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Courtroom Psychology

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Introduction

Mary Beth Pfister
Chief Learning Officer
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Trial attorneys understand that there is more to a courtroom presentation than the testimony and exhibits introduced. How the case is explained, the order in which evidence is presented, and each attorney's delivery and style in questioning witnesses can impact a jury's perception of the evidence, as well as the inferences and conclusions they draw. The composition of the jury—as individuals and as a group—also plays a role in how they perceive and credit the evidence presented and come to a decision—or not.

This edition of the Department of Justice Journal of Federal Law and Practice (DOJ Journal) is devoted to courtroom psychology and provides valuable insight on the role that psychology plays in trial practice from jury selection through deliberation. The issue begins with an overview of the expanded role of science and technology in modern trial practice by Assistant U.S. Attorney (AUSA) Mac Caille Petursson from the District of Alaska. She explains how attorneys are using the science of psychology to help select jurors and design presentations. She also previews possible roles for virtual reality and artificial intelligence in the courtroom.

Next, Doug Squires, Assistant Director of Criminal Programs at the Office of Legal Education (OLE), and William Kanellis, Trial Attorney with the Civil Division's Commercial Litigation Branch, explain how to apply the science of psychology to take better advantage of voir dire and ultimately make better decisions in jury selection. The authors discuss how to use concepts like heuristics and Schema Theory to determine which jurors are the best fit for your case. They also offer helpful tips for how to use the voir dire process to improve the odds that you select jurors who can be fair and impartial.

Angela Dooley, Chief Learning Officer for the Justice Management Division, then offers a deeper dive into the psychology of perception and memory. She provides tips for capturing and keeping jurors' attention and helping them understand and remember the most important information presented. She explains the importance of presenting information in discrete segments; why you might want to wait until after a break to call your most important witness; why visual aids are helpful; and why it is crucial to limit information overload.

The next three articles provide guidance on how the attorney as ad-

vocate can most effectively approach interactions with victims, witnesses, and jurors. Leslie Hagen, National Indian Country Training Coordinator at OLE, describes the challenges of investigating and prosecuting crimes against children and explains both why and how you should consider the psychology of the child victim at each stage of the process. Howard J. Zlotnick, former Managing AUSA from the Eastern District of Virginia, explores the art of discrediting defendant and defense witness testimony while avoiding improper vouching and inflammatory rhetoric. The issue concludes with an explanation of why the advocate's choice of words is crucial. Chris Fisanick, Assistant Director for Publications for OLE, describes the science of why we like or dislike certain words and how the wrong word choice by an attorney or witness can create an unhelpful association or distraction.

I am grateful to each of the authors for the substantial efforts they devoted to researching and preparing these articles and to our excellent OLE Publications Team staff who work behind the scenes editing, reviewing, and disseminating the DOJ Journal. I especially appreciate the vision and leadership of Managing Editor Kari Risher for proposing the idea for this issue, recruiting a talented cadre of contributors, and delivering an excellent product. This journal would not have been published without the hard work of each person involved. I hope you find these articles interesting, and—most importantly—that their practical tips help you in performing the vital work you do.

Methods of Courtroom Psychology: Innovation, Technology, and Change in Jury Selection and Courtroom Presentation

Mac Caille Petursson
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I. Introduction

Courtroom psychology, an intersection of legal practice and psychological science, plays a pivotal role in innovation and technology in the courtroom. Courtroom psychology encompasses a range of methods aimed at understanding and influencing the behaviors and decisions of jurors, witnesses, attorneys, and judges. Key methods used in courtroom psychology include jury selection, witness preparation, expert testimony, interrogation techniques, eyewitness identification procedures, and courtroom communication techniques. Advancements in technology and evolving legal practices are reshaping how attorneys present evidence, how jurors make decisions, and, ultimately, how the legal system serves justice.

This article explores the transformative advancements in courtroom psychology, focusing on the integration of innovative technologies and evolving methodologies in jury selection and courtroom presentations. It discusses current advancements and anticipates future trends that could reshape the legal landscape. The goal of this article is to provide analysis of the advancements in courtroom psychology and to highlight how these innovations contribute to a more effective and fair legal process.

II. Innovations in traditional methods of jury selection

Traditional courtroom methods have long relied on established psychological principles to sway jurors' perceptions and decisions. Innovations within these methods continue to refine and enhance their effective-

ness, particularly as they relate to jury selection and courtroom presentation. Technological innovations that integrate digital evidence and utilize psychometric tools to select unbiased juries have transformed traditional practices. These changes have profound implications for how attorneys present evidence and how jurors perceive evidence, ultimately influencing trial outcomes.

Voir dire, the process of jury selection, aims to identify and exclude potential jurors with biases that could affect their impartiality. Traditionally, this process involves attorneys and judges questioning potential jurors to uncover biases and ensure impartiality. Attorneys use targeted questioning techniques to identify jurors' attitudes, beliefs, and potential biases. This practice is critical in ensuring a fair trial, as the impartiality of the jury is a cornerstone of the judicial system.[1]

Trial consultants and lawyers can now employ innovative and sophisticated psychological assessments to predict jurors' behavior more accurately. Assessments may include personality trait analysis, juror bias and attitude scales, psychographic profiling, and cognitive decision-making models, discussed in more detail below. These tools help attorneys assess potential jurors' likelihood to be swayed by certain arguments or evidence.

A. Personality trait analysis

Assessing jurors based on the Big Five personality traits—openness, conscientiousness, extraversion, agreeableness, and neuroticism—provides insights into how they might interpret evidence and interact during deliberations.[2] Although this is not a fool-proof method and is certainly dependent on a combination of factors, attorneys can assess personality traits by tailoring their questions to address all five traits.[3] Attorneys may also seek jury selection experts who develop questions for jurors tailored specifically to each case and defendant. For example, jurors who are high in openness may be more open-minded and less prejudiced, while those high in agreeableness and extraversion could be more persuasive in the deliberation room.[4] Understanding these traits can help select jurors who are more likely to be fair and thorough in their evaluations.[5]

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

[2] Robert R. McCrae & Oliver P. John, *An Introduction to the Five-Factor Model and Its Applications*, 60 J. of Personality 175–215 (1992); J. M. Digman, *Personality Structure: Emergence of the Five-Factor Model*, 41 Ann. Rev. of Psych. 417–40 (1990).

[3] McCrae & John, *supra* note 2; Digman, *supra* note 2.

[4] McCrae & John, *supra* note 2; Digman, *supra* note 2.

[5] *Understanding the Impact of Personality Traits on Jury Deliberation Using Jury Analysis to Leverage Psychographic Information*, Jury Analyst (May 9, 2023), https://juryanalyst.com/blog/understanding-the-impact-of-personality-traits-

In the trial of Martin Shkreli, the CEO of Mylan Pharmaceuticals, the defendant was charged with multiple counts of securities fraud and conspiracy to commit securities fraud.[6] These charges stemmed from his management of two hedge funds, MSMB Capital Management and MSMB Healthcare, as well as his control of the pharmaceutical company Retrophin.[7] Personality trait analysis was used alongside traditional methods. The selection process included evaluating jurors' attitudes toward corporate ethics and their potential biases against Shkreli due to his public persona and actions related to drug pricing.[8]

B. Psychographic profiling

Psychographic profiling is another innovative method that analyzes jurors' lifestyles, interests, and values to predict how they might respond to different arguments and pieces of evidence. Techniques used in marketing research are adapted for jury analysis to create detailed profiles of potential jurors. This method considers factors such as media consumption habits, which can influence how jurors process information.

Notable cases have utilized psychographic profiling to enhance the jury selection process by understanding potential jurors' personalities, beliefs, and biases. During the O.J. Simpson trial, in which O.J. Simpson was charged with two counts of murder, jury consultants used extensive questionnaires to gather demographic and psychographic data on potential jurors.[9] The data aimed to predict jurors' biases and sympathies. The defense's approach involved extensive data collection, including responses to an 80-page questionnaire that covered a wide range of topics, from personal experiences with law enforcement to views on domestic violence and interactions with celebrities.[10] This allowed the defense to build comprehensive profiles of potential jurors and identify those who might be more favorable to their case. Although advanced artificial intelligence (AI) tools were not available at the time, the use of detailed questionnaires provided a form of early psychographic profiling.[11]

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on-jury-deliberation-using-jury-analysis-to-leverage-psychographic-information/.

[6] Fed. Trade Comm'n v. Shkreli, 581 F. Supp. 3d 579 (S.D.N.Y. 2022).

[7] *Id.*

[8] Dick Semerdjian & Janice Mulligan, *Jury Selection: The Often-Overlooked Make-It-or-Break-It Phase of a Trial*, Am. Bar Ass'n (2019).

[9] Henry J. Reske, *Verdict on Simpson Trial: Observers Say Prosecution Lost the Case over A Bloody Glove, Racist Cop*, 81 Am. Bar Ass'n J. 48 (1995).

[10] *Juror Questionnaire,* Superior Ct. of the State of Cal. in & for the Cnty. of L.A. (Sept. 23, 1994), https://www.nlrg.com/hs-fs/hub/79400/file-15660239-pdf/docs/california_v_oj_simpson.pdf/documents_attorney_writing_samples/california_v_oj_simpson.pdf.

[11] Douglas O. Linder, *Famous Trials*, *The O.J. Simpson Trial: The Jury*, UMKC Sch.

More recently, *United States v. Holmes* used psychographic profiling.[12] Holmes, the founder and former CEO of Theranos, a health-care technology company that claimed to revolutionize blood testing with its proprietary technology, was charged with multiple counts of fraud and conspiracy for allegedly deceiving investors, patients, and doctors about the capabilities and reliability of Theranos's technology.[13] Psychographic profiling played a significant role in that trial: Jury consultants analyzed potential jurors' beliefs about technology, startups, and corporate responsibility.[14] The profiling helped the defense and prosecution identify biases related to the high-profile nature of the case and the intense media coverage surrounding Holmes.[15]

Similarly, in the Harvey Weinstein trial—involving the former Hollywood producer, who was charged with multiple allegations of sexual misconduct—psychographic profiling was employed to understand potential jurors' views on sexual assault, the #MeToo movement, and the entertainment industry.[16] The use of detailed questionnaires helped in filtering out individuals with strong biases either in favor of or against Weinstein to ensure a more balanced jury.[17]

Psychographic profiling in these cases involved the use of advanced questionnaires, AI tools, and behavioral analysis to predict jurors' behavior more accurately. This approach complements traditional demographic data, providing a deeper understanding of jurors' values, beliefs, and potential biases. By leveraging this information, attorneys can make informed decisions during jury selection, aiming for a fairer trial process.

OF L., https://famous-trials.com/simpson/1989-jurypage#selection (last visited July 26, 2024).

[12] No. 18-CR-258, 2020 WL 5414786 (N.D. Cal., Sept. 9, 2020).

[13] Press Release, U.S. Dep't of Just., Theranos Founder Elizabeth Holmes Found Guilty of Investor Fraud (Jan. 4, 2022).

[14] *Holmes*, 2020 WL 5414786; Taylor Dunn, *A Glimpse Inside Jury Selection for Theranos Founder Elizabeth Holmes*, ABC NEWS (Sept. 7, 2021), https://abcnews.go.com/US/glimpse-inside-jury-selection-theranos-founder-elizabeth-holmes/story?id=79864426.

[15] *Juror Questionnaire,* U.S. DIST. CT. FOR THE N. DIST. OF CAL. (Aug. 12, 2021), https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/usa-v-holmes-et-al/18-cr-00258-ejd-1_final_jury_questionnaire.pdf.

[16] *Harvey Weinstein Timeline: How the Scandal Has Unfolded,* BBC (Feb. 24, 2023), https://www.bbc.com/news/entertainment-arts-41594672.

[17] *Prospective Juror Questionnaire*, SUP. CT. OF THE STATE OF N.Y., https://kkcomcon.com/docjq/StatevHarveyWeinstein.rape.pdf (last visited July 29, 2024).

C. Cognitive and decision-making models

Cognitive and decision-making models integrate principles from social and cognitive psychology and help in understanding how jurors make decisions. These models consider various psychological processes, such as information processing, memory recall, and heuristics. They provide a framework for predicting how jurors might weigh evidence and testimonies.[18] There are many variations of cognitive and decision-making models, such as the Story Model, the Bayesian Decision Models, Cognitive Dissonance Theory, Hindsight Bias, and Counterfactual Thinking.[19] These cognitive and decision-making models provide valuable frameworks for attorneys to understand and influence juror behavior, ensuring that the evidence is presented in a way that jurors can effectively process and use to make fair decisions.

In *Holmes*, both the prosecution and defense teams implicitly used the Story Model to present their cases.[20] The prosecution built a narrative of deliberate fraud and deception. They detailed how Holmes knowingly misled investors about the capabilities and reliability of Theranos's blood-testing technology.[21] Testimonies from whistleblowers, former employees, and business partners who felt misled by Holmes's representations of the company's technology supported the prosecution's narrative.[22] The defense attempted to portray Holmes as a visionary entrepreneur who faced significant challenges and made some errors but did not intentionally defraud anyone.[23] The defense emphasized Holmes's belief in the technology and her commitment to improving health care, trying to frame her actions within the context of genuine, albeit misguided, efforts to achieve her goals.[24]

These narrative strategies were crucial for each side to help the jury understand and interpret the complex technical and financial evidence

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[18] M.B. Kovera & J.L. Austin, *Identifying Juror Bias: Moving from Assessment and Prediction to a New Generation of Jury Selection Research*, *in* The Witness Stand and Lawrence S. Wrightsman, Jr. 75 (C. Willis-Esqueda & B. Bornstein eds., 2016); Lora M. Levett, *Jury Decision-Making, in* The Oxford Handbook of Psychology and Law 709 (David DeMatteo & Kyle C. Scherr eds., 2023).

[19] Sonia Chopra, *The Psychology of Jurors' Decision-Making*, Plaintiff Mag. (2018); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, *in* Inside the Juror: The Psychology of Juror Decision Making 192 (Reid Hastie ed., 1993).

[20] 2020 WL 5414786 (N.D. Cal., Sept. 9, 2020).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

presented during the trial.[25] Jurors were effectively guided to construct their own stories based on the evidence and arguments provided, aligning with the principles of the Story Model.[26]

III. Predictions in methods of courtroom psychology

The future of courtroom psychology promises continued changes as technology and legal practices continue to evolve.

A. Augmented reality and virtual reality in courtroom

The future holds an opportunity for attorneys to use augmented reality to overlay digital information onto physical spaces in the courtroom, enhancing the presentation of evidence. Jurors could see annotations and additional context overlaid on physical exhibits, leading to a deeper understanding of the case. Virtual reality (VR) reconstructions could revolutionize the courtroom by providing jurors with immersive experiences of crime scenes and complex scenarios, giving them the ability to walk through recreated crime scenes. Though the Federal Rules of Evidence will pose challenges to these realities in the courtroom, there may still be room for them in the form of demonstrative evidence.

The University of Ottawa is among the first programs to conduct moot court sessions in VR, giving students an opportunity to argue moot appellate cases.[27] In a recent study conducted at the University of South Australia, researchers compared jurors' responses when shown a crime scene through photographs with jurors' responses when immersed in the same crime scene using VR.[28] Two groups, each consisting of 15 participants, were asked to reach a verdict on a deadly hit-and-run case. The findings revealed that participants who experienced the crime scene in VR were significantly more accurate in recalling the correct placement of evidence items and reached a nearly unanimous decision, in contrast to the group that viewed photographs, who were completely divided in their

[25] *Id.*
[26] Paul Troop, *Jury Decision-Making: What's the Story?*, The Open Univ. (May 18, 2023), https://www.open.edu/openlearn/society-politics-law/law/jury-decision-making-whats-the-story.
[27] Jillian Renken, *Three Examples of Virtual Reality (VR) in the Courtroom*, Foretell Reality (May 2, 2022), https://foretellreality.com/post/three-example-of-virtual-reality-vr-in-the-courtroom/.
[28] *Id.*

verdict.[29]

From a preparation perspective, VR provides advantages for both lawyers and witnesses. Lawyers often practice their cases before other experts to simulate the pressure and stress they will face in court. With VR, lawyers can rehearse their arguments in front of a virtual audience, which closely mimics the emotional experience of an actual courtroom.[30] Additionally, using VR to view a crime scene allows lawyers a better understanding of the witness's perspective, potentially leading to more out-of-court settlements.[31] For witnesses, VR enables them to prepare for questioning and depositions by simulating the trial environment, helping them to recount their story accurately and manage the emotional challenges often encountered during testimony.[32]

B. Artificial intelligence and data analytics

AI and machine learning algorithms are being used to analyze vast amounts of data, identifying patterns and correlations that might be overlooked by human analysts. Predictive analytics can aid in developing case strategy, performing jury selection, and assessing the credibility of witness statements.[33] AI and machine learning are crucial in identifying fraudulent activities and financial crimes. For instance, in cases involving complex financial fraud, prosecution teams use AI algorithms to detect unusual patterns and correlations in financial data, helping prosecutors build stronger cases based on robust data analysis.[34]

C. Remote testimony and virtual hearings

The COVID-19 pandemic accelerated the adoption of remote technologies in the courtroom. Virtual hearings and remote testimonies have become more common, supported by platforms designed to maintain the integrity and security of the legal process. This shift not only increases accessibility but also introduces new challenges in maintaining the psychological aspects of face-to-face interaction. While these advancements

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Anatolii P. Getman et al., *The Impact of Artificial Intelligence on Legal Decision-Making,* 9 Int'l Compar. Juris. 155 (2023).
[34] *Machine Learning Models for Precise Predictive Analytics*, Stefanini Grp. (Oct. 4, 2023), https://stefanini.com/en/insights/news/machine-learning-models-for-precise-predictive-analytics; Prasanna Chitanand, *Innovations in Predictive Analytics: ML and Generative AI*, Express Analytics (June 9, 2023), https:/www.expressanalytics.com/blog/innovations-in-predictive-analytics-ml-and-generative-ai/.

can be expected to continue in the future, they pose two challenges: (1) defendants' Sixth Amendment Right to confront their accusers, which has been interpreted as an in-person right to confront; and (2) security risks during remote proceedings. Expanding the use of secure and reliable platforms for remote testimonies and virtual hearings is another crucial step. Establishing protocols to address security concerns and ensure compliance with legal requirements, including defendants' rights to confront their accusers, will be vital in this regard. Furthermore, incorporating training on new technologies and methodologies into continuing legal education programs will help legal professionals stay abreast of these advancements. Partnering with academic institutions and technology providers to offer workshops and courses will facilitate ongoing education.

IV. Conclusion

Innovations in traditional methods, technological advancements, and the anticipation of future changes are transforming the landscape of methods of courtroom psychology. As these developments continue to unfold, they could enhance the fairness and effectiveness of the legal system. By pursuing these innovations, legal professionals ensure justice in a manner that is both just and technologically adept.

About the Author

Mac Caille Petursson is an Assistant U.S. Attorney (AUSA) in the District of Alaska focusing on a wide range of criminal prosecution. She received her M.A. in Eurasian, Russian, and East European Studies from Georgetown University's School of Foreign Service and her J.D. from Suffolk University Law School. Before becoming an AUSA, she clerked for The Honorable Kyle F. Reardon in the U.S. District Court for the District of Alaska. Before that, she spent seven years as a paralegal for several U.S. Attorneys' Offices across the country.

Modern Jury Selection and Voir Dire

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I. Introduction

You have assembled a team of the finest from the Department of Justice (Department) to take a great investigation—reviewed, indicted, and supported by strong evidence and believable witnesses—over the finish line at trial. Your discovery plan is working, the theory of your case is tested and true, you have met the court deadlines, and the court has issued juror summons. Although the court is your gatekeeper and referee, the case is about to be turned over to everyday citizens selected from licensed drivers, registered voters, and state-issued identification holders.[1] Before that can happen, however, you must select your jury. But be careful who you select: The jury you pick will destine your hard-fought case for success or failure.

Jury selection comes down to two key concepts: (1) protecting prospective jurors—the members of the venire—who will use common sense and logical reasoning; and (2) doing your best to legitimately remove potential jurors who might exercise bad judgment, erratic behavior, or unreasonably strong emotions. Protecting favorable jurors is far more difficult than removing the wild ones; the process of jury selection is more about the deselection of problematic jurors than the selection of beneficial jurors. Everyone has biases—we all view the world through the lens of our past experiences—but undetected, masked bias is dangerous. Seeing through the prospective jurors' masks and exposing potentially dangerous biases

[1] The source lists often referred to as a "Master Jury Wheel"—the original list from which jurors are either summoned to appear or qualified and placed into another wheel—will vary, but these three sources are used most often.

is difficult, even for seasoned veterans. This is especially difficult in jurisdictions where attorneys have less personal input in voir dire due to the court's level of control.

Selecting a jury is far less intuitive than it may seem because of the obstacles and risks associated with selecting beneficial jurors and eliminating problematic ones. This article is designed to help Assistant U.S. Attorneys (AUSAs) understand why traditional advice (such as "do not pick a juror with open-toed shoes, but a juror with cowboy boots is fine") by itself has missed the mark. Folklore, intuition, and experience all have their place in the jury-selection discussion, but they should be considered alongside vetted social-science techniques. Modern jury selection, or scientific jury selection, uses concepts like heuristics[2] and Schema Theory[3] to determine which jurors are the best fit for each case. These new techniques complement traditional jury-selection approaches to provide a more premeditated, strategic selection process.

Although this article is certainly not an exhaustive list of all the research on the topic, it supplies general guidance in determining where to start when using scientific jury selection. We begin by explaining how jury selection got to where it is today with a case study of one high-profile prosecution. We then discuss Department training and experience and provide context for jury selection by explaining what goes on behind the scenes before you see a jury. Finally, we discuss theories, skills, and specific lines of questioning that may aid in identifying beneficial jurors and precluding problematic ones before covering how to use those skills when selecting your own jury.

This article has some important takeaways. It

- proposes a pretrial analytic framework that will allow you to overcome the hurdles and avoid the pitfalls of modern jury selection;
- supplies an overview of the process of assembling the venire and the mechanics of how jurors are selected from the venire;
- discusses how to increase the prospect of seating a fair, impartial jury and obtaining a just trial outcome based on the evidence and law by incorporating voir dire as part of your larger trial strategy;
- helps to reduce ad-hoc, intuitive guesswork during voir dire by providing practical guidance on jury risk assessment and a practical model for assessing the venire and striking problematic venirepersons; and

[2] *See* discussion *infra* section V.D.
[3] *See* discussion *infra* section V.C.

- provides a handy snapshot of federal jury selection by district, which can be seen in the appendix to this journal.[4]

II. History

The practice of jury selection started with the Egyptians, Greeks, and Romans. Although each bore distinct characteristics and functions, two salient threads are woven through ancient jury processes: (1) each jury was comprised of qualified persons drawn from local communities; and (2) each jury engaged in accusatory and deliberative functions.[5] Over time, rules emerged as to who qualified to sit on these bodies, and by the 18th Century, English law excluded Lords of Parliament; criminals (deemed not credible); individuals biased by economic or familial relations; and those disqualified by "lack of personhood" because of sex, nationality, or insufficient property ownership.[6] Although presumptions about personhood and competency have evolved over time—for example, women may now serve on juries—juror qualification remains dependent upon two threshold questions: competency and bias.

Although the constitutional right to an impartial jury traces back to the ratification of the Sixth Amendment in 1791, the first U.S. study into the science behind jury processes did not appear until the 1950s.[7] The Jury Project, conducted by the University of Chicago School of Law, evaluated the difference between *actual* jury verdicts and judges' *hypothetical* verdicts in the same case.[8] In doing so, the study "revealed total agreement between judge and jury in roughly 75 percent of the cases" and noted that "disagreement was most often due to the jury's lenience in comparison to the judge's preferred verdict."[9] After this initial research, social scientists' research into the jury process declined until the combination of social-science exploration and controversial Supreme Court opinions

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[4] *See* Appendix: Federal Jury Selection by District.

[5] J. E. R. Stephens, *The Growth of the Trial by Jury in England*, 10 Harv. L. Rev. 150 (1896); Roger D. Groot, *The Jury of Presentment Before 1215*, 26 Am. J. of Legal Hist. 1 (1982); Chas. T. Coleman, *Origin and Development of Trial by Jury*, 6 Va. L. Rev. 77, 79–80 (1919); *The Historic Origin of Trial by Jury*, 70 Pa. L. Rev. 1 (1921); Douglas M. MacDowell, The Law in Classical Athens (Cornell Univ. 1978).

[6] William Blackstone, Commentaries on the Laws of England 361–65 (1768).

[7] Dale W. Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744 (1959).

[8] *Id.*

[9] Jury Psychology: Social Aspects of Trial Processes 3 (Joel D. Lieberman & Daniel A. Krauss eds., 1st ed. 2009).

in the 1970s brought jury research back into the spotlight.[10] Since then, the body of available jury-selection research has continued to grow. The recent developments in Artificial Intelligence and Large Language Models like ChatGPT ensure that the ability to obtain, understand, and use juror data will only become more efficient and accurate in the future.

Jury consultants emerged in the 1900s, and they have become popular in complex cases, high-profile cases, and cases in which one party has sufficient resources such that they can afford the expense.[11] Access to a jury consultant may be an option for particularly significant cases, while some go so far to suggest that jury consultants may have become "[e]ssential in [h]igh-[s]takes [t]rials."[12] Jury consultants, however, are often expensive and may not be an option for indigent criminal defendants or the government in most civil or criminal cases.

The first high-profile case to use jury consultants—and the science behind jury selection—was *California v. Orenthal James Simpson* in 1994.[13] In this trial, Orenthal James (O.J.) Simpson, the former football star, was tried for the double homicide of his ex-wife Nicole Brown Simpson and her acquaintance Ronald Goldman.[14] At the time, jury consultants were so new that a jury consultant volunteered to work pro bono for the prosecution.[15] Simpson's defense team used his extensive resources to purchase their own jury consultants.[16] With mock juries and modern jury-selection techniques, both consultants were able to independently determine that verdicts were split along racial lines and that Black American female jurors had an intense adverse reaction to the lead prosecutor, Marcia Clark.[17] Despite the consultant's assessment, Clark decided to ignore the consultant's advice and instead "rely on her gut-level feelings that African American women would warmly accept and support her interpretation of the facts."[18]

During voir dire, Clark and the prosecution were "so comfortable with

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[10] *Id.*

[11] April J. Ferguson, *The Who, What & Why of Jury Consultants*, Opveon, https://www.opveon.com/blog/the-who-what-why-of-jury-consultants (last visited Aug. 20, 2024).

[12] David Lat, *Why Jury Consultants Are Now Essential in High-Stakes Trials*, Bloomberg L. (July 24, 2024), https://news.bloomberglaw.com/us-law-week/why-jury-consultants-are-now-essential-in-high-stakes-trials.

[13] Joel D. Lieberman & Bruce D. Sales, Scientific Jury Selection 6 (Genevieve Gill ed., 1st ed. 2007).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 7.

[17] *Id.*

[18] *Id.*

the demographic makeup of the jury that they chose not to use several of the 20 peremptory challenges they were allotted to remove potential jurors from the panel."[19] Just one and a half days into voir dire, the prosecution's jury consultant was informed that he was no longer needed on the case.[20] Eventually, 24 individuals were selected for the jury: 12 jurors and 12 alternates.[21] Of these 24 individuals, 15 were Black American, 6 were White, and 3 were Latino.[22] The 12 seated jurors included 1 Black American man, 8 Black American women, 2 White women, and 1 Latino man.[23] Although the trial itself was a grueling eight months long, the jury reached its verdict in less than four hours: not guilty.[24] Although there were certainly other issues at play in the trial, this case serves as an example of the importance of understanding your jury and, in turn, why selecting the right jury to begin with, is pivotal.

III. Department knowledge and experience

Experienced trial attorneys know that although cases cannot be won during jury selection, they can be lost. With a downturn in jury trials, and the Department's average level of trial experience decreasing, all attorneys can benefit from an understanding of the science behind jury selection. Judging jurors' credibility can be tricky, and modern methods of jury selection maximize your chance of success.

