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PROFESSIONALISM AND ADVOCACY AT TRIAL—REAL JURORS SPEAK IN
DETAIL ABOUT THE PERFORMANCE OF THEIR ADVOCATES

Mitchell J. Frank* & Dr. Osvaldo F. Morera**

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[T]he proper functioning of our system of criminal justice, both federal and state, necessarily places heavy reliance on the professionalism and judgment of trial attorneys¹

The most important persons in the courtroom to the juror are the attorneys who participate in the trial. In all situations involving human beings, each person and each group of persons chooses a leader for guidance, and in a court of law the attorney is the leader. Invariably, the remarks in the jury room center on the impression made by the attorney. The verdict of the jury in every case reflects the skill of the attorney in presenting the case. The attorney is always on the spot and is the focus of attention;

¹Wainwright v. Sykes, 433 U.S. 72, 115 (1977) (Brennan, J., dissenting).

*the attorney's appearance, manners, logic, and what the attorney puts value upon are the factors that bring jurors to conclusions.*²

*Law is an art, not a science*³

I. INTRODUCTION

If law is an art, which surely it is, juries provide a canvas upon which trial lawyers have the potential to create their greatest works of professionalism.⁴ And their opportunities to do so are many. “Each year in the United States, nearly 32 million people are randomly selected and summon[ed] to serve as jurors in the approximately 150,000 jury trials that take place in state and federal courts. About 1.5 million will ultimately be sworn as trial jurors.”⁵ Among these are the 955 real jurors who responded in the survey that is the subject of this article. Whether that potential is being realized, and whether attorneys have an equal opportunity to do so regardless of differences in their race, gender, and age, is the subject of this article.

The fact that jurors as described above play such a major role, not only because of their numbers but because of the impact they have on the lives of so many, warrants as much empirical research about them as can reasonably be accomplished. The analyses in this article accomplish this purpose by considering numerous variables of attorneys' performance, as well as examining the relationships between performance and results in both criminal and civil cases. Although it is outside the scope of this article to compile jury research results, pertinent studies will be discussed to place the results of this survey in context.⁶ Despite the importance of these

²Daniel A. Procaccini, *First (and Lasting) Impressions*, R.I. B.J., Sept.–Oct. 2010, at 15, 17 (quoting J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS & ETHICS* 39 (3d ed. 2002) (quoting James P. Brown, *A Juror's View*, 2 GA. ST. B.J. 225, 227 (1965) (juror discussing the link between courtroom etiquette and the power of persuasion))).

³*Anderson v. United States*, 393 F.3d 749, 755 (8th Cir. 2005) (quoting *Simmons v. Lockhart*, 915 F.2d 372, 375 (8th Cir. 1990)).

⁴*See id.*

⁵Nat'l Ctr. for State Courts, *Best Practices in Jury System Management*, NCSC ONLINE, http://www.ncsconline.org/d_research/cjs/BPinJurySystemMgmt-v3.pdf (last visited Mar. 4, 2012).

⁶*See infra* notes 13–14.

subjects and mindful that correlation does not equal causation unless specified, the results shown herein are not represented as establishing to a certainty a causal relationship between attorneys' performance and jurors' verdicts. As noted by an Illinois survey:

Most empirical work on the effects of attorneys fails to find a strong relationship between perceptions of attorneys or witnesses and juror verdict choices. Here, we find that evaluations of the lawyers were related to the type of witness presented and that an attorney's perceived level of performance was positively affected by the strength of his cross-examination of an opposing expert. Yet none of these favorable evaluations translated into greater success as measured by juror verdicts. This lack of a clear connection between the jurors' assessments of the attorneys and their verdict choices suggests that influence by the attorneys is complex, and cannot easily be captured either in a research setting or the world outside the laboratory.⁷

Notwithstanding this lack of a "clear connection," however, as a Nevada survey has stated: "[T]hough case facts and evidence are the strongest predictors of trial verdicts, attorneys should not discount the influence of their behaviors and performance on jurors' decisions."⁸ The main motivation behind this survey was to discover and evaluate the nature of such influence.

Following this Introduction in Part I, Part II provides the organization and methodology of the survey, including how its statistical analyses were done. Part III describes and discusses the importance of what the jurors reported in eleven different areas of trial performance. In Part IV, this article analyzes the jurors' findings as to their attorneys' performance in relation to the attorneys' sex, race, and age. Part V focuses on the jurors'

⁷Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17, 43 (1996). This article contains in Part III an excellent compilation of research studies, which is outside the scope of this article to provide, in regard to opening statements as well as closing arguments. *Id.* at 26.

⁸Steve M. Wood et al., *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*, THE JURY EXPERT, Jan. 2011, at 23, 30, available at <http://www.thejuryexpert.com/wp-content/uploads/Woodetal.TJJan2011Vol23Num1.pdf> (citing NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 42 (2000)). This survey involved 572 jurors who served in both civil and criminal cases. *Id.* at 23.

perceptions of their attorneys' opening statements and closing arguments, and particularly on what effects these may have had on the verdicts these jurors returned. The article concludes in Part VI.

II. THE JURY SURVEY: ORGANIZATION AND METHODOLOGY⁹

This survey involved real jurors who served in civil and criminal trials from October 2003 through September 2004. Because they did not participate in deliberations, alternate jurors were not surveyed. Three judicial circuits in the central Florida area, comprised of nine counties,¹⁰ served as the survey site. A total of 955 jurors, not including alternates, responded.¹¹ It is believed to be the second largest such survey ever performed.¹² By sex, 60% were female and 40% were male. By race, 85%

⁹This survey provided the basis for Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237 (2006). This first publication, unlike the current article, did not heavily focus on jurors' evaluations of the attorneys who tried cases before them.

¹⁰These were the 9th Circuit (Orange and Osceola counties), the 7th Circuit (Volusia, St. Johns, Flagler, and Putnam counties), and the 18th Circuit (Seminole and Brevard counties). The 5th Circuit (comprised of Lake, Citrus, Sumter, Marion, and Hernando counties) originally was part of the survey as well, with the support of its Chief Judge, the Honorable Victor Musleh, but no surveys were returned due to the apparent unwillingness of its trial judges to participate. The author gratefully acknowledges the support and cooperation of the Chief Judges of the 9th, 7th, and 18th Circuits, respectively the Honorable Belvin Perry, Jr., the Honorable Julianne Piggotte, and the Honorable James E. C. Perry; the trial judges in these Circuits who participated and whose cooperation and assistance was essential; and the jurors who gave their time, often immediately after spending days in trial. Finally, this survey would not have been logistically possible without the substantial and able assistance of court administrative personnel. For this, the author further gratefully acknowledges Karen Levy in the 9th Circuit, Mark Weinberg in the 7th Circuit, Wendy Witsett in the 18th Circuit, and their staffs.

¹¹Logistical barriers, including the number of courthouses and judges potentially distributing the survey, coupled with concerns over both case and juror anonymity, did not allow for an actual count of the surveys given to jurors. Calculating from the number of surveys printed, the number retrieved post-survey, and those returned by jurors, the survey response rate was not less than 14.9%. This figure in reality is almost certainly much higher, as post-survey comments by court personnel indicate that a significant number not given to jurors were discarded or lost and not returned. The authors' best estimate of the actual response rate, considering these factors, is between 25% and 30%.

¹²The Los Angeles Jury Survey was conducted during 1987–1988, generating 3,830 responses from civil and criminal jurors, including 2,533 who actually served. *E.g.*, Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DE PAUL L. REV. 49, 67 (1997); Franklin Delano Strier, *Through the Jurors' Eyes*, 74 A.B.A. J. 79, 81 (1988) [hereinafter Strier, *Through the Jurors' Eyes*].

were White Non-Hispanic, 6.4% were White Hispanic, and 5.2% were Black. By age, 10.1% were over 65, 27.5% were 55–64, 28.8% were 45–54, 22.1% were 35–44, 8.1% were 25–34, and 2.7% were under 25. The following table shows how many jurors served in the four types of trials surveyed:

11. Type of trial in which you participated:

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	CIVIL (NON CRIMINAL) PERSONAL INJURY OR WRONGFUL DEATH	107	11.2	11.4	11.4
	CIVIL (NON CRIMINAL) OTHER TYPE OF CLAIM	52	5.4	5.5	16.9
	CRIMINAL (CIRCUIT COURT - FELONY)	568	59.5	60.5	77.4
	CRIMINAL (COUNTY COURT-MISDEMEANOR)	212	22.2	22.6	100.0
	Total	939	98.3	100.0	
Missing	System	16	1.7		
Total		955	100.0		

As to the attorneys these jurors evaluated for this survey:

- 66.4% of plaintiffs'/prosecuting attorneys were male; 32.4% were female.
- 80.6% of defense attorneys were male; 17.9% were female.
- 84.9% of plaintiffs'/prosecuting attorneys were White Non-Hispanic, 4.7% were White Hispanic, 7.1% were Black, 1% were Asian, and 0.8% were Black/Hispanic.
- For defense attorneys, 81.5% were White Non-Hispanic, 6.6% were White Hispanic, 6.6% were Black, 0.8% were Black/Hispanic, and 0.9% were Asian.
- As close as the jurors could determine as to the age of the plaintiffs'/prosecuting attorneys, 9.0% were over 50, 67.9% were 31–50, and 22.3% were under 30.

- For defense attorneys, 12.5% were over 50, 76.1% were 31–50, and 9.9% were under 30.

