THE SCIENCE OF ADVOCACY

Steven Penrod, Daniel Linz, Larry Heuer,

and Dan Coates

University of Wisconsin—Madison

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I. Introduction

What is effective advocacy and how does one become an effective advocate? The answer to this question obviously depends on who answers it. Any trial attorney who has taken the time to look at the trial handbooks prepared by experienced trial attorneys will have noted that virtually all trial practice handbooks tackle a common body of litigation problems. For example, a recent volume by Mauet (1980) covers eight substantive areas: pretrial preparation, jury selection, opening statements, direct examination, exhibits, cross-examination, closing arguments, and objections. Of course, the experts all emphasize somewhat different aspects of advocacy because most authors of trial practice handbooks draw on their own litigation experience and emphasize those lawyering skills which they believe to have been important in their own litigation success. Our volume follows much the same format employed in traditional advocacy handbooks but our presentation is based on social science research that attorneys seldom encounter in handbooks. The volume has been written with the "generic" jury trial--rather than the bench trial--in mind. This orientation largely reflects the fact that (1) existing social and psychological research specifically addressed to courtroom processes has largely focused on the jury trial and (2) related areas of research which have not been specifically oriented to the courtroom (e.g., research on persuasive communication) have generally concerned themselves with lay persons rather than "experts" such as the trial judge. Although we have not attempted to make systematic suggestions geared to bench trials, we do believe that many of the principles we identify will be relevant to bench trials.

The volume has also been constructed with a typical criminal trial in mind. In particular, we have assumed that trial attorneys will most commonly be confronted with relatively straightforward criminal trials lasting no more than several days and involving testimony from perhaps a dozen witnesses. We have further assumed that the factual patterns, the evidence and applicable statutes and case law can be, if presented properly, understood by a juror of average intelligence and experience. Recent concern with so-called "complex civil litigation" has given rise to concerns about the competency of lay jurors. Similar concerns might be raised about complex criminal cases. However, complex cases are relatively uncommon and, unfortunately, there is virtually no existing research on the difficulties encountered by lay jurors in complex cases nor research on methods that might serve to reduce those difficulties.

Objectives and limitations of this volume

It may be helpful to note that in contrast to more traditional volumes on advocacy, there are several things that we do not attempt to do. First, we are quite satisfied that existing handbooks do a very good job of leading trial practitioners through evidentiary and procedural problems, provide adequate guidance on the use of pretrial motions, provide concrete examples of the ways in which questions can be framed during direct and cross-examination, review the various forms of evidence and how they may be employed during the trial—in sum, these volumes provide excellent guidance on the nuts and bolts of advocacy. The better ones attempt to go one step further and encourage the attorney to step back from the litigation process, encourage the attorney to reflect on what he or she is doing in the courtroom and encourage thoughtful consideration of courtroom tactics and strategies. We believe this volume falls into the latter category, for what we have attempted to do is provide the trial advocate with a critical perspective on the litigation process. We have not attempted to educate the trial attorney about procedure and evidence, for these are not our areas of expertise. Nor have we attempted to provide a cookbook approach to litigation. Rather, we have drawn upon social science research which we believe is relevant to the courtroom and used that research to formulate suggestions about the development and selection of courtroom tactics and strategies that will improve the quality of courtroom decisionmaking.