The combination of the changing demographics of prosecutors and government attorneys, disruption of work patterns from COVID-19, and budgetary concerns have changed the way lawyers learn trial skills such as jury selection. The Department's Office of Legal Education has noticed a trend experienced by most organizations: Much of the training previously offered in person has moved to virtual programs.[25]

Historically, veteran litigators imparted their knowledge to new attorneys with sage advice passed down through spoken word. This advice amounted to something like: "Never impanel a scientist or accountant, they will want everything to add up perfectly and will have trouble with reasonable doubt instructions." Or even that "teachers are too empathetic, accept justification for bad acts too easily, and may extend sym-

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 8.
[25] *How COVID-19 Has Affected Employee Skills Training: A Simplilearn Survey*, Simplilearn (Sept. 1, 2023), https://www.simplilearn.com/how-covid-19-has-affected-employee-skills-training-article.

pathy to a defendant." But water-cooler advice sessions may be things of the past. With fewer cases ending in trials, there is less trial experience to pass on, and even veteran AUSAs need a refresher on best practices for jury selection and how to connect with today's younger jurors.[26]

The Department is filled with a broad demographic spectrum of attorneys born between 1946 and 1997: from the Silent Generation to Generation (Gen) Z. As seen in Figure 1, 51.25% of current Department trial attorneys are Millennials.[27] Almost 65% of current Department attorneys have been barred in the past 20 years.[28] Attorneys with decades of experience are outnumbered by the younger generations, and it is becoming increasingly more difficult to pass on trial knowledge through actual jury trials. Over the next 10 years, the Silent Generation and Baby Boomers will continue to retire, and members of Gen Z will continue to join the Department. The Department needs standardized objective methods and procedures for selecting jurors—not simply to facilitate the passing of knowledge to newer attorneys, but also to add greater depth to the skill of veteran trial attorneys. The modern methods of jury selection serve both purposes and will lead to quick identification of the jurors you want, and more importantly, the ones you do not.

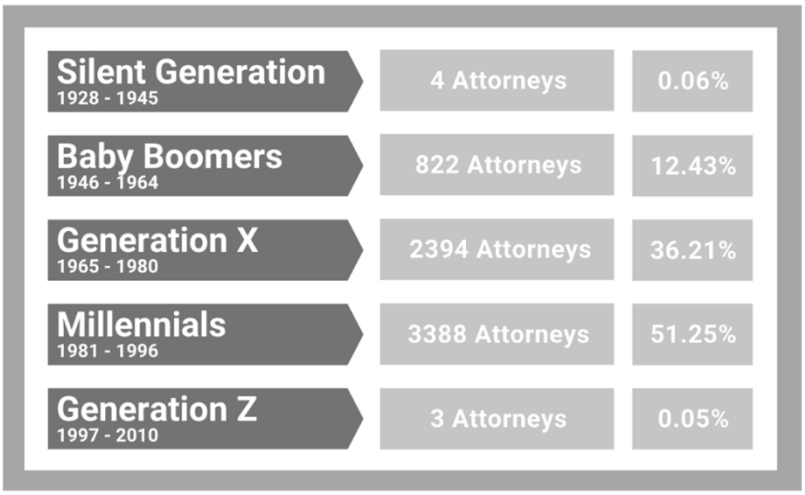

Figure 1

[26] *Id.*

[27] The statistics referenced here and shown in Figure 1 were created with data provided by the Human Resources section of the Executive Office for U.S. Attorneys (EOUSA).

[28] This information was compiled during our research for this article and was created with data provided by the Human Resources section of the EOUSA.

When it comes to jury selection, where you get your training and advice matters. As of late 2024, each generation—Gen Z,[29] Millennials,[30] Gen X,[31] and Baby Boomers[32] —prefers to get its information and advice in different ways. But each needs a thoughtful, reasoned approach, and using scientific methods for modern jury selection may be the best way to do it.

IV. Mechanics of the jury-selection process

Each district has its own jury practices and procedures. While preparing this article, we compiled an appendix, which lists the current processes in each of the federal districts.[33] Although it is available as a resource and may provide a starting point in tracking down information about your district, it is simply the product of our own research and may not be the most current, so confirm with the relevant district before relying on the information in the appendix.[34]

The increasing popularity of crime television means most people are familiar with the concept of a jury and the role the jury plays in the justice system. What many people overlook, however, is how someone goes from an everyday citizen to a seated juror on a federal trial. Attorneys use each step of the process to determine which jurors are best for our case. But jurors often do not view jury duty the same way. Some believe the jury is made up of "12 people who were unsuccessful in getting out of jury duty."[35]

Often before a defendant is even charged, the federal district where the defendant's trial will take place has already created a source list. These source lists, often referred to as master jury wheels (MJWs), contain the names of registered voters, licensed drivers, state-issued identification

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[29] One study shows that over one-third of Gen Z respondents said they used TikTok to get most of their health advice. Lauren Sforza, *Most of Gen Z Using TikTok for Health Advice: Survey*, The Hill (July 16, 2024), https://thehill.com/policy/technology/4774795-tiktok-gen-z-health-advice/.

[30] Based on the authors' personal experiences, millennials tend to spend more time in the research phase of decision-making but move through reach decisions quickly and often seek advice and inclusivity.

[31] Only 20% of Gen X uses a smartphone as their main source of internet access. They tend to prefer email and one-on-one communication. *From Boomers to Gen Z: Understanding Generational Communication Styles*, AnswerNet (Feb. 13, 2024), https://answernet.com/blog-generations-styles-communication/.

[32] Based on the authors' personal experiences, Baby Boomers typically do not self-educate. They tend to expect someone to guide them through their decision making.

[33] *See* Appendix: Federal Jury Selection by District.

[34] *See* Appendix: Federal Jury Selection by District.

[35] Trey Gowdy, Doesn't Hurt to Ask: Using the Power of Questions to Communicate, Connect, and Persuade ix (Forum Books, 1st ed. 2020).

holders, and a variety of other individuals from other sources that will vary from state to state. This MJW is the first step of the jury-selection process in every district. MJWs are compiled and managed by the clerk of court, must be at least 1% of the district's population, must be representative of the demographics of the district, and are often multiple thousands of people long.[36] These MJWs must be refilled periodically; the time will vary for each district but is generally between two months and four years.[37]

Once individuals are placed on the MJW, they must be summoned to determine if they meet the minimum legal qualifications to sit on a jury. The frequency with which names are summoned from the MJW will vary but often occurs one of two ways: (1) a specific quantity of names is randomly pulled and summoned for all scheduled trials in a particular quarter; or (2) a predetermined quantity of names are randomly pulled and summoned to be pre-qualified and placed into another wheel, the qualified juror wheel (QJW). The second option is far more common and is the practice in at least 80 out of the 94 federal districts.[38]

When an individual on the MJW is first summoned, they are also sent a questionnaire. Though some districts use their own questionnaire, most use the one provided by the Administrative Office of U.S. Courts which asks a general set of questions applicable to any case, civil or criminal.[39] Individual deemed to meet minimum qualifications, based on the answers in their questionnaires, will then be placed on a QJW to be summoned later in jurisdictions that use QJWs, or they will be given a date and time to appear in jurisdictions that do not.

Members of the venire will be qualified for jury service—whether or not the jurisdiction uses a QJW—unless they fall into one of the following categories: (1) they are not a citizen of the United States who is at least 18 years old and has resided within the district for a year; (2) they are unable to read, write, and understand enough English to complete the juror qualification questionnaire; (3) they are unable to speak English; (4) they are "incapable, by reason of mental or physical infirmity, to render satisfactory jury service"; or (5) they have felony convictions or

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[36] Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 54.
[37] *See* Appendix: Federal Jury Selection by District.
[38] *See* Appendix: Federal Jury Selection by District.
[39] Although this particular juror questionnaire is not available to the public, the District of Alabama and the Middle District of Georgia provide their questionnaires on their websites. *Juror Questionnaire*, Dist. of Ala. (Jun. 4, 2020), https://www.alsd.uscourts.gov/sites/alsd/files/Blank% 20Juror%20Questionnaire.pdf; *Juror Information Questionnaire*, Middle Dist. of Ga., https://www.gamd.uscourts.gov/sites/gamd/files/Blank Questionnaire.pdf.

pending felony charges, in state or federal court.[40] Some professions are exempt from jury service, such as active service members of U.S. Armed Forces; members of police or fire department; and executive, legislative, or judicial public officers in federal or state government who are elected or who are directly appointed by a person elected to public office.[41] Judges may excuse potential jurors after they appear for a variety of reasons including:

- undue hardship or inconvenience,
- inability to be impartial,
- likelihood of causing a disruption of proceedings, or
- prior completion of jury service in the previous two years
- upon peremptory challenge or challenge for cause by a party;
- or upon judicial determination that the juror's service would threaten the "secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations."[42]

In addition to the process described above, some districts use or allow supplemental questionnaires. These questionnaires are sent after jurors have been qualified but before they appear, and they are used to obtain additional information about those jurors in relation to a specific case. Although these questionnaires are not often standard practice, several districts specifically state that they allow supplemental questionnaires, and others state they can be used with judge approval.[43] This article will discuss why supplemental questionnaires can be valuable.[44]

Once prospective jurors appear, they may be given an overview of the framework of the upcoming trial—similar to an orientation. This orientation covers logistics and procedures. Many courts now use videos to provide introductory information before the venire is sent into the courtroom. These videos traditionally provide an overview of jury selection, the trial process from opening statements to deliberations, rules governing juror conduct, and answers to frequently asked questions. In addition, courts

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[40] 28 U.S.C. § 1865.
[41] *Id.* § 1863(b)(6).
[42] *Id.* § 1866(c), (e).
[43] The following are several districts that allow supplemental questionnaires with judicial permission: the Western District of Arkansas, Northern District of New York, and Northern District of Ohio. The following are the only two districts that always have jurors complete supplemental questionnaires: the Northern District of California and Southern District of Illinois.
[44] *See* discussion *infra* section VI.A.1.

have begun including a discussion of the effects of unconscious bias.[45] If your district does not invite attorneys to preview these orientation videos before trial, a copy should be requested and reviewed before the venire appears.[46]

V. Scientific jury selection

Think back to the last major decision you made and ask yourself why the decision-making process was so hard, why you put off a hard decision, or worse yet, why you made a decision that turned out badly. Chances are that the basis of your decision was not entirely clear when it was made. Jurors exhibit a similar lack of forethought when they make decisions. The key to obtaining the maximum benefits from the jury-selection process is understanding the methods and processes behind human decision making. Human decisions are shaped by the habits, rituals, and emotions experienced in the decision-making process. Attorneys who are experienced at picking juries may have some insight into how jurors think, but scientific jury selection is a powerful tool for any attorney—new or otherwise.

Modern jury selection relies on experience built upon generations of legal expertise—reflected in tried-and-true jury-selection lore—as well as proven social-science techniques; this results in the most effective juries who will fairly consider and evaluate the evidence and then properly apply the law to the evidence. Schema Theory and heuristics help accomplish the following: (1) categorize members of the venire based on their answers in questionnaires or voir dire; and (2) determine whether they will be helpful to our case. Schema Theory[47] sorts individuals based on their character traits, and heuristics[48] identify subliminal decision-making processes in potential jurors. Once you have determined which schema potential jurors fit into or which heuristics may be present, you may use the information to decide how to present your case-in-chief, form your order of proof, and optimize your presentation to heighten the probability the jury will fairly receive and consider the evidence.

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[45] *Introductory Video for Potential Jurors*, U.S. Dist. Ct., N.D. Cal. (Mar. 18, 2021), https://cand.uscourts.gov/attorneys/unconscious-bias-video-for-potential-jurors/.

[46] The Center for Jury Studies has compiled a list of many jury orientation videos over the past 10 years from 33 states and the District of Columbia. *See Juror Videos,* Ctr. for Jury Stud., https://www.ncsc-jurystudies.org/what-we-do/juror-videos (last visited Aug. 20, 2024).

[47] *See* discussion *infra* section V.C.

[48] *See* discussion *infra* section V.D.

A. Establishing an effective framework for voir dire and jury selection

To build a viable framework within which to approach jury selection, we adopt five shared premises about our goals and limitations (listed below in Table 1). While you cannot predict exactly how people will process information, you can lower the risks of unpredictability by preventing individuals who may not be fair from being seated on the jury.

With the five premises described in Table 1, your jury-selection stratagem should crystallize: Voir dire and jury selection are prophylactic tools used to preclude seating of venirepersons who will increase the risk of irrational, anomalistic judgments, and unjust outcomes.

	Premise	**Reasoning**
1	The United States brings and defends just cases based upon a good faith interpretation of the law and substantial evidence in support of the government's theory of the case.	We seek just outcomes, and at trial will present evidence and arguments to achieve a fair outcome consistent with the law and the Constitution.
2	The evidence the United States presents at trial is admissible, credible, substantial, and supports the factual narrative underlying the government's theory of the case.	A common-sense assessment of evidence admitted at trial (*facta probantia*) should logically and reasonably support the factual narrative (*factum probandum*) underlying the government's theory of the case.
3	We ask jurors to do the following: (1) reasonably interpret admitted evidence; and (2) fairly apply the law to this evidence in the manner prescribed by the trial court.	We seek rational, unbiased jurors who will fairly consider and apply evidence to the law. By contrast, we seek to avoid impaneling a juror who meets any of the following criteria: (1) holds unfair bias; (2) will not rationally consider and interpret evidence; or (3) will not apply the law to the evidence in the manner instructed by the trial court.

	Premise	Reasoning
4	We cannot predict how a single juror will interpret evidence and apply the law to the evidence.	We cannot predict how more than one juror will collectively interpret evidence, reach conclusions, or negotiate compromises about the *factum probandum*, or whether extraneous factors may influence these judgments and conclusions.
5	Trial lawyers do not affirmatively "select" jurors.	Lawyers can only exclude certain venirepersons from the jury.

Table 1

When you accept these premises and this conclusion, your framework is distilled into a much more manageable goal. Rather than attempting to affirmatively identify individuals within the entire venire that you would like to impanel, your focus can narrow to identifying and excluding persons from the venire who may disrupt or impede the jury's logical, reasonable, and fair application of law to facts.

B. Voir dire as a component of your larger trial strategy

At trial, you generally have only three opportunities to address the jury directly: (1) voir dire; (2) opening statements; and (3) closing argument and rebuttal. Although trial judges increasingly control communications with the venire during voir dire, your exposure to the venire at this early stage presents a valuable opportunity to do two things: (1) establish and frame the trial narrative (or "story"); and (2) establish your trial team's credibility. Although voir dire provides an opportunity to become familiar with the jury, judges generally loathe attorneys who attempt to ingratiate themselves to the venire or pre-try their case. For this reason, the California Code of Civil Procedure describes an improper question in voir dire as one whose "dominate purpose[] attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law."[49]

Trial evidence is presented and assimilated more as a holistic "story" rather than as mathematical or logical proof. For example, a criminal defendant's motive for the conduct underlying the charged crime is rarely

[49] Cal. Civ. Proc. Code § 222.5(b)(3) (West 2018).

a formal element of proof. Yet, it is an indispensable component of the government's case-in-chief because jurors, when reconstructing events at issue, draw from their personal experiences and assumptions about human behavior and require a plausible explanation for why the defendant would do what the government alleges. Voir dire presents an opportunity to introduce and entrench the government's story and theme, rather than the opposing party's competing story and theme. In a tax-fraud trial, is this the story of a greedy businessperson undervaluing properties to avoid paying taxes, or the story of an overworked and distracted entrepreneur who kept sloppy records? As discussed in detail below, heuristic principles of availability, anchoring, and familiarity teach the value of introducing and anchoring your trial narrative by introducing themes, words and phrases, concepts, and numeric values as early as possible.[50] This may start in voir dire. Even something as ostensibly innocuous as reading the indictment to the jury (a practice in certain district courts) provides the jury a chance to observe you, hear your voice, and deploy the "familiarity" heuristic.

C. Schema Theory

Juror decision making is filtered through the elements of jurors' lives that make up their core values: bias, experience, fears, and so on. Jurors tend to remember and believe witness testimony and accept evidence that supports their own values.[51] Jurors tend to reject evidence contrary to their own values. Those values, made up of personal beliefs and knowledge, can also be explained in the Schema Theory.[52] The Schema Theory is the cognitive theory that our knowledge base is organized into mental frameworks used to understand ourselves, others, and concepts in our environment.[53]

We must understand personality traits to better predict and evaluate jurors' behavior and decision-making processes. For example, the idea that nurses have too much empathy and should be avoided because they will side with the defendant may not always be the case. To the contrary, an emotional or empathetic juror may be ideal in human victim cases. As another example, one popular bromide is that accountants should be avoided because they want 100% certainty (which is higher than the standard of proof at trial). But in certain cases, a perfectionist may be a

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[50] *See* discussion *infra* section V.D.

[51] Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of "Plain-Language" Jury Instructions*, Scholarly Works 643 (2013).

[52] John R. Anderson, Cognitive Psychology and its Implications (5th ed.) (Worth Publisher 2000).

[53] Jeff Pankin, Schema Theory and Concept Formation (2013).

good thing.

1. Relevant traits

Over the past century, legal scholars, celebrated jurists, and paid jury consultants have offered assured opinions about the predictive value of jurors' immutable traits or demographic characteristics, such as gender, race, ethnicity, familial nationality, and religion. For example, in 1936, Clarence Darrow offered sweeping conclusions about the trial tendencies of members of various nationalities and religions, including the admonishment to "[b]eware of the Lutherans, especially the Scandinavians; they are almost always sure to convict."[54] Such default presumptions may attract a trial attorney who, in the frenzy preceding trial, has not given much thought to a jury-selection strategy.

More comprehensive studies have shown, however, that such views are as incorrect as they are anachronistic: "Research . . . has generally shown demographics to be unreliable predictors of juror behavior."[55] "Age, occupation, demeanor, appearance, gender[,] and race . . . have minimal or no predictive value for verdicts."[56] A 1980 study of 4,000 jurors serving on 326 trials in the United Kingdom concluded that demographic factors such as gender, age, and occupation had no demonstrable effect on trial outcomes.[57] Joel Lieberman and Bruce Sales, the authors of *Scientific Jury Selection*, surveyed the scholarship and studies on whether demographic characteristics affected trial outcomes and found no uniform views that occupation, age, ethnicity, or gender had a meaningful effect on outcomes in criminal and civil cases.[58]

Modern research has shown that other traits are more reliable and appropriate measures of whether a prospective juror is likely to engage in a reasonable and fair application of law to facts. We may instead consider two other spectra of traits of prospective jurors: "leader v. follower" and "rule-based v. intuitive." "Leader v. follower" is an antipodal spectrum that describes the degree to which a prospective juror will exercise "leadership"—that is, steer the framework of deliberation, influence other jurors, and independently verbalize opinions.[59] The "rule-based v. intuitive" antipodal spectrum describes how a prospective juror will assim-

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[54] Clarence Darrow, *How to Pick a Jury,* Esquire Mag. (1936).
[55] Lieberman & Sales, *supra* note 13, at 75.
[56] *Id.* at 76.
[57] John Baldwin & Michael McConville, *Does the Composition of an English Jury Affect Its Verdict?*, 64 Judicature 132 (1980–1981).
[58] Lieberman & Sales, *supra* note 13, at 59–72.
[59] For examples of such leader v. follower traits, see Joseph L. Curtin, *Emergent Leadership: Case Study of a Jury Foreperson*, 4 Leadership Rev. 75 (2004).

ilate, evaluate, and apply legal norms to evidence. At one end of this spectrum, a juror deploys a systemic and rational approach to evaluating evidence, free from emotion and biases. At the other end of the spectrum, a juror assesses evidence by relying upon intuitive or emotional instincts rather than logic and reason.

2. Juror risk assessment axis

As we learn about each venireperson through voir dire, we may evaluate the background and responses of each venireperson through the lens of these two spectra of characteristics. These characteristics may be depicted in a juror risk assessment axis, depicted in Figure 2.[60]

Given our desire to decrease the risk of irrational, anomalistic judgments and unjust outcomes, we seek to identify and strike jurors who will not (1) exercise common-sense, rational assessments of evidence; and (2) fairly consider this evidence under the law. But we cannot entirely control the composition of the venire; the number of strikes is limited for each side, so there is no guarantee we will strike all risky potential jurors. At best, we may seek to identify and strike problematic members of the venire who are most likely to control or influence deliberations—that is, those who exhibit the qualities of a leader.

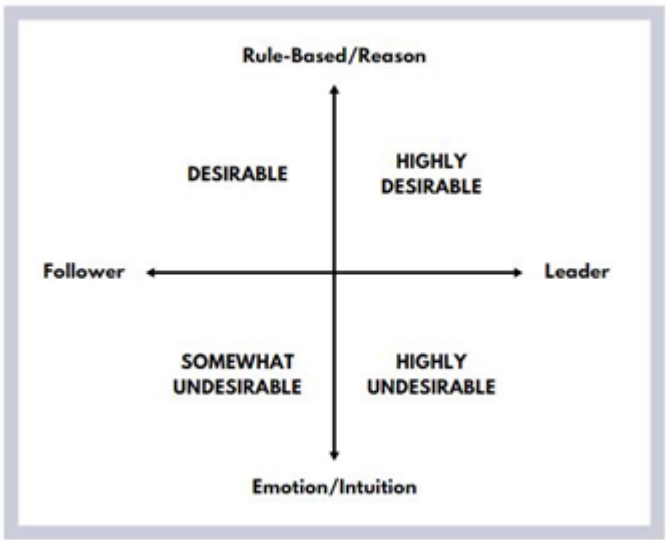

Figure 2

The jury risk assessment axis may be used as a tool during voir dire: As each member of the venire responds to questions, you may mark your

[60] This figure has been created by the authors and is a product of their own experience, knowledge, and training.

assessment of where they fall on an axis comprised of these two spectra. For example, you may assess that a naval engineer is governed by rule-based norms more than intuitive ones and is more of a leader than a follower; she belongs in the upper-right quadrant. You may also assess that a performance artist who is outspoken or overly opinionated in response to questions is driven more by intuitive judgments but exhibits independence as well as leadership qualities; he belongs in the lower-right quadrant.

D. Heuristics

1. Understanding heuristics

Heuristics—the mental shortcuts and simplified decision-making strategies humans use to make decisions—are powerful tools used to assess potential jurors. As humans, particularly in the fast-paced culture of the United States, we want judgments and decisions to be swift and clear. Because mental shortcuts have been ingrained in our daily activity, juror opinions about the witnesses and evidence presented at trial may be influenced by heuristics.

Not all heuristics are irrational or unfair, and they may play a significant, if subliminal, role in how individual jurors assimilate and process information. Assimilating a trial narrative is complicated by the fact that the introduction of evidence is episodic, presented through various witnesses and evidentiary sources. Outside of opening and closing statements, these complicated facts are not encapsulated and presented in a unified manner. Heuristic judgments may creep in where a juror struggles to assimilate facts or seeks to simplify the trial narrative. For example, in a complex securities fraud trial, jurors may be asked not only to assemble a narrative story—that is, to understand who the individuals and entities are and what roles they played in the scheme—but also the mechanics of securities transactions and the regulatory regime within which they operate. These complexities may cause a juror to fall back on irrational or biased judgments or assumptions that undermine a reasonable interpretation of evidence and a just outcome.

An example of a heuristic effect that may be seen at trial is that of the "warm glow" heuristic. Studies have shown that people often prefer familiar stimuli because familiarity signals safety.[61] Thus, a defendant who reminds a juror of a sympathetic person in the juror's life—like a son, daughter, or spouse—may, at least initially, evoke sympathetic feelings.

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[61] *See, e.g.*, Eddie Harmon-Jones & John J. B. Allen, *The Role of Affect in the Mere Exposure Effect: Evidence from Psychophysiological and Individual Differences Approaches*, 27 Personality & Soc. Psych. Bull. 889 (2001).

"We often speed through our fast-moving, complicated world using limited information to make tough decisions. But taking the right shortcuts is not easy."[62] In his new book, Dale Nance digs into complex decision making during uncertainty.[63] And in an undergraduate seminar he taught this year, Nance focused on the use of stereotypes in everything from regulating dangerous dogs to profiling potential terrorists.[64]

Stereotyping has a negative connotation, but at its core, stereotyping is just a generalization about how individuals may behave. Although stereotypes are often supported by statistics and societal expectations (which is how perceptions become stereotypes to begin with), many believe they should not be used to make decisions. Like age requirements, however, these stereotypes can be particularly useful in society. For example, while most 12 year olds would make poor drivers, some 12 year olds have spent their lives driving tractors on the family farm and would make better drivers than some 25 year olds. In that context, drivers' tests are the way standardized decisions can be used to determine competency. But such tests are expensive, controversial, and are not appropriate in certain contexts, like voting.

First, it is naive to say you cannot use a generalization about a class of people unless it is universally valid—we use such stereotypes all the time and would be paralyzed without them. Second, it is important to work out the ways in which the use of a stereotype can go wrong—as in determining when some alternative, like individualized testing, is appropriate. Because of their historical misuse, many generalizations—like those based on race or gender or religion—are rightly subject to scrutiny. But even in the context of jury selection, it would be an error to say the use of a stereotype is "wrong" just because there are exceptions to the generalization.

Other mental shortcuts unrelated to stereotyping involve forming a perceived reality that influences a person's perception of an issue or problem. For example, the "anchoring" heuristic relates to the early belief in a range of values that may become entrenched and may ultimately lead to flawed judgments.[65] As an example, look to the popular television show *The Price is Right*: when estimating the prices of goods, the contestants announce their guesses one at a time and are influenced by the estimates

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[62] Dale A. Nance, The Burdens of Proof: Discriminatory Power, Weight of Evidence, and Tenacity of Belief (Cambridge Univ. Press 2016).
[63] *Id.*
[64] Erin Peterson, *Why Not All Stereotypes are Bad: Using Generalizations to Help Make Better Decisions*, Think Mag., https://case.edu/think/fall2017/stereotypes.html (last visited Aug. 20, 2024).
[65] *See* discussion *infra* section V.D.6.

of the contestants before them.[66] The strategy is often to guess just one dollar over the last closest estimate without going over. While each contestant may have an estimate in mind before they are exposed, all are influenced by this process.

Cognitive and confirmation bias can be a reason for selective perception. Humans tend to seek out information that confirms their strong beliefs while rejecting contrary views. For example, jurors who have been arrested or otherwise had negative interactions with the law are more apt to view police skeptically. Similarly, jurors who were victims of crime are more likely to have empathy for current victims of crimes, which in turn makes them more likely to convict criminal defendants.

A strategic, scientific approach to voir dire requires that we do the following: (1) identify potential hazards of unfair or irrational heuristic judgments (for example, racial or class prejudice); (2) negate or dilute that risk; and (3) strike venirepersons who appear susceptible to introducing these irrational or anomalistic judgments into jury deliberations. In this portion of the article, we will identify certain heuristics, discuss how they may affect prospective jurors, and suggest how to use this knowledge to prevent unfair or irrational judgments.

2. Representativeness

a. Study conclusions

The representativeness heuristic manifests when individuals make judgments based on assumptions at odds with statistics This is called the "base rate" fallacy. For example, study participants may be asked whether Alex plays soccer or golf based on this description: "Alex is a doctor, plays cello, and loves opera." This description may lead to the conclusion that Alex plays golf based on two suppositions: (1) he is from the upper class; and (2) individuals from the upper class play golf. This assumption is statistically erroneous, as more people play soccer than golf.[67]

b. Considerations for voir dire

A trial is ripe with potential for infection by the base rate fallacy; jurors must make credibility assessments of witnesses and parties based upon a highly restricted line of testimony presented in a small temporal window. This can be problematic where a witness, party, or victim carries outward attributes that betray a stereotype. For example, a jury may be inclined to believe that a businessperson on trial for fraud would not lie

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[66] *See* Paul Kvam, *The Price Is Right: Analyzing Bidding Behavior on Contestants' Row*, 75 Am. Statistician 15, 22 (2021).
[67] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974).

because of the prevailing stereotype that rich people commit fewer crimes than the poor. And the businessperson may have other advantages, such as comfort with public speaking and a polished appearance.[68]

Voir dire presents an opportunity to mitigate such unwarranted stereotypes. One tactic may be to confront it directly: Present to the venire the fact the defendant is a wealthy businessperson, or the victim is not highly educated, and ask whether, if the evidence supports it, venirepersons will be willing to fairly consider evidence notwithstanding the fact that the defendant or witness falls within a particular income or educational status. Raising unfair stereotypes will sensitize jurors to their own biases.