Jurors who actually serve have significant advantages in providing evaluations of the attorneys who appeared before them, as opposed to mock jurors. Among these are the fact that they participated in a full trial, likely for days if not longer; they were questioned during jury selection and actually interacted with their attorneys; and they saw their attorneys display their skill, or lack thereof, in a multitude of ways at trial, such as arguing evidentiary objections and questioning on both direct and cross-examination. Finally, they participated in actual deliberations at the end of the trial. In these and certainly other ways that could be included, real jurors are far more involved in the trial process than mock jurors, as they have a much greater opportunity to observe and then evaluate the attorneys who appeared before them. One disadvantage to surveying real jurors, it has been noted, is that this method is “limited by the cognitive biases and limitations of respondents, which can make it difficult to reconstruct an accurate picture of what happened during deliberation.”¹³ This weighs lightly against the significantly advantaged viewpoint a real juror brings to a survey asking about the attorneys they watched for days.¹⁴

This survey was sponsored by Barry University School of Law in Orlando, Florida. It included jurors who sat on criminal felony cases tried

¹³Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 627 (2001). This article compiled all empirical research studies on jury decision making published from 1955 to 1999. *Id.* at 622. Of these 206 studies, only 70 involved real jurors. *Id.* at 627. Of these, 40 were done through archival analysis (typically court files), 13 used field studies or experiments with actual jurors, and 3 combined two of these methodologies. *Id.* Only 14 of these 206 involved surveys or interviews with ex-jurors. *Id.* In addition to compiling the research, it discusses “Participant Characteristics” as found in the literature, including those of attorneys, in detail. *Id.* at 673–84.

¹⁴Although outside the scope of this article, judges have performed such surveys as well. *See generally* Dorothy Linder Maddi, *Judges' Views of Lawyers in Their Courts*, 1979 AM. B. FOUND. RES. J. 689 (1979); Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317 (2010); William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 GA. L. REV. 85 (1992); Franklin Strier, *The Road to Reform: Judges on Juries and Attorneys*, 30 LOY. L.A. L. REV. 1249 (1997); Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649 (2010).

in circuit court, misdemeanor cases in county court, and general civil cases in circuit court.¹⁵ There were two exceptions. Death penalty jurors were not surveyed due to (1) the inapplicability of the survey design to penalty phase proceedings, and (2) the uncertainty of preserving the confidentiality of the responses of death penalty jurors, in the face of anticipated intense efforts to obtain their surveys to seek grounds for appeal after conviction. General civil cases in county court, whose jurisdiction includes claims of \$15,000 or less,¹⁶ were also not surveyed due to the minimal number of civil jury trials taking place there.

The survey consisted of 204 separate statements in a large number of subject areas, following which jurors were asked in most cases to state whether they agreed strongly, agreed, disagreed, or strongly disagreed with the statement. Separate survey sections applied to civil and criminal trials. Areas of the survey included, but were not limited to: (1) jurors' assessment of the conduct, ability, and demeanor of trial counsel; (2) their decision-making process, both before and during deliberations; (3) their evaluations about all portions of the trial, from jury selection through closing argument; (4) their assessment of parties and witnesses, both lay and expert; (5) in criminal cases, whether and how the presumption of innocence and the effects of defendants testifying or not testifying impacted them; (6) the import of certain types of evidence, both physical and non-physical; and (7) jurors' assessment of their jury instructions, including whether and how well they understood and applied them.

Jurors additionally provided information concerning: (1) demographic information about themselves, as well as what they perceived to be true of parties and trial counsel, and (2) the verdicts they returned, including in civil cases their findings on liability, damages, and comparative negligence (where applicable). Finally, jurors were given an opportunity to provide their views as to what would have enhanced their experience.

¹⁵ See FLA. STAT. ANN. § 26.012(2)(a), (c) (West 2009) (circuit court has jurisdiction, respectively, of felony cases and claims in excess of \$15,000); see also FLA. STAT. ANN. § 34.01(1)(a), (c) (West 2010) (county court has jurisdiction, respectively, of misdemeanor cases and claims of not more than \$15,000).

¹⁶ *Id.* § 34.01(1)(c).

Trial judges were asked to employ the following procedures:¹⁷

- (1) After the jury returns its verdict, ask jurors to complete the juror survey and return it in its prepaid return envelope to Barry University School of Law.
- (2) Read the cover letter¹⁸ to jurors, or hand it out along with the survey and return envelope.
- (3) Emphasize that all individual responses will be kept confidential and that the survey is anonymous.

¹⁷Undoubtedly, there was variation in how the several dozens of trial judges in these three circuits explained the survey to the jurors.

¹⁸The cover letter stated:

On behalf of the Chief Judge of this Judicial Circuit, I want to thank you for your jury service. I also want to ask for your help in filling out this highly important survey. Its purpose is to educate our Judges and lawyers on your experiences as a jury, so that improvements can be made within the court system both in this Circuit and in Florida. You are in a unique position to help make the jury system better precisely because you have just served as a juror. Through this survey, you are being given the opportunity to express your likes and dislikes about what you saw.

Your responses will be kept **completely anonymous** and your participation is **completely voluntary**. There is nothing in the survey that would call for your name, the case you participated in, or the names of the Judge, attorneys or witnesses. Please **do not** add any such information. You are under no obligation whatsoever to reveal your survey responses to anyone who might ask.

This Circuit is one of only a few in Florida that has been selected to give this feedback. Given the importance of this survey, I ask that you answer the survey with the same seriousness that you devoted to your jury service. And, given that your memory of your jury service is still fresh, I ask that you complete it before you leave the courthouse and then mail it in the postage paid envelope you have been provided. It takes about 20 to 30 minutes to complete. If you cannot complete the survey today, please complete it and mail it by tomorrow or the next day at the very latest. In addition, please attempt to complete the survey prior to speaking with anyone, other than your fellow jurors, or reading or hearing any news about the trial. Once you have finished the survey, please **do not** hand it to any lawyers, court personnel or anyone else; please only return it by mail.

- (4) Tell the jurors their participation is voluntary, but everyone's participation is essential to the research that is being conducted.
- (5) Tell the jurors it is preferable for them to complete the survey while they are still in the courthouse, and thank them for their participation.

Jurors were prompt in completing the surveys: 29.1% did so on the same day, 26% the next day, 23.8% within two to five days, and 12.1% within six to ten days. Only 6.7% took eleven days or more to do so.

The data was tested for statistical significance at a $\alpha = .05$ level.¹⁹ Correlations regarding significance will generally be described and defined herein as follows:

- “Not statistical,” “no statistical significance,” or “not valid”: It has a p-value > 0.05 .
- “Weakly associated”: Statistically significant, meaning it has a p-value < 0.05 , and the magnitude of the absolute value of the correlation is smaller than 0.20.

¹⁹The statistical analyses performed in evaluating this survey consist of the following. When the item had four possible answers and the answers represented an ordering of increased value (disagree strongly, disagree, agree, agree strongly), the item was treated as continuous. Otherwise, the categories of the variable were treated as categorical. Associations between continuous variables were determined with a Pearson product moment correlation coefficient. A chi-square test of independence, which allows for an examination of association between categorical variables, was also conducted. Statistical significance of each test was established at a $\alpha = 0.05$ level.

Associations between categorical variables and continuous variables were assessed with analysis of variance, which allows for the assessment of mean differences across levels of the categorical variables. When one categorical independent variable was involved, it was treated as the only independent variable, and its association with the continuous dependent variable was assessed. When two categorical independent variables were involved, mean differences across the categories (levels) of the independent variables were assessed, as was the association between the two independent variables and their interaction. Statistical significance of each analysis of variance was established at a $\alpha = 0.05$ level. Social scientists “have traditionally accepted . . . as statistically significant” a p value of less than 0.05, meaning “that the difference is unlikely to be caused by chance and more likely to be caused by the instructions.” Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions?: Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 413 (1990).

- “Somewhat associated”: Statistically significant, and the magnitude of the absolute value of the correlation equals or exceeds 0.20 but is less than 0.30.
- “Moderately associated”: Statistically significant, and magnitude of the absolute value of the correlation equals or exceeds 0.30 but is less than 0.40.
- “Strongly associated”: Statistically significant, and the magnitude of the absolute value of the correlation equals or exceeds 0.40 but is less than 0.50.
- “Very strongly associated”: Statistically significant, and the magnitude of the absolute value of the correlation exceeds 0.50.

Insofar as pertinent tables and statistical analyses are not included herein, the reader will find them, identified by section, in the Appendix that follows. The statements for which jurors gave their ratings may also be found therein. Hereinafter these “statements” will be called “variables” for ease of understanding and clarity. Finally, unless otherwise noted: (1) the survey variables paired prosecutors with plaintiffs’ attorneys, and criminal and civil defense attorneys, and (2) attorneys will be referred to herein as “prosecuting attorneys” or “prosecutors,” and “defense attorneys,” except as the variable may pertain to civil matters only, in which case “plaintiffs’ attorneys” will be identified.

III. JURORS’ PERCEPTIONS OF THEIR ATTORNEYS—THE PLUSES, THE MINUSES

In many respects in this 204-variable survey, the jurors were asked to provide feedback as to their attorneys’ actions, as well as traits that it was hoped they would be able to discern while in the courtroom. Of the many that were included, the following best combined pertinence and statistical significance.

A. Attorneys’ “Belief in Their Case”

Whether or not a trial lawyer believes in his or her case will be apparent, if not during jury selection, then by opening statement or shortly thereafter.

An average trial day begins at 9:00 a.m. and continues to noon with a fifteen-minute break. Trial resumes at 1:00 p.m. and continues to 5:00 p.m., again with a fifteen-minute break. Allowing for various times when attorneys are not in front of the jury, for example motions to exclude evidence, this means that jurors are either watching or listening to their lawyers for approximately six hours per day. Even if a trial lasted one day, it would be enough for jurors to determine whether their lawyers believed in their cases. Because trials typically last longer, or on occasion much longer, jurors have much more time than they need to form judgments about their attorneys on this and other factors. As the following reveals, these jurors had sufficient time.