Scientific basis of this volume

There is a second point that we cannot emphasize too strongly. Some attorneys may approach this volume with the expectation that they will learn some behavioral science strategems that may allow them to turn an otherwise weak case into a strong case--or, more pointedly, may aid them in "pulling the wool over someone's eyes." We believe that some social scientists have misguidedly fostered the impression that there are "psychological tricks" that can be played in the courtroom or that some form of psychological alchemy can turn losing cases into winning cases. Even well-intentioned social scientists sometimes foster this view because their research seems to suggest that the decisions of judges and juries are susceptible to extra-legal, non-evidentiary influences such as whether a defendant is attractive (Efran, 1974); the similarity of defendant and juror general attitudes (Bray, 1974, 1976); the order in which evidence is presented (Thibaut & Walker, 1975). Other research suggests that legal efforts to assist jurors in decisionmaking are less than fully effective--e.g., jurors have difficulty understanding and applying instructions on the law (Severence & Loftus, 1982; Elwork, Sales, & Alfini, 1982); jurors have difficulty following the dictates of curative and limiting instructions (Tanford & Penrod, 1983; Greene & Loftus, in press); and that the size of juries (Saks, 1977) and the decision rules (unanimous versus non-unanimous, Hastie, Penrod, & Pennington, 1983) they employ affect their decisionmaking the attention given to shortcomings in courtroom decisionmaking after obscures the fact that the most important determinant of courtroom decisionmaking is evidence. We know of no social scientists who would contest the view that the nature and quality of trial evidence far outweighs the impact of all extra-legal factors combined. Of course, in most social scientific studies of courtroom decisionmaking the researcher attempts to control the strength and quality of evidence in order to determine the influence of non-evidentiary factors. Rarely is the strength, nature or quality of evidence explicitly examined by the researcher, although all researchers who conduct courtroom experiments know from the pre-testing of their case materials that minor changes in evidence (such as the presence or absence or corroborating non-testimonial evidence) can dramatically influence the likelihood that jurors will convict or acquit. Thus, most social psychological research examines the influence of "marginal" courtroom factors rather than the variable with the greatest courtroom impact. We believe the attorney's first priority should be the unearthing of all relevant evidence and only then should consideration be given to when and how that evidence will be presented at trial. As a consequence we have deliberately constructed our presentation to emphasize the ways in which science research can be used to increase the impact of evidence and minimize the impact of extraneous extra-legal factors on legal decisionmaking. There simply is no substitute for solid evidence and we would not want this volume to divert the trial attorney's attention from the importance of a thorough and aggressive pre-trial search for relevant evidence.

In the vast majority of cases we believe that the available evidence will point compellingly in the direction of guilt or innocence--the fact that nine in ten cases are plea bargained in most jurisdictions is partially a reflection of the fact that defendants are frequently confronted with incontrovertable evidence. There are indication the jurors in a large proportion of the cases that do reach trial find the evidence rather compelling (e.g., Kalven & Zeisel, 1966, found that jurors were evenly split—6 votes for conviction and 6 votes for acquittal—in only 10 of 225 cases that they studied, and that overall, only about 6% of juries using unanimous decision rules fail to reach a verdict).

Of course, one of the reasons cases go to trial is that the defense and prosecution, when they assess all the available evidence, disagree on the question of how jurors will respond to the evidence. As a practical matter, we believe that the suggestions made in this volume must be viewed in light of the evidence that would be

presented at trial. It is in close cases, where evidence is relatively balanced or ambiguous, that the suggestions made in this volume are likely to be of most value. We think it is particularly revealing that none of the major trial advocacy handbooks have chosen to title or even subtitle their works with the term "the science of advocacy." The absence of this term is apt, for until recently there has been very little scientific investigation of courtroom processes and it would therefore have been impossible to write a volume that pretended to concern itself with the science of advocacy. Although scientific research on advocacy is relatively new and the future will unquestionably see a growing volume of higher quality research, there is now enough research to begin outlining a science of advocacy.

What do we mean by scientific advocacy? Perhaps the best way to explain the point is to contrast the contents of this volume with the contents of traditional trial handbooks. With few exceptions, traditional handbooks are written by trial attorneys who have developed trial "expertise" in the course of a (generally) long litigation career. It is usually thought that this extensive trial experience equips the author to do two things. First, the authors' experience equips them to make judgments about the kinds of legal knowledge and skills that an effective advocate must possess. Thus, the emphasis in handbooks on evidentiary and procedural matters reflects the experienced advocate's belief that the success of a trial attorney turns in some measure on the attorney's knowledge of the rules of evidence and the rules of procedure and a sense of how a trial is organized and conducted. An experienced trial attorney typically learns about his or her strengths and shortcomings as a result of concrete feedback on their performance. It is particularly easy to learn about shortcomings in one's knowledge of procedure or evidence, because trial judges and opposing counsel remain ever ready to identify those shortcomings. The experienced trial attorney learns not only from the study of rules but also from embarrassing and sometimes damaging courtroom errors. Feedback on these errors (e.g., in the form of adverse rulings on motions, objections, procedural and evidentiary matters) provides a very sound basis for formulating advice about methods of trial advocacy. We have no quarrel with the authors on these points. However, when it comes to the second kind of "expertise" possessed by experienced trial attorneys, we balk. When the author of a handbook offers advice that cannot be authoritatively tested in the courtroom, then they enter the realm of speculation. What we mean by this is that whenever handbooks make suggestions about courtroom strategies--such as suggestions about what types of jurors to select for particular types of trials--the attorney is almost inevitably making inferences from courtroom experience and supplementing those inferences with courtroom folklore. Of course, it makes excellent sense that experienced and successful trial attorneys should be the source of suggestions concerning courtroom tactics when it is clear that there are ways of accomplishing goals that are legally correct (e.g., appropriate methods for laying a foundation for questions on direct examination) or when everyone agrees that one form of behavior (e.g., speaking clearly) is more effective than another form (mumbling inaudibly). However, experienced trial attorneys are not necessarily the best judges of what works in the courtroom and what does not. One problem that they confront when evaluating their own and their opponent's courtroom performance is that it may be virtually impossible for them to step back from a particular trial and arrive at an objective evaluation of the courtroom performances. While it may be obvious to them that greater preparation, better knowledge of the rules of evidence and procedure, better evidence and better witnesses make it easier to win a case; the trial attorney, no matter how experienced he or she may be, simply cannot systematically evaluate all the strategic decisions that they make in the course of litigation.

