurors are forced to interact in an artificial environment, the emergence of leaders and followers typically mirrors that of society's norms. In other words, the more influential an individual is in society, the more influential that person will likely be in the jury room.

Sometimes a foreperson is selected at random and, even when elected, a foreperson does not always emerge as a dominant voice during deliberations. He

or she may keep the group on course and focused, but may not have much influence over the decisions of others. When selecting and deselecting jurors during the voir dire process, it is crucial to examine each individual's propensity for becoming a leader during deliberations.

Psychological research has shown that the size of the group affects the degree of juror interaction and the amount of influence each juror tends to have over the others. N. Fay, et al. "Group discussion as interactive dialogue or as serial monologue: the influence of group size," *psychological science*, 11, (6), 487-92 (2000). A small group, such as a six-person jury, typically makes decisions in a dialogue format, meaning each juror has a voice and all voices are, for the most part,

continued on page 7

*“Every gun that is made,
every warship launched,
every rocket fired represents,
in the final analysis, a theft
from those who hunger and
are not fed, who are cold and
are not clothed.*

*This world in arms is not
spending money alone. It
is spending the sweat of its
laborers, the genius of its
scientists, the hopes of its
children.”*

- Dwight Eisenhower

A TOUCHY TOPIC
continued from page 2

Research ties money to fat. Sociologists document a pay differential between female employees with weight problems and those without. Research shows that obesity is associated with an 18% reduction in women's wages, and a 25% reduction in women's family income. The obesity numbers, as well as focus group and post-trial verdict conclusions, dictate we add this discrimination to the biases and prejudices, like anti-litigation, anti-plaintiff, personal responsibility, hindsight, defensive attribution, race and so on whose impact we expect and work to minimize. Minimizing this bias is different than elimination or eliminating "bad jurors". Impact of a mindset can be minimized without eliminating every person who shows any sign of using it – as the rest of this article lays out.

All biases and prejudices share two similarities. They grow out of people's life experiences, and they influence us on conscious and unconscious levels. Unfortunately, no all-purpose remedy for extinguishing these influences exists, as they can never be fully identified and ranked according to their influence in general, or in a specific case. In *FACTS CAN'T SPEAK FOR THEMSELVES*, Eric Oliver shows how each juror builds their own case story out of a mixture of their life experiences and case facts. A *case story* is a story each juror makes up to connect the case's facts to meanings stemming from life experiences. Connections give meaning to case facts and differ depending on how facts are presented. The result is that each set of case facts offers its own unique opportunities for minimizing landmines (including weight problems) and maximizing views helpful in story building. The trial professionals' job is finding out what the case story is and how best to present it to accomplish these two goals.

In order to develop strategies to minimize weight bias in focus groups and in trials, having a deeper understanding of the unconscious influences can be helpful. Clotilde Rapaille sheds light on the unconscious meaning our

culture gives to fat. In *THE CULTURE CODE*, "the code for fat in America is Checking Out." In general, American's *perceptions* of overweight and obese people are of people who are "checking out". This is a substantial departure from the *cause* of overweight and obesity. Rapaille shows us how: Getting fat is an unconscious way to check out of the rat race, to adopt a strong identity (as an overweight person) without having to fight for it, to move from active to passive. Being fat defines who we are (fat), why this has happened (the overabundance of food "forced" on us), who is responsible (McDonald's or some other fast food restaurant that "makes us" eat their food), and what our identity is (a victim).

For jurors referencing this perspective, a jury trial is superfluous. Before learning the facts, the stories jurors make up about an overweight party to a lawsuit unfavorably answer many of the questions they are summoned to address: who is this person, why has this happened and who is responsible.

For many, serious weight problems are an unsolvable problem, or failure. They try diet after diet, see awareness campaign after awareness campaign and attempt exercise program after exercise program. They fail, while weight problems grow. Jurors may see the trial as a step to resolve an unsolvable problem. Jurors tend to perceive the problems in trial as weight-related, even if factually they aren't. For example, in a plaintiff's medical negligence case, jurors concluded a bad outcome was due to the plaintiff's weight, although weight was so far removed as a factor, the defense did not even hint it could be a cause. Being creatures of habit, jurors tend for the trial to follow the established pattern of failure they perceive brought about overweight or obesity in the first place. Why should this event be any different than the rest?

The stories jurors have told during post-verdict interviews and focus groups reveal how their perceptions of overweight and obese people influence the case stories they build and the decisions they reach. Following are bits of

complete stories, from different cases:

It's just an unfortunate, unplanned side effect (of her obesity, not of misdiagnosis).

He should have backed away and said, I'm not going to do it because I can't do certain things, you know, because of your size.

She probably wouldn't have lived very long. She was obese.

She probably ate herself to death and died of a heart attack. And I think it's greed on the part of the family to take advantage of the doctor's compassion when he knew the risk.

Why aren't they saying -- they should be yelling and screaming. If it was my mother, I'd be in that doctor's face saying, get off your hiney and do something.

Something connects these stories and many others like them. It doesn't matter whether jurors and participants tell of side effects, other consequences or family members. What matters is the way they speak about these things, the connections between the topics. Connections consist of the unconscious meanings given to the facts. These stories, and their unconscious meanings, confirm Rapaille's culture code for fat. Jurors and focus group participants alike see the respective parties in trial as disconnected from society. And, they go beyond. They believe society disconnects itself from the fat party, and the jury is part of society. People are turned off, they stay inside, and they fail to connect.

But, there is hope. Some overweight and obese parties have received justified verdicts and substantial damage verdicts. What's their secret? Many times, they have found connections to society, to the jury. Understanding potential jurors' perceptions of your client allows us to address this issue in more profound ways than adding weight limits to criteria for case selection. If we start out by meeting jurors at their model of the world, we can delicately show them how your client is an exception to typical presumptions. Direct approaches of this topic in voir dire, with "who has a problem with my client's weight?", or

continued on page 5

A TOUCHY TOPIC
continued from page 4

trying to convince them weight is a non-issue, or trying to explain away your client's weight, usually backfire. Attention to this topic, both negative and positive, reinforce the very perspective we want to minimize. More effective solutions lie in laying out comparisons helpful to us. For example, if we compare the obese client's efforts, work product, use of time, care or attention (or whatever case specific topic is helpful) to a reasonable person's, specific comparisons can be more attractive for jurors to focus on than their general bias.

Looking at post-verdict interviews and focus groups, we find more effective means for dealing with this touchy topic, and since weight is not actually the problem, neither is it part of the solution. Solutions lie in helping people connect:

I think if you start building up a series of things that are wrong with you, you have to look at what has been diagnosed to see if this is working. And if this isn't working, maybe you should go to somebody else for basic help. And I guess I'm surprised that a person who was intelligent, but had so many things wrong, had not found a way to get somewhere without using so many medicines, I guess.

I didn't know her before the incident, so I don't know what her actions were.

She kept calling the doctors. The doctors kept saying, come into the hospital, come into the clinic. And she never did...my opinion is she was lazy. She just didn't want to go that day. I don't know if she had something else she wanted to do. Or I don't know if there was something she wanted to watch on TV, I don't know what. I kind of got the feeling that she was basically a lazy person because she was kind of living within herself.

It just boiled down to how responsible was she for her own well being and what kept her, if she really was having the kind of problems that she said she was. If she was in excruciating pain, what would keep you from dialing 911?

The patient had numerous health problems and did not try to care for her

needs as she should have.

Did this woman do everything in her mind, heart, soul, to help her in her own situation, different situations, you know, herself.