FINDINGS

- The survey showed that jurors' increased perception of both prosecutors' and defense attorneys' belief in their cases was strongly associated with jurors' evaluations of their ability.
- Increased perception of belief in their cases was somewhat associated with likeability of prosecutors, and weakly associated for defense attorneys.
- In civil cases, jurors' perception of how the attorneys themselves perceived the fairness of the verdicts they were requesting was negatively associated with the offense jurors took at the amount in closing argument (1) requested by plaintiff's attorney, or (2) which defense counsel said should be paid. The lower the former perception was, the higher the latter, and vice versa.

These are logical correlations, particularly as to the first finding. They can serve as a cautionary note to trial counsel to not act in any way that would create the perception that they do not believe in their case.

B. The Attorneys "Understood Both the Strengths and Weaknesses of Their Case"

Possessing an understanding of the strengths and weaknesses of the case is necessary for counsel to be fully prepared at trial. This must include understanding the strengths and weaknesses of both sides of the case for *all*

parties, which requires both extensive time in preparation for trial and judgment. The former without the latter may “prepare” one to know the facts, but only the latter can provide the understanding required to appreciate the importance of the facts in all material ways. Any failure by counsel in this regard would be obvious to the jury at various points in the trial, including but not limited to during deliberations when strengths and weaknesses of all the parties will almost certainly be discussed.

FINDINGS

- The survey showed for all cases that 17.2% of prosecution jurors and 10.6% of defense jurors believed that their attorneys were deficient in this regard. While these percentages may not seem high, in the former case it equals one juror on every six-member panel. One possible explanation is that what jurors found to be strengths and weaknesses differed from those on which the attorneys focused. That this may happen is an inherent risk of trying cases. Nevertheless, the more likely explanation is that these attorneys truly did exhibit what jurors found—a lack of understanding.
- For prosecuting attorneys, how well they understood their case’s strengths and weaknesses was very strongly associated (the highest category for statistical significance) with jurors’ findings on ability. For defense attorneys, it was strongly associated. This factor played a role in likeability as well, as it was found to be somewhat associated with increased likeability.

These results strongly support the need for trial lawyers not only to understand fully the strengths and weaknesses of all parties, but to make evident to jurors that they do.

C. Bringing the “Bad Parts of the Case to the Attention of the Jury” Before the Opposition Did

Experienced trial lawyers know that they should give strong consideration to alerting the jury to “bad parts” of the case before the opposition has an opportunity do so, both framed in a manner and presented in a way that suits their purposes. This survey provides support for that

belief. It found that there was an association for all lawyers between this variable and both ability and likeability, albeit a “weak” one.

D. Was the Attorney “Honest with the Jury at All Times”?

To a high degree, the jurors answered “no” when asked if the attorney was honest with the jury at all times.

24.I believe the plaintiff's/prosecuting attorney was honest with the jury at all times.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	21	2.2	2.2	2.2
	DISAGREE	124	13.0	13.1	15.4
	AGREE	460	48.2	48.8	64.2
	AGREE STRONGLY	338	35.4	35.8	100.0
	Total	943	98.7	100.0	
Missing	System	12	1.3		
Total		955	100.0		

25.I believe the defense attorney was honest with the jury at all times.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	36	3.8	3.8	3.8
	DISAGREE	234	24.5	24.9	28.7
	AGREE	495	51.8	52.6	81.3
	AGREE STRONGLY	176	18.4	18.7	100.0
	Total	941	98.5	100.0	
Missing	System	14	1.5		
Total		955	100.0		

That 15.2% of prosecution attorneys and 28.3% of defense attorneys impressed their jurors as not being honest at all times is a distressing sign. It is contrary to the goals of professionalism and candor toward the tribunal, which in a jury trial must include the jurors. It is contrary to standards of trial conduct, including, for example, those found in the Code of Trial Conduct promulgated by the American College of Trial Lawyers: “The conduct of a lawyer before the court and with other lawyers should at all times be characterized by honesty, candor and fairness.”²⁰

²⁰ AM. COLL. OF TRIAL LAWYERS, CODE OF PRETRIAL CONDUCT AND CODE OF TRIAL CONDUCT 22(a) (1994), available at http://www.txed.uscourts.gov/cgi-bin/view_

No exception exists for being less than completely honest with the jury,²¹ nor should it. Analysis of these results both confirmed and raised questions about them.

FINDINGS

- Across all attorneys, honesty was moderately associated with jurors' perceptions of both their ability and likeability. This was a statistically significant relationship. However, the question may be asked, why was there not a *stronger* correlation between honesty on the one hand and ability and likeability on the other? The only possible, and partial, explanation is that some jurors may have thought it was their attorneys' "job" as advocates for one side to reveal only what they wanted jurors to hear. Such an explanation, however, does not take into account the effect of affirmative misrepresentations, which any trial lawyer would be foolish to make to a jury, but likely were occurring before these jurors, given the high percentages shown above. Further research is warranted to find out why jurors believed their attorneys were not being honest with them at all times.

While this survey framed the question in terms of "honesty," others have used the term "credibility." A Delaware survey involving 269 real jurors who sat in civil cases found that credibility does matter, stating: "Attorneys who were not credible, had poor demeanor, used excessive appeals to the jurors' sympathy, or were poorly organized tended to alienate the jurors."²² However, male and female attorneys may not be perceived the same as to credibility.²³ "Generally, male attorneys are considered more credible than female attorneys, regardless of whether female attorneys

document.cgi?document=1182.

²¹ See *id.*

²² See Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 IND. L.J. 1297, 1317 (1993).

²³ See Mary Stewart Nelson, *The Effect of Attorney Gender on Jury Perception and Decision-Making*, 28 LAW & PSYCHOL. REV. 177, 182 (2004) (citing Kittie D. Warshawsky, Note, *The Judicial Canons: A First Step in Addressing Gender Bias in the Courtroom*, 7 GEO. J. LEGAL ETHICS 1047, 1075 (1994)).

perform better or demonstrate greater ability than their male counterparts.”²⁴

E. Did the Attorney “Ask the Witnesses Questions That Were Important to Deciding the Case”?

Jurors, like most people, do not like having their time wasted. Since they could not “volunteer” to be called to jury service, and jury service can disrupt one’s personal and professional life, no authority ought to be needed to support the proposition that many do not wish to be there to begin with. For these reasons, attorneys who too often ask questions that jurors do not find important—which includes questions that they do not find relevant—risk alienating their jury. This proved true in this survey.

FINDINGS

- For prosecutors, the perception that they were asking important questions was strongly associated with jurors’ findings on ability, and somewhat associated as to likeability.
- For defense attorneys, there again was statistical significance as to both, with the respective findings of “moderately” and “somewhat” associated.

Given the degree of these associations, and that they are statistically significant regardless of their degree, trial lawyers would be well advised to “get to the point” in their questioning, and not just ask about, but emphasize, what is important.

F. What Was the Effect of the “Stronger Personality”?

Jurors told an interesting statistical tale in response to the statement: “The plaintiff’s/prosecuting attorney, overall, showed a stronger personality in the courtroom than did the defense attorney.”

²⁴ *Id.*

FINDINGS

- The more jurors found that the personality of prosecution attorneys (recalling that this includes plaintiffs' attorneys) was stronger than that of their defense attorneys, the greater jurors found the ability of the former to be. There was a "very strong" association between these variables.
- On the other hand, there was no such statistical validity between "stronger" personalities and ability for defense attorneys.

One possible reason for this difference may be that prosecutors and plaintiffs' attorneys have the burden of proof. They present their cases first. They are "on the attack" in their cases, and this may help account for the perception that they have stronger personalities than those "defending."

G. Were "Too Many Objections" Made, or with "Too Aggressive a Tone"?

Across all cases and attorneys, jurors' beliefs that attorneys made too many objections are "weakly associated" with reduced ability by all attorneys across all cases. Additionally, such perceptions are associated with decreased likeability—"somewhat associated" for prosecutors, and "weakly associated" for defense attorneys. These findings are not surprising. The jurors would likely want to hear what they are being told, but by an objection being made, they should not have heard. Most trial lawyers have likely had the experience of arguing an objection at the bench, presumably outside the hearing of the jury, only to glance at the jury box and see jurors paying rapt attention to what they likely know, from prior judge's instructions about bench conferences, should not concern them.

Jurors were asked if the tone of the attorneys in making objections was "too aggressive." The results were identical to those above as to ability, but there was a greater price to pay as to likeability—the strength of the associations for this variable rose for prosecutors from "somewhat" to "moderately" associated for prosecutors, and from "weakly" to "somewhat" associated for defense counsel.

One must conclude, given the homogeneity and constancy of these findings for both ability and believability, that trial lawyers who object too

often or in too aggressive a tone risk incurring increasingly negative perceptions of both their likeability and ability.

H. Did Counsel Try the Case in “an Honorable Way”?

As one Supreme Court justice has stated, a “heavy reliance on the professionalism and judgment of trial attorneys” is necessary for “the proper functioning of our system of criminal justice, both federal and state.”²⁵

Jurors through their evaluations confirmed that they thought more highly of attorneys who tried their cases “in an honorable way.”

FINDINGS

- Across all attorneys in the survey, jurors’ perceptions of increased honorability were strongly associated with increased ability.
- The same was true for increased likeability.

“Honorability” was not defined in the survey not only because of space restrictions but because no one definition could reasonably capture how an array of jurors would self-define it. Any definition provided would have necessarily caused some jurors whose definition was at odds with it to respond differently than they would if they had a freer hand on the subject. It was therefore left to them to frame their responses in terms of their own values. As these were the most consistently strong findings for any single variable in the survey, the concept of “honorability” was extremely important to the jurors. Because honesty must be part of any concept of honorability, which in turn is strongly associated with both ability and likeability, trial lawyers would be wise to make a far greater effort to be honest with the jury at all times.²⁶

²⁵ *Wainwright v. Sykes*, 433 U.S. 72, 115 (1977) (Brennan, J., dissenting).