For a variety of reasons, it is extremely difficult for attorneys to evaluate such information in a systematic manner. The individual attorney may have idiosyncratic characteristics, may try cases in a particular way (for example, choosing to litigate cases that other attorneys may not) and most importantly, trial attorneys receive very little in the way of systematic feedback about their courtroom

performances. Yes, they learn whether they have won or lost the case depending on how the jury votes at the conclusion of the trial, and they may exchange views with the other attorneys in the case and even receive criticisms and suggestions from the trial judge, but this still does not provide even the most experienced of attorneys with the detached perspective that may be necessary in order to determine what works in a courtroom. This problem is further compounded by the fact that most litigators tend to go with what they think works and they do not undertake systematic evaluations of tactics and strategies that they regard as inferior to the ones they have opted for. What this means is that these attorneys do not have an opportunity to test these alternative tactics and strategies.

One consequence of the inability of experienced trial attorneys to systematically test and evaluate very different courtroom methods is that suggested courtroom tactics sometimes end up being little more than anecdotal accounts of what the author of the handbook personally believes to be effective in the courtroom. Because the recommendations are based on anecdotal experiences rather than systematic observations one often finds that different handbooks make different recommendations for precisely the same problem. We have not attempted to resolve these inconsistencies--except where research clearly indicates that one strategy is to be preferred to another--but instead we have attempted to develop general principles of advocacy based on social science research that can be used to guide decisions about a wide range of problems.

One concrete example may serve to illustrate our point. The trial attorney is rarely in a position to say with authority that he or she won or lost a case because he or she selected a particular "type" or juror and is probably never in a position to recommend to another attorney that the second attorney will benefit or be harmed by the selection of that type of juror in a different case. Virtually all social scientists--and, we would like to believe, most trial attorneys--understand that generalizing from single instances is a most dangerous proposition. Although we do not propose to turn this introduction into a discussion of philosophy of science or social science research methodology, we would like to emphasize that the suggestions made in this volume are based on what we believe to be sound scientific research conducted by competent researchers using methods that allow us to generalize. The studies upon which our recommendations are based use well-controlled, experimental techniques, large numbers of subjects and systematic collection of data and therefore provide a sounder basis for generalization than do unsystematic collections of anecdotal experiences.

At the same time, we offer our generalizations cautiously, for we are well aware that today's limited body of scientific research on the courtroom will expand rapidly in the next decade and our conclusions will be qualified and modified substantially. For the present we are content to say that where questions arise about the use and presentation of trial evidence or the selection of trial strategies and scientific findings conflict with the intuitions of trial practitioners, we believe that existing scientific research findings are to be preferred to the less scientific and often conflicting recommendations found in traditional trial handbooks.

In each section of this report, we have drawn very heavily upon the research of psychologists in an effort to arrive at general principles. In some areas the existing social science research has been addressed to specific types of courtroom tactics. For instance, there is research on the impact that differing orders of presentation of evidence will have on jurors, on the presentation of victims in the courtroom, on the effects of pretrial publicity, the failure of a defendant to testify on his own behalf, on the effects of limiting and curitive instructions, on the impact of eyewitness testimony and on juror comprehension of legal concepts. In other domains the social science research has only occasionally addressed issues specific to courtroom settings, but because of the nature of the research there are often clearcut

courtroom implications. For instance, there is a large body of research on the factors that affect eyewitness reliability--this research can clearly be useful in discrediting or rehabilitating an eyewitness. Similarly, there is a very large body of research on factors that affect the persuasiveness of communications--this research underscores the influence of the communicator, the message, and the audience--and in the courtroom each of these have quite clear analogues. Likewise, there is a large body of research on nonverbal communication. Although this research has generally not been conducted in courtroom settings, it can nonetheless provide useful guidance on how an attorney ought to conduct him or herself in the courtroom in order to maximize persuasiveness and trustworthiness, and on how to prepare witnesses so that they present their testimony in a credible manner.