Regardless of the kind of story a participant tells, a powerful theme emerges. These themes all serve a purpose: To make this overweight and obese person an exception to the rule, an exception to the general bias about overweight and obese people. This theme might involve "getting somewhere", "taking action" or "doing things". These stories all involve various forms of movement, and movement makes us feel engaged, connected and active. According to Rappaille, "the Code for health and wellness in America is Movement." The greatest

perceptual problem with being fat is immobility. Jurors perceive loss of movement as a dramatic statement about isolated individuals, and this chronic change toward a less mobile state is not something they can easily hang on your opponent. Better known biases like hindsight and norming work similarly: For example, people use facts about prior health or lawsuit history as a basis for their decisions. A difference with this bias is overweight and obesity are less consciously available for discussion, and therefore for direct interventions in voir dire, etc.

In cases where the influence of overweight becomes secondary, the client's movement and mobility are often apparent. The manner in which the overweight

continued on page 6

"This Epidemic is a threat to your health. It has two distinct sources. One is the medicalization of everyday life. Most of us experience physical or emotional sensations we don't like, and in the past, this was considered a part of life. Increasingly, however, such sensations are considered symptoms of disease. Everyday experiences like insomnia, sadness, twitchy legs and impaired sex drive now become diagnoses: sleep disorder, depression, restless leg syndrome and sexual dysfunction.

Perhaps most worrisome is the medicalization of childhood. If children cough after exercising, they have asthma; if they have trouble reading, they are dyslexic; if they are unhappy, they are depressed; and if they alternate between unhappiness and liveliness, they have bipolar disorder. While these diagnoses may benefit the few with severe symptoms, one has to wonder about the effect on the many whose symptoms are mild, intermittent or transient.

The other source is the drive to find disease early. While diagnoses used to be reserved for serious illness, we now diagnose illness in people who have no symptoms at all, those with so-called predisease or those 'at risk.'"

**- Medical Authors: H.G. Welch, Lisa Schwartz,
Steven Woloshin**

party becomes an exception overrides the bias. This may seem counter-intuitive if your client is an injured plaintiff. In that case, in light of the discrimination we're minimizing, we need to establish a strong baseline for comparison before the injury. To the extent possible, having friends and relatives offer anecdotes to portray the overweight client's activities, not the person, can be very helpful. First, focus on specific areas of engagement, before the injury. Movement can take several forms: at work, in the household, sports, church, on the phone, with friends, family, etc. Your client does not have to run marathons to get this point across to jurors. Supportive language in the active tense: moving, doing, going, taking, acting, etc. can reinforce this notion to the unconscious. Regardless of weight, the idea is to move mental images of movement to the forefront in jurors' images of your client.

Then, show the plaintiff's efforts to regain mobility or remain mobile, moving and active after the injury. Again, this comes across best from specific anecdotes from witnesses, other than your client. If jurors get to know your client as active, concluding this party has "checked out" (disengaged from personal responsibility) will be more difficult. If jurors see your client moving to help herself, they will be more likely to follow this pattern of activity, and move toward a verdict in her direction, rather than follow a presumed pattern of failure. Basically, we are saying, without directly saying it, "my client hasn't totally checked out" and here's her pattern of movement the jury can endorse.

Last, and perhaps most important, jurors need a strong central image of the opponent's conduct to overpower the image of your overweight or obese client. A *central image* is something visual that the jurors can focus on, besides your client, that persuasively represents your case in a nutshell. Inviting jurors to picture an image supportive of your case story is a tough bill to fill since jurors are looking at your client day in and day

out during trial. If your case facts lend themselves to having a model, an object or a representation of the central image of your case on counsel table or in the courtroom during the whole trial, that would be ideal. Perhaps it's a paint can, a machine part, or replication of power lines. If you are able to create a sound or word for jurors to associate with this object, that's even better. Then, jurors have a visual and a verbal hook for remembering a helpful meaning of your side's case story, rather than a hurtful one. A central image is the visual portrayal of a verbal theme. Focus groups, which take into account and utilize the unconscious forces driving participants' responses, are the best way, sometimes the only way, to determine your case story's central image and corresponding theme.

To reinforce your case story's central image, personalize the character who best personifies your central image long before personalizing your overweight client. *Personalize* means invite jurors to get to know that character much better and sooner than your client or others involved in the case. A main character may be your opponent, what they should have done and what they didn't do, or it may be a higher authority, the hands-on workers, a can or a contaminate, or something or someone completely different. Jurors tend to blame whoever they see as the main character of their story. That can easily be your client since s/he is in full view of the jury for hours on end, but this tendency can be minimized by first and thoroughly introducing the case story's main character, and then focusing on him/her every chance you get. After the main character is established in the jurors' minds, jurors can be more open to getting to know your client later in the trial without holding overweight against you.

Since many trial professionals may be personally dealing with weight issues, addressing the influence of advocate's overweight or obesity on jurors can also be necessary. The meanings jurors give to overweight and obesity apply to us just as much as to our clients. When jurors experience overweight or obese

attorneys go through voir dire without connecting with them, present opening statements without building rapport, observe very little movement from counsel table, fumbling with papers and visuals, this behavior confirms their image of counsel as someone "checked out". They will have difficulty engaging with the presentations. Jurors will not distinguish between you and your message. They make you part of the message, rather than a messenger, and the message is "checked out." It's hard to get a verdict carrying this message. This holds true for jurors' evaluations of slender attorneys with similar behavior; however, jurors are unconsciously *primed* for this conclusion when the attorney is overweight or obese.

When jurors experience heavier attorneys connecting with them starting in voir dire, building rapport and maintaining it throughout trial, when they observe these attorneys engaged and moving professionally through the courtroom, when they see efficient and goal-oriented handling of visuals, they see you as a transmitter of the message, rather than the message. Overweight or obesity can become irrelevant. Certain attorneys have proven this to be true time and time again.

Our aim is neither to "eliminate" bad facts and bad jurors, nor "fix" or "answer" hurtful biases in decision makers' minds. Rather, our aim is to present a case story that "raises" helpful perceptions and "lowers" hurtful perceptions in decision makers' minds. To achieve this goal identifying which story elements to raise and lower and how to present them is more important.

Helpful perceptions of presentation are raised by wearing a well-fitting suit. That may seem obvious, but jurors notice. Take time to catch your breath before speaking. Slow down so you don't lose your breath. All this shows control, not failure, in handling your case and your weight. Videotape practice sessions; areas needing improvement present themselves on tape. This combined with preparation, practice and presentation of a compelling case story focusing on a strong central image

of the case's main character followed by your "mobile" client can make all the difference.

Research on overweight and obesity combined with Rapaille's CULTURE CODE and Eric Oliver's methodology provide new lenses through which to view the issues facing an overweight party in the courtroom. Since weight is not the problem, addressing weight is not the solution. Solutions lie in compelling case stories.

Amy Pardieck is an experienced trial consultant who comes from a family of trial attorneys. She works through the Bloomington, Indiana based firm of Perceptual Litigation, L.L.C., and has worked with a nationwide selection of attorneys. She is frequently at work as a Senior Consultant with Metasystems, Ltd. In earlier years, as a qualified systemic therapist, she developed a specialty in nonverbal communication within groups and with individuals which serves her well when it comes to focus groups, mock trials and actual jury panels. She is a member of the American Society of Trial Consultants, and can be reached at amy@eric-oliver.com.

"3,000 People died on 9/11, Right? But since then, nearly 150,000 Americans have been killed with guns!

So do you spend hundreds of billions preventing gun violence? Of course not. Why? Because you're more afraid of terrorists!"

– Doonesbury

equally powerful and influential. There is a greater amount of discussion in a small group, which suggests that case evidence and testimony may be discussed more thoroughly, although not necessarily with greater accuracy. While the dominant person within a small group has less influence than the dominant person in a larger group, a leader will nonetheless emerge and undoubtedly affect the decision-making process.