3. Availability

a. Study conclusions

The heuristic of "availability" involves the relative ease with which a concept or notion may be recalled. This can lead to a misestimation of a probability. For example, one study addressed how participants who overestimated the probability of winning the lottery were unduly affected by publicity surrounding a single winner.[69] Another study asked participants to estimate whether there were more words in English that either began with the letter k or had the letter k as the third letter. The study observed that more people assumed incorrectly that more words began with k because, in part, words that begin with k were easier to recall.[70]

A third study conducted before the 1976 presidential election asked participants to *imagine* whether one of the two presidential candidates—Gerald Ford or Jimmy Carter—would win the presidency. They were then asked to *predict* which candidate would win. The participants, more often than not, predicted the winning candidate to be the one that they were asked to imagine winning.[71]

b. Considerations for voir dire

The availability heuristic may be used during voir dire to introduce a new or complicated term, phrase, or concept to the venire. Early and repeated exposure to a term or phrase may give a juror comfort with the term or phrase so that its introduction during testimony is easier to accept. Questions during voir dire may introduce a phrase or concept that

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[68] *See* Patricia Davis, Perceptions of Criminality: An Experiment on Race, Class, and Gender Stereotypes (Louisiana State Univ. 2016).
[69] Stuart Sutherland, Irrationality (Pinter & Martin, 2d ed. 2007).
[70] Kvam, *supra* note 66.
[71] John S. Carroll, *The Effect of Imagining an Event on Expectations for the Event: An Interpretation in Terms of the Availability Heuristic*, 14 J. Experimental Soc. Psych. 88 (1978).

will likely appear again in the jury instructions to supply jurors a mental precedent for an idea and make the language of the jury instruction more mentally palatable when jurors apply it to the circumstances at issue.

4. Priming

Priming is a phenomenon related to availability. It is used to connect a concept with another thing, since a concept's availability may be enhanced by the frequency or recency of its use: "The likelihood that a behavior is encoded in terms of a particular trait category is postulated to be a function of the relative accessibility of that category in memory."[72]

a. Study conclusions

In one study, participants were supplied words or concepts associated with hostility or kindness. They were then asked to interpret the behavior of a person described in a short, ambiguous story. Their interpretations skewed toward the emotion with which they had been earlier primed, and the effect of the priming correlated to the frequency of use.[73]

b. Considerations for voir dire

Where the jury will be introduced a novel concept or phrase, or where you seek to connect that concept or phrase to the defendant or opposing party, you may seek to introduce it in questions during voir dire. For example, in a civil fraud trial, you may introduce a question on voir dire by indicating that the jury will be asked to pass judgment on a defendant and hold the defendant liable for fraud. This phrase, "liable for fraud," used with the defendant's name primes the jury to the ultimate fact it must decide and what it will be asked to conclude at trial's end.

5. Dilution

Dilution is a heuristic that may weaken a representativeness heuristic. It is that "adding null or weak positive evidence to what is already very strong positive evidence reduces the overall strength of belief about a hypothesis."[74]

a. Study conclusions

In one study, participants were given only the names "Paul" and "Su-

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[72] Thomas K. Srull & Robert S. Wyer, *The Role of Category Accessibility in the Interpretation of Information About Persons: Some Determinants and Implications*, 37 J. Personality & Soc. Psych. 1660 (1979).
[73] *Id.*
[74] Jared M. Hotaling et al., *The Dilution Effect and Information Integration in Perceptual Decision Making*, 10 PLoS ONE 1, 3 (2015).

san" and were asked who was more assertive.[75] With only this information, more study participants concluded Paul was the more assertive person.[76] Another group of participants were provided additional details: Paul's mother and Susan's mother each worked in a bank. With these additional details, the participants rated Paul and Susan as equally assertive. The study concluded that the additional information diluted the gender stereotype.[77]

b. Considerations for voir dire

Voir dire presents an opportunity to dilute unfair or unwarranted representativeness stereotypes. For example, a jury may initially assess that a wealthy chief executive officer of a company on trial for bank fraud may not fit within the traditional profile of a criminal defendant. The principle of dilution teaches that it may help jurors to disregard such a stereotype by introducing details regarding the executive, and the theory of the government's case (including motive), during voir dire.

6. Anchoring

Anchoring involves decision making—estimates or judgments regarding values—where an opening "anchor" value is set, and variations based upon that set point are made until an appropriate value is reached. This initial anchor point has a disproportionate influence on subsequent estimations of value.

a. Study conclusions

Multiple studies illustrate the anchoring effect. In one study, participants were asked to estimate what percentage of United Nations countries are in Africa.[78] For each estimate, a number between 0 and 100 was randomly selected. Subjects were then asked (1) whether their estimate of the percentage was higher or lower than the value of the random number; and (2) to estimate the value of the quantity by moving upward or downward from the given number. The arbitrarily selected numbers had a notable impact on the participants' responses: For participants that received 10 as the random starting point, the percentage estimated was 25, and for participants who received a random starting point of 65, the estimate was 45.[79] In another study, when presented with the same hypothetical crime and circumstances, experienced judges who were given

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[75] Ziva Kunda, Social Cognition: Making Sense of People (MIT Press 1999).
[76] *Id.*
[77] *Id.*
[78] Kvam, *supra* note 66.
[79] *Id.*

an upper sentencing range of 34 months imposed sentences of more than 8 months greater than judges who were given a sentencing minimum of 12 months.[80] The same anchoring effect of value assessments proximate to values introduced earlier has been observed in students' grades.[81]

b. Considerations for voir dire

Ample scholarship has addressed the effect of the anchoring heuristic on damages awards.[82] These studies teach that providing a numeric value close to the desired outcome early has an anchoring effect on subjects' subsequent judgments.[83] Thus, if civil damages are at issue and the government is the plaintiff, you may find it helpful to raise to the venire the fact that you will be requesting the jury assess damages against the opposing party, and whether prospective jurors would be able to assess damages in the range sought by the government—emphasizing the upper end of that range if that would be a just result. The same principle may apply when there is a factual dispute about the time frame of the conduct at issue at trial. By introducing the time frame to the jury during voir dire—for example, "The indictment alleges that from 2019 to 2023, the defendant conspired to smuggle illegal infant formula into the United States"—that time frame may be anchored within the venire.

VI. Implementing what you know

Each district—and even the circuits within that district—will have its own rules for the use of, distribution of, or access to information in juror questionnaires. Please check your local rules before conducting jury research or providing juror demographics or answers to individuals who are not on the trial team. To aid in this process, as you may be unfamiliar with where to find that information, we created an appendix meant to be a starting point in locating the practices in your district.[84]

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[80] Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. Applied Soc. Psych. 1535 (2001).

[81] Jean-Paul Caverni & Jean-Luc Péris, *The Anchoring-Adjustment Heuristic in an "Information-Rich, Real World Setting": Knowledge Assessment by Experts*, 68 Advances in Psych. 35 (1990); Reid Hastie & Robyn M. Dawes, Rational Choice in an Uncertain World: The Psychology of Judgment and Decision Making (SAGE Publ'g, 2d ed. 2009).

[82] *E.g.*, Mollie W. Marti & Roselle L. Wissler, *Be Careful what You Ask for: The Effect of Anchors on Personal-Injury Damages Awards*, 6 J. Experimental Psych.: Applied 91 (2000).

[83] Karen E. Jacowitz & Daniel Kahneman, *Measures of Anchoring in Estimation Tasks*, 21 Personality & Soc. Psych. Bull. 1161 (1995).

[84] *See* Appendix: Federal Jury Selection by District.

A. Understanding jurors

1. Questionnaires and supplemental questionnaires

As discussed above, juror qualification—either before a venire appears or before qualification in a QJW—starts with questionnaires sent to individuals by the clerk of court. The answers provided in these questionnaires can be highly valuable when conducting voir dire. Each district has a different approach to attorney access for questionnaire answers, so familiarize yourself with the practices in your district. The following are several different approaches to what an attorney can access regarding questionnaire responses:

- names, provided automatically or only on request;
- names and personal information;
- names and answers to supplemental questionnaires; and
- redacted questionnaires.

The collective experience of the authors of this article has led us to conclude that voir dire in open court can be intimidating for potential jurors. Moreover, with courts limiting both the questions themselves and the way questions are asked, alternatives need to be explored.

A supplemental questionnaire can mitigate a limited voir dire and effectively probe issues that can derail a trial. Written supplemental questionnaires give potential jurors a sense of privacy and anonymity that can uncover important details, especially on sensitive topics. Furthermore, written supplemental questionnaires allow jurors more time to think through the questions, provide complete answers, and ensure the venire is not tainted by the bias of another potential juror. As a practical matter, these kinds of questionnaires can expedite voir dire by providing counsel with advance information concerning each prospective juror—information that counsel may otherwise only obtain through individual in-court questioning of each juror.[85]

Judges, however, are reluctant to believe written questionnaires have a greater impact than queries under oath.[86] In addition, written questionnaires place additional burdens on the clerks of court, and courts are

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[85] Lin S. Lilley, *Let Jurors Speak the Truth, in Writing*, 41 Trial J. for Am. Ass'n for Just. 64 (2005); *see also* Pena-Rodriguez v. Colorado, 580 U.S. 206, 245–46 (2017) (Alito, J., dissenting) ("Lawyers may use questionnaires or individual questioning of prospective jurors in order to elicit frank answers that a juror might be reluctant to voice in the presence of other prospective jurors."); United States v. Petters, No. 08-364, 2009 WL 3430133, at *2 (D. Minn. Oct. 16, 2009) (commenting that court's "use of a jury questionnaire" during voir dire helped "root out any possible prejudice").

[86] Linchiat Chang & Jon A. Krosnick, *Comparing Oral Interviewing with Self-*

skeptical of new processes. A joint motion for supplemental jury questionnaires may encourage the court to try the process. The motion could point out that candid responses from potential jurors, however, will allow both sides to make intelligent use of individual voir dire and challenges and promote judicial efficiency by streamlining the jury-selection process. Although it may be tempting to use the same supplemental questionnaire from case to case, questionnaires should be tailored to your case to yield the best results.

To that end, the civil and criminal rules of procedure vest in district courts broad discretion to control the nature and extent of the examination of potential jurors.[87] This discretion extends to the decision to submit a jury questionnaire to prospective jurors before trial.[88]

2. Social media

Because social media sites such as TikTok, Instagram, and Facebook allow individuals to set up an online profile, their business, or an event topic or topic they are interested in, social media can be a valuable resource when learning about potential jurors' preferences or biases. Although there is a great deal of information to glean from these sites, attorneys should proceed with caution and ensure they evaluate local practices, rules, and procedures before beginning social media searches.[89] Furthermore, attorneys should never access juror social media information that could notify the jurors that their information has been viewed by counsel, as this could encourage jurors to conduct their own searches into the parties, the attorneys, or the case itself. Parties to any litigation should not "friend" a judge or juror for litigation purposes, especially when your purpose is undisclosed and even if you have an agent do so.[90] In addition to potential unauthorized contact with jurors, performing research of this kind could lead to information that attorneys are not able to discover during voir dire and are thus not supposed to know when selecting their jury.

Research into available information about jurors outside of question-

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Administered Computerized Questionnaires: An Experiment, 74 Pub. Op. Q. 154 (2010).

[87] Fed. R. Crim. P. 24; Fed. R. Civ. P. 47.

[88] United States v. Crespo, No. 08-349, 2009 WL 10700814, at *4 (D. Minn. Feb. 6, 2009) ("The use of a jury questionnaire is an aspect of case management that is entirely within the discretion of the trial court.").

[89] The Sedona Conference, *The Sedona Conference Primer on Social Media, Second Edition*, 20 Sedona Conf. J. 3, 39 (2019).

[90] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014) (discussing lawyers reviewing jurors' internet presence).

naires is typically conducted exclusively from publicly accessible information, including public record searches and publicly facing social media profiles and platforms. How those searches are performed should conform with Department policy and the ethics rules under which you operate.

In civil cases, social media data is typically handled through standard discovery procedures according to the Stored Communications Act.[91] In criminal cases, social media information has been mined by lawyers and is a popular source of information for jury consultants. Outside of limits placed on litigants from courts and local rules, there is some disagreement on whether passive review of a juror's social media profile is a forbidden ex parte contact if the site automatically notifies the juror when the page is viewed.[92] ABA Model Rule 3.5, regarding impartiality and decorum of the tribunal, specifies an attorney may not engage in ex parte communications with a juror during a proceeding—unless authorized to do so by law or court order. So, when conducting research of potential jurors, or monitoring juror social media interactions during trial, lawyers must avoid research techniques that would result in an ex parte communication with any juror or prospective juror.[93]

Judges have prohibited the parties from conducting any internet research on potential jurors, especially in cases where extensive questionnaires and supplemental questionnaires have been employed.[94] A court in the Northern District of Illinois recognized a split of authority on whether attorneys could conduct internet research on prospective jurors. Some courts have ordered an anonymous jury—even in the face of defense requests to monitor jurors' social media accounts—because of the danger of chilling potential jurors to serving.[95] As one court put it, "[t]he jury is not a fantasy team composed by consultants, but good citizens commut-

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[91] 18 U.S.C. § 2701.

[92] *See* N.Y.C. Bar Pro. Ethics Comm., Formal Op. 2012-2 (2012) ("[I]f an attorney views a juror's social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably 'communicated' with the juror."); N.Y. Cnty. Laws. Ass'n, Formal Op. 743 (2011) ("[U]nder some circumstances a juror may become aware of a lawyer's visit to the juror's website. If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial.").

[93] Model Rules of Pro. Conduct r. 3.5(b) (Am. Bar. Ass'n, 10th ed. 2023).

[94] *See* United States v. Burke, No. 19 CR 322, 2023 WL 7221897 (N.D. Ill. Nov. 3, 2023).

[95] United States v. Norwood, No. 12 CR 20287, 2014 WL 1796644, *4 (E.D. Mich. May 6, 2014); *accord* United States v. Kilpatrick, No. 10-20403, 2012 WL 3237147, at *3 (E.D. Mich. Aug. 7, 2012).

ing from all over our district, willing to serve our country, and willing to bear the burden of deciding a commercial dispute the parties themselves cannot resolve. Their privacy matters."[96]

B. Selecting jurors: using challenges

Once the venire appears, on what is usually the first day of trial, the attorneys have the job of exercising challenges to remove jurors before they are seated as a member of the jury. This is done through one of the two kinds of challenges: (1) challenges for cause; and (2) peremptory challenges. With challenges for cause, attorneys declare a reason why the juror is not qualified, for example, if the juror has a clear bias or conflict of interest. Peremptory challenges do not require an explanation. Although peremptory challenges are limited in number, each party has an unlimited number of challenges for cause.

1. Peremptory challenges

Peremptory challenges to potential jurors do not require a reason but cannot be based on impermissible reasons. When peremptory challenges are based on impermissible reasons such as race, national origin, religion—all of which are constitutionally protected against discrimination—courts established corrective procedures. Peremptory challenges are "used precisely when there is no identifiable basis on which to challenge a particular juror for cause" and "may be wielded in a highly subjective and seemingly arbitrary fashion, based upon mere impressions and hunches."[97] Historically, latitude to peremptory challenges because of their central functions: "to enable a litigant to remove a certain number of potential jurors who are not challengeable for cause, but in whom the litigant perceives bias or hostility"; "to reassure litigants—particularly criminal defendants—of the fairness of the jury that will decide their case"; and to "enhance the right to challenge jurors for cause because they allow litigants to strike prospective jurors who may have become antagonized by probing questions during voir dire."[98] In a noncapital felony case, the government has 6 and the defendant or defendants jointly have 10.[99]

Justice Thurgood Marshall noted in his concurring opinion in *Batson v. Kentucky* that discrimination would continue to infect the jury-

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[96] Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1103 (N.D. Cal. 2016).
[97] United States v. Annigoni, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc); *see* Rivera v. Illinois, 556 U.S. 148 (2009); United States v. Lindsey, 634 F.3d 541, 544–51 (9th Cir. 2011) (Annigoni's rule that erroneous denial of a peremptory requires automatic reversal "was effectively overruled by the Supreme Court in Rivera v. Illinois.").
[98] *Annigoni*, 96 F.3d at 1137.
[99] Fed. R. Crim. P. 24(b) (with special procedures for multiple defendants).

selection process and could only be stopped "by eliminating peremptory challenges entirely."[100] He cited two reasons: First, a discriminatory inference will be difficult to establish except in the most flagrant of cases.[101] Second, trial courts face the unenviable task of assessing motives and evaluating "easily generated explanations" from attorneys who may not even recognize their own "conscious or unconscious racism."[102]

Studies support the proposition that more diverse juries yield more reliable verdicts. A 1997 study from Cornell University's *Journal of Law and Public Policy* looked at the realistic responses to the limitations of *Batson*.[103] The study showed that only 18% of attorneys accused of violating the principles of *Batson* were found to be in violation of the case. The study concluded that this was largely because courts are quick to accept even the most minimal race-neutral explanations.[104] Perhaps this is because *Batson* motions have become commonplace as a free and easy defense claim regardless of the facts. Either way, one conclusion drawn from the scholarship is that if voir dire is expanded—with attorneys having more opportunities to learn about jurors—there is less of a chance that peremptory strikes will be used in a manner violating *Batson*.[105]

Notions of dialing back peremptory challenges are present in a modern trend of attacks on such challenges; that is, removing jurors without a reason. One side argues the peremptory strike is based on stereotypes and biases which undermine the jury's representative function.[106] Defenders counter that the ingrained common law practice is valuable, promotes overall fairness, and should not be purged just because of a few abuses.[107]

The verdict's legitimacy is enhanced when the jury reflects the community. People tend to view themselves as more objective, even-handed, and insightful than they truly are. A 2006 study supports the notion that racially diverse heterogenous groups, in this case with four White people and two Black people, deliberated longer and considered a wider range of information than did homogenous groups.[108] There were two reasons

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[100] 476 U.S. 79, 103 (1986) (Marshall, J., concurring).
[101] *Id.* at 105.
[102] *Id.* at 106.
[103] Shari S. Diamond et al., *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 Cornell J. L. & Pub. Pol'y 77 (2015).
[104] *Id.*
[105] *Id.*
[106] April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 Stan. J. C.R. & C.L. 1 (2020).
[107] *Id.*
[108] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality &

cited for this: (1) the minorities added new perspectives; and (2) the others participated more effectively by deliberating more thoroughly and were amenable to discussion of race-related issues.[109]

Arizona is leading the charge for modern diversity in juries, and the reasoning behind the movement exposes the erosion of the peremptory challenge.[110] In January 2022, Arizona entirely abolished peremptory exclusions.[111] Two Arizona appellate judges led the effort, claiming it would definitively stop intentional and unintentional bias in jury selection and eliminate court involvement with reviewing *Batson* claims.[112]

In 1998, the District of Columbia Jury Project Council for Court Excellence recommended the elimination or drastic reduction of the number of peremptory challenges.[113] It argued the practice is inconsistent with the fundamental precepts of an impartial jury and there is no constitutional right to peremptory strikes.[114] The Project noted that even a reduction of such challenges would transfer power from attorneys to the trial judge who has the last say on challenges for cause.[115]

A modern trend in the United States follows the United Kingdom's elimination of the peremptory challenge in 1988 and Canada's same modification to trial procedures in 2019.[116] Those countries claimed the benefits of disallowing peremptory challenges include streamlining proceedings and reducing the overall number of individuals summoned for jury duty who "make the effort to appear [and] are merely fodder for arbitrary hunch-based strikes."[117]

2. Challenges for cause

Rounding out the discussion of challenges, competency to sit as a juror for a specific reason may be a basis of a challenge for cause. Rea-

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Soc. Psych. 597 (2006).

[109] *Id.*

[110] H.R. 2413, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (proposal to reinstate peremptory challenges).

[111] *See generally* Peter B. Swann & Paul J. McMurdie, *R-21-0020 Petition to Amend Rules 18.4 and 18.5 of Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, Ariz. Jud. Branch (Jan. 11, 2021), https://www.azcourts.gov/Rules-Forum/aft/1208.

[112] *Id.*

[113] Council for Court Excellence, *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington, D.C.*, D.C. Jury Project (Feb. 1998), https://www.courtexcellence.org/uploads/publications/juries_for_y2k_and_beyond_exec_summary_1998.pdf.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Swann & McMurdie, *supra* note 111, at 4.

sons may include bias, prejudice, an acquaintanceship with either of the parties, prior knowledge that would prevent impartial evaluation of the evidence presented in court, or an inability to serve (such as being seriously mentally ill). The judge has the ultimate say as to who is dismissed for cause. Strategically, parties often request dismissal for cause if there is some basis for the challenge because, if granted, they avoid having to use a peremptory challenge.

C. Selecting jurors: strategies for voir dire

1. Early attribution

Most jury trials involve the resolution of facts that require the attribution of guilt, liability, or responsibility to one party or another. Attributional biases affect juror assessments of facts, and these biases may carry the same risks as those identified above regarding heuristic judgments.[118] For example: "When a juror becomes familiar with the facts of an accident, there is a psychological tendency to worry about being involved in a similar situation."[119] This identification may give a juror with a heightened sensitivity to the wrong alleged, effectively placing the juror in the shoes of the victim.

Voir dire presents an opportunity to ask questions to the venire that may allow for attribution or dilute it early on. For example, in a Medicare fraud trial, the venire may be told that elderly Medicare recipients were used by the defendant to claim services that were not provided, and the potential jurors may be asked whether they or a relative have received medical care using Medicare benefits. This question alone may amplify a juror's awareness that the alleged crime could happen to the juror or elderly relative.

2. Identifying biases

Social-science scholarship reflects that biases relating to immutable and irrelevant characteristics such as gender, race, religion, and socioeconomic status remain deeply imbedded across groups.[120] One step toward mitigating such unfair and irrational biases is to highlight them during voir dire. Addressing the race, gender, or socioeconomic status of a party or victim before asking the venire whether they can fairly assess

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[118] Donald E. Vinson, Jury Persuasion: Psychological Strategies and Trial Techniques 83–109 (Aspen L. & Bus., 1994).
[119] *Id.* at 97.
[120] *E.g.*, Tessa E. S. Charlesworth et al., *Identifying and Predicting Stereotype Change in Large Language Corpora: 72 Groups, 115 Years (1900–2015), and Four Text Sources*, 125 J. Personality & Soc. Psych. 969 (2023).

the evidence regardless of this characteristic, highlights the impropriety of such judgments. The apparent social opprobrium of considering these characteristics should prevent jurors from introducing them during deliberations.

3. Unrealistic expectations of proof

One challenge in contemporary trials is overcoming unrealistic expectations of prospective jurors about the quality and quantity of evidence required to prevail. The so-called "CSI effect" can lead "jurors to have unrealistic expectations of forensic tests and possibly cause them to incorrectly weigh the importance of either the absence or presence of forensic evidence."[121] Unrealistic expectations of what the police can and cannot do have been perpetuated in theater and television for years. The time to dispel the CSI effect is in jury selection. Although some scholarship has questioned whether this effect has been overstated, because jury instructions that set and define the burden of proof are not ordinarily supplied until after the jury has received evidence that there is some risk that a juror carries unrealistic expectations while receiving evidence.[122]

Voir dire presents an opportunity to mitigate such unrealistic expectations of the quality and volume of evidence presented. You may alert the jury that the judge will instruct them about the type of evidence they can receive, including direct and circumstantial evidence, and the judge will ask venirepersons whether they would be comfortable reaching a conclusion based upon circumstantial evidence alone. If possible, the CSI effect should be addressed early on by using probing questions and reminders to apply the facts of the case to the law. You can direct some questions about TV shows and expectations about the relationship of real life versus TV. This has been proven effective and manages time expectations. Real trials take days, whereas multiple homicides can be wrapped up in less than 45 minutes on TV.

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[121] John Alldredge, *The "CSI Effect" and Its Potential Impact on Juror Decisions*, 3 Themis: Rsch. J. Just. Stud. & Forensic Sci. 114 (2015); *see* Young S. Kim et al., *Examining the "CSI-Effect" in the Cases of Circumstantial Evidence and Eyewitness Testimony: Multivariate and Path Analyses*, 37 J. Crim. Just. 452 (2009); Rebecca M. Hayes-Smith & Lora M. Levett, *Jury's Still Out: How Television and Crime Show Viewing Influences Jurors' Evaluations of Evidence*, 7 Applied Psych. Crim. Just. 29 (2011).

[122] *E.g.*, Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 New Eng. L. Rev. (2007).

4. Organizational and anti-government bias

Academic studies have identified biases against large institutions, including a growing bias against and distrust of the government. You may identify and mitigate such biases through voir dire. Since 1958, the Pew Research Institute has conducted an annual survey of the public's trust in the government, asking participants whether they trust the government to do what is right "just about always" or "most of the time."[123] The survey reveals a precipitous decline in trust over six decades, from 73% in 1958 to 22% in 2024.[124] A separate 2022 survey found that only 14% of respondents had "a great deal" or "'quite a lot' of confidence" in the criminal justice system.[125]

These sentiments were not exclusive to governmental entities. Another study concluded that from 1972 through 2012, "Americans became significantly less trusting of each other and less confident in large institutions, such as the news media, business, religious organizations, [and] the medical establishment."[126] Similarly, a 2022 survey found that 71% of respondents believed "large corporations," had a "negative effect on the way things are going in the country" these days.[127] Furthermore, 56% of respondents believed banks and financial institutions had a negative effect.[128] Notably, only 18% believed that "small businesses" had a negative effect.[129] A contemporaneous Gallup poll found that 53% of respondents had a "negative" view of "big business."[130] Another recent study on the perception of large businesses distinguishes "corporations" from their employees, and concluded that survey participants "'believe

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[123] *Public Trust in Government 1958–2024*, Pew Rsch. Ctr. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/.
[124] *Id.*
[125] Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, Gallup (July 5, 2022), https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx.
[126] Jean M. Twenge et. al., *Declines in Trust in Others and Confidence in Institutions Among American Adults and Late Adolescents, 1972–2012*, 25 Psych. Sci. 1914 (2014).
[127] *Anti-Corporate Sentiment in U.S. Is Now Widespread in Both Parties*, Pew Rsch. Ctr. (Nov. 17, 2022), https://www.pewresearch.org/short-reads/2022/11/17/anti-corporate-sentiment-in-u-s-is-now-widespread-in-both-parties/#:~:text=Majorities%20of%20Americans%20express%20negative,the%20same%20about%20large%20corporations.
[128] *Id.*
[129] *Id.*
[130] *Do Americans Like or Dislike 'Big Business'?*, Gallup (June 27, 2022), https://news.gallup.com/poll/270296/americans-dislike-big-business.aspx.

companies share too little of their success with employees.'"[131] Merely identifying such biases in prospective jurors may not adequately mitigate them.

Dilution using "contact hypothesis" is one technique that may mitigate institutional bias. The contact hypothesis emerged in the 1940s. Studies found that, under certain conditions, prejudice between groups could be reduced by increased socialization between the groups—for example, racial prejudice was less pronounced in desegregated neighborhoods than it was in segregated neighborhoods.[132] People self-identify with others in a similar social posture (the "in group") and dissociate from others who they perceive in a different social position (the "out group").[133] Academic studies show a strong connection between a subject's greater social interaction and exposure to members of the "out group" and diminished biases against that group. Subsequent scholarship has observed that this contact effect is diminished where the "out group" participants are more anonymous—this is, when that interaction is less personalized.[134] Collectively, these studies confirm that unfair biases may be diminished as members of an "out group" are individualized and personalized.