In presenting the conclusions that we have drawn from the scientific research, we have generally chosen not to go into detail about the underlying research. Our intent is not to produce a review of scientific literature that would be of interest (and could perhaps be read) only by psychologists. For the benefit of the reader who would like to know more about the research foundations for our recommendations we have endeavored to provide fairly extensive bibliographies--particularly calling attention to review articles written by and for psychologists.

However, a few words about the nature of the research may serve to establish a context for out recommendations and may also help the reader to personally assess the relevance and limits of the recommendations to his or her practice. The vast bulk of the research that we have drawn upon is experimental laboratory research. This means that in most instances the subjects of these studies have been college students rather than jurors, the subjects have typically been confronted with a problem or task other than "juror decisionmaking," the studies have taken place in psychology laboratories rather than courtroom, the researchers have carefully controlled (experimentally manipulated) the types of information, or procedures, or situations confronting the subjects in order to assess the impact of different types of information, procedures and situations.

Generalizing from such studies to the courtroom is obviously a perilous task. Our strategy has been to proceed cautiously and to offer recommendations only when the recommendations are clearly supported by a sizable number of research studies. In some instances we have also developed recommendations based on a smaller number of studies, but only when the findings have been internally consistent and make sense in light of existing psychological theories.

What is effective trial advocacy?

Just a decade ago Chief Justice Warren Burger publicly criticized the level of training of trial advocates. He called for better training of litigators and also suggested the need for some sort of certification program. In the wake of his criticisms a number of major studies were undertaken in order to assess the quality of the training trial lawyers were receiving. These studies examined law schools (the so-called Cramton report, 1979), continuing legal education programs (an ALI-ABA study, 1979), and trial attorney effectiveness (the Devitt committee, 1979). More recently new life (or at least new controversy) has been breathed into law school clinical programs as a result of Harvard's Michelman report which recommended an expanded role for clinical courses in the Harvard Law School curriculum. The debate over clinical programs in law schools reflects a concern with the quality of preparation given to law students who, after graduation, find themselves in settings--such as litigation--which require practical skills not found in traditional law school courses. There is clearly debate within the law schools about whether or not clinical programs possess the kind of scholarly and academic characteristics that make such courses appropriate for law school settings that the quality of practical skills possessed by law students upon graduation can be improved upon. Recent studies

by the American Bar Foundation (Maddi, 1978, 1981) clearly underscore some of the skill deficiencies in trial lawyers.

What are these deficiencies? In the Devitt committee's survey of federal judges over 41% of the responding judges indicated that there was a serious problem of inadequate trial advocacy. The performance of nearly 2000 lawyers were rated by the federal trial judges and nearly 9% of these attorneys were rated as "very poor," "poor," or "not quite adequate." And another 16.8% were rated as "adequate but no better." The Devitt committee highlighted three aspects of trial competence: (1) A proficiency in the management and planning of litigation (especially the development of strategies of conducting cases and having the ability to recognize and react to critical issues when they arose during the course of litigation); (2) Competence in the examination of witnesses (including both direct and cross-examination and the use of objections); and (3) General knowledge of the Federal Rules of Evidence and Procedure. The Maddi (1978) study was based on responses from over 1400 judges located in every state in the U.S. and the District of Columbia. When these trial judges were asked to rate the competence of the attorneys appearing before them in their five most recent trials, they indicated that an average of 11% were partially incompetent and 2% were predominantly incompetent. What contributed to this incompetence? Maddi classified the criticisms into six major categories. The first category was preparation--that is, organizational skills, knowledge of the case facts, knowledge of the case law, and knowledge of sentencing alternatives--it constituted 27% of all the factors that were mentioned and 85% of the trial judges indicated that preparation was a crucial component to trial competence. Experience and training--experience, and knowledge of law and rules--was the second major category (23% of all factors and mentioned by 70% of the judges). The third most frequently mentioned category was presentation skills--argumentation, brevity, communication in all skills, general courtroom abilities and client control--these factors constituted 21% of all the factors mentioned and were noted by 65% of the responding judges. The fourth major category was personal skills--including diligence, etiquette, ethics, personality, appearance, and punctuality--these constituted 18% of all the factors identified and were mentioned by 57% of the judges. The fifth major category was intellectual ability--this included analytic ability, the ability to identify real issues, intelligence, writing skills, and objectivity--constituting 9% of all the factors mentioned and identified by 36% of the trial judges. Finally, there was a miscellaneous category which included 2% of all the factors mentioned.