In a larger group, such as a 12-person jury, information is usually rendered through one to three key speakers who dominate the group and influence the remainder of the panel. Fewer jurors contribute in a meaningful, influential way, and the interaction is less inclusive than in a small group. Why does this matter? If a juror supporting your client and your arguments does not assert himself or make his voice heard, he will never be in a position to influence others. A silent advocate does nothing for your client.

While conventional wisdom suggests that the dominant speakers will convey accurate information, studies show that larger-group members are more influenced by those who speak most frequently, rather than by those who speak most accurately. This has dangerous ramifications for trial teams who end up seating a potential leader who dispenses misinformation or conflicting themes, or champions the cause of opposing counsel.

No juror can retain all of the information presented during trial, and no two jurors will focus on the same themes or perceive the evidence in the same manner. Psychological studies show that individual jurors recall about 60% of testimony and 30% of evidence, whereas the group as a collective whole, after discussion and interaction, recalls approximately 90% of testimony and 80% of evidence. Thus, juror interaction in the deliberation room becomes a critical determinative factor in the ultimate decision reached. In addition, research has revealed that the more vocal, confident and respected group members have a greater impact and influence over the decisions of other members. These jurors are your potential leaders, and

it would benefit you and your client to identify them before impaneling the jury.

Deciding whom to strike

Consider the following scenario: your client—a nationally-known medical manufacturer—is a defendant in a products liability suit. The plaintiff claims that your client should have warned of potential allergies associated with latex gloves. The plaintiff is a female nurse in her mid-30's, married with 6-year-old twins. You have one strike left, but two jurors cause you some concern. Pretrial research and conventional wisdom suggest that the following jurors may be dangerous for your client: married women with young children, those working in the helping professions, minorities, those with prior litigation experience, those with severe allergies and jurors without post-secondary education.

Juror A is a 35-year-old single, caucasian male with a high school diploma currently working as a teacher's assistant in an elementary school. He has many allergies requiring medication, including latex. He is a voracious reader, enjoys surfing the internet and building model airplanes. His voir dire responses suggest that he is anti-corporation and socially liberal.

Juror B is a 45-year-old african-american female who works full-time in medical sales. She has a bachelor's degree in marketing, and is married with an 8-year-old son. Her husband was a plaintiff in a personal injury matter, and she is the primary caregiver for her ailing father. She is a room mother for her son's class, and she participates in a bowling league.

As a defense lawyer, whom will you strike? If you chose juror a, the teacher's assistant, you just struck a potential follower. While he may have some potentially dangerous attitudes and biases, the likelihood of this particular juror emerging as group leader is small. Juror a is an introvert; he gravitates toward hobbies and recreational activities that do not require social skills or group interaction. Because he has a high school diploma rather than a college degree, he will not likely be deemed as having specialized knowledge.

continued on page 8

If you chose juror b, you struck a potential leader. Juror b is an extrovert. She has chosen a group-oriented career and has social interests. She is continually interacting and influencing others. She has a college degree, and because she works in medical sales, she will likely be viewed as having knowledge above that of the

“Neither the White House nor the Democratic Party seems to grasp that the public and business community are miles ahead of them on this energy/environment issue. The presidential candidate who finally figures that out, though – And comes up with a compelling energy/environment agenda – is going to have a real leg up in 2008.

What would be compelling? I used to think it would be a “Manhattan Project” on energy. I don’t any longer. I’ve learned that there is no magic bullet for reducing our dependence on oil and emissions of greenhouse gases – and politicians who call for one are usually just trying to avoid asking for sacrifice today.”

**- Columnist,
Thomas L. Friedman**

“average joe.” Juror b is outgoing and accustomed to selling her opinions to others. In the deliberation room, she will likely be respected, admired and have a voice to be reckoned with.

Who will lead?

While many aspects of trial consulting are based on experience, pretrial research and juror interviews, the “leader/follower phenomenon” is nothing new in the field of psychology. There have been a number of studies testing the correlation of gender with leadership. One study suggested that, all things being equal, men were more likely to dominate discussions in mixed-gender groups. N. Porter et al., “Androgyny and leadership in mixed-sex groups,” *J. Personality and Soc. Psychol.*, 49, 808-23 (1985). Although studies suggest that men are five times more likely than women to emerge as leaders within a group, because the role of women in American culture has changed dramatically in the last 20 years, it is likely that the influence power of women in the jury room will shift as well. N.L. Kerr, “social transition schemes: model, method, and applications,” in *group decision making* 59-79 (1982).

But what about age? While society typically associates age with wisdom, as far as group leadership is concerned, there is little correlation. However, if group members assume that age is indicative of experience and judiciousness, then they are more likely to prefer an older leader. It’s all a matter of perception.

As one might expect, jurors who are more intellectual tend to emerge as leaders. Acumen, however, encompasses much more than formal education. Jurors who exhibit an above-average capacity to comprehend the material and communicate this understanding to others are often leaders in the deliberation room. Interestingly, if too great a discrepancy exists between one juror and the remainder of the group, the more “intelligent” juror will often be viewed with skepticism (e.g., One juror with an MBA and Ph.D., Five jurors with 12th grade educations). Jurors embrace leaders who are trustworthy, sensitive and able to communicate with everyone in a respectful, noncondescend-

ing manner.

Seating jurors who possess valued skills or knowledge can be extremely risky for a number of reasons. First, a juror with specialized knowledge is more likely to be viewed as the expert in the deliberation room. While human nature is to assume, “great! He’ll understand my arguments and our evidence,” the more realistic conclusion is that he will filter all of the evidence through his personal experiences and spin the evidence in whatever manner fits with his perception of reality. Believing that his views will align with yours is akin to playing Russian roulette. Second, a juror with specialized knowledge is more likely to be viewed as a leader within the group. He will either influence the panel in your favor or hang you by your toes. Are you willing to take that risk?

A number of studies have been conducted on participation rates amid group decision-making. Not surprisingly, the person who speaks the most will be more likely to emerge as a leader within the group. See, e.g., T.T. Stein & T. Heller, “an empirical analysis of the correlations between leadership status and participation rates reported in the literature,” *J. Personality and Soc. Psychol.*, 37, 1993-2002 (1979). However, this finding raises concerns because it implies that group members value quantity more than quality. From a jury-deliberation perspective, this phenomenon can have terrifying results. Remember the extremely talkative, yet likable, juror who had a comment for everything, yet nothing he said was accurate or helpful to your case? Even though this person was full of misinformation, if he was as talkative in the jury room as he was in the courtroom, he would likely emerge as a leader within the deliberation group simply because he talked the most.

Perhaps the most important indicators of potential leaders are personality traits and characteristics. Over the years, psychological research has identified core personality traits that correlate with leadership, and pretrial research frequently validates these results. Leaders tend to be goal- and achievement-oriented, responsible, assertive, confident, social and energetic. D.R. Forsyth, *Group*

continued on page 9

FOLLOWING THE LEADER

continued from page 8

dynamics (2d ed. 1990). They also have the ability to evaluate a situation and modify their behavior when necessary. Leaders tend to feel as though they have power over their life and that they can seize opportunities and conquer adversity; they have an internal locus of control. While jurors do not wear these personality identifiers on their sleeves, most become evident during artful voir dire questioning, or can be gleaned from the occupational and recreational choices of individual jurors.

The human need for acceptance often causes jurors to “follow” in the footsteps of the group leaders and abandon their positions in favor of acceptance. Regardless of how strongly a juror feels about a particular incident, if the need for acceptance outweighs the need to stand firm, more than likely that juror will cave. Peer pressure, promises of compromise and sheer intimidation will often cause minority-opinion holders to conform to the majority position.