Voir dire may supply an opportunity to dilute potential biases against the government or large businesses by individualizing the government or corporate actors who participated in the events' underlying factual narrative. Voir dire questions should avoid describing the government's conduct as that by "the government," but should instead introduce the individual names, or identifying details, of agency personnel who engaged in the conduct on behalf of the government. Dilution of anti-government animus may be accomplished by individualizing government actions through government employees "doing their jobs" and exercising reasonable judgments, rather than describing government conduct in institutional, monolithic terms. This strategy should continue through your opening statement, witness testimony, and closing argument.

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[131] Ben Schiller, *Americans Agree on Something: They Don't Like Big Corporations*, Fast Co. (Nov. 15, 2017), https://www.fastcompany.com/40495233/americans-agree-on-something-they-dont-like-big-corporations.

[132] *See generally* Gordon W. Allport, The Nature of Prejudice (1954).

[133] Henri Tajfel & John C. Turner, *An Integrative Theory of Intergroup Conflict, in* The Social Psychology of Intergroup Relations 33 (W. G. Austin & S. Worchel eds., 1979); John C. Turner et. al, Rediscovering the Social Group: A Self-Categorization Theory, 68–88 (Basil Blackwell 1987).

[134] *E.g.*, Sandy Schumann et al., *When is Computer-Mediated Intergroup Contact Most Promising? Examining the Effect of Out-Group Members' Anonymity on Prejudice,* 77 Comput. Hum. Behav. 198 (2017).

VII. Conclusion

Although stereotypes are prevalent in jury selection, scientific research reveals that relying upon those stereotypes alone may not be the best way to select a jury. The research behind such stereotypes is inconclusive at best, and at worst, it shows that single sources of information like stereotypes are not helpful in selecting juries. Jury selection is complicated, and there are many approaches to jury selection. But using a thoughtful approach with modern jury selection, based on science and legitimate research, can increase the odds of a fair outcome. Experience and intuition are valuable when selecting juries, but so is understanding why your gut is telling you to strike a juror. Tempering instincts with the methods in this article will help you decide which jurors could be problematic for your case.

Even if your court does not allow attorneys to speak directly to the venire during voir dire, or your judge controls most of the jury-selection functions, these techniques can still be relevant to tasks like advancing proposed voir dire questions. Selecting a jury is difficult, and removing wild-card jurors is certainly not easy, but approaching jury selection with an understanding of Schema Theory and heuristics will help you make more informed decisions about who to remove from the venire and how the makeup of your jury can impact your case.

About the Authors

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The authors heartily thank ***LauraKate Roland*** *for her invaluable talents in drafting, researching, organizing, and editing this article. LauraKate is a J.D. Candidate in the Class of 2025 at the University of South Carolina Joseph F. Rice School of Law. She is brilliant and patient. There is no doubt that her talents—reflected here and in her credentials and honors, as well as her experience as a top notch Law Clerk with several entities, including the Department—will serve her well.*

Attention Spans: How Juries Think and How to Help Them Think Better

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I. A quick introduction

Let's be frank. Do you want to read this article, or would you rather skip to the end where I just tell you how to help juries think better? If so, it is okay, and you are not alone. In the age of sound-bite information packaged as "edutainment," people want things fast and fun. What about trials, then? Do people have the attention spans to sit still and listen that long anymore? And what can you do to help? This article looks at research on attention spans, how attention connects to learning, and what you can do when presenting information to help jurors pay better attention and process information.[1]

II. What is attention and why does it matter in trials?

Attention is the brain's limited ability to simultaneously do the following: (1) orient, select, and sustain focus on something (known as "stimuli"); and (2) block out other information or stimuli, long enough to process the information in working memory and ultimately store it in long-term memory.[2] This can be seen in Figure 1.

[1] Graphics were created by the author, and icons and images are from PowerPoint stock.

[2] Francesca C. Fortenbaugh et al., *Recent Theoretical, Neural, and Clinical Advances in Sustained Attention Researc*h Annals 1396 N.Y. Acad. Sci. 70 (2017).

Figure 1: Attention

Attention, therefore, is the key first step and critical component of memory. Without the ability to orient, select, and sustain attention, jurors cannot learn or remember critical information.[3] There are four major steps—shown in Figure 2—we all must undertake to learn and remember.

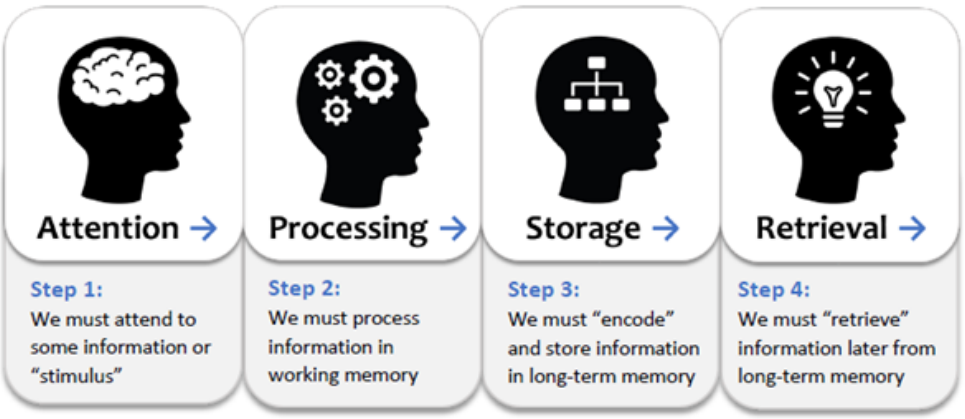

Figure 2: Four Major Steps in Learning

We must follow these steps sequentially. If we don't, we will fail to learn and remember, or we will learn and remember incorrectly. Then we will likely make poor decisions based on insufficient or incorrect information. This is not good for trials.

III. Attention is a limited resource!

Brain studies show that we cannot multitask attention, but rather we can only "pay" attention to one stimulus at a time. We can divide our attention among multiple stimuli (also known as "task switching"), but the "cost" of task switching is reduced memory and reduced retention of

[3] *See generally* Gabriel A. Radvansky, Human Memory (3d ed. 2017).

information.[4] We typically direct our attention (voluntarily and involuntarily) to interesting, new, or important stimuli—stimuli can be anything visual, auditory, kinesthetic, or even our own thinking (for example, that delicious breakfast you had this morning).[5] Examples of typical courtroom stimuli are listed in Figure 3.

It is important to note that many of these stimuli are new to jurors (but not to you) and can therefore compete for jurors' attention. For example, jurors may need more time at the beginning of a trial to focus on and process visual stimuli—the defendant, the judge, opposing counsels, and even the layout and architecture of the courtroom itself. These are all things attorneys have gotten used to and no longer consciously process.

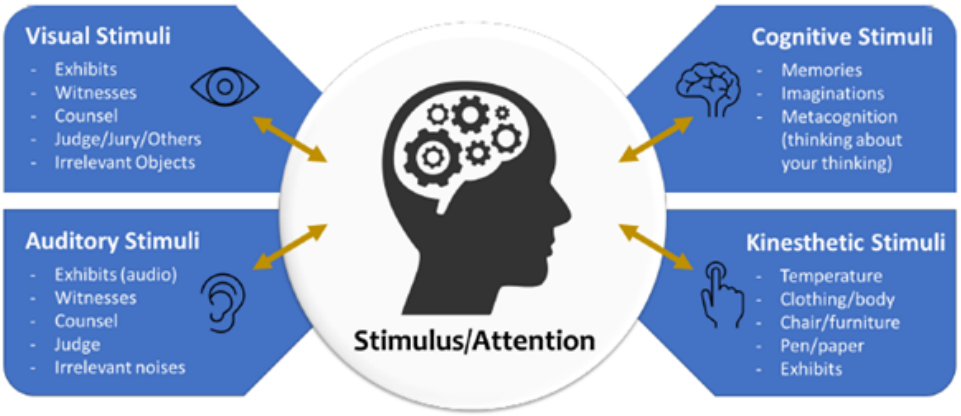

Figure 3: Typical Courtroom Stimuli

IV. Are attention spans shrinking?

Currently, and perhaps surprisingly, no valid collection of research shows that our attention spans today are shorter than attention spans of previous generations (that is, Generation Z has similar abilities to orient, focus, and sustain their attention as all generational cohorts do).[6] What has changed, however, is the vast amount of stimuli now available through technology and the media, coupled with the fact that we are voluntarily

[4] *See generally* Daniel Reisburg, Cognition: Exploring the Science of the Mind (8th ed. 2022); Richard E. Mayer, Multimedia Learning (3d ed. 2020); *see also* Steven E. Petersen & Michael I. Posner, *The Attention System of the Human Brain: 20 Years After*, 35 Ann. Rev. Neuroscience 73 (2012) (discussing task switching and competing stimuli).

[5] *See generally* Fortenbaugh, *supra* note 2.

[6] *See* Francesca C. Fortenbaugh et al., *Sustained Attention Across the Life Span in a Sample of 10,000: Dissociating Ability and Strategy,* 26 Psych. Scis. 1497 (2015).

choosing to focus shallowly and task-switch among interesting bits of information.[7] We can sustain our attention, but we choose not to, and we can easily become overloaded with task switching.[8]

V. What is wrong with information overload?

Overload is a concern in trials because jurors are not as attentive when they are flooded with information. They can also feel stressed and fatigued when overloaded, which negatively affects their memory and retention of information. Researchers analyzed data from 81 studies involving 94,073 adults and found positive correlations or relationships between information overload and the following: (1) information avoidance; and (2) burnout and fatigue.[9] They found negative correlations between information overload and the following: (1) performance; and (2) satisfaction.[10] Basically, our brains cannot process everything we are receiving. We then feel stressed, so we stop paying attention and processing information.[11] Memory and decision-making suffer as a result.

To counter this potential pitfall in trials, trial attorneys should focus on the "cognitive load" of jurors, or the mental effort it takes to learn information.[12] Cognitive load includes two types of processing: (1) essential processing of critical information; and (2) nonessential processing of extraneous, or distracting, information.[13] The goal for trial attorneys is to help jurors' brains increase the amount of essential processing and decrease the amount of nonessential processing. The following suggestions are research-based ways to do that.

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[7] Adam Gazzaley & Larry D. Rosen, The Distracted Mind: Ancient Brains in a High-Tech World 168–69 (2016).
[8] *Id.* at 170.
[9] Benedikt Graf & Conny Herbert Antoni, *A Meta-Analysis on the Relation Between Information Overload, Behavior, and Experience*, Acad. Mgmt. Ann. Meeting Proc. (2021).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

VI. Four proven strategies to increase attention, processing, and learning

A. Segment information into manageable "chunks"

According to the "segmenting effect," people learn better when information is presented in shorter segments rather than in one continuous, long presentation. Segmenting complex information helps learners mentally organize information, and therefore process and remember more information.[14] In a meta-analysis review of 56 experimental research studies including over 6,000 young adults, researchers found moderately significant improvements in information retention and reductions in mental effort by segmenting information.[15] Trial attorneys should keep the presentation of information reasonably short and help jurors understand how that information fits into the framework of the case.

B. Provide breaks between "chunks" of information

Attention Restoration Theory theorizes that when individuals take breaks, they restore or reset their attention, and their cognitive performance improves as a result. In a meta-analysis review of 42 experimental control studies, individuals of all ages improved their working memory, cognitive flexibility, and attentional control after taking breaks, especially breaks in natural and natural-like environments.[16] Of note, participants in stressful conditions benefited even more than those in non-stressful conditions.[17] For trial attorneys, requesting a recess or break before and after a cognitively or emotionally difficult part of the trial will likely help jurors reset their attention and better process information.

C. Provide visuals "cues" for critical information

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[14] Mayer, *supra* note 4.
[15] Günter Daniel Rey et al., *A Meta-Analysis of the Segmenting Effect*, 31 Educ. Psychol. Rev. 389 (2019).
[16] Matt P. Stevenson et al., *Attention Restoration Theory II: A Systematic Review to Clarify Attention Processes Affected by Exposure to Natural Environments*, 21 J. Toxicology & Env't Health 227 (2018).
[17] *Id.*

The "Pictorial Superiority Effect" states that graphics are remembered better than words and text.[18] Graphics can be pictorial (for example, a photo or document) or organizing (for example, boxes, arrows, or icons), and they can provide signals or cues for what is important and what is coming next.[19] Researchers analyzed 42 randomized controlled trials and found that providing visual cues (primarily icons) moderately improved understanding and recall overall, but largely improved understanding for those with lower literacy.[20]

D. Reduce or eliminate "seductive details"

"Seductive details" are interesting yet irrelevant information that can distract learners' attention and hinder learning and memory for relevant information. For example, if a prosecutor tells a story about a hospital's new gift shop when it is irrelevant in a tax fraud case, jurors are more likely to remember the items in the gift shop than the items in the falsified balance sheet. In a large meta-analysis of 68 research studies and 7,521 participants, researchers found that learners whose presentations included seductive details scored lower on measures of retention and transfer than those whose presentations did not include seductive details.[21] The negative effects of seductive details were even larger for those with no prior knowledge of the critical information.[22]

VII. Conclusion and more

At the risk of overload (if you have read enough, you can stop now or take a break and come back), trial attorneys can best support jurors' understanding and memories of critical information by helping them manage their attention and overload. In addition to the four recommendations discussed above (also included here), researchers recommend the strategies in Table 1 for anyone responsible for helping others learn and remember.

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[18] John Medina, Brain Rules 191 (2d ed. 2014).
[19] *See* Mayer, *supra* note 4.
[20] Danielle Schubbe et al., *Using Pictures to Convey Health Information: A Systematic Review and Meta-Analysis of the Effects on Patient and Consumer Health Behaviors and Outcomes*, 103 Patient Educ. & Counseling 1935 (2020).
[21] NarayanKripa Sundararajan & Olusola Adesope, *Keep it Coherent: A Meta-Analysis of the Seductive Details Effect*, 32 Educ. Psych. Rev. 707 (2020).
[22] *Id.*

Recommendation	Principle	Findings
Break learning into meaningful chunks, rather than long, uninterrupted presentations	Segmenting	People learn better when information is presented in shorter segments rather than continuously
Add visual or verbal emphasis to key information	Signaling	People learn better when cues highlight important information
Reduce or eliminate irrelevant information or distractions	Coherence	People learn better when extraneous material is excluded
Balance presentations with key words AND key graphics	Multimedia	People learn better with graphics and words than either alone
When showing meaningful images, speak or narrate rather than relying on written text	Modality	People learn better from graphics and narration than from graphics and on-screen text
When meaningful images are not possible, use key words presented visually	Redundancy	People do not learn better when verbose printed text is added to graphics and narration
Present related pictures and key words as close together as possible in both time and space	Temporal and Spatial Contiguity	People learn better when corresponding pictures and key words are presented closer together
Use simple, personal language	Personalization Principle	People learn better when words are in conversational style
Allow for periodic breaks between segments of information	Attentional Restoration	People "reset" and pay better attention after exposure to breaks

Table 1: Recommended Strategies for Remembering

About the Author

Angela Dooley is the Chief Learning Officer for the Department of Justice (Department), overseeing learning and development for 115,000 Department employees. She is also an Educational Psychologist and researcher with over 25 years of practical and academic experience in teaching, learning, and the study of memory. She has worked with government

and private organizations to develop teaching, advocacy, and persuasion skills, and she has an extensive background in incorporating the sciences of cognitive psychology, graphic design, and marketing into persuasive presentations, including trials. Angela has conducted multiple empirical research studies in the areas of attention, learning, and memory among legal professionals and how to promote jury attention and memory when presenting complex information. Angela holds a PhD in Educational Psychology and Research from the University of South Carolina; an MBA from Baker College in Flint, Michigan; and an MHA in Health-care Administration from the University of South Carolina.

Protecting Child Victims in Federal Court

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> *"The true character of a society is revealed in how it treats its children."*[1]

I. Introduction[2]

Jane was a 10-year-old girl living in Indian country. While at school, a classmate repeatedly rubbed his clothed groin against Jane's buttocks as if he was simulating intercourse. This incident resulted in an investigation by child protective services (CPS). During questioning by the CPS social worker, Jane disclosed that two years earlier her Uncle Jimmy, an adult Indian male, digitally penetrated her "privates."

Tammy, age six, and Julie, age four, were Native American sisters who lived on a small reservation in Northern Michigan. Their mother became romantically involved with a non-Indian man, Edward, who was convicted of molesting two young girls 20 years earlier. Tammy and Jane's mother allowed Edward to move into the family home and almost immediately he began molesting the two young sisters. The case was investigated by law enforcement when a tribal social worker looked at an online sex offender registry and saw that a registered offender was living in the same home as Tammy and Julie. When interviewed by the police, neither girl disclosed abuse; however, Tammy sobbed at the mention of Edward's name and Julie wet her pants as soon as authorities said his name. The girls' mother denied any abuse had occurred, and she steadfastly supported her boyfriend throughout the subsequent investigation and trial.

A six-year-old boy, Timmy, alternated living with his father and maternal grandmother. Both homes were in Indian country, and all parties were Native American. The boy's father struggled with substance abuse

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[1] Nelson Mandela, Address at Worcester Station (Sept. 27, 1997).

[2] Each scenario in this article is loosely based on a real Indian country case, and each of those cases did go to trial. The *Seymour* and *Kappell* cases were tried by the author, and the *Wandehsega* case was tried by a colleague of the author.

and was in and out of treatment facilities. While staying with his grandmother, the young boy disclosed that his father and he did what his dad and girlfriend do. When his grandmother asked for clarification, the boy pointed to his groin. While subsequently being examined by a physician, the boy said that his father touched his penis and put a finger up his rectum several days before the medical examination.

In each of these scenarios, the federal government has jurisdiction to prosecute the crimes committed. Federal jurisdiction is concurrent to that of the tribe. This means that each of these cases could be prosecuted in both tribal court and federal court. An Indian defendant cannot raise the Double Jeopardy Clause as a bar to federal prosecution following a tribal prosecution based on substantially the same acts or underlying elements.[3] Tribes have sovereign authority to prosecute criminal offenses over all Indians.[4]

Each case describes an aggravated sexual abuse, or penetration crime, perpetrated on a child under the age of 12.[5] If convicted, each defendant faces a mandatory minimum 30-year sentence in federal prison. Because of this significant incarceration exposure, it is likely these cases will go to trial. In fact, each scenario is loosely based on a real Indian country case, and each of those cases did go to trial.

Given the tender ages of the victims, it is important to know about the protections available to child victims in federal court. It is also important to recognize that these same protections apply in any case where there is federal criminal jurisdiction and a child has been harmed; for example, cases on military installations, National Parks, or interstate crimes.

Once someone reports a complaint of a crime committed against a child, that report initiates a process that may be terrifying for the victim. This is especially true if the crime is sexual in nature, as the child may have to endure an invasive physical examination and be asked questions that can feel embarrassing. In most cases where a child is abused or sexually assaulted, the suspect is a family member, friend, or someone known to the child. The relationship of victim to defendant combined with possibly diverging interests of family members and friends of the parties can serve to heighten the anxiety and pressure on the child victim.

This article covers statutes and Department of Justice (Department) policy that, if followed, should make the investigation and trial process more child-focused and less traumatic for the victim.

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[3] *See* Mainon A. Schwartz, Double Jeopardy, Dual Sovereignty, and Enforcement of Tribal Laws (2022); U.S. Const. amend. V.
[4] *See* United States v. Lara, 541 U.S. 193, 198 (2004).
[5] 18 U.S.C. § 2241(c).

II. The investigation: forensic interview

According to the revised Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines), the first investigator responding to a report of child abuse or sexual abuse should refer the child victim for a medical examination.[6] If possible, a clinician trained and experienced in performing child medical forensic examinations should see the child. And if the disclosure concerns historical abuse, there is no need to rush the child to the first provider available, as there is little chance any physical evidence will be recovered. Instead, investigators and the prosecutor can determine together who is the best medical provider to do the exam. Depending on the type of assault and time between the incident and examination, the physician may do more of a wellness check and confirm for the child that they are normal.

Whenever possible, interviews of child victims and witnesses should be conducted by personnel properly trained in the techniques designed to best elicit truthful information from a child while minimizing additional trauma to the child.[7] The goal of a forensic or investigative interview is to obtain a factual statement from a child or adolescent in a developmentally sensitive, unbiased, and legally defensible manner that supports accurate and fair decision making in the criminal justice and child welfare systems.[8] Decisions about interviewing children and the extent of the interview process must weigh and balance the potential impact, both positive and negative, on the child, as well as the safety of the child and other children.[9] According to the National Children's Advocacy Center (NCAC), "It is never the desire of a forensic interviewer to 'get information' at the expense of the child's emotional and psychological well-being."[10] Selecting the appropriate individual to conduct the forensic interview is a critical decision. A poorly conducted interview could become the focus of the court case and have a detrimental impact on the child and the willingness of the family to cooperate with the investigation and prosecution.

In the case scenarios outlined above, it is possible that a Federal Bureau of Investigation (FBI) Child and Adolescent Forensic Interviewer (CAFI) will be called in to do the forensic interview. CAFIs are victim

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[6] U.S. Dep't of Just., The Attorney General Guidelines for Victim and Witness Assistance (2022) [hereinafter AG Guidelines].
[7] *Id.*
[8] State of Mich. Governor's Task Force on Child Abuse & Neglect & Dep't of Health & Hum. Servs., Forensic Interviewing Protocol 1 (4th ed. 2017).
[9] National Children's Advocacy Center, Position Paper on the Introduction of Evidence in Forensic Interviews of Children 3 (2013).
[10] *Id.*

service providers with specialized forensic interviewing expertise.[11] Whenever possible, only those personnel properly trained in forensic interviewing techniques for interviews of minor victims and witnesses should be used to conduct a forensic interview.[12] FBI CAFIs use an evidence-based, legally sound, developmentally appropriate, and child-sensitive methodology designed to obtain accurate information and minimize trauma experienced by minor victims or witnesses.[13] Although forensic interviews are primarily used as an investigative tool, they may yield useful information for a child protection agency or other agencies making decisions concerning custodial placement and mental health treatment. CAFIs are integral members of Multidisciplinary Teams (MDTs).

The Forensic Interviewing Protocol used by the FBI is based on a phased interview approach that is investigative and consistent with national standards and guidelines, including those adopted and promulgated by the American Professional Society on the Abuse of Children (2012), the NCAC, and the National Children's Alliance.[14] The interview includes seven phases, and each phase serves a unique purpose:

- build rapport;
- establish ground rules;
- conduct a practice interview;
- introduce the topic;
- elicit a free narrative;
- question and clarify; and
- close the interview.

While the entire investigation and interview process has the potential to be distressing to a victim, criminal justice professionals do not forgo these processes out of fear of inflicting potential trauma. Professionals working the federal criminal justice process are directed to—and should—use methods designed to minimize additional stress resulting from participating in the criminal justice process and ensure that victims have adequate support. FBI CAFIs use a research-based interview protocol and question continuum designed to minimize secondary trauma to the victim.

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[11] U.S. Dep't of Just. & Fed. Bureau of Investigation Off. for Victim Assistance, Children Affected by Crime: Information for Parents (n.d.).
[12] AG Guidelines, *supra* note 6, at 30.
[13] *Id.*
[14] Chris Newlin et al., Office of Juvenile Justice & Delinquency Protection: Juvenile Justice Bulletin, Child Forensic Interviewing: Best Practices 2 (2015).

III. Charging the case

All three of the fact scenarios above involve sexual abuse.[15] For the prosecutor to properly charge the case and then prove the case beyond a reasonable doubt in court, the prosecutor must understand exactly what the victim is reporting. It is also critical the prosecutor understand female anatomy. While this may seem obvious, a review of multiple trial transcripts and case opinions, demonstrates many police and prosecutors refer to most penetration crimes committed against females as "penetration of the vagina."[16] Admittedly, it can be tricky working with a child victim, and even some adults, because they almost never use clinical terms to describe what body part was touched. In fact, the child may say something as esoteric as "he stuck his bean in my noodle." It is then up to the forensic interviewer or the prosecutor, through non-leading questioning or clarification, to determine exactly what happened.

To illustrate the issue, let us look at the case involving 10-year-old Jane. She told investigators that her uncle had "fingered" her two years earlier. During further questioning, she said that he touched her in "the front private where you go pee." It would be wrong for either an investigator or prosecutor to draw from this statement that the child's vagina was penetrated. A charge of aggravated sexual abuse on a child under 12 requires proof of a sexual act—that is, penetration—but does not require a showing that the vagina, an internal structure, was penetrated.[17]

The term "sexual act" is defined in federal law, and there are four different categories of sexual activity that meet the definition.[18] While most of the terms used in the statute are obvious, the terms vulva and genital opening require further clarification. The vulva is the mons pubis, the labia majora, the labia minora, the clitoris, and the vaginal orifice.[19] The female genital opening is the labia majora or outer lip area. So, all that must be shown to prove a sexual act is penetration, however slight, of the labia majora.[20] Vulva and female genital opening are likely not terms that most citizens serving on a jury are familiar with. Therefore, if contact with the vulva or female genital opening is part of the charged

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[15] *See* discussion *supra* section I.

[16] This assertion is based on the author's research and experience.

[17] 18 U.S.C. § 2241(c).

[18] *Id.* § 2246.

[19] United States v. Jahagirdar, 466 F.3d 149, 152 (1st Cir. 2006).

[20] United States v. Norman T., 129 F.3d 1099, 1104 (10th Cir. 1997) (finding evidence sufficient to establish digital penetration of the victim's "genital opening" as required by section 2246(2)(C), where the defendant's finger injured both the victim's labia majora and labia minora; explicitly rejecting his argument that vaginal penetration was required).

offense, the prosecutor must ensure evidence has been introduced that clarifies the term for the jury. This can be done by calling a medical provider as a witness to educate the jury about female anatomy.

In a case similar to Jane's, the victim testified on direct examination that the defendant "'touched me between my legs' where 'you would wipe after you go . . . pee.'"[21] The defendant, Seymour, appealed his conviction and argued there was no evidence of penetration of the genital opening of the child victim.[22] The Sixth Circuit affirmed defendant's conviction finding that even though the victim "testified on cross-examination that she could not remember whether Seymour 'went inside' her, a reasonable juror could still credit her statements made on direct examination."[23] Prosecutors must be comfortable talking to children and their parents or guardians about body parts and sex crimes. Prosecutors also must develop a series of questions to use when interviewing children that will help illicit what body parts were involved in the assault and how they were touched, manipulated, or penetrated.