The trial judges were also asked to estimate the percentage of trial attorneys who were incompetent on 13 different aspects of trial performance. Over 30% of trial attorneys were judged deficient in their awareness of professional ethics, over 40% were judged deficient in courtroom etiquette, ability to argue before a jury, ability to handle and present documents, ability to present expert testimony and use of technical or expert services; an average of over 50% of trial attorneys were rated as having inadequate ability to frame objections properly, to perform adequate analysis of issues, to conduct proper cross-examinations, or to show adequate knowledge of the rules of evidence, substantive law or procedure. Most tellingly, an average of 69% of trial attorneys were rated as displaying inadequate preparation.

To complement the evaluations of trial judges, Maddi (1981) interviewed 100 trial attorneys from Cook County, Illinois. When they asked what made a lawyer competent, 54 of these attorneys indicated preparation, 27 mentioned experience and 28 mentioned work. Twenty-six of the respondents mentioned knowledge, either of the facts of the case, substantive law, rules of evidence, or rules of procedure. Smaller numbers of attorneys mentioned other factors: personal characteristics, appearance, sincerity and credibility, jury appeal, interpersonal skills, verbal ability and persuasiveness, confidence, diligence and organization.

The picture that emerges from these judge and attorney ratings of competence is

one that emphasizes pre-trial preparation and fundamental knowledge of the rules of procedure, evidence and substantive law. This volume probably is not appropriate for an attorney who is lacking in these qualities. Social scientists can be of little assistance in educating trial attorneys about the law and there is little that we, as social scientists, can do to reduce the problem of inadequate preparation--other than to encourage attorneys to develop work habits that will assure that they go into court with an adequate knowledge of their case and have undertaken adequate pretrial preparation of the arguments, evidence, and witnesses they intend to present at the trial. However, if an attorney is adequately prepared in these fundamental skills, then we believe that this volume may substantially assist the attorney in polishing the other kinds of skills that have been identified by judges and lawyers. Research by psychologists into processes of persuasion, argumentation, organization of arguments, interviewing and examination, and interpersonal skills can provide practical assistance to trial attorneys. Furthermore, specialized social science research on courtroom phenomena such as jury selection, cross-examination techniques, the exercising of objections, the organization of opening statements and closing arguments, and on juror comprehension of legal instructions can find direct application in the courtroom.

What is contained in this report?

The materials contained in this volume take several different forms: the vast bulk of the material is in the form of general recommendations about courtroom methods and strategies. These recommendations are based upon what we believe to be a critical reading of basic social science research--particularly social psychological research on fundamental social processes which occur both within and outside courtroom settings. For instance, we have attempted to distill a large volume of social psychological research on attitude change and persuasion into a set of readily used guidelines on how to organize and present opening statements, closing arguments and witnesses and evidence. Similarly, we have attempted to distill the many studies on nonverbal communication into a set of practical suggestions on how to manage one's own nonverbal communication and the nonverbal communication of the witnesses that one prepares for courtroom presentation. The emphasis is on avoiding nonverbal behaviors that detract from or undermine presentations and developing nonverbal behaviors which will serve to underscore the credibility and authority of the attorney and the attorney's witnesses. These are only two examples of the types of social science literature that we have drawn upon in order to frame general recommendations. For the most part research on persuasion and nonverbal behavior has not focused on courtroom settings and the careful social scientist is always concerned about the problems of generalizing research findings from one setting to another. As noted before, we have exercised substantial caution in making these generalizations--and indeed some social scientists might be prepared to make far more specific recommendations about persuasive or nonverbal techniques than those contained in this volume. By exercising caution in making generalizations we believe that we have identified a set of very basic methods that are sufficiently robust that they will aid the attorney who employs them in the courtroom.

A second type of material that we cover in this volume is social science research that has specifically addressed issues that arise in courtroom settings. For instance, there is a growing body of psychological and sociological research relevant to the problems of jury selection. Some of this research has addressed the question of whether or not there are individual differences among jurors that are systematically related to jury decision- making. One can cull from traditional textbooks a vast mythology concerning the types of jurors that are deemed appropriate for particular kinds of cases. We use the social science research to directly address the question of whether or not such jury selection strategies make sense. Other research has been directed to issues such as the impact of pretrial publicity on juror decision making, the effectiveness of curative or limiting instructions given to

jurors when evidence is presented only for a limited purpose or testimony or evidence has been ruled inadmissible. There is research on other topics as diverse as the use language in the courtroom, the effects of physical appearance, the use and abuse of objections, and on juror comprehension of instructions. In these and many others instances we have attempted to devise practical guidelines for courtroom use based upon these research findings.