When evaluating the jury panel and determining strikes, it is essential to ex-

amine the “big picture.” Rather than focus on demographics or isolated voir dire comments, evaluate each juror as a complex individual whole. Consider the unique characteristics of each juror and evaluate the likelihood of that juror becoming a leader or follower in the deliberation room. After all, seating two perilous followers may be statistically safer than seating one dangerous leader. The choice is ultimately yours.

Kacy Miller, President of CourtroomLogic Consulting, has more than nine years experience in the field of litigation consulting and over fifteen years in the field of social science. She has debriefed hundreds of jurors throughout the country. Prior to founding CourtroomLogic Consulting, Ms. Miller worked as an in-house litigation consultant with the law firm of Strasburger & Price, LLP. She has also worked at Courtroom Sciences, Inc. — a nationally recognized trial sciences firm. She is a member of the American Society of Trial Consultants, the American Psychological Association and the American Psychology-Law Society.

“Before Sept. 11, this country whose moral authority much of the world is ‘beginning to doubt’ [according to Colin Powell] was a nation whose moral authority inspired much of the world. Imperfect and even hypocritical as we often were, we were in many ways the world’s moral policeman, the nation that held other nations accountable on human rights. Friends and enemies might have thought us a tad too idealistic, a bit too naive, a Boy Scout in the community of nations, but many of them admired us, too, for our simple faith in the power of right.

Then we got scared. And fear changed everything.

We are often told that terrorists threaten our ‘way of life.’ We hear this so often that it’s jolting to realize it’s not true.

Oh, they threaten our lives, certainly. Your life, mine. But our ‘way’ of life? No.

Granted, that’s a broad and vaguely defined term but still, no. Whether you take it to mean things frivolous (baseball, MTV, fireworks on the Fourth) or things fundamental (freedom of speech, equality under the law, the native idealism of our national character), there is no way suicide bombers and fanatics with box cutters can destroy our way of life.”

– Columnist, Leonard Pitts

spots, if you aren't real careful. As an advocate, the lawyer keeps their eyes on the prize and seeks to win. But, as a counselor and shepherd of the client's case through the litigation and trial process, the attorney can do much more good at the end of the case presentation by finishing with an eye toward protecting the

“While no one believes that hospitals are really like “ER” or that doctors are anything like “House,” no one blames doctors for the failure of the health care system. From No Child Left Behind to City Hall, teachers are accused of being incompetent and underqualified, while their appeals for better and safer workplaces are systematically ignored.

Every day teachers are blamed for what the system they're just a part of doesn't provide: safe, adequately staffed schools with the highest expectations for all students. But that's not something one maverick teacher, no matter how idealistic, perky or self-sacrificing, can accomplish.”

**- Tom Moore, a 10th -
grade history teacher
at a public school in the
Bronx**

story from some common catastrophes.

First Things First, at the Last

In voir dire, where allowed, and in focus groups in venues with and without jury selection, it is almost always important to interview potential jurors or their surrogates about the law. When done in court, this process can have the added advantage of causing judges some discomfort for fear the attorney may be invading their territory when it comes to dispensing instructions from on high. It is usually pretty easy to make the distinction between giving jurors instructions and questioning jurors about their relative abilities to *follow* instructions once they are given. The often overlooked point is that understanding an instruction is not the only factor involved in following it.

Assuming you have had this discussion with jurors, or, where not permitted, the significant points of law have been emphasized in opening statement and with witnesses where possible, closing argument provides an opportunity to clarify and reinforce the jurors' jobs as they relate to the rules they will be hearing, (maybe) reading, and expected to follow.

Survey and other research has shown consistently that jurors place a very high premium on getting the job right, and not getting fooled by denizens of the legal system while doing it. At the start of a case, the lawyer who assumes the position of the teacher or revealer of lessons on how to more easily do a job the great majority take very seriously has a chance to get a real advantage over the opposition's counsel. Likewise, closing argument offers a chance to appear to step out of the advocate's role and into the coach or mentor's position as it comes to instructions.

Problematic instructions for the plaintiffs usually include standard and burden of proof, sympathy, cause and soft damages. Naturally, punitive instructions carry their own challenges, with definitions like “evil mind” and the almost universal substitution of the idea of specific intent for phrases like “conscious disregard” or “indifference”. As

in voir dire or opening, it is always wise to meet jurors where they most likely are in their mindsets, and then invite them to move in the direction you want them to go. This approach is not only polite, but it is much more effective than trying to align oneself with the bench or the law and thunder down ultimatums and threats about sacred duty and sworn oaths to God, the court and this great land of ours. So, where are they usually when it gets to closing and instructions on the law and jury questions are front and center? In a word, they are scared.

Though they take the job seriously, and worry about getting it wrong, jurors feel ill-served by the system, and inadequately prepared for the task at hand. Again, the best thing an attorney can do in this situation is present him or herself as the open source for useful, intelligible aids to understanding and doing that job. So, rather than simply rephrasing the legal standard of proof as “more sure than not” or “more of the credible evidence than not” for each verdict question, not just the one(s) about fault, it can help to plug it into the context in which these definitions will actually be used.

For instance, you could propose scenarios both personal and interpersonal. “Let's say you are really quite convinced by a lot of evidence the doctor's attorney brought out from the witness stand. Maybe almost halfway convinced about the way the standards were followed, or the chances to do anything differently, or the way the defendant did almost everything she could. In other words, you have a number of doubts about the correctness of the plaintiff's case. How do you know when there are too many doubts, and when you must decide for the plaintiff *in spite* of even a large number of doubts regarding the evidence?” Rhetorical questions and proposals can help engage jurors in the thought process you want to rehearse with them again. Hopefully, you have anchors and analogies collected from the responses inside the box during voir dire that you can reinforce at this point, addressing the way to know when even a 48% level of leaning to the defense evidence is just never good enough according to the

continued on page 11

rules “we’ve sworn to follow.” This stage of this third person role-playing also offers you the chance to dispense with another popular bias, sympathy and prejudice on behalf of corporations, institutions and individuals “victimized” by plaintiff lawsuits. The same scenario should be mounted when the juror hears inappropriate standards being applied by a fellow fact finder in deliberations, so that worthwhile responses can be suggested. Knowing the rules is one thing. Knowing how and what to say to speak up when they are violated is quite another thing. Teaching jurors how to know the difference just when they need it can be invaluable.

Jurors often assume the sympathy instruction means they are prejudiced if they admit to feeling any sympathy at all. And, the way to follow the instruction is to deny any feeling leaning them in the plaintiff’s direction as proscribed by the court. Using closing to help people put sympathetic feelings in context with the job they have to do by following the instructions (and helping their colleagues to do that) in the process of assigning damages can help overcome multiple challenges to a worthwhile outcome in deliberations. First, reestablishing the task at hand as a job they took on, with all the skills and experience necessary to pass through jury selection, can help with the sorting process. Second, inviting people to acknowledge they have sympathetic or empathetic feelings before they start to discuss how the facts in evidence have suggested this amount as a fair value for this damage and so forth accomplishes three things. First, it undercuts a hostile juror’s effort to discount a fair value number proposed by someone as “just prompted by sympathy” because the individual doing the proposing has already acknowledged and set aside their sympathetic feelings *before* attributing the proposed value to the facts in evidence. Second, it refocuses the discussion on assigning cash values to facts in evidence, which can also be used to challenge the low-ball juror when

he or she tries to use just bias against a large number or sympathy for the poor sued defendant to cut down a number without attributing the desire to chop it down to any lack of evidentiary support. And, third, the discussion actually can encourage more sympathetic responses toward the plaintiff and among the jurors simply by force of repetition and group dynamic.