²⁶ See discussion *supra* Part III.D.

I. Was Their Attorney a "Likeable Person"?

Jurors' findings on this variable were highly positive as to their prosecution attorneys, and marginally less so as to their defense attorneys:

34. The plaintiff's/prosecuting attorney was a likeable person.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	9	.9	1.0	1.0
	DISAGREE	87	9.1	9.3	10.3
	AGREE	703	73.6	75.3	85.6
	AGREE STRONGLY	134	14.0	14.4	100.0
	Total	933	97.7	100.0	
Missing	System	22	2.3		
Total		955	100.0		

35. The defense attorney was a likeable person.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	16	1.7	1.7	1.7
	DISAGREE	139	14.6	14.9	16.6
	AGREE	675	70.7	72.3	89.0
	AGREE STRONGLY	103	10.8	11.0	100.0
	Total	933	97.7	100.0	
Missing	System	22	2.3		
Total		955	100.0		

Because this survey did not ask jurors in what ways they found their attorneys to be likeable, or what might account for this feeling, reference here to prior research on this subject is appropriate.

One survey sought to determine the effects of both verbal and nonverbal immediacy characteristics of lawyers upon their jurors.²⁷ "Immediacy behavior is that nonverbal behavior which enhances feelings of closeness to another person."²⁸ Examples of such behavior include "close

²⁷Lance Stockwell & David C. Schrader, *Factors That Persuade Jurors*, 27 U. TOL. L. REV. 99, 99-100 (1995) (involving twenty-eight college students who were surveyed after viewing two simulated criminal trials).

²⁸*Id.* at 100 (citing ALBERT MEHRABIAN, SILENT MESSAGE 4 (1971)).

conversational distance . . . direct body and facial orientation, forward lean, increased eye contact, positive reinforcers—such as smiling and nodding—frequent gesturing, and pleasant facial expressions . . . Studies show that the utilization of these behaviors enhances persuasive power.”²⁹ The instant survey phrased “immediacy behavior” in a less technical way—likeability.

As to verbal behaviors, five significant correlations were found with jurors’ attributions of their attorneys.³⁰ “Verbal style correlated significantly with believability, trustworthiness, persuasiveness and attractiveness, while the content of the evidence and arguments correlated significantly with likability.”³¹ As to nonverbal immediacy, while “focusing primarily on vocal immediacy behaviors will enhance jurors’ perceptions of witnesses, it is not possible to make such a general statement for lawyers, for whom jurors appear to make attributions on a variety of variables.”³² This difference, it was posited, is explained by lawyers’ greater freedom in the movement and expression in the courtroom, and witnesses being less comfortable there.³³ “Consequently, there are simply more lawyer behaviors than witness behaviors available from which jurors can make attributions.”³⁴ The survey concluded that:

[T]he results of this study indicate that nonverbal immediacy was the most important factor differentiating between winning and losing lawyers and witnesses. Verbal style, as well as the content of the evidence and testimony, played a substantial role in differentiating between winning and losing lawyers, but was not a factor in differentiating between winning and losing witnesses. Further study is needed, however, to confirm these findings about lawyers’ nonverbal immediacy behaviors.³⁵

In addition to jurors providing evaluations of their attorneys, a

²⁹ *Id.* at 101 (citing Judee K. Burgoon, *Nonverbal Signals*, in HANDBOOK OF INTERPERSONAL COMMUNICATION 344, 349–50 (M.L. Knapp & Gerald R. Miller eds., 1985); JUDEE K. BURGOON ET AL., *NONVERBAL COMMUNICATION: THE UNSPOKEN DIALOGUE* 64 (1989)).

³⁰ *Id.* at 107.

³¹ *Id.*

³² *Id.* at 108.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 109.

Wisconsin study of 477 real jurors in both civil and criminal cases had the attorneys rate themselves.³⁶ Interestingly, jurors gave their defense attorneys significantly lower ratings for overall articulateness, enthusiasm, arrogance, nervousness, friendliness, and likeability than did the attorneys themselves.³⁷ Self-ratings by prosecutors, on the other hand, showed more substantial agreement with juror ratings.³⁸

Attorneys in trial are always either being observed or subject to being observed by jurors. No exception exists when they are not questioning witnesses or making arguments to the court. Although experienced trial lawyers know this, in the heat of trial one can forget and exhibit, for example, facial expressions that jurors may view as a lack of professionalism or, worse, make comments that produce the same results. Inexperienced lawyers may be more susceptible to this. If lawyers do forget, they risk exhibiting non-verbal behaviors contrary to those discussed above³⁹ and being subject to what one survey called “offstage observation”⁴⁰ by jurors. According to one text, “careful attention to impressions [even] includes areas beyond the courtroom doors”:

You never know when a juror may be observing you. If you are going to impress the jurors, you have to impress them in every way. And for those of you who own Cadillacs, Maserattis, and Mercedes, give those cars back to your spouses on the day you go to court. Go to court in a Chevy.⁴¹

³⁶Daniel Linz et al., *Attorney Communication and Impression Making in the Courtroom*, 10 LAW & HUM. BEHAV. 281, 287, 289 (1986).

³⁷*Id.* at 293–94, 297.

³⁸*Id.* at 297.

³⁹See Stockwell & Schrader, *supra* note 27, at 101.

⁴⁰See Mary R. Rose et al., *Goffman on the Jury: Real Jurors’ Attention to the “Offstage” of Trials*, 34 LAW & HUM. BEHAV. 310, 310 (2010).

⁴¹*Id.* at 312.

J. “Overall Ability” of Attorneys

Overall, jurors thought their attorneys were very able. And there was no substantial difference between prosecution and defense attorneys:

38. Please rate the overall ability of the plaintiff's/prosecuting attorney.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	POOR	53	5.5	5.6	5.6
	FAIR	231	24.2	24.6	30.2
	GOOD	406	42.5	43.2	73.5
	EXCELLENT	249	26.1	26.5	100.0
	Total	939	98.3	100.0	
Missing	System	16	1.7		
Total		955	100.0		

39. Please rate the overall ability of the defense attorney.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	POOR	44	4.6	4.7	4.7
	FAIR	216	22.6	23.1	27.7
	GOOD	453	47.4	48.3	76.1
	EXCELLENT	224	23.5	23.9	100.0
	Total	937	98.1	100.0	
Missing	System	18	1.9		
Total		955	100.0		

That approximately 70% of the lawyers seen are either “good” or “excellent” is an encouraging sign. The same is true for the very low totals for “poor” lawyers. And it is possible that some were rated “poor” simply because they were inexperienced, perhaps even trying their first case.

Perhaps the most stark example of how lawyers’ skills at trial will play a role is found in the results of a survey of 320 criminal jurors in New York, Los Angeles, Maricopa County, Arizona, and Washington, D.C.⁴² “Skill”

⁴² See Jennifer Bennett Shinall, Note, *Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 VAND. L. REV. 267, 278 (2010).

was defined as “the qualities that an attorney brings to the courtroom independent of his case’s strength, such as rhetorical abilities, tactical strategies, and knowledge of the law.”⁴³ The results showed that:

[T]he skill level of the defense attorney plays *no role* in determining the outcome of a criminal trial in everyday cases with non-celebrity defendants. Instead, the prosecution’s skill level is crucial to the verdict. A guilty person may be more likely to walk free when the prosecution performs poorly, and an innocent person may be more likely to land in jail when the prosecution performs well.⁴⁴

In a survey of 660 jurors who sat in criminal and civil trials in Maine, the jurors ranked eight categories of attorney performance: (1) competence, (2) demeanor, (3) sincerity, (4) opening statement, (5) preparedness, (6) closing argument, (7) testimony, and (8) exhibits.⁴⁵ When ranked by average scores from best to worst, competence was highest.⁴⁶ When ranked by frequency of a score of “excellent,” the highest rating, competence was again highest, with 39.26%.⁴⁷

What this Maine survey called attorney “competence” was termed “skills” in the Los Angeles Survey.⁴⁸ However, it is not only the skills of *one* attorney, or lack thereof, that can have a material effect on jurors or on the verdict itself.⁴⁹ There, 56% of the jurors believed that “*disparate* attorney skills can affect the outcome of a case.”⁵⁰ More strikingly, 35% “felt that the difference in attorney courtroom skills probably affected the verdict in the actual case they served on.”⁵¹ “The percentage is obviously higher if we ignore those who did not see any difference in attorney skills.”⁵² That fully one-third of the jurors found such a difference in ability and admitted that it probably affected their verdict is telling. It

⁴³ *Id.* at 269.

⁴⁴ *Id.* at 291.

⁴⁵ D. Brock Hornby, *How Jurors See Us*, 14 ME. B.J. 174, 174 (1999).

⁴⁶ *Id.* at 175.

⁴⁷ *Id.*

⁴⁸ See Strier, *Through the Jurors’ Eyes*, *supra* note 12, at 79–80.

⁴⁹ See *id.* at 80.

⁵⁰ *Id.* (emphasis added).

⁵¹ *Id.*

⁵² *Id.*

bodes badly for new or inexperienced trial lawyers who face savvy courtroom veterans, unless they have obtained trial skills in law school through Trial Advocacy, Trial Team, or clinical experience that enable them to “hit the ground running.”

IV. JURORS’ OPINIONS OF ATTORNEYS’ PERFORMANCE IN RELATION TO GENDER, RACE, AND AGE OF ATTORNEYS

This survey’s findings show that in material respects, jurors’ opinions regarding performance at trial were affected by the gender, race, and age of their attorneys.

In the findings reported here, the notation of “***” denotes that the finding was statistically significant. Means will also be provided as applicable, either with or without findings of statistical significance, as they still provide useful information highlighting different findings based on gender, race or age.