IV. Competency examinations

Some have questioned whether young children are competent to testify. For example, can four-year-old Julie or six-year-old Timmy appreciate the difference between the truth or a lie? Rule 601 of the Federal Rules of Evidence provides that every person is competent to be a witness in a case until proven otherwise.[24] The Child Victims' and Child Witnesses' Rights Act (CVCWRA) provides additional direction regarding child witnesses.[25] The statute explicitly states, "[a] child is presumed to be competent."[26] If a party requests a competency examination regarding a child witness, it must file a written motion and offer proof of incompetency.[27] The court will hold a competency examination only if the court determines, on the record, that a compelling reason exists; "[a] child's age alone is not a compelling reason."[28]

In *United States v. Walker*, a defendant's allegation that a nine-year-old victim "is merely repeating a well-drilled narration of the alleged incident without understanding it" was deemed insufficient proof of in-

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[21] United States v. Seymour, 468 F.3d 378, 388 (6th Cir. 2006).
[22] *Id.*
[23] *Id.*
[24] Fed. R. Evid. 601.
[25] 18 U.S.C. § 3509(c).
[26] *Id.* § 3509(c)(2).
[27] *Id.* § 3509(c)(3).
[28] *Id.* § 3509(c)(4).

competency.[29] The court said the defendant provided no evidence the child was repeating a rehearsed narrative of the crime, nor did the defendant establish a compelling reason for a competency examination.[30] In the case of *United States v. IMM*, the defendant, a minor, challenged on appeal the trial court's determination that a seven-year-old witness to the assault was competent to testify.[31] The trial court found the child competent after an examination in open court where the witness was questioned by the prosecutor, defense attorney, and the judge.[32] During this hearing, "the child's ability to understand and answer simple questions, his understanding of the difference between truth and falsity, and his comprehension of the importance of telling the truth" was tested.[33]

The defendant in *IMM* also argued on appeal that a seven-year-old could not understand what taking an oath required.[34] The Ninth Circuit disagreed and found the defendant's argument too rigid.[35] Federal Rule of Evidence 603 requires a witness give an oath or affirmation to testify truthfully; however, the accompanying Advisory Committee Note states that the rule is designed to afford flexibility, to include when children are witnesses.[36] No special verbal formula is required; an affirmation is merely a solemn undertaking to tell the truth.[37] The Ninth Circuit in *IMM* found that the district court properly concluded the child witness understood the difference between truth and falsity, and he appreciated the need to tell the truth while testifying.[38] The appellate court also noted that, for a number of reasons, the child's understanding or recollections of the offense were in question; those considerations, however, went to the weight to be assigned his testimony and not his competence under Federal Rules of Evidence 601 and 603.[39]

V. Age-appropriate questioning

Federal Rule of Evidence 611(a) provides that a court should exercise reasonable control over the mode and order of examining witnesses and

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[29] 261 F. Supp. 2d 1154, 1155 (D.N.D. 2003).
[30] *Id.* at 1155–56.
[31] United States v. IMM, 747 F.3d 754, 769 (9th Cir. 2014).
[32] *Id.*
[33] *Id.* at 770.
[34] *Id.*
[35] *Id.*
[36] Fed. R. Evid. 603.
[37] *Id.*
[38] *IMM*, 747 F.3d at 770.
[39] *Id.*; Fed. R. Evid. 601, 603.

presenting evidence.[40] Thus, a trial court may instruct counsel to refrain from questions that are confusing, misleading, ambiguous, or unintelligible.[41] When children are frightened, it may inhibit their ability to recall facts and testify truthfully. This fear can be exacerbated when defense counsel sits next to the individual who sexually abused the witness. It is in the best interest of all parties involved that children on the witness stand be asked questions that are not suggestive or intimidating.[42]

Therefore, the prosecutor can request the trial court instruct counsel to refrain from asking a child victim unduly embarrassing questions with marginal relevance.[43] The prosecutor can also request that defense counsel be required to ask simple, age-appropriate questions that are not suggestive or leading. While Federal Rule of Evidence 611 allows for leading questions on cross-examination, the Court may still limit such suggestive questioning techniques when certain types of witnesses, such as child witnesses, are cross-examined.[44] "The purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions" under certain circumstances.[45] A young child might agree with an overly suggestive and aggressive question rather than disagree with an adult in a room full of strangers, regardless of the truth of the response. Such cross-examination methods will not achieve the desired result of achieving justice through the presentation of the truth. Since the goal of a trial is to get to the truth, the prosecutor can request that the trial court strictly limit the number of leading questions by the defense during cross-examination of young victims and witnesses.

VI. Protective orders

To protect child victims and witnesses from unwanted attention, the government should request the victims be referred to by a pseudonym; for example, Victim A or Victim B.[46] Similarly, the children's parents can also be referred to by pseudonyms; for example, the Parent of Victim A.

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[40] Fed. R. Evid. 611(a).

[41] Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (court may place reasonable limits on cross-examination based on harassment, prejudice, confusion of issues, witness's safety, repetitive or marginally relevant questions).

[42] *See* Allie Phillips & Susanne Walters, A Courtroom for All: Creating Child- and Adolescent-Fair Courtrooms 10 (2013).

[43] *See* Alford v. United States, 282 U.S. 687, 694 (1931) (the trial judge should protect the witness from questions which "go beyond the bo[u]nds of proper cross-examination merely to harass, annoy or humiliate"); Fed. R. Evid. 611(a).

[44] Fed. R. Evid. 611.

[45] *Id.* at advisory committee's note to 1972 proposed rules, subdiv. (c).

[46] 18 U.S.C. § 3509(d)(3)(A).

The CVCWRA provides as follows:

> On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.[47]

The AG Guidelines explicitly state that "a child's name or other identifying information (other than a pseudonym) should not be reflected in court documents or other public records unless otherwise required by law."[48] Therefore, prosecutors should use pseudonyms (for example, Minor Victim 1, MV-1, Jane Doe, or Child Witness 1) and not initials, first names, or last names when referring to child victims and child witnesses in publicly available court filings. This is to ensure the privacy of child victims and child witnesses.

An earlier version of the AG Guidelines provided that "[a] child's name or other identifying information (other than initials or an alias) should not be reflected in court documents or other public records unless otherwise required by law."[49] Using a child's initials instead of a pseudonym may make it easy for the public to deduce the identity of the victim. It is also important for prosecutors to consider how much information regarding the relationship between the defendant and victim, or other information (*e.g.*, address, school, etc.) that could be used to identify the child, is included in pleadings. For example, if the documents filed in court use a pseudonym for the victim's name, yet detail that the six-year-old victim is the son of the defendant, the victim's right to privacy has been destroyed.

Finally, any filings (for instance, indictments) that contain the child's real name should be filed under seal; redacted versions of any such documents should then be filed on the public docket.[50] Where appropriate, prosecutors should seek protective orders to ensure information that should not be released publicly is, in fact, not released publicly.[51]

VII. Closing the courtroom

The young abuse victims described in the case scenarios at the beginning of this article may be understandably reluctant to tell what happened

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[47] *Id.*
[48] AG Guidelines, *supra* note 6, at 29.
[49] U.S. Dep't of Just., Attorney General Guidelines for Victim and Witness Assistance 17 (2011).
[50] 18 U.S.C. § 3509(d)(2).
[51] *Id.* § 3509(d)(3); Fed. R. Crim. P. 49.1(e).

to them in front of a courtroom full of strangers, family, and community members. It is likely these children will have to travel a long distance to the courthouse and that they will be asked repeated questions about intimate and explicit details of a traumatic event. This reality leads many to ask if it is possible to close the courtroom so the children do not have to testify publicly?

The CVCWRA statute provides that "[w]hen a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case."[52] Before the court closes a courtroom, however, it must find "on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate."[53] The court's order must be narrowly tailored to serve the government's specific compelling interest.[54]

Defendants in cases where the court has granted a request to close the courtroom have argued that their Sixth Amendment rights were violated. This is because the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[55] The Sixth Amendment requirement of a public proceeding is, in part, to ensure the following: (1) the public will see that the defendant is being treated fairly; (2) the judge and prosecutor will responsibly fulfill their duties; and (3) witnesses will be encouraged to come forward and testify truthfully.[56] In addition, the press and public have an implicit First Amendment right of access to criminal trials.[57]

In *United States v. Thunder*, the defendant was accused of raping three preteen girls.[58] One victim was the defendant's own daughter.[59] The prosecutor moved to close the courtroom to the public, and the trial court granted the motion without a hearing and without putting any findings on the record to support the closure.[60] The Eighth Circuit found that the defendant's Sixth Amendment rights were violated, and his conviction was reversed.[61] The appellate court found that the trial court had ignored the stringent requirements imposed by the U.S. Supreme Court's public

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[52] 18 U.S.C. § 3509(e).
[53] *Id.*
[54] *Id.*
[55] U.S. Const. amend. VI.
[56] United States v. Yazzie, 743 F.3d 1278, 1286 (9th Cir. 2014).
[57] *Id.*
[58] 438 F.3d 866 (8th Cir. 2006).
[59] *Id.*
[60] *Id.* at 866–67.
[61] *Id.* at 868.

trial cases, and the trial court order "was not narrowly tailored to the advancement of any compelling government interest."[62]

There are four separate factors a court must consider when responding to a defendant's Sixth Amendment challenge to closing the courtroom. These factors are known as the Waller factors and come from a U.S. Supreme Court case, *Waller v. Georgia*.[63] First, the party moving to close the courtroom must advance an overriding interest that is likely to be prejudiced.[64] Courts have recognized that the physical and psychological well-being of a child is a compelling higher value that can support closing the courtroom.[65] Second, the closure must be no broader than necessary to protect the interest of overriding importance.[66] Closing a courtroom during the testimony of a sexual abuse victim is narrowly tailored where the purpose is to protect the victim.[67] Third, the court must consider reasonable alternatives to closing the courtroom.[68] Fourth, the court must make adequate findings to support closing the courtroom.[69]

VIII. Child's live testimony by two-way closed circuit television

If the court declines to close the courtroom another option is having the child victim testify via closed circuit television (CCTV). Since a young child may not be emotionally capable of testifying in open court, the CVCWRA specifically provides for CCTV testimony where the victims are children who are unable to testify in front of their abusers because of fear or the likelihood of emotional trauma.[70]

The Supreme Court has found CCTV is the functional equivalent of live, in-court testimony, and this procedure raises few constitutional problems.[71] The child testifies from a room outside the courtroom; counsel for both parties are present in the room with the child. The judge, defendant, jury, other courtroom personnel, and spectators remain in the courtroom. The testimony is contemporaneously transmitted on a monitor into the courtroom. Direct and cross-examination proceed as usual. The defen-

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[62] *Id.*
[63] 467 U.S. 39 (1984).
[64] *Yazzie*, 743 F.3d at 1287.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] 18 U.S.C. § 3509(b)(1)(B).
[71] Maryland v. Craig, 497 U.S. 836 (1990); United States v. Rouse, 111 F.3d 561, 568–69 (8th Cir. 1997).

dant and the child can see each other on the monitor, thus satisfying confrontation issues. The child, however, is physically removed from the defendant's direct presence, thus lessening the fear and trauma for the child.

In *Maryland v. Craig*, the Supreme Court held that the Sixth Amendment's Confrontation Clause does not "guarantee[] criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."[72] The Court found, instead, that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[73] The Court found that the Confrontation Clause ensures the reliability of testimony because it does the following: (1) ensures that the witness will give statements under oath; (2) forces the witness to submit to cross-examination; and (3) allows the trier of fact to observe the witness's demeanor.[74] The Court further found that "the protection of minor victims of sex crimes from further trauma and embarrassment"[75] is a compelling government interest that "may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[76]

The Court concluded that:

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.[77]

The Court stated that the requisite showing of necessity must be made on a case-by-case basis and set out three factors for the trial court to consider.[78] These factors are as follows: (1) whether use of a special procedure is necessary to protect the welfare of the particular child witness; (2) whether the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) whether the emotional distress suffered by the child witness in the presence of the de-

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[72] *Craig,* 497 U.S. at 844.
[73] *Id.* at 850.
[74] *Id.* at 845–46.
[75] *Id.* at 852.
[76] *Id.* at 853.
[77] *Id.* at 855.
[78] *Id.*

fendant is more than *de minimis*.[79] With respect to the third factor, there must be more than "mere nervousness or excitement or some reluctance to testify" on the part of the child witness.[80]

A jury convicted Patrick Roy Wandahsega of one count of abusive sexual contact.[81] The victim was his six-year-old son.[82] On appeal, Wandahsega argued that the district court erred in allowing the victim to testify via CCTV.[83] Before trial, the prosecutor filed a motion under the CVCWRA asking to have the victim testify via CCTV.[84] At a hearing, the magistrate judge heard testimony from a social worker about whether the boy would be able to testify in front of his father. The victim also testified at the hearing and said he would be scared to testify with the defendant present.[85] The magistrate judge found the victim would be unable to testify in front of his father because of fear, and there was a substantial likelihood the victim would suffer emotional trauma if forced to do so.[86] The magistrate judge recommended granting the government's motion and allowing the victim to testify at trial via CCTV. Wandahsega did not object to the magistrate's report and recommendation, and it was adopted by the district court.[87]

At trial, the government called the victim as its first witness. The boy was questioned in a room separate from the jury and the defendant. His testimony was transmitted to the jury by CCTV.[88] He testified that he no longer lived with his father because the defendant "'did something bad to [him]' while he was 'in [his] bedroom'" in his father's apartment.[89] The boy testified that his father touched the victim's privates—where he "poop[s] and pee[s]"—more than one time.[90]

On appeal, Wandahsega argued the use of CCTV was a violation of his right to confront his accusers.[91] But because he failed to object to the magistrate's report and recommendation, the Sixth Circuit found he waived the issue for purposes of appeal.[92] Nevertheless, the appellate

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[79] *Id.* at 855–56.
[80] *Id.* at 856.
[81] United States v. Wandahsega, 924 F.3d 868 (6th Cir. 2019); 18 U.S.C. § 2244(a)(5).
[82] *Wandahsega*, 924 F.3d at 874.
[83] *Id.*
[84] *Id.* at 875; 18 U.S.C. § 3509(b)(1).
[85] *Wandahsega*, 924 F.3d at 875.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 876.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 878.
[92] *Id.*

court looked at the merits of the issue and, citing *Maryland v. Craig*, ruled that the defendant's constitutional rights were not violated.[93]

The Sixth Circuit also raised an additional issue concerning CCTV that does not appear to have been raised by the defendant, which is how to reconcile *Crawford v. Washington* with *Craig*.[94] *Crawford* held that the Confrontation Clause prohibits the admission of testimonial out-of-court statements unless the witness is unavailable, and the defendant had a prior opportunity for cross-examination.[95] The *Wandehsaga* court referenced *United States v. Cox* and explicitly stated *Crawford* did not overrule *Craig*.[96] Any prosecutor litigating a Confrontation Clause argument in the context of CCTV is advised to look at this issue. Reading Judge Sutton's concurrence in *United States v. Cox* is recommended as it appears appellate judges are now raising the issue sua sponte.[97]

The *Crawford* issue was specifically addressed in *United States v. Kappell* in 2005.[98] The *Kappell* court said *Crawford* did not apply because that case involved the admissibility under the Confrontation Clause of recorded testimonial statements of a person who did not testify at trial.[99] Specifically, "[t]he holding in *Crawford* was that such statements, regardless of their reliability, are not admissible unless the defendant was able to cross-examine their maker."[100] In contrast, the two young victims in *Kappell* did testify and were cross-examined by defense counsel.[101] Defendant then put forward that because the two children were unresponsive or inarticulate during their trial testimony, "they should be viewed as 'unavailable' witnesses, whom the defendant could not effectively cross-examine."[102] In essence, the defendant was arguing the children should be treated as if they had not testified or been cross-examined.[103] The Sixth Circuit found this argument unpersuasive and cited to U.S. Supreme Court precedent: "'[T]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the

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[93] *Id.* at 879.
[94] *Crawford*, 541 U.S. 36 (2004); *Craig*, 497 U.S. 836.
[95] *Crawford,* 541 U.S. 36.
[96] *Wandahsega*, 924 F.3d at 879; *Cox*, 871 F.3d 479 (6th Cir. 2017); *Crawford*, 541 U.S. 36; *Craig*, 497 U.S. 836.
[97] 871 F.3d at 492.
[98] 418 F.3d 550, 555 (6th Cir. 2005).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

defense might wish.'"[104]

IX. Use of multidisciplinary child abuse teams

Criminal cases with child victims require careful coordination between many criminal justice and social service providers. This need for strong coordination and communication is magnified when multiple jurisdictions are involved in a single case. Crimes occurring in Indian country have the potential for federal, state, and tribal law enforcement and prosecutor involvement.[105] Federal law and Department policy supports and advances the team approach to these kinds of cases.

The Indian Child Protection and Family Violence Prevention Act (ICPFVP) was first enacted in 1990.[106] In addition to legislating the creation and implementation of Child Protection Teams (CPTs) in Indian country for the first time, it required the following:

- The establishment of a central registry for information on child abuse in Indian country;[107]
- The waiver of a parental-consent requirement in child abuse investigations for the forensic interviews;[108]
- The prioritization of protecting children by allowing interviews and examinations to be conducted in a manner that minimizes trauma to children using an MDT;[109]
- A federal magistrate or district court judge to enforce the provisions;[110] and
- Confidentiality in child abuse investigations and the sharing of information on a need-to-know basis, while expediting the sharing of information with MDT members.[111]

The passing of the ICPFVP allowed for the evolution of both CPTs and MDTs in Indian country.[112] Although the difference between the two

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[104] United States v. Owens, 484 U.S. 554, 559 (1988) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987) and Delaware v. Fensterer, 474 U.S. 15, 20 (1985)).
[105] 18 U.S.C. § 1151.
[106] 25 U.S.C. § 3201.
[107] *Id.* § 3204.
[108] *Id.* § 3206(b).
[109] *Id.* § 3206(c).
[110] *Id.* § 3206(d).
[111] *Id.* § 3205.
[112] *Id.* § 3201.

teams can be understood with the basic explanation that MDTs are prosecution focused and CPTs are designed with the protection of the child at their forefront, in Indian country, the members of both teams are often the same people. This structure enhances the mobilization of a multijurisdictional system response when a child is harmed and encourages the maximization of resources to address safety, potential for exposure to violence (risk factor), systems-based wraparound resources, and convictions in cases.[113]

Effective MDTs depend on a shared understanding of their goals, mission, and knowledge of practices and procedures to accomplish the following: (1) investigate and prosecute child abuse cases; and (2) provide vital intervention services to child abuse victims and their families.[114] Cooperation, sharing information, and case coordination are some of the benefits that support a multidisciplinary approach to investigating cases of child abuse and neglect. The MDT model is readily adaptable to other types of cases, such as elder abuse, sexual assault, and missing person cases.

Currently, most states have legislation mandating an MDT approach to child abuse.[115] The term *multidisciplinary child abuse team* is defined in the CVCWRA as "a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse."[116] This federal law applies to cases in Indian country. Federal prosecutors and law enforcement officials must work with their tribal counterparts to develop a comprehensive MDT that can be engaged the moment a case of suspected abuse is reported. The federal law calls for the MDT to be involved in the following:

- medical diagnoses and evaluation of services;
- telephone consultation services in emergencies and other situations;
- psychological and psychiatric diagnoses and evaluation services for the child, parent, or guardian;
- expert medical, psychological and related professional testimony;
- case service coordination; and
- training services.[117]

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[113] *See id.*
[114] Debra A. Poole & Michael E. Lamb, Investigative interviews of children: A guide for helping Professionals (Am. Psych. Ass'n 1998).
[115] Maxine Jacobson, *Child Sexual Abuse and the Multidisciplinary Team Approach,* 8 Childhood 231, 234 (2001).
[116] 18 U.S.C. § 3509(a)(7).
[117] *Id.* § 3509(g)(2).

The AG Guidelines provide that an MDT approach be used when feasible.[118] The AG Guidelines also require that Department personnel use existing MDT teams in their local communities; this includes Child Advocacy Centers.[119] Law enforcement are encouraged to add other professionals to the team.[120] In an Indian country case, law enforcement may include the FBI, the Bureau of Indian Affairs, and state, local and tribal law enforcement. Because local laws and guidelines regarding an MDT may vary, federal personnel should know local requirements.[121]

The MDT approach is integral to success in most child abuse or maltreatment investigations. The coordination of services to the victim can ensure that all needs are being met. And coordination between the agencies involved in the investigation can reduce the number of forensic interviews or physical examinations that the child victim must undergo.

X. Guardian ad litem

Section 3509(h) of Title 18 provides that the court may appoint a guardian ad litem to protect the best interest of a child victim or witness.[122] The guardian ad litem can do the following: (1) attend all hearings and trial proceedings in which the child participates; (2) obtain access to all reports and records necessary to advocate for the child; and (3) find and coordinate the resources and social services the child needs and report to the court on the child's welfare.[123]

Guardians ad litem are available only to victims of, or witnesses to, "a crime involving abuse or exploitation."[124] A "child" is a person under the age of 18, who is or is alleged to be "a victim of a crime of physical abuse, sexual abuse, or exploitation," or "a witness to a crime committed against another person."[125] "Exploitation" is defined as "child pornography or child prostitution."[126] Thus, a guardian ad litem is not available for victims of financial crimes, such as child identity theft. They are also not available to adults, even those who suffer mental or other impairments.

The guardian ad litem must act in the best interests of the child.[127] In some circumstances, this will mean that the guardian ad litem takes

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[118] AG Guidelines, *supra* note 6, at 30.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] 18 U.S.C. § 3509(h).
[123] *Id.*
[124] *Id.*
[125] *Id.* § 3509(a)(2).
[126] *Id.* § 3509(a)(6).
[127] *Id.* § 3509(h).

actions against the child's wishes. For instance, if the child wishes to return to live with an abusive parent, the guardian ad litem can petition the court not to allow that to happen. The federal statute on guardians ad litem states that "[a] guardian ad litem shall not be compelled to testify in any court proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem."[128] A guardian ad litem is paid by the court.[129]

The appointment of a guardian ad litem may be necessary in a case like Tammy and Julie's where their mother has sided with the man who molested them. If there is no supportive and protective family member, the prosecutor should strongly consider asking the court to appoint a guardian ad litem to represent the best interest of the girls.

XI. Speedy trial

The child victims in the case scenarios are young. Having to wait a year or more for a case to go to trial can be detrimental, especially if a child has anxiety about the proceedings or is being pressured by family members about testifying against a loved one. Moreover, memories can fade when four year olds must wait approximately 25% of their total time on earth for a case to be tried. Fortunately, federal law provides a mechanism to have a case with a child victim or witness deemed a case of special public importance. The law states:

> In a proceeding in which a child is called to give testimony, on motion by the attorney for the [g]overnment or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.[130]

In *United States v. Broussard*, the government moved for an order

[128] *Id.* § 3509(h)(2).
[129] *Id.* § 3509(h)(1).
[130] *Id.* § 3509(j).

designating the case as one of "special public importance," under section 3509(j).[131] The government wanted to schedule the trial during the child victim's summer vacation to minimize the disruption to the child's life.[132] The defendant objected and argued that subsection (j) is unconstitutional because it limited his ability to prepare his defense.[133] The district court in *Broussard* examined the legislative history for the statute and found that Congress intended to give the trial court a "tool" to expedite the pretrial and trial process "'in the interests of protecting the best interests of child victims and witnesses in a specific case.'"[134] The district court found that subsection (j) did not interfere with a defendant's Sixth Amendment right to adequately prepare for trial.[135] The impact of this statute is limited and two-fold: first, it provides that the court must consider the presence of a child victim or witness when considering a motion for a continuance or any other action that might affect the Speedy Trial Act; and second, the court must give child abuse cases priority over other criminal cases.[136]

The court found that subsection (j) provides that a court "must consider the presence of a child victim or witness when considering a motion for a continuance or any other action that might affect the Speedy Trial Act."[137] And a court must give child abuse cases priority over other criminal cases.[138]

In *United States v. Birdsbill*, another sexual abuse case with child witnesses, the court declared the case one of special public importance and denied a defense motion for a continuance stating such a delay would "cause extreme stress and suffering" to the child witnesses.[139]

XII. Testimonial aids

It is difficult for most adult witnesses to discuss in a public courtroom the details of a sexual assault. Understandably, it would be even more difficult for children to recount publicly what happened to them. Accordingly, the CVCWRA permits the use of testimonial aids.[140] Specifically, the statute provides, "The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative de-

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[131] *Id.*; 767 F. Supp. 1536, 1544 (D. Or. 1991).
[132] *Broussard*, 767 F. Supp. at 1544.
[133] *Id.*
[134] *Id.*
[135] *Id.*; U.S. Const. amend. VI; 18 U.S.C. § 3509(j).
[136] 18 U.S.C. § 3161 (Speedy Trial Act).
[137] *Broussard*, 767 F. Supp. at 1544.
[138] *Id.*
[139] 243 F. Supp. 2d 1128, 1130 (D. Mont. 2003).
[140] 18 U.S.C. § 3509(l).

vice the court deems appropriate for the purpose of assisting a child in testifying."[141]

In *United States v. Archdale*, the defendant was convicted of two counts of sexual abuse of a minor.[142] The victim in the case, J.K., was 12 years old.[143] At trial, the prosecutor asked the victim to identify on an anatomical diagram the "thing" defendant told her to suck.[144] At a different time, the prosecutor asked the victim to identify on the anatomical chart the parts of her body that the defendant touched.[145] On both occasions, the appellant objected to the use by the government of anatomical diagrams to assist J.K. in her testimony.[146] The trial court overruled the defendant's leading objections in both instances. The Ninth Circuit agreed with the trial court citing 18 U.S.C. § 3509(l).[147] The appellate court held that because the victim was under the age of 18 and alleged to be a victim of a crime of sexual abuse, she was a child under subsection (l).[148] The Ninth Circuit found that the district judge witnessed the child victim's testimony, and his conclusion that the use of the anatomical diagrams would assist her in testifying is entitled to deference.[149] In short, the trial court did not err in permitting the prosecution to use the diagrams to assist the child victim in testifying.[150]

XIII. Federal Rule of Evidence 414: similar crimes in child-molestation cases

Federal Rule of Evidence 414 specifically allows the prosecution to use evidence of a defendant's other acts to demonstrate to the jury that the defendant had a disposition of character, or propensity to commit these types of crimes.[151] Before the passage of Federal Rules of Evidence

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[141] *Id.*
[142] 229 F.3d 861 (9th Cir. 2000).
[143] *Id.* at 864.
[144] *Id.* at 866.
[145] *Id.*
[146] *Id.*
[147] 18 U.S.C. § 3509(l).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Fed. R. Evid. 414; United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005) ("Congress intended to include the defendant's propensity to engage in the offense of sexual assault"); United States v. McGuire, 627 F.3d 622, 626 (7th Cir. 2010) (finding admissible for propensity, under Rule 414, the evidence of defendant's molestation of four other children); United States v. Rogers, 587 F.3d 816, 822–23 (7th Cir. 2009) (discussing analogous Rule 413); *see also* United States v. Levinson, 504 F. App'x 824, 827 (11th Cir. 2013) ("[E]vidence that a defendant engaged in child molestation

413–415, admission of a defendant's prior crimes or acts was governed by Federal Rule of Evidence 404(b), which disallows such evidence when used to prove character to show action in conformity therewith.[152] Despite their differences, however, both Federal Rules of Evidence 414 and 404 are subject to the balancing test of Federal Rule of Evidence 403.[153]

Federal Rule of Evidence 414(a) provides that, "[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation," and such "evidence may be considered on any matter to which it is relevant."[154] Under Federal Rule of Evidence 414, "evidence that a defendant engaged in child molestation in the past is admissible to prove that the defendant has a disposition of character that makes it more likely that he did commit the act of child molestation charged in the instant case."[155] The term "child molestation" encompasses charged or uncharged criminal conduct under state or federal law involving traditional notions of hands-on offenses against children as well as the distribution, receipt, or possession of child pornography.[156] Federal Rule of Evidence 414 specifically includes any conduct, plus attempts and conspiracies, prohibited under Chapter 109A and committed with a child and Chapter 110 of

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in the past is admissible to prove that the defendant has a disposition of character that makes it more likely that he did commit the act of child molestation charged in the instant case."); United States v. Rivera, 551 F. App'x 531, 533 (11th Cir. 2014) ("Rule 414 evidence may be considered for its bearing on any matter to which it is relevant, including propensity."); United States v. Guidry, 456 F.3d 493, 501 n.2 (5th Cir. 2006) ("Rules 413, 414, and 415 provide exceptions to the general prohibition on character evidence in cases involving sexual assault and child molestation.").

[152] Fed. R. Evid. 404(b), 413–415; United States v. LeMay, 260 F.3d 1018, 1024 (9th Cir. 2001) (Rule 414 "changes this general rule with respect to child molestation cases."); *see also* Rogers, 587 F.3d 816, 821 (7th Cir. 2009) ("Congress intended, in passing Rule 413, to provide an exception to Rule 404(b)'s general bar and to permit the trier of fact to draw inferences from propensity evidence."); United States v. Brimm, 2015 WL 1898375, at *2–3 (11th Cir. Apr. 28, 2015) (citing United States v. McGarity, 669 F.3d 1218, 1243–44 (11th Cir. 2012) (addressing Rule 414)) ("Rules 413 and 414 permit the introduction of propensity evidence and thus contain exceptions to Rule 404(b)'s general ban on propensity evidence in 'sexual assault' and 'child molestation' cases."); United States v. Batton, 602 F.3d 1191, 1196 (10th Cir. 2010) (concluding that Rule 413 provides an exception to Rule 404's prohibition of propensity evidence).