When it comes to the cause instruction, a major landmine in many a plaintiff’s professional neglect case, the article “a” is often the key anchor requiring some care and attention from the panelists, directed by their job coach, the lawyer. “A cause” is never “the cause” and the legal standard of proof is something already reinforced and confirmed. Switching to a more universal standard is what many people accomplish by twisting the cause dictum to read, in essence, “the one and only cause”. This type of absolute perception is almost impossible to keep close enough track of in the mind of the decision maker to be sure its absolute implications don’t spill over onto the neighboring proof standards seated nearby in the juror’s mind. Repeating the same phrases used to distinguish a preponderant standard from a criminal one, i.e. “Absolutely, positively, completely, 100%, totally convinced”, can help people automatically shy away from engaging the higher standard on the cause question. Knowing that is to be avoided, by your example and invocation of the criminal standard adjectives, the panelists may be far more open at that point to suggestions about how to assess cause evidence more appropriately. Often, a menu of less-likely alternative causes can be set up and quickly dispatched, one after the other, leaving the preferred version standing alone at the end of the string. Or, more direct routes for reinforcing the causal connection to the unlawful acts may be in order. But, starting by linking the revelation of the “a” before “the” rule with the already established dangers of slipping into improperly higher proof standards can lay a more worthwhile foundation for many different tacks the case story you have would suggest taking.

Harvesting Anchors

There are two main kinds of anchors, or reinforced responses among the jurors in the box, which you want to collect and pump up during closing argument. The obvious ones are those you paid so much money and invested so many other resources to try and plant for the decision makers during the presentation of your case story. These come in both verbal and visual forms. If you have done focus groups or pursued some form of case story analysis before bringing your case to trial, you undoubtedly have come up with some form of a case presentation vocabulary; a set of key phrases, analogies, bits or metaphor and other turns of phrase vetted as being more persuasive than others in passing along this story as persuasively as possible.

Closing argument is a time when you need not work feverishly to get those particular phrases out of a witness’ mouth, interrupted by objections, unintentional or deliberate obfuscation, or simple bad timing. Now, you have complete control of which phrases come out, in which tone and volume, at what point in the story review you are inviting the jurors to take with them and which you deem most helpful. Avoid repetition for repetition’s sake. Consider actually expanding the choices by adding a couple of carefully chosen, new phrases to the mix as they emerge in your high points review of the story as you promised it would unfold. These new oral anchors can serve as organizers for all the more familiar ones, or simply as refreshing changes of pace to terms which can all too easily become overly familiar, when over used during trial.

Then, there are the demonstrative aids you prepared ahead of time and those which emerged during trial in either hand written form from witnesses, or in their gestures and facial expressions. Assuming these visual cues were strongly linked with certain aspects, factors or turns in the story as delivered to the decision makers, now is the time to let them stand on their own. Use them to collect otherwise bland or elusive details and link them to simple, potent and already reinforced images, graphic

depictions and bulleted listings of your story's most productive points.

Promises and Prevarication

Having reviewed both your own and opposing counsel's opening remarks, you can come in with three sets of "promises" to help the jurors in their approach to reviewing the evidence. This help is in the form of setting frames up around both your side's evidence and the opposition's which inclines people to see them as either more, or less, credible.

The old standard of reviewing the "promises" made in opening and highlighting each one as being fulfilled by your witnesses, by exhibits and by other evidence in the record is always valuable. This can be made even more effective by switching things around a bit for closing argument. If you understand how

to go about establishing a set sequence for the case story as you prepare it and then deliver it in court during voir dire, opening and especially through your witnesses, you can now do something a little different to reinforce all that effort even more strongly. Many injury cases, for example, lend themselves to a *reversal* of the story sequence in closing argument, particular if the case involves punitive damages tried as one case. Starting at the end of the story, very often with the compensatory harms review and valuations can accomplish two very important persuasive goals. First, as David Ball has pointed out more than once, it reinforces what should be the meta-theme for most plaintiff injury cases, judging the value of the harms caused. Primacy helps in this regard.

But, more importantly than that, you are starting where the jurors left off in your case in chief. Beginning at the "end" of fully argued injuries, harms

and losses can better invite listeners to go back to the "beginning" with you, where the cause of harms and legal accountability for creating them must now be seen through the more immediate filter of emotion-laden injury argument, using the harms to perceptually bootstrap the fault and cause parts of the story in their respective - now-reversed - order of original presentation. Imagine your most effective damage presentation and the effects it has produced, followed by the phrase, "...and who is not only responsible for all this, but was also the one person trusted by one and all to prevent all this?" and you can see the potential.

The kicker in the punitive cases is that the pass back through the liability and cause sections of the story is a natural, and accelerating springboard to exactly the kinds of perceptions you want to encourage and expand on the way to reframing that neglect as a higher (or lower) form of bad judgment and action than the ordinary, more venal sin of mere legal neglect. And, done in reverse to the now three-times reinforced sequence, the unique but easily followed order of argument can be launched from a foundation of *both* logic and emotion, called damages. Naturally, you can expect limited results from this tack if your damages are slight, but with the right story, delivered well prior to closing, it can be a most compelling break with hoary tradition indeed. All that has to be given up is the lawyer's desire to save his or her own emotional wave riding for last.

When it comes to attacking the other side(s) opening statement "promises", you have two tracks to consider inviting the jurors to take. First is the traditional one. That is you list claims made which have either been left out of the defense presentation, or discredited in testimony. Using bits of testimony to produce their greatest ill effect requires a bit of stagecraft, a bit of blocking, vocal flexibility, and timing, but the results are well worth the effort. If a visual aid or exhibit is involved in the discrediting, be sure you revive it along with the moment, so the jurors have the best chance of having their reaction in this moment impacted by a fuller revivification of their reactions

continued on page 13

"In its waning months, the 109th Congress has finally achieved a status in politics that the 1919 Black Sox achieved in sports: It is a symbol of utter corruption. Over the past two years, the congressional scandals have traversed the universe from the gross to the grandiose to the grotesque: visits from call girls, gifts of Rolls Royces and fancy commodes, sweetheart deals for contractors, high-paying lobbyists jobs for underachieving children, free vacations for members and their families.

Yet, if the young boy saying 'say it ain't so, Joe' to Shoeless Joe Jackson perfectly summed up the betrayal of the 1919 World Series, the young male pages pursued by former GOP congressman Mark Foley of Florida perfectly summed up the betrayal of the 109th Congress. The public clearly suspects that, in dealing with Foley, House leaders were more concerned with protecting a House seat than a House page. In a CNN poll, 75% of Americans say the Republicans failed to act responsibly, and 52% believe a cover-up was attempted."

– Legal Columnist, Jonathan Turley

BEGINNING OF THE END
continued from page 12

back in the moment when the point was first made or revealed some time ago. A little care in this subjective resuscitation process can make all the difference between a point that is discussed and responded to by all in deliberations, and one that is “inexplicably” robbed of all its seemingly obvious persuasive and probative impact.

Another avenue open to you to challenge defense claims and promises from opening is to filter them through the instructions now very much on every juror’s mind. Anxiety and concerns about not only following the rules, but simply *understanding* them is a major concern at this point. If the weaknesses of the defense lend themselves to a trip through the many ways in which they do not meet the demands of the legal rules the jurors must apply in their decision making, then you have a powerful ally to make your challenge to the other side’s opening statement promises indeed. Think about remote or far-fetched alternate cause factors proposed and the definition (and commonly held implications) of the proximate cause instruction. In the same vein, think of the many ways the overall legal standard of “likelihood” can be used by comparison, by opposition or by direct indictment of “much more unlikely” defense assertions or claims. “You have a job to do ladies and gentlemen. And that job requires you to follow the law, and the law is quite clear about this point. So, before you let the defense attorney sit down after his closing argument, be sure he explains to you, specifically and precisely how he expects you to overcome this problem that seems so clearly against this claim his expert Dr. Jones has made to you.”