A. Findings Analyzed by Gender

- Female prosecutors “brought the bad parts of their case to the attention of the jury first, before the defense did” more than males. (Male mean = 2.62, Female mean = 2.84) These means are not statistically significant and are based on the survey scale of 1 to 4, with 4 being the highest. On the other hand, male defense attorneys were more likely to bring the bad parts of their case, relative to their female counterparts.*** Their mean differences further reflected this: Male = 2.51, Female = 2.17.
- Female prosecutors were perceived to be more honest than male prosecutors.*** (Male mean = 2.98, Female mean = 3.27). For defense attorneys, there were no statistically significant findings, and the means were not materially different.
- Plaintiffs’ attorneys in this data set⁵³ were considered to be the least honest, and by a significant mean difference as well.***

⁵³ Analyses of variables such as ability, sex, race, and age were performed on separate data sets, each of which consisted of those jurors who responded to all independent and dependent variables which made up the analysis. When analyzing different variables, therefore, their data sets differed. Thus, the mean as to ability found in the analysis of gender would be different from

(Personal injury = 2.83, Civil Other = 3.06, Criminal Felony = 3.28, and Criminal Misdemeanor = 3.33).

- Male prosecutors were perceived to make too many objections more than female prosecutors.*** (Male = 2.00, Female = 1.71). There were no such differences for defense attorneys.
- Female prosecutors are more likeable than male prosecutors.*** (Male = 2.99, Female = 3.15). And this gap grows even larger when examined by type of case. Among personal injury plaintiffs' lawyers: Male = 2.90, Female = 3.43. This held true for defense attorneys.*** (Male = 2.95, Female = 3.12). Defense attorneys were found most likeable in personal injury and Civil Other cases, M = 3.20 and 3.18 respectively, and least likely in felony and misdemeanor cases, M = 2.89 for each.***
- In terms of ability in this data set, plaintiffs' lawyers as a whole were rated highest,*** with a mean of 3.26, followed by Civil Other = 3.23, Criminal Felony = 2.92, and Criminal Misdemeanor = 2.71. These results, particularly as to the difference between the latter two, are not surprising, as the newest prosecutors will begin in misdemeanor court and after gathering experience move to felony court. Civil defense attorneys were rated highest by a wide margin among all defense attorneys.*** (Personal Injury = 3.45, Civil Other = 3.07, Misdemeanor = 2.81, and Felony = 2.75).

The gender-based findings in this survey do not stand alone.⁵⁴ As one author who surveyed studies of the relationship between an attorney's gender and jury decisions has noted:

Although few social scientists have addressed the effect of an attorney's gender on jury decisions, those who have explored the topic have reached conflicting conclusions. Most researchers have found that an attorney's gender has

the mean found in the analysis of race. In short, different data sets will likely produce different means.

⁵⁴ See Nelson, *supra* note 23, at 177.

an effect on jury verdicts.⁵⁵ However, other analysts have concluded that attorney gender has little or no effect on jury decisions⁵⁶ A comprehensive review of the literature and studies available indicates that, though the increasing presence of women in the legal profession has decreased the effect of an attorney's gender on his or her success, attorney gender continues to be a pervading factor in jury perception and decision-making.⁵⁷

After discussing the varying methodologies that had been used in such research,⁵⁸ the reasons for this effect were described as follows:

Despite the questionable methodologies of the primary studies on the subject, the surveys indicate that attorney gender affects a jury's decision-making because the factors surrounding gender affect the jury's perception of attorneys and consequently their verdicts. Factors surrounding gender, including gender stereotypes and attorney appearance, tend to affect a jury's perception of attorneys based on their gender. Thus, the jury tends to have a biased perception of an attorney's expected presentation style and a biased perception of the attorney's credibility, based on the historically small number of women in the legal profession, the treatment of women in the courtroom by judges and attorneys, and the jury's perception of an attorney's competence and trustworthiness. Research and literature indicate that this biased perception tends to adversely interfere in a jury's decision-making.⁵⁹

⁵⁵ *Id.* The author here cites numerous studies, the most pertinent of which is Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 535 (1996).

⁵⁶ Nelson, *supra* note 23, at 177 (citing David L. Cohen & John L. Peterson, *Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts*, 9 SOC. BEHAV. & PERSONALITY 81, 85–86 (1981); Janet Sigal et al., *The Effect of Presentation Style and Sex of Lawyer on Jury Decision-Making Behavior*, 22 PSYCHOL.: Q.J. HUM. BEHAV. 13, 17 (1985)).

⁵⁷ *Id.*

⁵⁸ *See id.* at 178–80.

⁵⁹ *Id.* at 192.

A 1981 study found the following in regard to the effects of gender:

- There was no expected confirmation of the hypothesis that male jurors paired with a male defense attorney would find significantly less defendant guilt than female jurors paired with a male defense attorney.⁶⁰
- There was again no expected confirmation of the hypothesis that male jurors paired with a female defense attorney would report significantly more defendant guilt than female jurors in the presence of a female defense attorney.⁶¹
- There was confirmation of an unexpected result: “Jurors [regardless of their gender], in the presence of a female defense attorney, reported significantly less defendant guilt . . . than jurors in the presence of a male defense attorney.”⁶²

This survey also showed that race played a role, in that “[verdicts of] jurors in the presence of a black defense attorney reported significantly more defendant guilt than jurors in the presence of a white defense attorney.”⁶³

B. Findings Analyzed by Race

- There was no statistical significance for race of either prosecution or defense attorneys, or a material mean difference, as bearing on either honesty or likeability. However, among all prosecutors measured in this data set, personal injury attorneys were rated by far as being the least honest. (M = 2.62, as compared to Misdemeanor = 3.36, Felony = 3.23, and Civil Other = 3.18). These means differ from those seen in the findings in Section V.A above concerning honesty. In neither case, however, are the results complimentary to personal injury

⁶⁰ See Cohen & Peterson, *supra* note 56, at 84 (survey of mock-trial jurors testing the influence of the attorneys’ sex and race on findings of guilt in a murder case).

⁶¹ See *id.*

⁶² *Id.*

⁶³ *Id.*

plaintiffs' attorneys. One possible explanation is that this finding reflects the belief that jurors had at the start of trial, and is not one promoted by lawyers before them. Further research would be welcome on what such a belief is based on, and to what degree that belief existed prior to trial.

- In terms of ability of prosecutors by race, the jurors' means in this differing data set show that they perceived the order of ability to be: Other = 3.17, White = 2.94, Black = 2.79. When examined by case type, the order of ability was: Civil Other = 3.40, Personal Injury = 3.13, and then there was again a significant drop to the criminal cases, Felony = 2.69 and Misdemeanor = 2.64. With respect to criminal felony cases, there were statistical differences by prosecutor race, with resulting means of White = 3.01, Other = 2.67, and Black = 2.38. This is a significant difference in perceived ability between black and white prosecutors.
- Similarly, and to a statistically significant degree, white defense attorneys are perceived as having significantly more ability than black attorneys.*** (White = 3.08, Other = 2.82, and Black = 2.41). One possibility is that this finding stems from attitudes that jurors brought with them to court. Further research is warranted to find out what underlies such jurors' perceptions.

C. Findings Analyzed by Age

The results here are in some respects inconsistent with the belief that young or younger trial lawyers do not have the experience of older lawyers, and therefore would not be perceived as well by jurors.

- By a wide margin, the younger the prosecutor the more likely he or she was to bring bad parts of his or her case to the attention of the jury before the opponent.*** (Less than 30 = 3.10, 30–50 = 2.67, and 50+ = 2.38). One possible explanation is that recent efforts in law schools to teach enhanced trial skills are having an effect, which likely would point out the wisdom of doing this. This would not, however, explain why older prosecutors are perceived as doing it less. One may surmise

that “old school” prosecutorial styles are responsible for this. A second possibility is that jurors perceive older prosecutors as “tougher,” more “hardened,” and therefore, inferentially, less communicative. For defense attorneys, there was neither significance nor material mean difference based on age.

- There was no relationship between age, either of prosecutors or defense attorneys, and its effect on jurors’ perceptions of their honesty.
- Most interestingly due to its absence, there was no statistical significance between age either of prosecutors or defense attorneys and its effect on perceptions of their ability. There seems only one logical explanation for this—jurors feel this way because it *is* this way. It is doubtful that jurors come into court with the belief that “younger attorneys are every bit as good as older ones.” If anything, conventional wisdom would suggest the opposite. The question then arises—*why* are younger trial lawyers doing as well? The answer would seem to again be, as discussed above in regard to bringing up damaging information first, that law schools’ efforts to produce trial-ready students by the time they graduate are bearing fruit.

V. JURY FINDINGS AS TO OPENING STATEMENT AND CLOSING ARGUMENT AND WHETHER THESE AFFECTED THEIR VERDICTS

A. *Opening Statement*

The attorney’s opening statement is thought by many trial lawyers, based on “trial lore,” to be critical to the outcome of any trial. But was it to these jurors? The following tables supply the answers in part.

63. The plaintiff's/prosecuting attorney's opening statement was persuasive.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	19	2.0	2.0	2.0
	DISAGREE	259	27.1	27.7	29.7
	AGREE	569	59.6	60.9	90.6
	AGREE STRONGLY	88	9.2	9.4	100.0
	Total	935	97.9	100.0	
Missing	System	20	2.1		
Total		955	100.0		

Roughly 30% of the jurors, or one-third on average of each six-member panel, did not find the prosecution's opening statement to be persuasive.