[153] Fed. R. Evid. 403–404, 414; United States v. Loughry, 660 F.3d 965, 970 (7th Cir. 2011); *see also* McGarity, 669 F.3d at 1244 n.32 ("[E]vidence admitted under Rule 414(a) must satisfy Rule 403.").

[154] Fed. R. Evid. 414(a).

[155] Levinson, 504 F. App'x at 827; Fed. R. Evid. 414.

[156] *See* Fed. R. Evid. 414(d)(2).

Title 18 of the U.S. Code as child molestation.[157]

In short, the Federal Rule of Evidence 414 analysis has four prongs: (1) the defendant must be accused of a child-molestation offense; (2) the prior offenses the government seeks to admit are child-molestation offenses; (3) the evidence must be relevant; and (4) the probative value of the evidence must not be substantially outweighed by the danger of undue prejudice.[158]

A recent case from the Eighth Circuit illustrates how useful this evidence can be in a difficult case: Stanley Patrick Weber was convicted in South Dakota for multiple counts of aggravated sexual abuse[159] and sexual abuse of a minor.[160] Weber was an Indian Health Service (IHS) doctor for a number of decades and he sexually assaulted many young boys on reservations in South Dakota and Montana.[161] Weber was also charged in the District of Montana, and that case was tried first with convictions on four counts related to victims RFH and GRC.[162] The South Dakota trial court ruled that three of Weber's Montana victims RFH, FSE, and GRC, would be allowed to testify. At the time of the South Dakota trial, however, GRC could not be located, so the court admitted, over objection, GRC's prior testimony from the Montana trial.[163]

On appeal, Weber argued the trial court wrongly balanced the prejudicial and probative impact of the three witnesses' testimonies in violation of Federal Rule of Evidence 403.[164] The Eighth Circuit disagreed with Weber and held that in criminal cases where a defendant is accused of sexual assault, evidence of a prior sexual assault is admissible under Federal Rule of Evidence 414 and 413 "unless its probative value is substantially outweighed by one or more of the factors enumerated in Rule 403, including the danger of unfair prejudice."[165] The appellate court found no evidence of any improper balancing by the district court or unfair prejudice to the defendant.[166]

The Eighth Circuit said that the testimony of the three victims in the Montana case had substantial probative value at the South Dakota

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[157] *Id.*; 18 U.S.C. Chapters 109A, 110.
[158] Fed. R. Evid. 414.
[159] 18 U.S.C. § 2241(c).
[160] *Id.* § 2243(a).
[161] United States v. Weber, 987 F.3d 789, 791 (8th Cir. 2021).
[162] *Id.*
[163] *Id.*
[164] *Id.* at 793; Fed. R. Evid. 403.
[165] *Id.* (citing United States v. Keys, 918 F.3d 982, 986 (8th Cir. 2019)) (quoting United States v. Gabe, 237 F.3d 954, 959 (8th Cir. 2001)); Fed. R. Evid. 413–414.
[166] *Weber*, 987 F.3d at 793.

trial.[167] The testimony established the defendant's propensity to molest young boys in his medical care and young boys invited to his house. The victims all testified that the abuse started during a medical examination at an IHS facility where the defendant abused his position as a pediatrician. The appellate court opined that the probative value of the Montana victims' testimony at the South Dakota trial was perhaps even more substantial than in other cases because "Weber advanced a theory of defense that he had been the victim of a conspiracy among some witnesses since he was an outsider in the Pine Ridge community."[168] The similar crimes testimony rebutted this defense, because these three witnesses came from an entirely different community and were not connected to the South Dakota victims.[169]

XIV. Resources

The Office for Victims of Crime has several helpful resources for children and their families and for professionals preparing children for court. The Child Victims and Witnesses Support Materials are available online for free.[170] These resources were created to support children and youth during their involvement with the justice system as victims or witnesses to a crime. The resources are designed for children of different age groups and were developed with the input of national experts and lived experience experts. The materials are intended to teach children about how the justice system works, what their rights are, the roles of the different professionals they will meet, and how they can cope with their feelings. The materials also include tips for children who must testify in court.

In a document published by the Zero Abuse Project, seven pretrial motions are outlined that prosecutors should file in most cases of child maltreatment.[171] These motions are intended to protect children from confusing or abusive practices while testifying and to facilitate testimony that is fair and accurate.[172] The motions include the following: a child friendly oath; a court order requiring questions that a child can understand; a motion requiring that the child's testimony be taken at a time that is best for the child; an order allowing the child to bring a comfort

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[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] Child Victims and Witness Support Materials, Dep't of Just. Off. for Victims of Crime, https://ovc.ojp.gov/child-victims-and-witnesses-support (last visited Aug. 12, 2024).
[171] Victor I. Vieth, A Trauma-Informed Courtroom: Seven Pre-Trial Motions Child Abuse Prosecutors Should Routinely File (2021).
[172] *Id.*

item to the stand; an order allowing the presence of a support person; an order prohibiting intimidating questioning; and a courtroom modified to meet the child's needs.[173] Many of these suggested motions are, in fact, possible using 18 U.S.C. § 3509.[174]

XV. Conclusion

Larry EchoHawk once wrote, "Child sexual abuse is the murder of innocence. A victim of this terrible crime may thereafter never live a normal, happy, healthy, and secure life because they face an increased risk of suffering an array of devastating short and long-term consequences."[175] It is true each of the victims referenced at the beginning of this article struggled. And, admittedly, their testifying at trial was difficult on them, particularly Tammy and Julie. In part, their trauma was likely magnified because their mother essentially abandoned them and stuck by the side of the abuser. But each of these children did get through the trial and all their abusers were convicted and sentenced to lengthy prison terms. What helped make the process easier for each of these young victims was an MDT comprised of committed federal and tribal criminal justice and social service professionals that employed as many of the victim protections outlined in the CVCWRA as were applicable and possible.[176]

Mr. EchoHawk also wrote about the Iroquois's view toward children and the future of their people. He wrote that the Iroquois always refer to the "Seventh Generation":

> In our way of life, in our government, with every decision we make, we always keep in mind the Seventh Generation to come. It's our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours—and hopefully, better. When we walk upon Mother Earth, we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them.[177]

While the "Seventh Generation" does not translate exactly to the work we do as federal prosecutors, the premise of considering the effects of our

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[173] *Id.*
[174] 18 U.S.C. § 3509.
[175] Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y. Univ. J. of Legis. & Pub. Pol'y 83, 87 (2001).
[176] 18 U.S.C. § 3509.
[177] EchoHawk, *supra* note 175, at 83 (quoting Harvey Arden & Steve Wall, Wisdomkeepers: Meetings with Native American Spiritual Elders 68 (1990)).

actions on future generations has considerable merit. Working collaboratively and using the tools and resources available, the government can successfully prosecute a violent crime case yet do so in a manner that does not compound the trauma for child victims. As prosecutors prepare for trial with a child victim, every case decision made should include consideration for the impact on child victims. Our goal is always justice. Our goal is also a criminal justice system response that promotes healing for victims, especially vulnerable children.

About the Author

Leslie A. Hagen serves as the Department's first National Indian Country Training Coordinator. In this position, she is responsible for planning, developing, and coordinating training in a broad range of matters relating to the administration of justice in Indian country. Previously, she served as the Native American Issues Coordinator for the Executive Office for U.S. Attorneys (EOUSA). In that capacity, she served as EOUSA's principal legal advisor on all matters pertaining to Native American issues, provided management support to the U.S. Attorneys' Offices, coordinated and resolved legal issues, and served as a liaison and technical assistance provider to Department components and the Attorney General's Advisory Committee on Native American Issues. She started with the Department as an Assistant U.S. Attorney in the Western District of Michigan where she was assigned to Violent Crime in Indian Country and handled federal prosecutions and training on issues of domestic violence, sexual assault, child abuse, and human trafficking affecting the 11 federally recognized tribes in the Western District of Michigan. Before joining the Department, she was both an elected prosecuting attorney and assistant prosecuting attorney in Michigan.

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Discrediting Defense Testimony: Liars, Lies, and Softer Language

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I. Introduction

To prevail at trial, the prosecution must destroy the credibility of defense witnesses, especially the testifying defendant. Herbert Stern emphasized that there are times when winning a trial requires calling a witness a liar.[1] This is especially true when the defendant testifies because the defendant's testimony becomes a crucial issue in the case. In addressing a defendant's credibility, prosecutors must remember their special role,[2] the ethical rules prohibiting personal opinion,[3] and the caselaw limiting the characterization of the defendant's testimony.

During a District of Nevada securities fraud trial in 1990, I argued the following regarding the defendant's testimony:

> I can summarize [the defendant's] testimony only one way under the evidence in this case. If the lies told by [the defendant] on that witness stand were weighed against the truths told by [the defendant] on that witness stand, the scales of justice would have knocked him right off that stand. That's how badly he falsified his statements.[4]

The Ninth Circuit upheld an identical argument and reasoned that "[i]t is neither unusual nor improper for a prosecutor to voice doubt about the veracity of a defendant who has taken the stand."[5] This argument would likely push the envelope too far in at least the Fourth Circuit.

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[1] Herbert J. Stern, Trying Cases to Win, Summation 184 (John Wiley & Sons 1996).
[2] *See* Berger v. United States, 295 U.S. 78, 88 (1935).
[3] Model Rules of Pro. Conduct r. 3.4(c) (Am. Bar Ass'n, 10th ed. 2023).
[4] Trial Transcript at 144, *United States v. Condie,* 974 F.2d 1343 (9th Cir. 1992).
[5] United States v. Birges, 723 F.2d 666, 672 (9th Cir. 1984) (holding the prosecutor's remarks neither grossly nor prejudicially improper).

Prosecutors must vigorously employ advocacy tools to maintain fairness and avoid inflammatory language in objection arguments.[6] Judge Learned Hand described this dilemma, stating:

> While, of course, we recognize that the prosecution is by custom more rigidly limited than the defense, we must decline to assimilate its position to that of either judge []or jury, to confine a prosecuting attorney to an impartial statement of the evidence. He is an advocate, and it is entirely proper for him as earnestly as he can to persuade the jury of the truth of his side, of which he ought to be thoroughly convinced before he begins at all. To shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice . . . .[7]

According to Judge Hand, addressing the defendant's credibility in a manner that implicates the balance of the scales of justice restricts prosecutors. One of the key fulcrums on the balance scale is the rule against advocates expressing personal opinions about the credibility of a witness.[8] Prosecutors must use measured language to attack the defendant's testimony and thereby avoid injecting matters outside of the evidence into a case. Some view such limitations on prosecutors' closing arguments as an unnecessary impairment on their ability to persuade the jury to reject the defendant's testimony.[9] Justice Scalia similarly argued that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[10]

This article examines whether a prosecutor can characterize a testifying defendant or defense witness as a liar or refer to a version of events provided in their testimony as lies in a closing argument. Different circuits will have different answers because the rules are inconsistent, as this article will demonstrate. First, this article will analyze the key cases under current precedent and reveal that these holdings are premised on the underlying reasons for the rule against expressing personal opinions on witness credibility. Suggestions for various techniques are then listed for prosecutors to effectively argue the defendant's untruthfulness without communicating their personal beliefs or crossing the reversal line. Finally, the article will examine and critique the Fourth Circuit's strict approach

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[6] Viereck v. United States, 318 U.S. 236, 253 (1943) (Black, J., dissenting).
[7] DiCarlo v. United States, 6 F.2d 364, 368 (1925).
[8] United States v. Young, 470 U.S. 1, 8 (1985).
[9] Clair Gagnon, *A Liar by Any Other Name? Iowa's Closing Argument Conundrum*, 55 Drake L. Rev. 471, 485 (2003).
[10] Crawford v. Washington, 541 U.S. 36, 62 (2004).

to this issue.

Federal caselaw is divided on this question. Some circuits review the argument's context and permit calling the defendant a liar or saying the defendant lied if the statement is tied to the evidence.[11] Other courts view the use of the word *liar* as creating unfair prejudice but allow the prosecutor to make temperate use of forms of the word *lie* by highlighting evidence conflicting with the defendant's testimony or particular statement.[12] This article will not consider the propriety of describing statements by a non-testifying defendant as lies in a fraud scheme or perjury trial.[13]

Today, Fourth Circuit prosecutors must resort to softer words and carefully construct their closing arguments to avoid the words *liar* and *lie* to describe the defendant's testimony.[14] The Fourth Circuit has held that arguments calling a defendant a liar or using the term *lie* are improper personal opinions.[15]

To avoid problems on appeal, a prosecutor should refrain from calling the defendant a liar and instead marshal facts from the record to support the inferences that the defendant should not be believed. Judge Hand's recognition of "oratorical emphasis" as legitimate prosecutorial advocacy remains intact, so long as prosecutors stick to the evidence and do not stray into personal opinion.

II. The reasons for the rule against expressing personal belief

Cases addressing the prosecutor calling the defendant or a defense witness a liar rely upon the canons of ethics that prohibit both prosecutors and defense attorneys from expressing a personal belief or opinion about the credibility of a witness.[16] In *United States v. Moore* (*Moore I*), the Fourth Circuit stated: "The ethical canons of our profession prohibit

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[11] *See* United States v. Moreland, 622 F.3d 1147, 1161 (9th Cir. 2010); United States v. Coriaty, 300 F.3d 244, 255–56 (2d Cir. 2002); United States v. Stover, 474 F.3d 904, 916 (6th Cir. 2007); United States v. Manos, 848 F.2d 1427, 1436–37 (7th Cir. 1988).

[12] *See* United States v. Saad, 888 F.3d 561, 569–70 (1st Cir. 2018); United States v. Phillips, 704 F.3d 754, 766 (9th Cir. 2012).

[13] *See* United States v. Powell, 680 F.3d 350, 358 (4th Cir. 2012); *Phillips*, 704 F.3d at 766; United States v. Dean, 55 F.3d 640, 665 (D.C. Cir. 1995).

[14] United States v. Woods, 710 F.3d 195, 202 (4th Cir.2013); United States v. Garcia, 818 F.2d 136, 144 (1st Cir. 1987).

[15] *Woods*, 710 F.3d at 203.

[16] Model Rules of Pro. Conduct r. 3.4(c) (Am. Bar Ass'n, 10th ed. 2023); Herbert J. Stern, Trying Cases to Win, 16 (John Wiley & Sons, 1990).

the direct expression of an advocate's opinion as to the veracity of a witness."[17] Although harmless error, the *Moore I* three-judge appellate panel found an improper expression of a personal opinion on the ultimate issue when the prosecutor accused the witness of "telling the most incredible lies."[18]

The *Moore I* three-judge appellate panel reasoned that by expressing an opinion on the credibility of a witness, "the prosecutor strayed close to, if not beyond, the outer limits of proper argument."[19] They identified two dangers posed by such arguments: (1) there was a risk the jury would give a prosecutor's views extra weight because of the prosecutor's position; and (2) the jury could infer the prosecutor had extrajudicial knowledge about the witness.[20] Thus, arguing a witness is a liar risks obtaining a conviction by injecting evidence not presented to the jury about the witness and improperly using the prestige of the prosecutor's office.[21]

Courts also interpret the word *lie* as an expression of the prosecutor's personal opinion that impinges on the jury's role as the sole arbiter of witness credibility. In *Harris v. United States*, in an opinion written by Chief Justice Burger, the Court determined that the prosecutor's portrayal of the defendant's testimony as a lie and a fabrication was an improper opinion about the veracity of the defendant where veracity might have determined the issue of guilt or innocence.[22] In requiring softer language, the Court stated:

> Appellant's testimony permitted the prosecutor to ask the jury to consider whether it was implausible, unbelievable, highly suspect, even ridiculous. Many strong adjectives could be used but it was for the jury, and not the prosecutor, to say which witnesses were telling the truth. Neither counsel should assert to the jury what in essence is his opinion on guilt or innocence. Yet this is the effect of remarks such as those of the prosecutor here when the accused gives testimony directly conflicting with that of the government's witnesses.[23]

Thus, to Chief Justice Burger, the advocate's job in closing argument is to ask the jury to determine credibility based upon the evidence, not

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[17] United States v. Moore (*Moore I*), 710 F.2d 157, 159 (4th Cir. 1983).
[18] *Id.* at 159–60.
[19] *Id.* at 159.
[20] *Id.*
[21] Alex J. Grant, *Criminal Law—Mirroring the Trial: Making Sense of the Law of Closing Argument in Criminal Cases*, 41 W. New Eng. Rev. 47 (2019).
[22] 402 F.2d 656, 657 (D.C. Cir. 1968).
[23] *Id.* at 658.

the advocate's opinion. He also viewed opinions on credibility as improper by prosecutors and defense attorneys.[24]

A final reason against expressing an opinion on the witness's credibility is to prevent either counsel's credibility from becoming an issue in the case. Closing arguments should focus the jury on the evidence in the record rather than "the need for opposing counsel to meet 'opinions' by urging his own contrary opinion."[25] Some courts reason that given their special role as the government's representative, the personal opinions of prosecutors carry added evidentiary weight against a defendant.[26] Experience also shows that such arguments may benefit seasoned and better-known defense attorneys whose views carry more importance to a jury. Despite the rule against personal opinions, acquittals based upon improper remarks by defense counsel cannot be appealed because of the Double Jeopardy Clause.[27]

One commentator criticized the application of this rule as a court-imposed "code of politeness" that is, "in the extreme form adopted by some jurisdictions, essentially at war with the notion of argument itself."[28] In reality, the rule functions as more than "a civility code" because it preserves the jury's role as the decision-maker on witness credibility solely based on the evidence presented at trial.[29] It prevents diverting the jury from matters outside of the evidence such as the perception that a lawyer has information about a witness that has not been presented to the jury.

III. How to avoid personal-opinion pitfalls

The prosecutor's task is to effectively argue the defendant's lack of credibility without violating *Moore I*'s prohibition on "direct expression" of a personal opinion. This requires the following: (1) meticulously preparing witness credibility arguments; (2) directly connecting remarks about the defendant's lack of veracity with the evidence in the record; (3) avoiding the use of first-person language; and (4) removing the appellate issue of prosecutorial misconduct by avoiding the pejorative term *liar*.[30]

The prosecutor may not usurp the jury's role in credibility determina-

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[24] *Id.* at 659.
[25] United States v. Brown, 508 F.3d 1066, 1075 (D.C. Cir. 2007).
[26] Berger v. United States, 295 U.S. 78, 86 (1935); *Moore I*, 710 F.2d 157, 159 (4th Cir. 1983).
[27] Grant, *supra* note 21, at 13.
[28] *Id.* at 9.
[29] *Id.* at 44.
[30] *See* Robert W. Clifford, *Identifying and Preventing Improper Prosecutorial Comment in Closing Argument*, 51 Me. L. Rev. 241, 244 (1999).

tions.[31] To prevent a direct expression of a personal opinion, prosecutors may never say, "I believe the defendant lied," but they may say what they believe the jury will say, such as, "You will find the defendant lied."[32] Likewise, a personal opinion of a witness's veracity such as "[the defendant] is one of the most artful liars I have ever met" is prohibited.[33] Similarly, direct expressions of personal knowledge are improper. For instance, a prosecutor may not state, "I do not believe the defendant," or "I know the defendant is lying."

In *United States v. Nersesian*, the Second Circuit recognized the need for prosecutors "to find careful ways of inviting jurors to consider drawing argued inferences and conclusions and yet to avoid giving the impression that they are conveying their personal views to the jurors."[34] Although there is no rule against a prosecutor's use of the first-person language,[35] it suggests to the jury the prosecutor (that is, the speaker) believes the point being submitted to the jury for its consideration.[36] Thus, in addressing the credibility of the defendant or any witness, avoid prefacing comments framed using first-person language such as "I think" or "I believe." These comments risk being interpreted as injecting personal opinions on credibility or improper vouching.[37] They also can not imply the prosecutor possesses knowledge that is not presented to the jury.[38]

Instead, prosecutors must make clear that they are arguing a conclusion the jury may make from the evidence and not expressing a personal opinion. This is accomplished by reminding the jury that determining witness credibility resides exclusively in their province, and a prosecutor's remarks are designed to point out evidence in the trial record to help them make those assessments. If the prosecutor uses evidence presented at trial to prove the defendant lied or admitted to lying on a particular occasion, it is not a personal opinion.

Prosecutors can safely address the defendant's testimony in a variety of ways. Here are three ways to attack the defendant's credibility while avoiding claims of improper personal opinion:

- Link the argument to the evidence by stating "the evidence clearly demonstrates that the defendant's testimony is not truthful," and emphasize discrepancies between the defendant's testimony and the

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[31] *Id.* at 243.
[32] Stern, *supra* note 1, at 94.
[33] United States v. Anchondo-Sandoval, 910 F.2d 1234, 1237–38 (5th Cir. 1990).
[34] 824 F.2d 1294, 1328 (2d Cir. 1987).
[35] United States v. Higgs, 353 F.3d 281, 332 (4th Cir. 2003).
[36] Brokenbrough v. State, 522 A.2d 851, 859 (Del. 1987).
[37] State v. Swanson, 707 N.W.2d 645, 656 (Minn. 2006).
[38] United States v. Briseno, 843 F.3d 264, 273 (7th Cir. 2016).

record.[39]

- Rather than suggesting a point personally, experienced American and British advocates often argue, "I leave it to [the jury to decide] whether this evidence does not suggest . . . ."[40] Leaving a point or argument with the jury differs from personally suggesting it.[41] Likewise, the Second Circuit approved the following language as unobjectionable to avoid personal opinion: (1) "you are free to conclude"; (2) "a conclusion on your part may be drawn"; (3) "you may perceive that"; or (4) "it is submitted that."[42]
- In cases where there are two conflicting stories, argue that if you believe the defendant, then you must disbelieve these other government witnesses or forensic evidence. In *Harris*, Chief Justice Burger quoted with approval a portion of the argument where the prosecutor stated: "[the defendant] would urge upon you at the time he got this car it was about 8:00 o'clock, and if you are to believe [the defendant], if he got the car at 8:00 o'clock, then you must disbelieve [the prosecution's witness]."[43]

IV. The judge's role as referee

Like the prosecutor, defense counsel must refrain from injecting their personal opinions on the credibility of witnesses into their closing argument.[44] The trial judge's responsibility is to keep the arguments of "both the prosecutor and defense counsel . . . within appropriate[ ]bounds."[45] The trial judge may interrupt the argument and admonish an attorney for improper statements.[46] The judge should use curative instructions that the arguments of counsel are not evidence, the jury alone determines the credibility of witnesses, and that counsel's argument should point the jury to the evidence that will assist in their credibility determination.[47] Likewise, during closing arguments, prosecutors may contemporaneously object to improper personal opinions or wait until the conclusion of the defense's closing argument and request a sidebar and a curative instruction.[48] Before closing arguments, prosecutors may also employ motions

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[39] Clifford, *supra* note 30, at 247 (citing State v. Casella, 632 A.2d 121 (Me. 1993)).
[40] *Brokenbrough*, 522 A.2d at 859.
[41] *Id.*
[42] United States v. Nersesian, 824 F.2d 1294, 1328 (2d Cir. 1987).
[43] Harris v. United States, 402 F.2d 656, 658 n.3 (D.C. Cir. 1968).
[44] United States v. Young, 470 U.S. 1, 8 (1985).
[45] *Id.* at 10.
[46] *See* Viereck v. United States, 318 U.S. 236, 248 (1943).
[47] United States v. Thomas, 377 F.3d 232, 244–45 (2d Cir. 2004).
[48] *Young*, 470 U.S. at 13.

in limine to prevent defense attorneys from expressing improper personal opinions on witness credibility. These tactics are particularly helpful when dealing with defense attorneys who are known to head in that direction.

V. Standard of review for improper arguments

Assertions that the prosecutor improperly argued that the defendant was a liar or that the defendant lied are raised as claims of prosecutorial misconduct. These remarks, even if improper, will not result in a new trial unless they materially affect the defendant's substantial rights.[49] To determine such prejudice, the court considers six factors: (1) the degree to which the remarks tend to mislead the jury and prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of the proof to establish the guilt of the accused; (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters; (5) whether the remarks were invited by improper comments by the defense counsel; and (6) whether curative instructions were given to the jury.[50] Where defense counsel objected to the closing argument at trial, the claims are reviewed for harmless error. If no objection was made, the review is for plain error.[51] The difference between plain error and harmless error is that the government bears the burden of persuasion for harmless error, not the defendant.[52] Reversal under the plain-error standard, however, is appropriate only if (1) there was an error; (2) the error was clear or obvious under governing law; (3) the defendant established that the error affected his substantial rights; and (4) the court determines, in its discretion, that reversal is warranted because the error "seriously affect[ed] the fairness, integrity, or public reputation" of the proceedings.[53]

Even if a court finds that a prosecutor's statements calling the defendant a liar or asserting that the defendant lied were a clear or obvious (that is, plain) error, the conviction may still be affirmed based on a finding of no prejudice.[54] In *United States v. Woods*, for example, the

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[49] United States v. Loayza, 107 F.3d 257, 262 (4th Cir. 1997); *Young*, 470 U.S. at 12 (inappropriate prosecutorial comments standing alone do not justify reversal).
[50] United States v. Lighty, 616 F.3d 321, 361 (4th Cir. 2010).
[51] *Loayza*, 107 F.3d at 262.
[52] *See, e.g.*, United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004).
[53] *See, e.g.,* Rosales-Mireles v. United States, 585 U.S. 129, 134–35 (2018).
[54] *See* United States v. Woods, 710 F.3d 195, 202 (4th Cir. 2013); *see also* United States v. Saad, 888 F.3d 561, 569 (1st Cir. 2018) ("[T]he prosecution's closing argument contained inappropriate and prejudicial statements about the credibility of [the defendant's] testimony. . . . [I]t was improper for the prosecution to . . . say that

court affirmed the defendant's conviction based on its determination that the comments were isolated; the record contained substantial evidence against the defendant; the jury was not misled; and curative instructions were given.[55] Despite upholding the convictions, however, some courts criticized prosecutors for using the terms *liar* and *lies*.[56]

VI. Analyzing where the circuits fall

A. Caselaw allowing references to *liar* or *lying*

The Second, Fifth, Seventh, and Ninth Circuits allow prosecutors to call a defendant a liar where the defendant's credibility is the central issue and the evidence in the record supports the inference.[57] These circuits have imposed three limitations on this language. First, a prosecutor may not use these terms in a repetitive, excessive manner, or in a way that is "likely to be inflammatory."[58] Second, prosecutors are prohibited from expressing their personal beliefs about the credibility of government witnesses.[59] That is, it is improper vouching for a prosecutor to opine that a defendant is a liar from extrinsic evidence outside the record.[60] Third, to avoid prejudice, a prosecutor must link a defendant's specific lies to evidence in the trial record.[61]

Sometimes during cross-examination, the witness admits to telling lies.[62] In *United States v. Poole*, the Fifth Circuit considered the propriety of calling a defendant a liar when the defendant admitted on cross-

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Saad's testimony was 'malarkey,' . . . call[] Moseley an 'unmitigated liar' and accus[e] him of perjury.").

[55] *Id.*

[56] United State v. Rogers, 853 F.2d 249, 251 (4th Cir. 1988) (calling the defendant a liar, a thief, and a crook was excessive, uncalled for, and overkill but not plain error); *Moore II*, 11 F.3d at 481.

[57] *Coriaty,* 300 F.3d at 255; United States v. Poole, 735 F.3d 269, 277 (5th Cir. 2013); United States v. Turner, 651 F.3d 743,752 (7th Cir. 2011); United States v. Spivey, 859 F.2d 461, 465 (7th Cir. 1988) (calling the defendant a liar was not per-se misconduct); United States v. Laurins, 857 F.2d 529, 539 (9th Cir. 1988) (stating defendant was a liar could be construed as comment on the evidence).