Final Words

Whether punitives are involved or not, most civil cases deal with intention and motive because most civil cases deal with slices of the lives of the human beings involved. And, as a rule, human beings impart motives and intentions to the actions they observe in their fellows

whether a judge and a bailiff are present or not. This life-long habit is never going away because a judge tells it to. If anything, the proscription simply reinforces the habit of thinking all the more.

One of the most dangerous ways to approach discussion of motive and intent in closing is also, unfortunately, one of the most common. Directly declaring what you see - and what you want others to see - as the bad actor’s motives almost never works. It goes over just about as well as telling an uninitiated crowd waiting to watch the second Star Wars movie that Darth Vader is Luke’s father. Nobody will thank you. And, with a jury, few will necessarily believe you, either. Not without a confession from the perpetrator to that effect on the stand or on video tape.

The way to go about covering this very important base, important to the human mind making your decision if not to the rules of evidence, is to make your approach more indirectly. One simple and effective approach is to offer a “menu” of possible mindsets, instead of an unsupported declaration like, “I’ll tell you what they were thinking. They were thinking only of profit and never about people - that’s what they were thinking!” Menu lists can be posed as statements, or sometimes more elegantly, as questions. “Ask yourselves what they could have been thinking about. Were they concentrating on making money to the exclusion of other concerns? Possibly. But, what if they were simply so busy on the course they had set out that they chose not to concern themselves with anything else for those six months? That’s possible too, isn’t it. Or maybe they...” and so forth. Naturally, you can collect all the verbal anchors at the end of the recitation and review each of them in the light of how utterly inadequate an excuse any one or all of them could be, and how none come even close to addressing the intentions and motives of the reasonable person, professional or organization under the same or similar circumstances.

Another way of exposing motives is to isolate and display, preferably in print form, key phrases direct from the horse’s

mouth in both deposition and courtroom testimony which imply emotional or attitudinal leanings about the choices and acts at issue. Again, don’t just tell people what you think they mean. Ask them. “What could that possibly say about a primary priority of protecting patient safety in the labor and delivery room?” And, if there are several, by way of sum-

continued on page 14

“How to get a job in Washington, that balmy, bipartisan town: Direct an organization that opposes contraception on the grounds that it is ‘demeaning to women.’ Compare premarital sex to heroin addiction. Advertise a link between breast cancer and abortion – a link that was refuted in 1997. Rant against sex Ed. And hatch a loony theory about hormones.

You’re a shoo-in, and if your name is Eric Keroack you’re in your second month as deputy assistant secretary for population affairs at the Department of Health and Human Services. Dr. Keroack, a 46-year-old Massachusetts ob-gyn, today oversees the \$280 million Title X program ‘designed to provide access to contraceptive supplies and information to all who want and need them, with priority given to low-income persons.’

– Columnist, Stacy Schiff

BEGINNING OF THE END
continued from page 13

mary at the end, suggest that, “no matter if it was X, Y, Z, or Q on their mind at the time, that is certainly a long, long way from what the law/their professional standards requires of a person under those circumstances, isn’t it?”

Also, don’t overlook the value of contrasting or opposing presentations. One way people can be invited to impute pure motives and intentions to a reasonable actor against which you wish to invite them to compare the terrible actor at the defense table is to run through the “right way - happy ending” scenario in

delicious detail, as it *could* have been done in this case. “A doctor who truly had patient safety as her number one priority would start here, and always stop and check this before moving on. That reasonable, caring doctor would have this to say, this to ask and that to do before ever heading off in this direction having seen this but not received that. And, the reasonable, cautious medical professional would always...”. Be sure to include the sights, sounds and sensations of the exact situation the jurors are so familiar with by now, only populate it with every *right* move they have come to know was the legal, proper alternative for this trucker, doctor or shop foreman

in this place, on that day, under these circumstances. And, be sure to finish the job. Play it out all the way to the vision of the car arriving safely at church, the patient safely discharged to home, or the welder safely shut down and locked away with the injured party hale and healthy before you stop.

If you take this tack, however, you have to be sure you don’t take away with your process the very value you hope to produce in your results. There can be no qualifying preliminaries, such as, “If this were done right”, or “Although it never happened this way and this isn’t the way the testimony went, I’d like to you try and imagine...” Save the gas money. You’ve killed the trip.

Use the present tense and implications, not declarations about what’s on the “good guy’s” mind. Get through all three sense representations, or how it looks, sounds and feels at each major step. Take your time and gauge the listeners’ level of involvement at each stage before moving on. Then, tell the defendant’s story the same way, except that, at each step of the road just traveled with the reasonable model toward a happy ending, repeatedly say, “Instead of doing X, this defendant chooses to say Y and leave this behind...”, and so on. And, remember the unhappy outcome is just as important as the happy one, only this one gets delivered with an air of inevitability and finality at the hands of the defendant. Do not break the “as if” frame to remind people it’s just you retelling a story. Invite them into the story instead.

If there were only one suggestion to consider about delivery of an effective closing argument, it would be the title of this article. The closing argument is the beginning of the end for one party. That party is the lawyer. Any implications that the case is now done, almost done, or the bigger portion is done is likely to come back shortly and be “done” all over you and your client. That viewpoint belies all the platitudes about the case being placed in the trusted jurors’ hands, and the important task lying just ahead for them. Be sure you have the right point of view in your remarks (and demeanor)

continued on page 15

“Corporate profits are at record levels. The Dow, too, has climbed past its high-water mark from the dot-com era. Executives read bigger and bigger paydays, even as wages have stagnated. Meanwhile, the widening investigation into stock-option backdating reminds us that the corporate malfeasance era was much more than just a couple of bad apples like Enron and WorldCom.

It seems almost unbelievable, then, that corporate America would pick this moment to beg for relaxed regulation and enforcement, as well as more protection from investors’ lawsuits. But as Stephen Labaton reported recently in The Times, industry groups are seeking broad new protections for corporations and accounting firms, not through legislation but from the Bush administration through agency rule changes.

The rationale is that the high cost of complying with the corporate governance law, the Sarbanes-Oxley Act, along with runaway lawsuits have scared foreign companies away from American stock exchanges. The timing is particularly odd given that the compliance costs associated with the much-reviled Section 404 of Sarbanes-Oxley – which requires audits of companies’ internal financial controls – fell last year, as did the number of investor lawsuits, for the second year in a row.”

– NY Times

BEGINNING OF THE END
continued from page 14

as you deliver the case to those hands for their judgment to be made about it. For a juror, fearful but determined to get this job done right, the hardest, and most active job is just about to start - not end. Always remember, it is just the end of the beginning for them.

**A LITTLE
PERSPECTIVE**

Pythagorean theorem:
24 Words

The Lord's Prayer:
66 Words

Archimede's Principle:
67 Words

The 10 Commandments:
179 Words

The Gettysburg Address:
286 Words

*The Declaration of
Independence:*
1,300 Words

*U.S. Government regulation
on the sale of cabbage:*
26,911 Words

LAWYERS ARE FROM MARS
continued from page 1

ibility of facts and testimony and make official decisions on technical matters. They come to the case with their own perspectives.