A third type of material included in the volume is more limited than the first two types, m may nonetheless be useful to trial attorneys. This third category of information concerns the use of social scientists to aid the attorney in achieving courtroom objectives. Thus, we briefly discuss the role of social scientists in the collection of data that may be necessary for change of venue motions, jury selection, or the systematic pretrying or pretesting of cases using jury simulation techniques, and their role as expert witnesses on issues of eyewitness reliability. The discussion of the use of social scientists and social science methodology has been restricted to emphasize generic problems that arise in the courtroom. Social scientists do serve as consultants on a variety of litigation problems such as equal opportunity, patent and copyright, desegregation, insanity defense and civil commitment proceedings, but we have concentrated on situations and problems that most commonly occur in criminal cases.

Experimental psychology is now a century old, and although some of the earliest research on basic memory processes has some relevance to trial practice, and some of the earliest forensic experiments date to the turn of the century, the vast bulk of experimental research which directly focuses on courtroom processes has been conducted in the past decade. The science of advocacy is literally in its nascent stages.

Although there are now vast bodies of social psychological research on processes such as persuasion and attitude change, nonverbal behavior, human memory and eyewitness reliability, and on interpersonal behavior, only a small portion of that research has been undertaken with the intention of applying the findings to courtroom settings despite the fact that traditional trial advocacy handbooks represent gold mines of research hypotheses which could be addressed by social scientists who do wish to develop a true science of advocacy. This volume represents only a first step towards the development of a science of advocacy. Our recommendations are necessarily somewhat tentative and somewhat general. But, our presentation does have one major objective that can be stated quite explicitly and may, in the long run, be more useful to the average practicing attorney than any of the concrete advice contained in this volume. More than anything else what we would like to do is to cultivate an attitude or perspective on the part of trial attorneys that would encourage them to reflect on and evaluate everything they do in the courtroom. It may fairly be said that everything that happens in the courtroom could be done in a different way. No matter what the trial attorney is doing, there are alternatives and some of those alternatives may make the attorney far more effective as an advocate. We would like to encourage the trial attorney to scrutinize his or her own courtroom behavior and to ask him or herself: "Is there a better way?" Often here will be no clear answer to that question and different attorneys may have different opinions about the alternatives. However, the volume, breadth and quality of research on advocacy increases every year and the number of authoritative answers to the questions of what works in the courtroom also increases. This volume does not represent the state of the art of advocacy, but rather the state of the science of advocacy.

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II. Bargaining and Negotiation

In light of the fact that 85-90% of all cases are plea bargained in most jurisdictions, it seem ill-advised not to consider pre-trial negotiations an integral part of advocacy and the trial process. Fortunately, bargaining and negotiating have received substantial attention from social psychologists over the past quarter century and the resulting research findings have a number of clear implications for attorneys who regularly find themselves plea bargaining (and negotiating in other circumstances as well).

What is "effective" negotiation?

In order to suggest an appropriate negotiating strategy, it is important to determine what is meant by "effectiveness" in negotiations. The suggestions offered in this section will be premised on the assumption that the most effective negotiations for trial attorneys are those in which an agreement is reached that is satisfactory to both attorneys and their clients. Effective bargaining results in the parties to both sides of the dispute being satisfied with the outcome and feeling that they have gained as a result of the negotiations. Furthermore, each attorney ideally should be satisfied not only with his or her own performance but also satisfied with the performance of his or her negotiating partner. This definition is similar to Deutsch's (1973) definition of constructive conflict. Bargaining is, after all, a conflict situation in that the two attorneys have opposing preferences or goals regarding the outcome. By choosing to plea bargain, each attorney has acknowledged the possibility of a settlement which is more satisfactory for both parties than is going to trial. Through a series of offers and counteroffers, the attorneys attempt to find an acceptable resolution to the conflict.

Should I bargain cooperatively or competitively?

The ABA Code of Professional Responsibility instructs its members that is their ethical duty to "represent a client zealously within the bounds of the law" (Canon 7). Zealous representation is clearly the norm as attorneys present their arguments and examine witnesses at trial. However, Williams et al. (1976) suggest that there are normative pressures for negotiating which can be distinguished from those for litigation. The normative pressures for negotiators emphasize good faith bargaining, accurate representation of a client's position, trust, candor, confidentiality and flexibility. The normative pressures then, seem to be for a cooperative approach to negotiations.

In keeping with our notion that the most effective negotiations are those in which both parties are satisfied with the outcome, the research evidence is strongly supportive of a cooperative approach to bargaining.