64. The defense attorney's opening statement was persuasive.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	21	2.2	2.3	2.3
	DISAGREE	326	34.1	35.4	37.7
	AGREE	523	54.8	56.8	94.5
	AGREE STRONGLY	51	5.3	5.5	100.0
	Total	921	96.4	100.0	
Missing	System	34	3.6		
Total		955	100.0		

Defense attorneys fared worse, with 38% disagreeing with the statement that their opening statements were persuasive.

It is possible that these percentages are high because opening statements are not "classically" meant to persuade. Jurors are instructed that opening statements are meant to inform the jury of what the issues are in the case and what the evidence will show on those issues, and perhaps they are taking this to heart and resisting being persuaded. However, as research cited below in this section will show, opening statements can and should be much more than this. Albeit without "arguing" during the opening statement, they *should* be persuasive.

65. The opening statement by the plaintiff's/prosecuting attorney was important to me in the way I finally decided the case.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	131	13.7	14.2	14.2
	DISAGREE	607	63.6	65.7	79.9
	AGREE	166	17.4	18.0	97.8
	AGREE STRONGLY	20	2.1	2.2	100.0
	Total	924	96.8	100.0	
Missing	System	31	3.2		
Total		955	100.0		

66. The opening statement by the defense attorney was important to me in the way I finally decided the case.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	133	13.9	14.6	14.6
	DISAGREE	600	62.8	65.6	80.2
	AGREE	170	17.8	18.6	98.8
	AGREE STRONGLY	11	1.2	1.2	100.0
	Total	914	95.7	100.0	
Missing	System	41	4.3		
Total		955	100.0		

The fact that approximately 80% of these jurors believed that their opening statements were *not* important in the way they decided the case appears to constitute some of the strongest evidence yet found to contradict existing research that opening statements have an important and even determinative effect upon verdicts.⁶⁴ These findings allow several possibilities. First, these statements may simply have been poor. Second, due to the length of their trials, jurors may have “forgotten” what was said during opening statement by the time they deliberated. A third possibility is that these jurors’ self-evaluations about what was important in how they decided their cases are inaccurate. Even if this were true for some of the jurors, it seems very doubtful that this would be a causative factor of

⁶⁴ See discussion *infra* at notes 68–79.

erroneous self-reporting given that these evaluations were provided by four out of every five jurors. The most likely explanation therefore appears to be that the opening statements were in fact, as four out of five of all jurors described them, “not persuasive” and “not important.” These findings should cause trial lawyers to re-evaluate how they are preparing and presenting their opening statements.

Previous research confirms the merits of this suggestion. In the Illinois study, 1,925 non-serving jurors, selected when the venire exceeded court needs, were shown a simulated videotaped civil or criminal case.⁶⁵ They then filled out questionnaires asking for their reactions to the trial and the witnesses.⁶⁶ Additionally, deliberations of these jurors were videotaped.⁶⁷

The study’s analysis regarding the importance of opening statements includes the following statement from one trial advocacy manual, although “[n]o citation to any research is offered to support this conclusion . . .”:

In fact, research on the impact of the opening statement consistently reveals that as many as 80 to 90 percent of all jurors have reached their ultimate verdict during or immediately after opening statements. Everything in the trial which follows will be selectively perceived to reinforce decisions *which have already been made*.⁶⁸

To the contrary, evidence from the survey suggested that the 80–90% figure “may be inflated, or at least misleading,”⁶⁹ and that “there is more instability in juror preferences than the trial advocacy literature seems to suggest.”⁷⁰

As noted in the Nevada study, some of the earliest empirical research shows that “plaintiff attorneys’ opening statements created a framework for the belief that the defendant was liable in the same way a witness for the plaintiff would have done.”⁷¹ This was confirmed in the Delaware study, where “[j]urors remarked that the prime value of opening statements and

⁶⁵ See Diamond et al., *supra* note 7, at 19.

⁶⁶ *Id.* at 21.

⁶⁷ *Id.*

⁶⁸ See *id.* at 27 (quoting DONALD E. VINSON, JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY 171–72. (1986) (emphasis added)).

⁶⁹ See *id.* at 29.

⁷⁰ *Id.*

⁷¹ See Wood et al., *supra* note 8, at 24 (citing H.P. Weld & E.R. Danzig, *A Study of the Way in Which a Verdict Is Reached by a Jury*, 53 AM. J. PSYCHOL. 518–36 (1940)).

closing arguments was that they provided a framework within which jurors could evaluate the cases Many jurors mentioned that [they] helped them to understand and recall information—but they did not consider this to constitute ‘influence.’”⁷²

The question of whether or not a successful “framework” correlates with verdicts, however, has received differing answers. In the Wisconsin study, research revealed that performance in opening statements did not contribute significantly to winning or losing.⁷³ However, prosecution opening statements were found to be “better organized and more factually and legally informative than those presented by defense attorneys.”⁷⁴ Defense attorneys’ opening statements were less so, but were rated as more “enthusiastic” than were prosecutors’.⁷⁵ The survey concluded, however, that none of these variables “proved effective in predicting trial outcome, whether measured as wins and losses, juror evaluations, or juror reports on first ballot preferences.”⁷⁶

The Nevada study found, on the other hand, that although “jurors’ ratings of the Prosecution/Plaintiff attorneys’ opening statements failed to significantly predict verdicts,”⁷⁷ “perceptions of the Defense attorneys’ opening statements was a significant predictor of verdict.”⁷⁸ “However, this result is in the opposite direction of what one might expect: Defense attorneys whose opening statements were evaluated more positively were less likely to win their case.”⁷⁹

As for how well attorneys were performing their opening statements, in the Maine study of 660 jurors, when ranked by average score, opening statements were fourth best out of the eight factors on which the jurors provided ratings, notably higher than for closing arguments, which was

⁷² See Hans & Sweigart, *supra* note 22, at 1329–30.

⁷³ See Linz et al., *supra* note 36, at 292 & n.3 (“Winning” for the defense was defined as acquittal on the primary offense, “losing” as a conviction on such a charge, and vice versa for the prosecution.).

⁷⁴ *Id.* at 296.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Wood et al., *supra* note 8, at 26.

⁷⁸ *Id.* at 28.

⁷⁹ *Id.* One suggested reason for this result is that “[a]s prosecuting attorneys must prove their cases beyond a reasonable doubt, they may come to trial better equipped with case-related information.” *Id.*

sixth.⁸⁰ By frequency of ratings of “excellent,” opening statements were sixth and closing arguments were fifth.⁸¹

In light of the varying results of jury research, what should not be disputed is that trial attorneys cannot afford to rule out the possibility, if not the probability, that their opening statements will significantly affect their verdicts.

B. Closing Argument

Closing argument is likely thought by the average person to be the highlight of the trial. It is the attorney’s last opportunity to attempt to convince the jurors who will decide the case. This survey asked these 955 jurors to speak to the question of how much of a highlight their closing arguments were.

126.The plaintiff’s/prosecution’s closing argument was persuasive.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	54	5.7	6.0	6.0
	DISAGREE	361	37.8	40.1	46.1
	AGREE	421	44.1	46.7	92.8
	AGREE STRONGLY	65	6.8	7.2	100.0
	Total	901	94.3	100.0	
Missing	System	54	5.7		
Total		955	100.0		

127.The defense closing argument was persuasive.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	54	5.7	6.0	6.0
	DISAGREE	367	38.4	40.9	46.9
	AGREE	419	43.9	46.7	93.5
	AGREE STRONGLY	58	6.1	6.5	100.0
	Total	898	94.0	100.0	
Missing	System	57	6.0		
Total		955	100.0		

⁸⁰ See Hornby, *supra* note 45, at 174–75.

⁸¹ *Id.* at 175.

124. Closing argument for the plaintiff or prosecution was important to me in the way I finally decided the case.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	71	7.4	7.9	7.9
	DISAGREE	450	47.1	49.9	57.8
	AGREE	332	34.8	36.8	94.7
	AGREE STRONGLY	48	5.0	5.3	100.0
	Total	901	94.3	100.0	
Missing	System	54	5.7		
Total		955	100.0		

125. Closing argument for the defense was important to me in the way I finally decided the case.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	74	7.7	8.2	8.2
	DISAGREE	411	43.0	45.8	54.1
	AGREE	354	37.1	39.5	93.5
	AGREE STRONGLY	58	6.1	6.5	100.0
	Total	897	93.9	100.0	
Missing	System	58	6.1		
Total		955	100.0		

This evidence, which is fairly consistent in terms of the very high percentages of jurors who did not find their closing arguments either persuasive or important, suggests one of two possibilities. The arguments may have been exactly as jurors found—unpersuasive and unimportant. On the other hand, they may have been unpersuasive and unimportant because the jurors had already made up their minds. In any event, few if any trial lawyers would be pleased to know that as to their closing arguments, which they likely spend much time preparing, evidence exists that it is essentially a “coin flip” statistically as to whether they will or will not be persuasive or important.

It is interesting to note the trends as between the findings as to opening statement and closing argument. For both prosecution/plaintiffs’ and

defense attorneys, the percentages for those finding a lack of persuasiveness rose significantly from opening statement to closing argument. On the other hand, for both types of attorneys, the percentages for those finding a lack of importance decreased significantly. The former is difficult to explain, unless, as noted, jurors resisted being persuaded after courts told them that opening statements were designed to tell them what the issues would be and what the evidence would show. The latter may possibly be explained by jurors having already made up their minds by the time of closing argument. Further research as to these trends may prove illuminating as to what is causing this result and how trial lawyers may cause these percentages to be reduced.

These unflattering results as to closing argument are consistent with findings in the Maine study.⁸² There, of eight categories of trial performance that were measured,⁸³ “[c]losing [arguments were] the second most likely aspect of a lawyer’s performance to be graded ‘poor’ or worse.”⁸⁴ There should be little reason for this finding to ever be made, as unlike cross-examination, which involves another party (the witness), closing arguments are uniquely within the power of trial attorneys to prepare and deliver. Both in this survey and the Maine study, the evidence exists that trial attorneys are not performing well in what should be their finest hour.