[58] Floyd v. Meachum, 907 F.2d 347, 354 (2d Cir. 1990) (calling defendant a liar 40 times in closing argument was excessive and inflammatory); *Turner*, 651 F.3d at 752.

[59] United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985).

[60] United States v. Garcia-Guizar, 160 F.3d 511, 520 (9th Cir. 1998); *Poole*, 735 F.3d at 277.

[61] United States v. Shareef, 190 F.3d 71, 78 (2d Cir. 1999); United States v. Francis, 170 F.3d 546, 552 (6th Cir. 1999) (referring to the defendant as a liar and conman without reference to the evidence produced at trial was improper).

[62] Francis L. Wellman, The Art of Cross Examination, 49–56 (4th ed. 1936).

examination that he lied to federal agents.[63] The court upheld the prosecutor's reference of the defendant as a liar because when the "'characterization is reasonably seen as drawing conclusions from, and is actually supported by, the evidence,' the prosecutor does not commit error by characterizing the defendant as a liar."[64] The remark was seen as a fair comment on the evidence that the defendant lied on a particular occasion, not an assertion of the prosecutor's personal opinion.

In the Sixth and Ninth Circuits prosecutors may safely refer to the defendant's lies on the witness stand, provided the comments are based on asking the jury to draw reasonable inferences from the evidence and state the reasons the evidence contradicts the defendant's testimony.[65] These circuits require the prosecutor to argue the defendant is lying by emphasizing discrepancies between the evidence in the record and the defendant's testimony.[66] This is a sensible approach because if direct or circumstantial evidence (such as prior statements or forensic evidence) prove the defendant lied, an advocate should be permitted to argue it.

B. The Fourth Circuit's approach

The Fourth Circuit prohibits prosecutors from calling the defendant a liar or arguing the defendant was lying. An analysis of *United States v. Moore* (*Moore II*)[67] and *United States v. Woods*[68] explains the reasons for disallowing these characterizations of the defendant's testimony. The Fourth Circuit's disapproval of both words follows the approach of several state jurisdictions[69] that view the word *lie* and its derivatives as "emotionally charged terms that may inject unfair prejudice into a proceeding

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[63] 735 F.3d at 277.

[64] *Id.* (quoting United States v. Bush, 451 F. App'x 445, 451 (5th Cir. 2011)).

[65] United Staes v. Phillips, 704 F.3d 754, 756 (9th Cir. 2012); United States v. Causey, 834 F.2d 1277, 1289 (6th Cir. 1987); *Francis*, 170 F.3d at 552 (referring to the defendant as a liar and conman without reference to the evidence produced at trial was improper).

[66] United States v. Stover, 474 F.3d 904, 916 (6th Cir. 2007) (reversal unwarranted because "[t]he difference between what the prosecutor actually said—'he is a liar'—and what the prosecutor could have permissibly said, that the evidence suggested that Defendant['s] testimony is not credible, is minimal").

[67] United States v. Moore (*Moore II*), 11 F.3d 475, 481 (4th Cir. 1993) (citing United States v. Cooper, 827 F.2d 991, 995 (4th Cir. 1987)).

[68] 710 F.3d 195, 203 (4th Cir. 2013).

[69] State v. Austin, 422 P.3d 18, 50 (Haw. 2018); State v. Locklear, No. COA11-194, 2011 WL 5148664, at *3 (N.C. Nov. 1, 2011); Lewis v. State, 569 P.2d 486, 488 (Ok. 2001); Williams v. State, 802 A.2d 927, 930 (Del. 2002); Davis v. State, 136 So.3d 1169 (Fla. 2014); State v. Graves, 668 N.W. 2d 860, 878 (Iowa 2003); State v Rehkop, 180 Vt. 228, 242 (Vt. 2006).

when utilized by the prosecution in reference to a witness's testimony."[70] Interestingly, unlike these state jurisdictions, the Fourth Circuit has determined that although prosecutors' use of the words *liar* and *lie* may be clear or obvious (that is, plain) errors, they do not necessarily warrant reversal absent a showing a prejudice.[71]

1. The facts of *Moore II*

In *Moore II*, undercover officers purchased cocaine base from the defendant's, Charles Moore's, brother Kirk Moore.[72] In the first transaction, Kirk paged Charles who did not answer.[73] The undercover officer and Kirk then drove to the defendant's residence and waited for him.[74] The defendant arrived and accompanied Kirk upstairs.[75] Kirk returned with a quantity of cocaine base and was paid by the undercover officer.[76] Subsequently, when the undercover officer requested Kirk provide half an ounce of cocaine, Kirk stated the drugs were locked in the defendant's safe and the defendant was out of town.[77] The defendant's residence was used for other transactions between Kirk and the undercover officer.[78] Police executed a search warrant at the defendant's residence.[79] Kirk and the defendant were arrested before the execution of the search warrant.[80] During the search of a safe in Charles Moore's bedroom, police seized $1,540; a broken scale; and empty plastic bags.[81] They also recovered a Glock handgun from his closet.[82]

Charles Moore was charged with conspiracy to distribute drugs and using and carrying a firearm during and in relation to the drug conspiracy.[83] He was convicted of the drug conspiracy and found not guilty of the firearms crime.[84]

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[70] *Austin*, 422 P.3d. at 50 (Polluck, J., concurring).
[71] *Cooper*, 827 F.2d at 995.
[72] *Moore II*, 11 F.3d at 477.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 478.
[84] *Id.*

2. Moore's trial proceedings

During the trial, the prosecution presented the undercover buys and the search evidence from Moore's room.[85] Kirk testified as a defense witness and denied that Charles was involved in the drug transactions.[86] The prosecutor impeached Kirk with his statements made to a detective who interviewed him the night of his arrest where he admitted: (1) Moore was Kirk's source of supply; (2) Kirk never dealt with the undercover officer without Moore's knowledge; and (3) Kirk always provided the proceeds of each drug sale to his brother Moore.[87]

3. The improper closing argument

On appeal, the court found Moore's "most salient argument" was that the prosecutor's closing argument improperly called the defendant and Kirk liars.[88] The prosecutor argued the following without a defense objection:

> This is a tragic case featuring Kirk Moore, a pathetic individual. And it's compounded when a young man like Kirk Moore comes into a federal court, takes an oath on the Bible, and lies. And it is compounded when the defendant, Charles J. Moore, comes into a federal court, takes the oath on the Bible, and lies. . . . But what the government knows and what you ladies and gentlemen know is that Kirk Moore lied when he took the stand.[89]

The court, citing *Moore I* and *United States v. Cooper*,[90] concluded that referring to the defendant and his brother, a defense witness, as liars was improper.[91] In criticizing the argument, the court wrote:

> Not only was the comment in this case improper and unnecessary in light of the overwhelming strength of the government's case, but it also skirts the precipice of reversible error. We have continually admonished the government not to engage in such conduct. Consequently, Moore has established that the government's reference to him and Kirk as liars was error and

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 480–81.
[89] *Id.* at 480 (cleaned up).
[90] *Moore I*, 710 F.2d 157, 159 (4th Cir. 1983); United States v. Cooper, 827 F.2d 991, 995 (4th Cir. 1987).
[91] *Moore II*, 11 F.3d 475, 481 (4th Cir. 1993).

> was plain. Fortunately for the government, we believe that Moore has failed to establish that his substantial rights were affected.[92]

4. Plain error

The court used the plain error standard of review because the defendant failed to object to the closing argument.[93] They found the remarks did not seriously affect the trial outcome but called them "improper and indicative of a shoddy and somewhat paltry closing argument."[94] It also determined the remarks did not impact the trial's outcome because the improper comments were isolated, the statements occurred only once, there was overwhelming evidence of guilt, and the conflicting evidence meant the jury understood someone was lying.[95] Finally, in a footnote, the court admonished the government "hopefully for the last time . . . to 'clean up its act.'"[96]

5. The Fourth Circuit's uncertainty after *Moore II*

In *Moore v. United States* (*Moore III*), an Eastern District of Virginia district court held the government can comment on the credibility of witnesses and even accuse them of lying because most criminal and many civil cases involve contests between different versions of past events where many of the versions reasonably appear to be deliberately false.[97] The court reasoned the word *liar* "is tailor-made" for such situations and Fourth Circuit precedent does not ban the words *liar* and *lying*.[98] The court distinguished *Moore III* as a case where the prosecutor did not link the characterization to the trial record and argued extrajudicial information.[99]

In *United States v. Powell*, decided in 2012, the Fourth Circuit again confronted the argument that a prosecutor, in an opening statement and closing argument, referred to the defendant as a liar.[100] In light of precedent from other circuits, the court stated in dicta: "We have not determined whether describing a defendant as a 'liar' is, per se, improper."[101]

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[92] *Id.*
[93] *Id.*
[94] *Id.* at 482.
[95] *Id.*
[96] *Id.* n.9.
[97] Moore v. United States (*Moore III*), 934 F. Supp. 724, 728–29 (E.D. Va. 1996).
[98] *Id.* at 730.
[99] *Id.*
[100] 680 F.3d 350, 358 (4th Cir. 2012).
[101] *Id.*

The decision did not cite *Moore II*. The *Powell* case, unlike *Moore II*, did not involve comments related to the defendant's trial testimony and instead related to his scheme to defraud.[102]

Then in 2013, the Fourth Circuit revisited the issue involving a defendant charged with wire fraud, aggravated identity theft, and assisting in the preparation of false tax returns.[103] The defendant, who worked for the Department of Veterans Affairs, operated a tax return business for supplemental income.[104] He prepared fraudulent tax returns, qualifying clients for illegal refunds by falsely listing patients from the Veteran's Administration as dependents.[105] The returns contained the patients' social security numbers and dates of birth.[106]

The defendant testified at trial that the incorrect information he entered on the tax returns came from the clients and denied he stole personal data from the Veterans Administration's patients.[107]

On appeal, the defendant claimed he was prejudiced by the prosecutor's improper statement in the closing argument stating he lied.[108] The prosecutor argued without a defense objection: "So, [the defendant] was right in the middle of getting these $500 payments for the fake dependents[,] *and he lied about it under oath* when he testified this morning."[109] The prosecutor did not call the defendant a liar but instead used the more delicate word *lied*.

The court reaffirmed and expanded *Moore II*.[110] They held that "error that is plain results when a prosecutor states that a defendant has lied under oath during trial, and we conclude that such an error occurred here."[111] They quoted *Moore II*'s language calling the argument "highly improper" and admonished "the government to clean up its act."[112] Significantly, the *Woods* court rejected any distinction between calling a defendant a liar and stating the defendant lied.[113] Therefore, they broadened the prohibition against calling the defendant a liar to include arguing the defendant lied under oath.

As in *Moore II*, the *Woods* court determined the improper remarks

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[102] *Id.* at 353.
[103] United States v. Woods, 710 F.3d 195, 199 (4th Cir. 2013).
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 200.
[109] *Id.* at 202 (emphasis in original).
[110] *Id.* at 209.
[111] *Id.* at 203.
[112] *Id.* at 202–03 (citing Moore II, 11 F.3d 475, 482 n.9 (4th Cir. 1993)) (cleaned up).
[113] *Id.* at 203 n.4.

were non-prejudicial and did not affect the trial's outcome.[114] The statements created a risk of prejudice, however, because the defendant's credibility was a key issue, and he was the only defense witness.[115] Nevertheless, the improper comments were isolated and not pervasive.[116] Finally, there was voluminous evidence against the defendant that undermined his version of events consisting of both documents and witnesses.[117]

6. The significance of the *Woods* case

The Fourth Circuit's ruling that characterizing a defendant's testimony as lies is the same as calling him a liar, though fact bound, is arguably inconsistent with the approach followed in some other circuits. The Ninth Circuit has held that "stating that the defendant lied . . . is less problematic than calling him a liar in general, since . . . the latter could have the tendency to overtake the role of the jury as the arbiter of credibility."[118] The Sixth Circuit did not see any meaningful distinction between the two terms so long as the terms were tied to the evidence.[119] The Fourth Circuit has not addressed situations where the defendant admitted on cross-examination to lying.

The *Woods* court also stressed the impact on the adversarial process when a prosecutor remarks about the veracity of a defense witness.[120] The court, in an opinion written by Judge Keenan, stated:

> When a prosecutor comments on the veracity of a witness, the prosecutor's statement presents two discrete risks: (1) of improperly suggesting to the jury that the prosecutor's personal opinion has evidentiary weight; and (2) of improperly inviting the jury to infer that the prosecutor "had access to extra-judicial information, not available to the jury."[121]

The court reasoned that these risks increase when the prosecutor states a defendant lied under oath because it suggests the defendant "abused []his constitutional right [to testify in his own defense] and attempted to manipulate the outcome of the trial to avoid being held responsible for his true actions."[122] The Ninth Circuit, however, permitted

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[114] *Id.* at 209.
[115] *Id.* at 203–04.
[116] *Id.* at 204.
[117] *Id.*
[118] United States v. Phillips, 704 F.3d 754, 767 (9th Cir. 2012).
[119] United States v. Stover, 474 F.3d 904, 916 (6th Cir 2007).
[120] United States v. Woods, 710 F.3d 195, 203 (4th Cir. 2013).
[121] *Id.* (quoting *Moore I* at 159).
[122] *Id.*

a similar argument in a case where a prosecutor argued that the defendant's duress claims were "figments of [the defendant's] imagination fabricated by him to escape the responsibility of his criminal actions in what I ferv[e]ntly hope will be an unsuccessful attempt to escape that responsibility."[123]

7. Critique of the Fourth Circuit's analysis

The Fourth Circuit's view that arguing the defendant "lied under oath" is an improper comment on his right to testify is misplaced. The Supreme Court has long recognized "a defendant's right to testify does not include a right to commit perjury."[124] At sentencing, a court may enhance the defendant's sentence for obstructing justice after finding the defendant willfully committed perjury at trial concerning a material matter.[125] A defendant can also be impeached by statements obtained in violation of *Miranda v. Arizona*[126] because "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury" and avoid "the traditional truth-testing devices of the adversary process."[127]

Under the Fourth Circuit's view, the believability of the defendant's testimony becomes the elephant in the room: The prosecutor may not fully address it in closing argument. In reality, a defendant who lies on the witness stand has obstructed justice and attempted to escape responsibility by abusing the right to testify. Implicit in a verdict rejecting the defendant's testimony is a jury finding a defendant attempted self-preservation by falsely testifying. It follows that so long as the prosecutor's remarks do not go outside the trial record, it is reasonable to argue the evidence showed—and the jury may find—the defendant's testimony was untruthful, and the defendant thereby tried to escape responsibility.

The *Woods* opinion also does not address cases where the defendant admits to lying on cross-examination. Defendants are often compelled to concede they told falsehoods to law enforcement or others about important facts. Here, a prosecutor's reference to the defendant's lies is directly supported by the record and leaves the question of the defendant's credibility to the jury.[128]

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[123] United States v. Birges, 723 F.2d 666, 671 n.1 (9th Cir. 1984).
[124] United States v. Dunnigan, 507 U.S. 87, 96 (1993).
[125] United States v. White, 810 F.3d 212, 229–30 (4th Cir. 2016).
[126] 384 U.S. 436 (1966).
[127] Harris v. New York, 401 U.S. 222, 225–26 (1971).
[128] United States v. French, 88 F.3d 686, 689 (8th Cir. 1996) (upholding the argument, "I think it is fair for you to conclude that . . . [the defendant] was lying to you").

8. Conclusions on the Fourth Circuit's approach

In the Fourth Circuit, labeling the defendant a liar or calling the defendant's testimony lies is an improper opinion of personal belief, thereby invading the jury's province as the sole judge of witness credibility.[129] The rule disallowing an unsworn prosecutor from asserting the personal belief that a witness is not credible is similar to barring an expert witness from giving opinions on the ultimate issue.[130]

It also avoids the appearance that prosecutors are using their official position to bolster their evidence based on extrajudicial knowledge supporting their opinion.

Despite the rationale, the Fourth Circuit's approach goes too far and oratorically handcuffs the prosecutor. It fails to recognize that when the defendant testifies to an alternative account of events, the defendant's truthfulness is the central issue for the jury's resolution. In one way or another, the prosecutor must convince the jury that the defendant is not telling the truth. The prosecutor should be permitted to speak harshly about the defendant's credibility if supported by the evidence.

Pointing out the occasions in the trial record where the defendant admitted to lying and calling those statements lies is not an improper opinion of personal belief; rather, it is taking the defendant's word that the defendant lied. There is no reason for a prosecutor to resort to softer words if the defendant's lies are fully supported by the record. Whether the prosecutor uses *lie*, *manipulation of the truth*, or *falsehood*, each phrase connotes an intentional misrepresentation designed to deceive the jury.

Likewise, calling discrepancies between the defendant's earlier statements, other witnesses, or forensic evidence disproving the defendant's testimony lies is a fair comment on the evidence.

Nevertheless, in the Fourth Circuit prosecutors needlessly inject an appellate issue into a case by characterizing a defendant as a liar or arguing that they lied. It is better to stay away from these words and argue the point in other ways.

VII. Final lessons

Caselaw provides the following lessons for closing arguments concerning a defense witness's or defendant's testimony:

- Prosecutors' arguments addressing the defendant's testimony require verbal discipline or they risk their rhetoric backfiring on appeal. Department of Justice (Department) attorneys should strive

[129] *See* discussion *supra* section VI.B.
[130] Fed R. Evid. 704(b).

for a measured argument, grounded in the trial record and devoid of inflammatory statements.

- Although allowed in a few jurisdictions, refrain from using the word *liar* because courts may interpret the term as usurping the jury's role by directly expressing an opinion on witness credibility. Some circuits see this as an inflammatory word, creating a risk of unfair prejudice. The word connotes an improper expression of the prosecutor's personal opinion of the veracity of a witness, especially if not tied to the trial record. It can also be interpreted as improper vouching. The term *liar* also risks the jury believing the prosecutor has extrajudicial information not contained in the trial record.
- Keep your circuit's rules in mind when crafting your closing arguments. As explained above, the Fourth Circuit specifically prohibits calling the defendant a "liar" or even stating the defendant "lied." The court has criticized closing arguments using these terms as improper attacks on the defendant's testimony. Although these characterizations are not, per se, reversible errors, they are plain errors subject to a review for prosecutorial misconduct. If a prosecutor makes this argument in the Fourth Circuit, a judge should sustain an objection to the prosecutor's characterization of a defendant as a "liar" and instruct the jury that the statements and arguments of lawyers are not evidence, and it is the exclusive role of the jury to make findings on witnesses' credibility.
- The same rule against using the term *liar* applies to defense attacks on government witnesses. Motions in limine are one method to ensure defense attorneys adhere to the rule prohibiting personal opinions on the credibility of witnesses.
- In closing arguments, prosecutors protect the record by reminding the jury they are sole judges of witness credibility, and it is their exclusive province to determine the believability or unbelievability of a witness. You should also tell the jury that your remarks are intended to point them to evidence presented at trial to help them make that independent determination. Always stress to the jury that findings on the defendant's credibility, or the credibility of any witness, rest exclusively with them. An attorney may safely state, "We leave it to you whether the evidence suggests the defendant's version of events is untrue."
- When commenting on a defendant's testimony, prosecutors should clearly state they rely on the facts presented in the trial record. When addressing a defendant's credibility, avoid first-person language. Phrases like "I think," "I believe," and "in my opinion" are

problematic because they convey the appearance of an improper expression of personal opinion. Instead, use the accepted language: "The evidence shows the defendant's version lacks credibility." Ensure all characterizations of the defendant's testimony are based on the evidence or reasonable inferences from the evidence and not on personal belief or opinion. Follow the same guidelines for government witnesses and avoid vouching. Just as prosecutors may not state they believe a government witness, they cannot opine that they disbelieve the defendant.

- Department attorneys must never suggest there is evidence not presented at trial or otherwise in the prosecutor's possession that refutes the defendant's testimony. Thus, it is wrong to state, "The government knows the defendant is not telling the truth."
- When arguing that the defendant's testimony is not credible, at least in the Fourth Circuit, use temperate forms of *lie* instead of the words *liar* and *lies*. It is better to say: "The evidence presented at trial contradicts the defendant's testimony," "You should find from the evidence the defendant's version of events is not credible," or "We leave it to you whether the defendant's testimony was truthful." Always highlight the evidence in the record directly conflicting with the defendant's testimony.
- Use the jury instructions on witness credibility as a framework to emphasize the implausibility of the defendant's trial testimony. Tell the jury that this instruction is a laundry list of the things you use to assess the credibility of witnesses. Argue that jurors use the same things to assess the credibility of witnesses in the courtroom as they do outside the courtroom. Superimpose these instructions on the defendant's testimony to argue the trial record reasons that the jury may find the defendant not credible. In rebuttal, you can rhetorically ask the jury, "Which witness has the biggest interest in the outcome of the case?" Then follow with more contradictions.
- The prosecutor's closing argument arms jurors who agree with the prosecution with the arguments from the trial evidence to persuade those jurors who disagree with that position.[131] You should underscore the discrepancies between the defendant's testimony and conflicting testimony from other witnesses, documents, and physical evidence. Footnote these conflicts with portions of the trial transcript. As a trial progresses, if you cannot obtain daily transcripts, purchase a few pages, or ask the court reporter to read back specific

[131] Stern, *supra* note 1.

statements in the record. You can write these down to accurately incorporate them into closing argument as specific examples.

About the Author

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Hear My Words: Effective Use of Words in Advocacy

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I. Introduction

"It's only words, and words are all I have . . . ."[1]

Words are all that we, as attorneys, have. Unlike Al Bundy,[2] we do not use one of those tools to measure foot size to sell shoes—incidentally, that is called a Brannock device[3]—nor do we use a wrench from the Crescent tool company[4] to fix pipes like plumbers do. Words really are all that we have. While a professional appearance, a pleasant speaking voice, and avoidance of verbal tics are important, they are just the surface.[5] Words give our case depth. Words give our case substance. Words can be the difference between winning and losing. How we can use words more effectively in our advocacy is the subject of this piece.

II. Ugly words

Ugly words can be a turnoff to people in the courtroom, including judges and juries. While it is subjective which spoken language sounds the nicest, English has words that sound lovely and others that do not.[6] Let

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[1] Bee Gees, *Words, on* Best of Bee Gees (Atlantic Recording Co. 1969).

[2] Bundy was the sad-sack, put-upon protagonist of the 1980s sitcom *Married . . . with Children. Married . . . with Children,* IMDb, https://www.imdb.com/title/tt0092400/ (last visited Aug. 6, 2024).

[3] *About Us: Our History,* Brannock Device Co., https://brannock.com/pages/about-us (last visited Aug. 6, 2024).

[4] *About Us,* Crescent Tool, https://www.crescenttool.com/about (last visited Aug. 6, 2024).

[5] *See* David Ball & Joshua Karton, Theater for Trial: Incorporating the Fourth Edition of Theater Tips and Strategies for Jury Trials (2017) (discussing the theater arts as applied to trials).

[6] The French language uses liaisons and orthographic changes, which create a mellifluous sound. *See French Pronunciation,* StudySmarter, https://www.studysmarter.co.uk/explanations/french/french-vocabulary/french-pronunciation/ (last visited Aug. 6, 2024); Victoria Wang, *Why French Sounds So*

us consider some of the most hated words in the English language, from a comprehensive study by Oberlin College in Ohio and Trinity University in Texas.[7]

- *Moist.* Much like Natural "Natty" Lite beer, generally finishing at #1 on "worst beer in the world" lists,[8] *moist* often finishes at the top of awful words lists.[9] Say it a few times—moist, moist, moist. Ewwww. According to one survey, 77% of respondents thought it was the grossest word in the English language.[10]
- *Phlegm.* It sounds like what it is. Disgusting. Similarly, *mucus* is a terrible word, right down there with *phlegm.*
- *Ointment.* This one, with its ugly phonetics, conjures up images of pustulant skin rashes. *Bubo*, another nasty word, is a swollen armpit or groin lymph node.[11]
- *Curd.* This is an ugly word because it rhymes with a slang word meaning excrement. I extend apologies to my Canadian friends with their poutine, that amazing side dish of French fries, gravy, and cheese . . . curds.[12]
- *Pulp.* Here is a queasy word that causes fights in my family—pulp or no-pulp orange juice.
- And this last one is my own most hated word: *delicious.* I hate this one with a passion. It sounds dreadful when celebrity chef and talk show host Rachael Ray[13] shortens it to "delish" or when you read a story in the media that director J.J. Abrams thought directing

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Beautiful: My Personal Journey of Learning a Third Language, Odyssey (Dec. 12, 2016), https://www.theodysseyonline.com/jibber-jabber-french.

[7] Paul H. Thibodeau et al., *An Exploratory Investigation of Word Aversion,* 36 Proc. Ann. Meeting Cognitive Sci. Soc'y 1580 (2014).

[8] *The Worst Beer in the World,* RateBeer, https://www.ratebeer.com/Ratings/TheWorstBeers.asp (last visited Aug. 6, 2024).

[9] *See* Shaunacy Ferro, *The Science Behind Why People Hate the Word Moist,* Mental Floss (June 26, 2023), https://www.mentalfloss.com/article/64984/science-behind-why-people-hate-word-moist.

[10] Catherine Townsend, *Cover your ears! Experts reveal the SIX words women hate the most—with 'moist' topping the list of cringe-inducing phrases,* Daily Mail (Aug. 10, 2015), https://www.dailymail.co.uk/femail/article-3192447/Cover-ears-Experts-reveal-SIX-words-women-hate-moist-topping-list-cringe-inducing-phrases.html.

[11] *Bubo,* Oxford English Dictionary (3d ed. 2010).

[12] *Poutine,* Oxford English Dictionary (3d ed. 2010).

[13] Barbara A. Schreiber, *Rachael Ray: American Chef and Television Personality*, Encyclopædia Britannica (July 15, 2024), https://www.britannica.com/biography/Rachael-Ray.

Star Wars IX was "too delicious of an opportunity to pass up."[14] I think I am going to throw up.

But you protest, "When am I ever going to use any of those words in court?" Well, you probably will not, but what general rules can we glean from this list? (Is *glean* acceptable, or should I have used a nicer word, like *intuit*? You be the judge.) First, many cringey words are associated with gross bodily fluids. Apart from that, it is all about the overall sound of words that use letters with nasty sounds, like*m, u,* and *o*. Note that there's nary a long or short *a* vowel sound in sight. Many of the ugly words in English have vowel sounds like */oo/* as in *mucous*. If you want someone to feel yucky, use a few of these words. Otherwise, stay far away from them in your advocacy.

III. Beautiful words

Keeping our stomach contents in our stomachs, let us turn to some of the most beautiful words in the English language, as determined by various internet surveys.[15]

- *Serendipity.* Notice the nice rhythm of syllables. As an aside, many people misuse this one as a synonym for "happiness," but it means "chance occurrence that's beneficial" or "*happy* accident."[16]
- *Bombinate.* This is one of those words that you see in vocabulary books. It means "buzzing, humming."[17] It is not used much—and I daresay not many know its definition—but it is a cool word, nevertheless.
- *Ethereal.* It not only has a beautiful pronunciation but also a beautiful meaning: "heavenly" or "celestial."[18]
- *Denouement.* Many words of French origin, with the correct pronunciation, sound pleasant.[19] I like *mise-en-scène* too, but unfor-

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[14] Beatrice Verhoeven, *JJ Abrams Reveals Why He Really Returned to Direct 'Star Wars Episode IX,'* The Wrap (Dec. 8, 2017), https://www.thewrap.com/jj-abrams-star-wars-episode-ix-why-return/.

[15] *See, e.g.,* Dan Dalton, *38 of the Most Beautiful Words in the English Language,* BuzzFeed (Aug. 22, 2023), https://www.buzzfeed.com/danieldalton/bob-ombinate.

[16] *Serendipity,* Oxford English Dictionary (3d ed. 2010).