These can bear little relation to the policies and arcane comprising statutes, court rules and published opinions. Jurors are called upon to evaluate the facts based on the law and their common-sense view of how things happen. Naturally, their experiences and prejudices will have a bearing on their performance. Therefore, it is no wonder a profound "disconnect" often separates the trial story as intended by court officers and as filtered by the decision-makers. Jurors wander off mentally during testimony; they hold a dislike of lawyers against his or her client; they misconstrue the instructions. Occasionally they engage in conscious nullification of the law. There are a thousand other reasons a verdict may seem mystifying. Jurors do not take secret ballots without discussion; they deliberate together, adding a layer of complex social interaction in the form of deliberations. They typically do not explain their verdicts.

The jury box looks more like a black box all the time: Voir dire is becoming more and more limited on the federal-court model, and there is discussion of eliminating peremptory challenges, reducing the lawyers' control still further.

The moral is not one of futility. Attorneys can bridge the gap; indeed, they are duty-bound to do so. But this requires stepping back momentarily from the framework imposed by law school hornbooks and jury instructions to understand the psychology of panel members as an independent, and crucial, reality.

The evolution of voir dire forces trial lawyers to shift the focus of jury research away from panel selection and toward understanding decision-making from the jurors' side. That requires attorneys first to comprehend the psychology of individual jurors better; then to factor in the group dynamics; and finally to craft a trial "story line" that not only satisfies the formal legal tests but is calculated to

persuade the broadest group of jurors. Research and brainstorming are needed to develop persuasion theory, as opposed to legal and case theory, with the specific purpose of taking jurors as the attorneys find them and leading them through a planned route of decision-making. Understanding individual decision-making is the key in the first instance to developing a case theory that holds the broadest appeal and probability of acceptance by a jury as a whole. Venus to Mars: Come in, please.

WHAT MAKES JURORS TICK

"All jurors hear the same evidence and have the same general knowledge" about how stories develop; so variations in how they structure particular evidence must arise from "differences in experience and beliefs about the social world." Appreciating the implications shapes trial preparation from beginning to end.

1. Jurors' life experiences shape determinative values and beliefs. They decide cases on their common sense. Their verdicts fly in the face of attorneys' trial stories — even when they are dead right under the law and look artfully presented.

A contract dispute, for example, may turn on whether a "material breach" has occurred and if so how to interpret the agreement's provision for this eventuality. The litigants debate these terms of art according to the established rules. Jurors, meanwhile, may be preoccupied with entirely unrelated issues: Why didn't the plaintiff make the agreement more explicit? Why not hold the drafting lawyers accountable instead of the defendant? If an attorney doesn't satisfactorily anticipate and address these rhetorical questions, jurors will make their ways to answers on their own, based on their experience and values. The attorney may not be happy with the result.

Case themes sensitive to juror frameworks are therefore crucial. They are the overarching story elements that connect your case facts to the way people relate their values and beliefs to new situations. Case themes create a framework for understanding the issues that is both reasonable to the jurors in light of their

continued on page 16

experience and favorable to your client in light of the law and evidence.

2. Not all values and beliefs are created equal. Some go to the core of a juror's character and personality. Others are more malleable. Attorneys should devise the best way to change or circumvent unfavorable, non-core beliefs, while not beating their heads against more fundamental attitudes.

Often the best approach will be to shift a juror's thinking away from a framework with unfavorable implications for your case and toward a different one pointing to a better outcome. Your client, for example, might be seen as violating the precept that everyone should get along. Your opportunity and challenge may be to shift the issue by showing that your client was protecting his or her rights.

3. You think liability; jurors act on attribution. The single most important psychological dynamic at play in jury deliberations is "attribution," or placing blame. This mechanism is by no means the same as finding legal culpability.

Litigators should pay close attention to discussions of values and attribution in jury simulations. Jurors will signal attributions with statements such as, "Why didn't company X have someone else look over the contract?" and "Why didn't the plaintiff read the label more carefully?"

Attribution introduces a wild card: blaming an unnamed party. This presents a huge risk to a plaintiff's attorney who assumes proving wrongful conduct and damages is sufficient. To defendants, it offers a golden opportunity to escape liability. Litigators must identify the potential for phantom "parties," identify them exhaustively and determine how to handle them.

4. "My cousin once worked in an architect's office." Jurors typically look for leadership to colleagues with subject-matter authority — real or imagined. For most jurors the issues will be foreign, so in deliberations they cede extraordinary influence to anyone who seems familiar

with them. This calls for two courses of action: learning the backgrounds of, say, the business owners, accountants and any lawyers on a contract-case jury, and addressing these jurors subtly during the trial in acknowledgment of their influence. For example, you might ask: "How would you compare this problem to what an accountant would find in an audit?"

To counteract misinformation or harmful opinions from supposed experts, take care to offer your own clear definitions of key terms and concepts.

The flip side is that less influential jurors have little effect on the outcome. Peremptory challenges are wasted on them even when they express disturbing attitudes. We have found, for instance, that the views of young inexperienced jurors generally carry little weight compared to views of older jurors'.

5. Demographics are not destiny — but they may offer a guide. Many lawyers make jury selection decisions based on characteristics such as ethnicity, gender and wealth. Value-based selection appreciates that demographics often bear little relation to how people think and what they believe. Knowing someone is a Caucasian woman provides little clue as to her feelings about abortion.

That said, however, one personal characteristic can be of great value in making generalizations for jury selection: length of employment. Especially where *voir dire* is curtailed, this variable can serve as a surrogate for conservatism and deference to rules, particularly when it comes to police officers, teachers, military personnel and other government employees.

Other decisions based on demography sometimes are legitimate and necessary. In one case where a woman plaintiff's alleged promiscuity was at issue, women's sympathies ran the gamut. Still, it became clear that most women tended to be sympathetic. Our defense strategy was to exclude women from the panel unless we specifically detected a favorable value or belief. This strategy helped minimize damages. Due to Batson-like restrictions, questions were developed to remove women by *reveal-*

ing their prejudices, not gender.

6. A tower of Babel. Trials are all about language. Our research demonstrates that jurors typically do not understand most case-related language. This problem is magnified when the subject matter is unfamiliar. The result: confusion, or worse yet, misguided decision-making.

Nowhere is this more important than with the judge's instructions and the verdict form. One study put the comprehension rate for jury instructions below 10 percent. Misunderstanding at this moment of truth, of course, can mean the instant reversal of what had been a clear win for your client.

Litigators should pay special attention during mock trials to how jurors handle the verdict form. The lessons should be reflected in the entire framework of the actual case. "Burden words" should be woven into questions to witnesses and into arguments. Charts teaching burden and other instruction language are essential.

WINNING HEARTS AND MINDS **Framing Issues: Opportunities And Limits**

Appreciating the significance of frames of reference is the most valuable insight that emerges from understanding values, beliefs and attitudes. Trying to persuade jurors that their frameworks are fundamentally misguided is futile. It is far more fruitful to try persuading them that, properly understood, your case fits more appropriately into a different framework than they might at first have thought. Even better to help them appreciate that, understood from the correct angle, the case actually coincides with their existing frame of reference. Inducing such adjustments is easier said than done. Only experimentation and careful testing can uncover the re-engineered story or alternative frame that jurors will embrace.

Framing is an art as well as a science, a product of both inspiration and perspiration. Some of the best practice and wisdom comes from testing and retesting ideas in conversations with all sorts of people, on trains, at parties, at

continued on page 17

religious services, anywhere. Nowhere is jury research more crucial and valuable than to identify pertinent frames that people in the trial venue refer to. Listen to potential and mock jurors discussing analogies or anecdotes that come to their minds; often, such comments provide the foundation for building easily accepted frames of reference.

Step Up to Real Weaknesses

Jurors want litigants to own up to problems with their cases. Taking responsibility is not the same as conceding liability. To avoid throwing away the case, weaknesses must be handled properly. First, you must find out what the actual weaknesses are instead of making assumptions. Jury research is needed to isolate the problems and determine how best to own up to them and move beyond them.