C. Effects of Opening Statements and Closing Arguments on the Verdicts

The design of this survey offered the opportunity not only to tabulate jurors’ responses concerning their attorneys’ opening statements and closing arguments, but also to analyze whether and how they affected the verdicts jurors reached in five separate areas. The following tables reflect this analysis:

1. Criminal Verdicts

- There is a small but statistically significant effect between guilty verdicts and persuasiveness of prosecutors’ opening statements,

⁸² See *id.* at 174–75.

⁸³ These were: competence, preparedness, sincerity, demeanor, closing, opening, exhibits, and testimony. *Id.* at 174.

⁸⁴ *Id.* at 175.

and, similarly, there is a small but statistically significant effect between not-guilty verdicts and less persuasive prosecutors' opening statements.

- Not-guilty verdicts are associated with higher scores on the persuasiveness of defense opening statements, while guilty verdicts are associated with lower evaluations of the persuasiveness of defense opening statements.
- Guilty verdicts are associated with higher scores on prosecutors' closing argument persuasiveness in comparison to all other verdicts. Some form of guilt is also associated with higher scores on prosecutors' argument persuasiveness when compared to not-guilty verdicts.
- Not-guilty verdicts are associated with higher scores on defense closing argument persuasiveness in comparison to all other verdicts except no verdicts (hung juries or cases where pleas were entered before verdict).

2. Civil Verdicts—Liability

- There exists a statistically significant relationship between defense closing arguments and defense verdicts.
- There is no such relationship between plaintiffs' opening statements, defendants' opening statements, or plaintiffs' closing arguments and verdicts.

3. Civil Verdicts—Percentage of Fault Assigned to the Parties

- There is no relationship for either as to jurors' determinations of percentage of fault assigned to the parties.

4. Civil Verdicts—Amount of Damages Awarded

- There is no statistically significant relationship between plaintiffs' opening statements or defendants' closing arguments on the amount of damages. There is a relationship between defendants' opening statements and the damages awarded.

When jurors do not award as much money they find these statements to be more persuasive.

- There is a relationship as well between plaintiffs' closing arguments and the damages awarded. When jurors award more money they find these arguments to be more persuasive.

5. Civil Verdicts—Were the Awards Closer to the Amounts Suggested by the Party Making Them?

- None of the parties' opening statements or closing arguments, including those of the plaintiffs, which typically include rebuttal as "the last word," had any statistically significant effect on jurors awarding amounts of damages closer to the amounts suggested by either counsel.

By contrast, in the Nevada study, perceptions of the 572 real jurors of closing arguments in their civil and criminal cases "was a significant predictor of verdict,"⁸⁵ while perceptions of defense attorneys' closing arguments were not.⁸⁶

VI. CONCLUSION

While this study contains positive findings related to the abilities, actions, and traits of the trial lawyers who appeared before these jurors, it raises significant questions about others. That these lawyers practice their profession in an environment that is immediate, intense, and challenging in so many ways does not mean that they should not strive to exhibit the highest degree of professionalism and ability before their jurors. It is hoped that these findings will serve to promote further research with the goal of helping trial lawyers, who defend our most basic rights and pursue justice, to be worthy of the "heavy reliance"⁸⁷ that our judicial system has placed upon them.

⁸⁵ See Wood et al., *supra* note 8, at 27.

⁸⁶ *Id.* at 23; see also *id.* at 34 tbl. 3.

⁸⁷ See *Wainwright v. Sykes*, 433 U.S. 72, 115 (1977) (Brennan, J., dissenting).

VII. APPENDIX—VARIABLES, STATISTICAL ANALYSES, AND TABLES

A. Section III: Attorneys' Actions and Perceived Traits

Item 18:	The plaintiff's/prosecuting attorney believed in his/her case.
Item 19:	The defense attorney believed in his/her case.
Item 20:	The plaintiff's/prosecuting attorney understood both the strengths and weaknesses of his/her case.
Item 21:	The defense understood both the strengths and weaknesses of his/her case.
Item 22:	The plaintiff's/prosecuting attorney brought the bad parts of his/her case to the attention of the jury first, before the defense did.
Item 23:	The defense attorney brought the bad parts of his/her case to the attention of the jury first, before the plaintiff or prosecution did.
Item 24:	I believe the plaintiff's/prosecuting attorney was honest with the jury at all times.
Item 25:	I believe the defense attorney was honest with the jury at all times.
Item 26:	The plaintiff's/prosecuting attorney asked the witnesses questions that were important to deciding the case.
Item 27:	The defense attorney asked the witnesses questions that were important to deciding the case.
Item 28:	The plaintiff's/prosecuting attorney, overall, showed a stronger personality in the courtroom than did the defense attorney.
Item 30:	The plaintiff's/prosecuting attorney made too many objections.
Item 31:	The defense attorney made too many objections.
Item 32:	The tone of the plaintiff's/prosecuting attorney in making objections was too aggressive.
Item 33:	The tone of the defense attorney in making objections was too aggressive.

Item 34:	The plaintiff's/prosecuting attorney was a likeable person.
Item 35:	The defense attorney was a likeable person.
Item 36:	The plaintiff's/prosecuting attorney tried his/her case in an honorable way.
Item 37:	The defense attorney tried his/her case in an honorable way.
Item 38:	Please rate the overall ability of the plaintiff's/prosecuting attorney.
Item 39:	Please rate the overall ability of the defense attorney.
Item 124:	Closing argument for the plaintiff or prosecution was important to me in the way I finally decided the case.
Item 125:	Closing argument for the defense was important to me in the way I finally decided the case.
Item 126:	The plaintiff's/prosecuting attorney's closing argument was persuasive.
Item 127:	The defense attorney's closing argument was persuasive.
Item 131:	I think the plaintiff's attorney believed in the fairness of the verdict he/she asked the jury to return.
Item 132:	I think the defense attorney believed in the fairness of the verdict he/she asked the jury to return.
Item 133:	I was offended by the amount of money the plaintiff's attorney asked for in closing argument.
Item 134:	I was offended by the amount of money the defense attorney said in closing argument should be awarded.

1. A. Belief in One's Case

Correlation (Item 18, Item 38) = .451, $p = .000$, $N = 936$
strongly associated

Correlation (Item 19, Item 39) = .430, $p = .000$, $N = 934$
strongly associated

Correlation (Item 18, Item 34) = .204, $p = .000$, $N = 929$
somewhat associated

Correlation (Item 19, Item 35) = .179, $p = .000$, $N = 929$
weakly associated

Correlation (Item 131, Item 133) = -.290, $p = .001$, $N = 123$
somewhat associated

Correlation (Item 132, Item 134) = -.131, $p = .164$, $N = 115$
not associated

These correlations do not statistically differ from another
($Z = 1.27$, $p > .05$).

2. B. Understanding of Both the Strengths and Weaknesses of
the Case

Correlation (Item 20, Item 38) = 0.556, $p = .000$, $N = 928$
very strongly associated

Correlation (Item 21, Item 39) = 0.472, $p = .000$, $N = 930$
strongly associated

Correlation (Item 20, Item 34) = 0.238, $p = .000$, $N = 920$
somewhat associated

Correlation (Item 21, Item 35) = 0.254, $p = .000$, $N = 924$
somewhat associated

20. The plaintiff's/prosecuting attorney understood BOTH the strengths AND weaknesses of his/her case.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	15	1.6	1.6	1.6
	DISAGREE	149	15.6	15.9	17.5
	AGREE	494	51.7	52.8	70.3
	AGREE STRONGLY	278	29.1	29.7	100.0
	Total	936	98.0	100.0	
Missing	System	19	2.0		
Total		955	100.0		

21. The defense attorney understood BOTH the strengths AND weaknesses of his/her case.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	STRONGLY DISAGREE	13	1.4	1.4	1.4
	DISAGREE	88	9.2	9.4	10.8
	AGREE	525	55.0	56.0	66.8
	AGREE STRONGLY	311	32.6	33.2	100.0
	Total	937	98.1	100.0	
Missing	System	18	1.9		
Total		955	100.0		

3. C. Bringing the “Bad Parts of the Case to the Attention of the Jury Before the Opposition Did”

Correlation (Item 22, Item 38) = 0.192, $p = .000$, $N = 895$
weakly associated

Correlation (Item 23, Item 39) = 0.107, $p = .002$, $N = 880$
weakly associated

Correlation (Item 22, Item 34) = 0.128, $p = .000$, $N = 887$
weakly associated

Correlation (Item 23, Item 35) = 0.093, $p = .006$, $N = 875$
weakly associated

Correlation (Item 24, Item 34) = 0.358, $p = .000$, $N = 927$
moderately associated

Correlation (Item 25, Item 35) = 0.353, $p = .000$, $N = 927$
moderately associated

4. D. Was the Attorney “Honest with the Jury at All Times”?

Correlation (Item 24, Item 38) = .351, $p = .000$, $N = 933$
moderately associated

Correlation (Item 25, Item 39) = .338, $p = .000$, $N = 931$
moderately associated

Correlation (Item 24, Item 34) = 0.358, $p = .000$, $N = 927$
moderately associated

Correlation (Item 25, Item 35) = 0.353, $p = .000$, $N = 927$
moderately associated

5. E. Did the Attorney “Ask Questions of the Witnesses That Were Important to Deciding the Case”?

Correlation (Item 26, Item 38) = 0.498, $p = .000$, $N = 929$
strongly associated

Correlation (Item 27, Item 39) = 0.388, $p = .000$, $N = 925$
moderately associated

Correlation (Item 26, Item 34) = 0.277, $p = .000$, $N = 920$
somewhat associated