[17] *Bombinate,* Oxford English Dictionary (3d ed. 2010).

[18] *Ethereal,* Oxford English Dictionary (3d ed. 2010).

[19] *Denouement,* Oxford English Dictionary (3d ed. 2010). We had a decision dealing with double jeopardy in the last Supreme Court term. *See* McElrath v. Georgia, 601 U.S. 87 (2024). How about some lovely Law French "double jeopardy" terms: *autrefois convict* and *autrefois acquit*? *See, e.g.,* United States v. Wilson, 420 U.S. 332, 340 (1975).

tunately, we cannot expect our jurors to be familiar with exotic foreign words used in film criticism.[20]

- *Eloquence*. This is a nice-sounding word, which makes many lists of beautiful words. Most words with the letters *qu*, except, perhaps, *kumquat*, are lovely in English: *quake, quiver,* and *quiet*.
- *Effervescence*. It is a bubbly word, not to be confused with the name of that cool band, Evanescence, fronted by the ethereal Amy Lee.[21]
- And finally, for you Scrabble buffs, *sequoia*, a seven-letter word that has a *q* and all five vowels, is a joy to hear.

What do these words have in common? Obviously, there is no gross imagery associated with them. They have many soft *e* vowel sounds and non-harsh consonants and call to mind pleasant things. Use as many beautiful sounding words as possible. Your judges and juries will appreciate it.

IV. Word associations

A long time ago, people started to collect data on word associations to study the way the human mind subconsciously operates. By word association, I mean if I say "dog," perhaps the first word that comes into your mind is *cat*. If someone says the word *mother*, the word that immediately comes to mind is most likely *father*. The same is true for *morning* and *evening*, *good* and *bad*. You get the idea. Psychoanalyst Carl Jung used the technique with his patients.[22] Word association is also used in advertising. Advertising agent James Vicary conducted a survey using word association for a beer company's advertisement campaign.[23] He said the word *lagered*. About one third of those surveyed—potential consumers—responded "beer," while another third said "tired," "dizzy," or other words with negative connotations. Based on this data, the beer company did not use the word *lagered* in its advertising campaign.[24]

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[20] *Mise-en-scène,* Oxford English Dictionary (3d ed. 2010); *see, e.g.,* Warren Buckland, Film Studies: An Introduction (Teach Yourself 2016).

[21] *See Amy Lee*, Red Light Mgmt., https://www.redlightmanagement.com/artists/amy-lee/ (last visited Aug. 7, 2024).

[22] *C.G. Jung's Word Association Test*, Ger. Clinic for Psychiatry, Psych. & Fam. Med. Dubai, https://chmc-dubai.com/articles/word-association-test/ (last visited Aug. 7, 2024).

[23] *Word Association,* DJS Rsch., https://www.djsresearch.co.uk/glossary/item/Word-Association (last visited Aug. 7, 2024); Lawrence R. Samuel, Freud on Madison Avenue: Motivation Research and Subliminal Advertising in America 43 (Univ. of Pa. Press 2010).

[24] Unfortunately, Vicary's success with word association was overshadowed by his fabrication of data about subliminal messages. He claimed that he had gotten movie

Now you probably see where I am going with this. So let me show you how this works for trial advocates. Suppose I say "fugitive." What was the first thing you thought of? A database from the University of South Florida lists these as the top responses: *criminal, prisoner, outlaw, run, runaway, escape, jail, convict,* and *hide.*[25] All these terms call to mind a thought favorable to the prosecution when you use the word *fugitive.* The first unfavorable or neutral free association is *law,* the tenth most popular response. This is not unexpected for a legal term of art.

I once had a First Assistant U.S. Attorney who used the word *gin* in sentences like, "Well, he tried to gin up the number of victims in his fraud scheme." What do you associate with the word *gin*? All the most popular responses conjure up the same subject. Number one was *tonic*, followed by *alcohol, liquor, rum, drink, rummy, vodka, whiskey, ale, drunk,* and *wine.* None of these words associated gin as it was used in the original sentence. This is a weak expression because it creates mental drift. You say *gin* and subconsciously people think about booze first, and then realize that, in context, it means "devise" or "generate." It is not a good expression to use at trial because it distracts listeners.

"But wait a second," you might say. "I don't have a jury. I'm making an argument to a learned audience, a judge. I don't need to worry about these psychological subtleties." In reality, you may have to worry about it even more with judges. When judges hear the word *gin* (or read it in your brief), their minds may wander to thoughts of the bar at the country club. It is only human nature. The bottom line: Do not use distractors.

Here is a final thought. From the first day I became a prosecutor, I have heard the sage advice, "Never use the word 'doubt' or the expression 'reasonable doubt' in your opening statement or closing argument." That is something for the defendant to raise. Do not give the jury any ideas. Years ago, I heard a colleague in my office tell a jury in opening statement, "We, as the prosecution, must prove our case beyond a reasonable doubt. We welcome that burden." He broke the rule to establish trust with the jury. But if you look up the word *doubt* in the word-association database, the number one response was, surprisingly, *fear,* followed by *unsure, uncertain, question,* and *confusion. Trust,* as the prosecutor in-

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theatergoers to buy more Coke and popcorn by inserting subliminal advertising that lasted 1/3,000 of a second each, reading "Drink Coca-Cola" and "Eat popcorn" during the movies. He finally admitted that it was all a stunt to help his advertising business, but people to this day believe it happened. Sheri J. Broyles, *Subliminal Advertising and the Perpetual Popularity of Playing to People's Paranoia,* 40 J. Consumer Affs. 392 (2006).

[25] Douglas L. Nelson et al., *The University of South Florida Word Association, Rhyme, and Word Fragment Norms* (1998).

tended to imply, was there, but it was low on the list. It seems that "don't ever mention reasonable doubt" is a good rule after all. You do not want to be planting thoughts of fear or confusion in the minds of jurors. (My colleague won his case anyway.)

There is a lot more research to be done in this area. For example, the word-association database I used has reverse-connection statistics. In other words, what would be a good collection of words to use to suggest *fugitive*? How about *run, escape,* and *runaway*? In addition to being empirically true, they make sense. Armed with this knowledge about how humans think through word associations, you can now include the most persuasive words in your closing argument.

V. Conclusion

It is a daunting task to convince 12 citizens off the street that the unassuming-looking defendant seated in the courtroom is guilty. To do so, one must use all available tools, subtle as some might be. Ugly words are off-putting, while beautiful words are persuasive. Avoid *moist* and embrace *serendipity*. In addition, guard against using words that create distracting word associations. Do not inadvertently implant thoughts of happy hour. Make your arguments sing with effective words, and you will become a better trial advocate.

About the Author

Christian A. Fisanick is Assistant Director for Publications for the Office of Legal Education (OLE) at the National Advocacy Center in Columbia, South Carolina. A career prosecutor for over 40 years, he has been with OLE since December 2017 and the U.S. Department of Justice since June 2002. His previous positions include Chief of the Criminal Division for the U.S. Attorneys' Offices in the Middle District of Pennsylvania and the District of the Virgin Islands. Before joining federal service, he was Chief Deputy District Attorney for Cambria County, Pennsylvania and Coordinator of Legal Research and Appellate Review for the Pennsylvania District Attorneys Institute. He has also served as Adjunct Professor of Law at the Thomas M. Cooley School of Law and Vytautus Magnus University, Kaunas, Lithuania.

He has spent his career working with words. His professional publications include *Vehicle Search Law Deskbook*,[26] two treatises on Pennsylvania evidence law, as well as a casebook on white-collar crime. He contributed a chapter to an Eastern European book on white-collar and

[26] Christian A. Fisanick, Vehicle Search Law Deskbook (2023 ed.).

economic crime and has written several law-review articles. One of his articles was selected to appear in an American Bar Association anthology of the best legal writing from *Litigation*.[27] He received his J.D. with honors from the William Mitchell College of Law and is a Phi Beta Kappa, summa cum laude graduate of the University of Richmond with a B.S. in Chemistry. In 2011, he received the Attorney General's Award for his work on civil rights cases and the Director's Award for his performance as Criminal Chief for the Middle District of Pennsylvania.

[27] *See* Christian A. Fisanick, *Travelogue of Appellate Practice,* 23 LITIG. 49 (Summer 1997).

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Note from the Editor-in-Chief

There's no such thing as a simple trial. Trials are complex matters involving not only law and facts but also psychology—the psychology of persuasion. As my boss, Chief Learning Officer Mary Beth Pfister, wrote in her introduction, "there is more to a courtroom presentation than the testimony and exhibits introduced." This issue gives you cutting-edge advice on topics such as jury selection, presentation of evidence, and understanding how jurors think. Our articles, written by experts in trial advocacy, shed some light on the human factors at play in the courtroom. I'm excited that we can share this information with you in this unique issue.

Putting together an issue of this law review is also not a simple task. But fortunately, some dedicated folks took time away from their busy schedules to write for us. They receive our highest thanks. Thanks also to the Publications Team here at the Office of Legal Education. This "in-house issue" was Managing Editor Kari Risher's baby from its inception, and she did an outstanding job developing the topics and recruiting our authors in addition to performing her regular editorial duties. She was ably assisted by Associate Editor Abbie Hamner, our University of South Carolina law clerks, and typesetting whiz Jim Scheide.

We hope that we've given you some things to think about before your next trial. If so, we'd like to hear from you. Until next issue, stay well.

Chris Fisanick
Columbia, South Carolina
October 2024

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Appendix: Federal Jury Selection by District

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Maine	1	Standard form can be submitted online; qualified jury wheel	There is a provision for the disclosure of supplemental questionnaires to attorneys but no mention of when they are allowed.	Names and supplemental questionnaires will be given "not less than three business days" before voir dire starts.	Usually performed by the judge but "sometimes" the judge allows attorneys to ask questions.
Massachusetts	1	Standard form; no qualified jury wheel		Attorneys will have access to a list of names and "juror information" but no timeline or specifics are given.	One judge requires proposed questions two weeks in advance. Another requires submission at the pretrial conference (civil) or per pretrial order (criminal).

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
New Hampshire	1	Standard form can be submitted online; qualified jury wheel		Names will be provided at least five working days before jury selection.	Only the judge will ask questions. It is unclear if attorneys can request questions.
Puerto Rico	1	Standard form submitted online; qualified jury wheel		Names cannot be given until after the trial is over.	
Rhode Island	1	Standard form can be submitted online; qualified jury wheel		Parties may have access to names and questionnaires seven days before empanelment.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Connecticut	2	Standard form can be completed online; qualified jury wheel		Names and "other biographical information" are provided but can't be disclosed before the jurors appear; "limited to name, town of residence, gender, age, race/ethnicity, occupation, education, employer name, marital status, number of children, and spouse's occupation."	Judge does the initial, and attorneys must submit additional questions for approval which may be asked by judge or attorney.
New York, Eastern	2	Standard form; qualified jury wheel		Names won't be made "public" until the individual shows up for court.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
New York, Northern	2	Standard form can be submitted online; no qualified jury wheel	"If a presiding trial judge authorizes the use of a pretrial questionnaire, the questionnaires may be provided to counsel (or a party if appearing pro se) at the discretion of the presiding trial judge."	Names won't be made "public" until the individual shows up for court. Questionnaires can be made available.	
New York, Southern	2	Standard form; qualified jury wheel		Names won't be made "public" until the individual shows up for court.	"Examination conducted by the judge and sometimes includes participation by counsel."
New York, Western	2	Standard form can be submitted online; no qualified jury wheel		Names and personal information will be provided in a "case set for trial" but no timeline is set.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Vermont	2	Standard form; no qualified jury wheel		Questionnaires can be provided to counsel when requested.	One judge does the initial and allows counsel to ask questions they provided to the court in advance.
Delaware	3	"[T]he clerk would then prepare a juror qualification form" to be sent out but later pulls names from a "qualified juror wheel" for individual cases.			One judge does the voir dire and provides samples for attorney review.
Maryland	3	Standard form submitted online; qualified jury wheel		Names cannot be provided until the jurors have been summoned and appeared in court.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
New Jersey	3	Standard form; qualified jury wheel		Names are provided within 10 days before jury selection if requested.	Two judges perform initial and ask attorneys to submit proposed questions in writing.
Pennsylvania, Eastern	3	Standard form can be submitted online; qualified jury wheel		Names shall be available to parties "only after application to the court."	
Pennsylvania, Middle	3	Standard form can be submitted online; qualified jury wheel		Names, addresses, and "other identifying information" can only be given for voir dire but no timeline is given.	One conducts initial but allows counsel to ask questions that have been preapproved.
					Another conducts the voir dire in criminal cases but by attorneys in civil cases.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Pennsylvania, Western	3	Standard form completed online; qualified jury wheel		"Lists of those juror names drawn from the qualified jury wheel and summoned for a term of court shall be made available to members of the bar who have cases pending on the current trial list."	"Expedited civil litigation" has all voir dire conducted by the attorneys. Criminal will be started by the judge, and the attorneys might participate.
Virgin Islands	3	Standard form submitted online; qualified jury wheel		Names can be requested.	
North Carolina, Eastern	4	Standard form can be submitted online; qualified jury wheel		The names and county of residence will be provided upon request.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
North Carolina, Middle	4	Standard form can be submitted online; qualified jury wheel		The "name, general address and occupation of each juror summoned and reporting, after court is opened for the session or case for which the jurors were summoned."	
North Carolina, Western	4	Standard form can be submitted online; no qualified jury wheel		Names and any other information must be requested.	
South Carolina	4	Standard form submitted online; qualified jury wheel		Parties may have access to names and questionnaires seven days before empanelment.	Conducted by the judge and "sometimes" includes questions by the attorneys.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Virginia, Eastern	4	Standard form; qualified jury wheel		Names will be provided (no timeline given) but questionnaires cannot be made available until three days before the trial.	
Virginia, Western	4	Standard form submitted online; qualified jury wheel	"Additional forms may be sent when additional information is required to effectuate the purposes and provisions of this Plan."	Names and "personal information" cannot be disclosed more than five days before trial unless there is a court order.	Only one judge provides guidelines but states that attorneys are allowed to ask questions after the judge.
West Virginia, Northern	4	Standard form; qualified jury wheel		Names and "contents of records" can be provided to counsel "as the court directs."	
West Virginia, Southern	4	Standard form; qualified jury wheel		Names can be provided "upon request."	The judge asks the initial voir dire, and attorneys can request specific questions if done in the pretrial order.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Louisiana, Eastern	5	Standard form can be submitted online; qualified jury wheel			Only one judge provides guidelines but states that attorneys are brought to the bench to be asked if "any additional questions to particular jurors are requested."
Louisiana, Middle	5	Standard form; qualified jury wheel		Names are not provided until the first day of the trial.	Only one judge provides standard voir dire questions.
Louisiana, Western	5	Standard form can be submitted online; qualified jury wheel	There is a provision for the nondisclosure of "juror supplemental questionnaires" but no mention of when they are allowed.	Names and supplemental questionnaires "must be returned . . . at the conclusion of jury selection."	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Mississippi, Northern	5	Standard questionnaire can be submitted online; qualified jury wheel	A "jury information form" is sent with the summons for the people selected from the qualified wheel.	Names will be provided "no more than one week" before trial if requested.	
Mississippi, Southern	5	Standard questionnaire can be submitted online; qualified jury wheel		Names not provided until the first day of jury service unless otherwise ordered.	
Texas, Eastern	5	Standard form; qualified jury wheel		Names provided at start of voir dire.	Both will ask questions.
Texas, Northern	5	Standard form; qualified jury wheel		Names are provided the first day of service unless the judge specifies otherwise.	One judge conducts the entire voir dire. Another does the initial and allows counsel to ask questions at least 14 days before trial.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Texas, Southern	5	Standard form submitted online; qualified jury wheel		Names cannot be disclosed before the first day of jury selection.	Initial done by judge, and then counsel can ask questions that were included in the pretrial order.
Texas, Western	5	Standard form; qualified jury wheel		Names cannot be disclosed before the first day of jury selection.	
Kentucky, Eastern	6	Standard form; qualified jury wheel		Per local rules, questionnaires are provided (if requested) to counsel seven days before trial.	
Kentucky, Western	6	Standard form can be submitted online; qualified jury wheel		Names "may be" disclosed seven days in advance but provision of questionnaires is up to each judge.	
Michigan, Eastern	6	Standard form; qualified jury wheel		Names aren't available until voir dire is over, and questionnaires require court order.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Michigan, Western	6	Standard form; qualified jury wheel		Names will be provided three business days before trial if requested.	A voir dire questionnaire is on the website.
Ohio, Northern	6	Standard form can be submitted online; qualified jury wheel	Upon motion or sua sponte, the court may distribute a case-specific additional questionnaire.	A list will be prepared for attorneys with the names but the timeline is unclear.	Per local rules, the judge conducts the initial, the attorneys may submit questions they want the court to ask, and attorneys may be allowed to ask their own questions if the judge allows.
Ohio, Southern	6	Standard form can be submitted online; qualified jury wheel	"[M]ay be required to fill out an additional juror qualification form in the presence of the Clerk or the Court."	Names cannot be disclosed until the individuals have appeared in court.	Sample voir dire questions appear to be entirely conducted by the court.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Tennessee, Eastern	6	Standard form submitted online; qualified jury wheel		Names and "personal information" can be provided in a case set for trial. No timeline is given.	Two judges perform the initial and allow attorneys wide latitude. One allows attorneys to submit questions before trial (no specific date).
Tennessee, Middle	6	Standard form; qualified jury wheel		Names disclosed upon request after juries are seated on "active jury panels."	
Tennessee, Western	6	Standard form; shall call "qualified jurors from the pool of prospective jurors"		Names disclosed at the beginning of voir dire.	"Examination conducted by the judge and sometimes includes participation by counsel."
Illinois, Central	7	Standard form submitted online; qualified jury wheel			The court will perform the initial but "will allow counsel to ask follow up questions if appropriate."

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Illinois, Northern	7	Standard form submitted online; qualified jury wheel		Names "shall be made public" the first day of the jurors' term of service. Parties can request access to the questionnaires.	One judge provides a sample of the questions and says that request for "variations or additions" should be made in writing in the manner prescribed in the pretrial order. Another doesn't appear to allow attorneys to ask questions.
Illinois, Southern	7	Standard form submitted online; qualified jury wheel	"The Clerk shall transmit to every person whose name is drawn from the master jury wheel a summons and request to complete the questionnaire and supplemental questionnaire."	List of names is not prepared until the first day of trial. One judge specifies that the questionnaires will be put into a binder for each party "before jury selection begins."	One judge performs voir dire and counsel can submit questions for the court to ask (if done by the final pretrial conference). Another performs the initial and allows counsel to ask pre-submitted questions.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Indiana, Northern	7	Standard form can be submitted online; qualified jury wheel		Names are provided but no timeline is given. One judge allows attorneys to view questionnaires in the clerk's office one business day before trial starts and gives copies on the first day.	One judge performs it, provides an example of standard questions, and requires questions to be submitted in advance. Another performs initial and allows attorneys to perform "limited voir dire."
Indiana, Southern	7	Standard form submitted online; qualified jury wheel		Redacted questionnaires "may be" provided "before the trial" but no timeline is given.	Per local rules, the judge conducts the initial but attorneys are not precluded by the rule from asking questions.
Wisconsin, Eastern	7	Standard form submitted online; qualified jury wheel		Names and "limited information" provided digitally 7–10 days before trial. Redacted questionnaires may be provided upon request.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Wisconsin, Western	7	Standard form submitted online; no qualified jury wheel			Voir dire questions have to be submitted electronically.
Arkansas, Eastern	8	Standard form; qualified jury wheel		Names and city can be provided (no timeline given).	
Arkansas, Western	8	Standard form; qualified jury wheel	Supplemental questionnaires may be mailed "at the direction of the presiding judge."	"Names and personal information concerning" the jurors will be provided but there is no timeline.	
Iowa, Northern	8	Standard form submitted online; qualified jury wheel		Copies of questionnaires are provided to the lead attorney seven days before trial.	
Iowa, Southern	8	Standard form can be submitted online; qualified jury wheel		Redacted questionnaires are provided to the lead attorney three days before the trial.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Minnesota	8	Standard form can be submitted online; qualified jury wheel		"Names and personal information" can be disclosed but no timeline is given.	Usually performed by judge but "sometimes" the judge allows attorneys to ask questions.
Missouri, Eastern	8	Standard form can be submitted online; qualified jury wheel		Names cannot be provided until the jurors have been summoned and appeared in court.	
Missouri, Western	8	Standard form submitted online; no information about a qualified jury wheel			Conducted by the judge and "sometimes" includes questions by the attorneys.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Nebraska	8	No information about the questionnaire; no qualified jury wheel	FAQ response shows that supplemental questionnaires are done but no other information is provided.	An answer to a FAQ specifies that attorneys will have access to supplemental questions during voir dire but it's unclear when they get them.	
North Dakota	8	Standard form; qualified jury wheel		The names, cities, and occupations are provided to attorneys when summonses have been issued.	
South Dakota	8	There is a questionnaire but there isn't any information about the contents. No info about qualified wheel.	A supplemental questionnaire "may be made available with the qualification questionnaire at the direction of the presiding judge in each division."	Names and "personal information" can be provided but no timeline is given.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Alaska	9	Standard form submitted online; qualified jury wheel		Names can be given in advance or kept confidential based on that particular judge's standing order.	
Arizona	9	Standard form submitted online; qualified jury wheel		Names are given the morning of the trial unless they are requested earlier.	Each judge has standard questions provided, one gives a list of questions and says, The parties only may ask follow-up questions to the responses generated by the jurors . . . counsel may not propound new questions to the entire panel."

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
California, Central	9	Completed online, questionnaire type unclear; no qualified jury wheel	"Jurors in 'time-qualified pools' will also be direct to answer supplemental questions"; a "[t]ime-qualified pool is a Jury Pool created for the purpose of pre-screening jurors for service on a lengthy trial."	Names can be released at any time by request but that's the only thing that can be provided.	One judge performs, and attorneys must discuss questions with the court at the final pretrial conference.
California, Eastern	9	Standard form submitted online; qualified jury wheel		Names provided at the beginning of jury selection.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
California, Northern	9	Standard form; no qualified wheel.	Supplemental questionnaires done through SurveyMonkey for every case.	Names "may be" provided on the day jury selection begins.	One judge asks for preferred questions to be provided in advance to be asked by the court. Another wants the parties to meet and confer to decide on questions for the court to ask.
California, Southern	9	Standard form submitted online; qualified jury wheel		The "information cards" (does not include SSN, address, or phone number) can be confidential until the morning of the trial but depends on the judge.	
Guam	9	Standard form submitted online; qualified jury wheel			"The judge and the attorneys then ask the potential jurors questions."

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Hawaii	9	Standard form; qualified jury wheel		Names can be provided "in advance" if the judge allows but otherwise will be given the morning the trial starts.	It is unclear who performs the voir dire but questions have to be proposed in the pretrial order.
Idaho	9	Standard form submitted online; qualified jury wheel		Names can be provided "in advance" if the judge allows but otherwise will be given the morning the trial starts.	The initial is performed by the court, but counsel can ask questions if allowed by that judge.
Montana	9	Standard questionnaire can be submitted online; qualified jury wheel		List will exclude social security numbers and addresses but will be provided "as it becomes available."	Questions asked by the judge and attorneys.
Nevada	9	Standard form submitted online; qualified jury wheel		Names may be provided if ordered by the judge but no timeline is given.	

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Northern Marianna Islands	9	Standard forms submitted online; qualified jury wheel		Names provided three business days before the trial.	"The judge and the attorneys then ask the potential jurors questions."
Oregon	9	Standard form submitted online; qualified jury wheel		Names provided at the start of jury selection.	All judges conduct the initial, and different judges may or may not allow attorneys to ask questions, but they can only ask more of a specific based on a prior answer or of the entire panel.
Washington, Eastern	9	Standard form submitted online; qualified jury wheel		Names provided the morning of trial.	Attorneys must provide any questions they would like to ask, in writing, seven days in advance. Criminal Rules. Civil Rules.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Washington, Western	9	Standard form submitted online; qualified jury wheel		Names and "certain biographical information" will be provided on the day of trial.	Multiple judges provide samples and state that they will ask initial and allow attorneys to ask additional.
Colorado	10	Standard form submitted online; no qualified jury wheel	Attorneys will have access to "any supplemental juror questionnaires" before empanelment.	No specific info provided but attorneys will have access to "any supplemental juror questionnaires" before empanelment.	One judge does the initial and allows each side 30 minutes to ask questions they are not required to submit in advance.
Kansas	10	Standard form; qualified jury wheel			"Conducted by the judge and sometimes includes participation by counsel."
New Mexico	10	Standard form; qualified jury wheel	A notification of jury service includes a "voir dire questionnaire" but the content and function are unclear.	Names can be provided if requested but no timeline is given.	Website specifies that questions should be directed to each judge for what their process is but no judges provide that information online.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Oklahoma, Eastern	10	Standard form can be submitted online; qualified jury wheel		Counsel will be provided with the "names, occupations, spouses' occupations, and cities and counties of residence" for each person assigned to the panel but no timeline is given.	Conducted by the judge and "sometimes" includes questions by the attorneys.
Oklahoma, Northern	10	Standard form submitted online; qualified jury wheel		A "jury list" is provided the first day of voir dire.	Conducted by the judge and "sometimes" includes questions by the attorneys.
Oklahoma, Western	10	Standard form; qualified jury wheel			
Utah	10	Standard form; qualified jury wheel			Different from judge to judge but they each appear to have guidelines on their page.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Wyoming	10	Standard form; qualified jury wheel		Names are provided no later than three days before trial. Juror questionnaires can only be viewed with permission from the court.	
Alabama, Middle	11	Standard form submitted online; qualified jury wheel		No information on the answers, but the names and "profiles" will be made available "prior to the trial" with no specified time.	No materials are available but the jury page explains that questions "will" be asked by the judge and "might" be asked by attorneys.
Alabama, Northern	11	Standard form submitted online; qualified jury wheel			One has the judge ask questions and allows attorneys to ask. Another has parties provide questions (listed next to the questions the judge will ask) as an attachment to the scheduling order.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Alabama, Southern	11	Non-traditional questionnaire (preferred news format, hobbies, demographics, personal info, bumper stickers, etc.); qualified jury wheel		Names are provided the Thursday before jury selection begins. Questionnaires do not appear to be given to attorneys.	
Florida, Middle	11	Standard form submitted online; qualified jury wheel		Names "may be disclosed . . . to counsel at the time of assignment" (term undefined) and after permission from the judge.	Court performs initial voir dire, and attorneys can perform a follow-up.
Florida, Northern	11	Standard form submitted online; qualified jury wheel		Names "may be provided to the [U.S.] Attorney by the clerk" but no timeline is given.	Court performs initial voir dire, and attorneys might perform a follow-up if the court allows.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Florida, Southern	11	Standard form; no qualified jury wheel		The clerk "shall retain and, when requested, provide public access to . . . [a] venire list" but the contents and timeline are unclear.	Information is available for each judge. One says "Court allows counsel a limited time for individual voir dire." Another allows counsel to perform voir dire and sets the deadline for question submissions in the scheduling order.
Georgia, Middle	11	Standard form submitted online; qualified jury wheel		Names and information can be provided "in a case set for trial" but no timeline is given. No access to questionnaires unless filing a motion challenging the selection of a jury.	One judge provides a sample of the questions, and it doesn't appear that attorneys get to ask their own questions.

Federal District	Circuit	Questionnaire	Supplemental	Answers/Juror Information	Voir Dire
Georgia, Northern	11	Standard form submitted; qualified jury wheel			"Conducted by the judge and sometimes includes participation by counsel."
Georgia, Southern	11	Standard form submitted online; qualified jury wheel		All information is confidential until the morning of the trial but if there is a standing order or other order by the judge, the "names and information" can be released "in advance."	It is unclear who performs the voir dire but proposed questions have to be submitted seven days in advance.
Washington D.C.	DC	Standard form submitted online; qualified jury wheel			