In a contract case, we recognized that dealing with why the client ignored contract language required confronting the underlying psychological weakness of the case, which was how the client allowed the negotiation to slip in the first place. To address this, we added to the trial story information about how companies and their lawyers negotiate contracts and how they are different from the common experience of most people with mortgages and credit cards. Business contracts are subject to give and take, and balance needs against wants. Each is customized for a particular deal, and so may not seem as clear as jurors would expect. They should be sensitized to some of the complications. A decision-tree or checklist graphic can visually explain the negotiation trade-offs and ultimately your view of the parties' intent. This approach has been used in many jury trials to preemptively explain how the problem arose, and head off the risk of being blamed for the confusion.

Trial weaknesses are a prime example of the significance of ordering the presentation of information in a case. They are best placed in the middle of the opening or case-in-chief. The beginning

and end are left for the strongest facts and arguments. Studies show that proceeding this way leaves listeners impressed with your candor but unable to remember many details of the concession — the best of both worlds.

Answering the Silent Questions

One of the most profound insights from a mocktrial is learning the questions that bother jurors but never are answered by the case presentations. These develop into nagging doubts that lead deliberations in entirely unexpected directions. Jurors will say: "Why didn't X happen?" or "The attorney never really covered Y." But the time bombs turn into bouquets for the litigator who anticipates and addresses them. Doing so demonstrates a powerful empathy with their concerns and creates a strong connection. Most of all, it averts the risk that jurors will become sidetracked in deliberations by answering unanticipated questions on the basis of their values and beliefs, without your guidance.

A stark example is offered by a medical-malpractice case: Even though the physician's liability should have been evident, a mock trial produced a more favorable outcome. Some jurors, we observed, faulted the parents of the plaintiff for failing to obtain additional medical opinions. A mock juror remarked: "I would never have allowed this to happen to me." From a strict legal standpoint, the lack of a second opinion should never have come up. Not surprisingly, many litigators would overlook the question. Yet failing to address the second opinion issue resulted in reduced liability and damages in the mock trial. This suggested the trial strategy: affirmatively emphasizing that the parents understandably relied on physicians' referrals and believed they were receiving the necessary information. A referral loop graphic was developed to present this specific issue during opening statement. The trial produced the biggest malpractice award in the state in years. Interviews with jurors confirmed the effectiveness of the pre-emptive attack.

Seeking a Common Denominator of Common Sense

Great trial lawyers know that a good case needs a great story, and great stories inspire in jurors the pursuit of justice. Your story, though, must balance your themes with the common-sense experience of most people. The story that fits the facts best within the widest range of jurors' values and beliefs will carry the day. Often, a litigator will want to test alternative stories and then refine their case theory to create the best between the central facts and the most plausible and favorable verdict. Sometimes, even after repeated testing, no usable story will emerge. In a recent case, we could not find any story that would explain management's ignorance of a series of criminal acts occurring within an organization. On our advice, the clients took a plea rather than going to trial.

A War of Images

Analogies and metaphors help people organize facts and understand the world through visualization. During deliberations, focus-group participants typically offer analogies that relate to their employment or other experiences. Similar images are powerful tools in the advocate's story-telling kit. A negotiation can be compared to achieving agreement at a big family dinner, if the necessity of compromise is a useful point. A litigator can use the metaphor that contract provisions should have been a red flag to the opponent's management, colorful language that can help drive home the point. The risk is that a clever adversary will flip an image around — perhaps indicating how your client ignored earlier red flags and set up later problems — which would not only undermine the point made originally but turns the power of the analogy or metaphor back on the originator with even greater force. Jury research is important in avoiding this trap.

Graphic Descriptions

Communicating the trial story takes many forms. Words are at the foundation. But visual rhetoric offers a visceral connection that, with proper research

continued on page 18

and case development, can beam your message directly to jurors' subconscious. I have developed this point in a Temple Law Review article. Every component we have discussed in this piece, from embedding language to thematic storytelling, has an analog in what is known as analytical graphics. This takes graphics beyond "what" and "how" to "why", providing a visual re-framing of jurors' thought processes. Common analytical graphics include a check list of what should have been reviewed by a plaintiff during the contract negotiations and was not; or a decision tree demonstrating the appropriateness of a defendant's decision process for creating safety standards; or a relationship chart explaining how the parties involved understood the appropriateness of an investment.

Timing can be everything

We all know the power of first impressions. People learn by "attaching" later information to earlier knowledge. Plaintiffs, being first at-bat, can control the context of the entire case through manipulation of order. In a contract-breach case, plaintiffs can take control of the liability issue by being first to explain how businesses negotiate a contract. Besides molding jurors' thinking through ordering, this would educate the panel on an unfamiliar procedure and its terminology. Here is a case where the powerful trial weapon of social psychology is double-barreled.

The larger point, however, is this: Throughout trial and well beyond the courtroom, the litigator's challenge is to listen to all the potential jurors they can — to all sorts of people, in other words. On their own and with expert assistance, trial attorneys must reach beyond their legal knowledge to absorb, analyze and cycle back the language and attitudes communicating with jurors on their own terms.

Samuel H. Solomon is not only the Chairman and CEO of DOAR, but also

a highly skilled legal strategist and a prominent speaker with over 25 years of experience in the legal, financial and information technology industries. Sam chairs a company whose clientele comprises nearly two thirds of New York's most prominent law firms. In addition to his management role, Sam has always remained a hands-on consultant participating in trial and jury strategy development, electronic discovery proj-

ects, graphics conceiving and courtroom communications

Sam has an M.B.A. with Distinction from New York University's Stern School of Business, an M.S. in Philosophy and Theological Ordination from Yeshiva University.

Sam's unique perspective, eclectic education and varied background make him a much-sought-after speaker and consultant.

“Both the security and the liberty of America have suffered heavy losses over the last fifty years, but none more apparent and therefore easier to weigh and count than those inflicted on the American political democracy by the military-industrial complex (a.k.a. the industrial autocracy, the commercial oligarchy) wearing the mask of the Bush Administration. The question now before the country is the one confronted by the man afraid of finding out that he’s been robbed. How much longer do we wish to pretend that nothing really happened, or that nothing really valuable is lost; that the crime is the losing of the Iraq war, not the making of it? That in place of the constitutional questions asking why, to what end, and in whose interest, we can afford to substitute the questions of logistics—how many troops to dispatch or withdraw over a period of how many days or months; when to tell the Iraqi government that we’re not renewing its social contract; what deals to cut with Syria and Iran; where to find another expedient lie to justify what we can present as an honorable exit strategy. The answers to the secondary questions will teach us nothing worth the knowing, but by impeaching President Bush the Congress not only can impart that most dreaded and envied kind of knowledge without which a free people can’t know whether the adjective is true or false; it also might turn over enough dirt to unearth the American democracy buried at the feet of Uncle Sam.”

– Author, Lewis Lapham

News

From The Mental Edge

The Newsletter of Uncommon Sense • Winter 2007

Inside this Issue:

- *Lawyers are from Mars; Jurors are from Venus*
By Samuel H. Solomon
- *Beginning of the End*
by Eric Oliver
- *A Touchy Topic on the Rise*
by Amy Pardieck
- *Following the Leader, of 6 or 12*
by Kacy Miller

MetaSystems, Ltd.
42015 Ford Road, PMB 224
Canton, MI 48187
Tel: 734-397-8042
Fax: 734-397-8023
www.eric-oliver.com

PRST STD
U.S. POSTAGE
PAID
Permit 220
Plymouth, MI

Address Service Requested