Morton Deutsch (1949), in a classic study of the effects of cooperation versus competition, presented two groups of students with a problem solving task. One of the groups was instructed to approach the task competitively, striving to defeat their opponents by the greatest possible margin. The other group was instructed to approach the task cooperatively, with a concern for their opponent's outcomes as well as their own. The results of the study provided strong support for the effectiveness of cooperation. Compared to competitive groups, the cooperators had more effective intermember communication, more friendliness, more helpfulness, less obstructiveness, more satisfaction with their own outcomes, more satisfaction with the other group members, a greater desire to win the respect of the other group members, a greater orientation toward task achievement, more orderly discussions, greater productivity, and a greater feeling of similarity and agreement with each other's ideas.

Although Deutsch's subjects were presented with a problem solving task rather

than a strict bargaining problem, a substantial body of research suggests that the most effective approach to negotiations is to view the conflict as a problem solving task, rather than as a distributive exercise. Walton and McKersie (1965), for example, have described two approaches to negotiations, integrative and distributive. The integrative approach is one in which the conflicting parties search for a creative solution to the bargaining problem--one which provides the greatest mutual satisfaction to both parties. The distributive approach, rather, is one in which the parties restrict themselves to a solution arrived at by splitting the difference between their opposing preferences. A distributive approach is more competitive in nature since each party tends to conceive of any gain for an opponent as a loss for oneself. The differences between integrative and distributive bargaining will be discussed in more detail below.

Since Deutsch's (1949) seminal research, numerous other studies have examined the effects of cooperation versus competition in actual bargaining situations. A review of this research by Rubin and Brown (1975) uncovered fifty-one such studies, forty-four of which provided partial or complete support for their proposition that a cooperative approach to bargaining is more effective than a competitive approach.

Based upon the results of the research discussed so far, a first principle is the following: (1) Negotiations are likely to be the most effective if the conflicting parties approach the negotiations cooperatively rather than competitively, that is, with a concern for their opponent's outcomes as well as their own. How can I elicit cooperative behavior from my bargaining opponent?

Although numerous manuals for successful negotiating advocate such cooperative attributes as honesty (Baer & Broder, 1973; Hermann, 1965) or cooperation (Cohen, 1982; Nurenberg, 1973), we have not seen any suggestions about methods for eliciting similar behaviors from one's opponent. Obviously, unconditional cooperation in the face of a combative, exploitative opponent is unlikely to be an effective bargaining strategy. Numerous researchers have proposed that negotiators gauge the strength or weakness of their opponent from his or her bargaining behavior (Chertkoff & Esser, 1976; Lawler & MacMurray, 1980). Unconditionally cooperative behavior by a bargainer might be perceived by the opponent as an indication of weakness and therefore as encouraging an exploitive response (Kormorita & Esser, 1975).

Two areas of research are informative regarding the establishing of mutual cooperation. Both of them stress the importance of effective communications for cooperative interactions.

First of all, Deutsch (1958, 1973) has proposed that trust is essential to cooperation. Each party must trust that any conciliatory initiatives on their part will be met with cooperation from their opponent. If such trust does not exist then the negotiators will bargain competitively in order to defend against exploitation. Deutsch (1958) suggested that the effective use of communication can work to increase trust and thereby increase the level of cooperation between the negotiators. The most effective communications for increasing the level of trust in a bargaining relationship are those that include the following four components: (1) the negotiator's clearly stated intention to cooperate; (2) the clearly stated expectation that any cooperative initiatives will be met with cooperation from the opponent; (3) the negotiator's clearly stated intention to impose sanctions on the opponent for any failure on his part to cooperate; (4) the negotiator's clearly stated intention to return to cooperation once any sanctions have been imposed and equity has been restored (Deutsch, 1958, 1973). Research by Loomis (1959) has supported Deutsch's hypotheses.

Second, Charles Osgood (1959, 1962, 1966) has proposed a strategy for reducing tensions and restoring trust in a bargaining relationship. According to Osgood's GRIT

(graduated reciprocation in tension reduction) strategy, one party can initiate tension reduction by making a unilateral concession accompanied by an invitation to the opponent to reciprocate. If the first conciliatory initiative is not reciprocated, the initiator should continue to perform conciliatory gestures, each time inviting reciprocation from the opponent, until the opponent does reciprocate. When the opponent does reciprocate the conciliatory gesture, as normative pressure would dictate he/she should (Gouldner, 1960), the initiator should increase the size of his/her next concession, in order that a cooperative spiral might develop, and tensions between the parties fade. Osgood (1962) points out that the initiating party should never concede so much as to limit his/her capacity to react to any attempts at exploitation from his/her opponent.