Correlation (Item 27, Item 35) = 0.245, $p = .000$, $N = 920$
somewhat associated

6. F. What Was the Effect of the “Stronger Personality”?

Correlation (Item 28, Item 38) = 0.501, $p = .000$, $N = 923$
very strongly associated

Correlation (Item 28, Item 39) = -0.024, $p = .475$, $N = 920$
not associated

7. G. Were “Too Many” Objections Made, or with “Too Aggressive a Tone”?

Correlation (Item 30, Item 38) = -0.131, $p = .000$, $N = 925$
weakly associated

Correlation (Item 31, Item 39) = -0.152, $p = .000$, $N = 925$
weakly associated

Correlation (Item 30, Item 34) = -0.236, $p = .000$, $N = 917$
somewhat associated

Correlation (Item 31, Item 35) = -0.164, $p = .000$, $N = 918$
weakly associated

Correlation (Item 32, Item 38) = -0.151, $p = .000$, $N = 921$
weakly associated

Correlation (Item 33, Item 39) = -0.121, $p = .000$, $N = 919$
weakly associated

Correlation (Item 32, Item 34) = -0.347, $p = .000$, $N = 914$
moderately associated

Correlation (Item 33, Item 35) = -0.249, $p = .000$, $N = 913$
somewhat associated

8 H. Did Counsel Try the Case “in an Honorable Way”?

Correlation (Item 36, Item 38) = 0.437, $p = .000$, $N = 934$
strongly associated

Correlation (Item 37, Item 39) = 0.410, $p = .000$, $N = 927$
strongly associated

Correlation (Item 36, Item 34) = 0.464, $p = .000$, $N = 926$
strongly associated

Correlation (Item 37, Item 35) = 0.449, $p = .000$, $N = 921$
strongly associated

B. Section IV: Jurors’ Opinions of Attorneys’ Performance in Relation to Sex, Race, and Age of Attorneys

Item 11:	Type of trial for which you participated: (civil injury/wrongful death, civil other, criminal felony, criminal misdemeanor).
Item 12:	The (sex) of the prosecuting attorney was:
Item 13:	The (sex) of the defense attorney was:
Item 14:	The (race/ethnicity) of the plaintiff/prosecuting attorney was:
Item 15:	The (race/ethnicity) of the defense attorney was:
Item 16:	The (age) of the plaintiff’s/prosecuting attorney was:
Item 17:	The (age) of the defense attorney was:
Item 22:	The plaintiff’s/prosecuting attorney brought the bad parts of his/her case to the attention of the jury first, before the defense did.
Item 23:	The defense attorney brought the bad parts of his/her case to the attention of the jury first, before the plaintiff or prosecution did.
Item 24:	I believe the plaintiff’s/prosecuting attorney was honest with the jury at all times.

Item 25:	I believe the defense attorney was honest with the jury at all times.
Item 28:	The plaintiff's/prosecuting attorney, overall, showed a stronger personality in the courtroom than did the defense attorney.
Item 30:	The plaintiff's/prosecuting attorney made too many objections.
Item 31:	The defense attorney made too many objections.
Item 34:	The plaintiff's/prosecuting attorney was a likeable person.
Item 35:	The defense attorney was a likeable person.
Item 38:	Please rate the overall ability of the plaintiff's/prosecuting attorney.
Item 39:	Please rate the overall ability of the defense attorney.

1. Gender of Prosecution Attorneys

Dependent variables: Items 22, 24, 28, 30, 34, 38

Independent variables: Item 11 and Item 12

Item 22: Brought bad parts of case	F(1, 839) = 3.903, p = .05, $\eta^2 = .005$	F(3, 839) = 3.088, p = .03, $\eta^2 = .011$	F(3, 839) = 0.984, p = .40, $\eta^2 = .004$
Item 24: Honesty	F(1, 839) = 8.811, p = .003, $\eta^2 = .01$	F(3, 839) = 4.989, p = .002, $\eta^2 = .018$	F(3, 839) = 1.723, p = .16, $\eta^2 = .006$
Item 30: Too many objections	F(1, 839) = 13.180, p = .00, $\eta^2 = .015$	F(3, 839) = 1.126, p = .337, $\eta^2 = .004$	F(3, 839) = 2.07, p = .103, $\eta^2 = .007$
Item 34: Likeable	F(1, 839) = 4.585, p = .03, $\eta^2 = .005$	F(3, 839) = 0.487, p = .69, $\eta^2 = .002$	F(3, 839) = 2.73, p = .04, $\eta^2 = .01$
Item 38: Overall ability	F(1, 839) = 3.015, p = .08, $\eta^2 = .004$	F(3, 839) = 6.222, p = .000, $\eta^2 = .022$	F(3, 839) = 1.98, p = .115, $\eta^2 = .007$

2. Gender of Defense Attorneys

Dependent variables: Items 23, 25, 28, 31, 35, 39

Independent variables: Item 11 and Item 13

Dependent Variable	Main Effect for Item 13 (sex of def. attorney)	Main Effect for Item 11 (type of case)	Interaction between Item 11 and Item 13
Item 23: Brought bad parts of case	$F(1,832) = 9.43$, $p = .00$, $\eta^2 = .011$	$F(3,832) = 2.18$, $p = .09$, $\eta^2 = .008$	$F(3,832) = 3.60$, $p = .013$, $\eta^2 = .012$
Item 25: Honesty	$F(1,832) = 3.28$, $p = .07$, $\eta^2 = .004$	$F(3,832) = 2.30$, $p = .08$, $\eta^2 = .008$	$F(3,832) = 1.92$, $p = .13$, $\eta^2 = .007$
Item 31: Too many objections	$F(1,832) = 0.53$, $p = .47$, $\eta^2 = .001$	$F(3,832) = 0.451$, $p = .71$, $\eta^2 = .002$	$F(3,832) = 2.02$, $p = .11$, $\eta^2 = .007$
Item 35: Likeable	$F(1,832) = 4.15$, $p = .04$, $\eta^2 = .005$	$F(3,832) = 5.10$, $p = .002$, $\eta^2 = .018$	$F(3,832) = 2.48$, $p = .06$, $\eta^2 = .009$
Item 39: Overall ability	$F(1,832) = 0.46$, $p = .49$, $\eta^2 = .001$	$F(3,832) = 8.98$, $p = .00$, $\eta^2 = .031$	

3. Race of Prosecution Attorneys

Dependent variables: Items 22, 24, 28, 30, 34, 38

Independent variables: Item 11 and Item 14

Dependent Variable	Main Effect for Item 14 (race of prosecutor)	Main Effect for Item 11 (type of case)	Interaction between Item 11 and Item 12
Item 24: Honesty	$F(2, 840) = 0.889$, $p = .411$, $\eta^2 = .002$	$F(3, 840) = 3.938$, $p = .008$, $\eta^2 = .014$	$F(3, 839) = 0.713$, $p = .64$, $\eta^2 = .005$

Item 38: Overall ability	F(2, 840) = 1.492, p = .23, η^2 = .004	F(3, 840) = 5.938, p = .001, η^2 = .021	F(6, 840) = 2.55, p = .019, η^2 = .018
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4. Race of Defense Attorneys

Dependent variables: Items 23, 25, 28, 31, 35, 39

Independent variables: Item 11 and Item 15

Dependent Variable	Main Effect for Item 15 (sex of def. attorney)	Main Effect for Item 11 (type of case)	Interaction between Item 11 and Item 13
Item 25: Honesty	F(2,822) = 0.94, p = .39, η^2 = .002	F(3,822) = 0.374, p = .77, η^2 = .001	F(5,822) = 0.39, p = .85, η^2 = .002
Item 35: Likeable	F(2,822) = 0.51, p = .60, η^2 = .001	F(3,822) = 1.50, p = .21, η^2 = .005	F(5,822) = 0.90, p = .48, η^2 = .005

5. Age of Prosecution Attorneys

Dependent variables: Items 22, 24, 28, 30, 34, 38

Independent variables: Item 11 and Item 16

Dependent Variable	Main Effect for Item 16 (age of prosecutor)	Main Effect for Item 11 (type of case)	Interaction between Item 11 and Item 12
Item 22: Brought bad parts of case	F(2, 839) = 3.62, p = .03, η^2 = .009	F(3, 839) = 3.01, p = .03, η^2 = .011	F(6, 839) = 3.44, p = .002, η^2 = .024
Item 24: Honesty	F(2, 839) = 0.96, p = .38, η^2 = .002	F(3, 839) = 3.26, p = .021, η^2 = .012	F(6, 839) = 1.80, p = .10, η^2 = .013
Item 30: Too many objections	F(2, 839) = 1.57, p = .20, η^2 = .004	F(3, 839) = 6.47, p = .000, η^2 = .023	F(6, 839) = 0.931, p = .47, η^2 = .007

Item 34: Likeable	F(2, 839) = 2.43, p = .09, $\eta^2 = .006$	F(3, 839) = 1.24, p = .29, $\eta^2 = .004$	F(6, 839) = 2.025, p = .06, $\eta^2 = .014$
Item 38: Overall ability	F(2, 839) = 2.06, p = .13, $\eta^2 = .005$	F(3, 839) = 1.09, p = .35, $\eta^2 = .004$	F(6, 839) = 1.80, p = .10, η^2 = .013

6. Age of Defense Attorneys

Dependent variables: Items 23, 25, 28, 31, 35, 39

Independent variables: Item 11 and Item 17

Dependent Variable	Main Effect for Item 17 (age of def. attorney)	Main Effect for Item 11 (type of case)	Interaction between Item 11 and Item 13
Item 39: Overall ability	F(2,828) = 2.34, p = .10, $\eta^2 =$.006	F(3,828) = 2.87, p = .04, $\eta^2 = .010$	F(6,838) = 0.98, p = .44, $\eta^2 = .007$