Both Osgood and Deutsch stress the importance of inviting cooperation from the opponent rather than trying to elicit concessions coercively. Any attempt to coerce concessions might be viewed as excessively demanding and could dispose the target to respond competitively in order to assert his independence (Brehm, 1966; Wicklund, 1974) or to resist any possibility of intimidation (Deutsch, 1960).

The suggestions of Deutsch and Osgood are quite consistent with one another and suggest the following principle: (2) Effective communication can enhance the trust that is essential for cooperative exchange. The most effective communications are those which include four components: (1) a clear statement of the intention to bargain cooperatively; (2) an invitation to the opponent to cooperate in return; (3) the stated intention to respond to any attempt at exploitation; and (4) the promise of a return to cooperation once such sanctions have been imposed, and equity restored.

Should I conceal information from my opponent in order to strengthen my bargaining position?

When negotiators approach the bargaining table, the situation is often an ambiguous one, and neither party is fully aware of the opponent's goals or the least satisfactory settlement which the opponent is prepared to accept. According to Walton and McKersie (1965), negotiators may take one of two approaches to exchange of information about settlement preferences: distributive or integrative. In distributive bargaining, each negotiator attempts to conceal as much information about their goals as possible, while he/she seeks to find his/her opponent's minimum settlement point. Walton & McKersie (1965) have described this process as follows:

> In negotiations, information is never complete. Even though both sides entertain compatible resistance points, this fact may not be known until agreement is actually reached. The tactics of distributive bargaining are designed to obscure, not to clarify, resistance points. If one side reveals his resistance point, this will probably induce the other side to press for at least this amount (p. 54).

Integrative negotiation occurs when the negotiators attempt to find a solution whereby both parties win, rather than either party attempting to defeat his opponent. In order to find the optimal solution, an integrative approach requires the negotiators to freely exchange information about their goals. Deutsch (1973) has argued that:

> The freedom to share information enables the parties to go beneath the manifest to the underlying issues involved in the conflict and, thereby, to facilitate the meaningful and accurate definition of the problems they are confronting together. It also enables each party to benefit from the knowledge possessed by the other and, thus, to face the joint problem with greater intellectual resources. In addition, open and honest communication reduces the likelihood of the development of misunderstandings which can

lead to confusions and mistrust (p. 165).

In a recent discussion of integrative bargaining, Pruitt & Lewis (1977) report a consistent positive correlation between the open exchange of possible solutions to the bargaining problem and the joint profit of the negotiators. Subjects in the research presented by Pruitt & Lewis (1977) were presented with disputes over several issues rather than just one. When there is more than one disputed issue, more integrative solutions become possible. For example, in the case of plea bargaining, Newman (1966) has identified a number of issues over which bargaining may take place. Such issues as the charge, the sentence, the recommendation of parole, and the evidence to be admitted might all be discussed. It may be that obtaining a conviction is of the utmost priority to the prosecuting attorney, while he is much less concerned over the length of the sentence. The defense attorney's priorities might be quite the opposite, so that the conviction is less important than is a lenient sentence. By clearly stating their priorities, the attorneys may arrive at a settlement which satisfies each attorney's main objectives.

While we have stressed cooperation in bargaining, there is some evidence that too much cooperation can be a hindrance to the development of integrative solutions.

Based upon the results of several studies, Pruitt and Lewis (1977) report that various strategies appear to assist the development of integrative solutions. Several of these can be suggested here as principles for more effective bargaining: (3) Negotiators should freely exchange information and generate proposals based on that information about their goals and desired outcomes. (4) If possible, two or more issues should be considered simultaneously rather than sequentially, in order that tradeoffs, or logrolling can be arranged more easily. Tradeoffs will be particularly appealing if the negotiators find issues on which their priorities are reversed, so that a concession of minor significance to one party is of major significance to the other. (5) The negotiators should stand firm on their original goals until all possible settlements have been considered. If a negotiator concedes too easily, the search for a more integrative option might be abandoned too early, and a more satisfactory potential settlement might not be discovered.

Where should the negotiations take place?

The advice from practitioners regarding the issue of location is consistent: When possible, the negotiations should be conducted on one's home turf (Coffin, 1973; Cohen, 1982). Although most of the research on the physical setting has not used bargaining paradigms, research from other areas indicates that the physical arrangements can play an important role in negotiations. A study by Martindale (1971) did use a bargaining paradigm, in which attorneys negotiated in the home of either the defense attorney or the prosecutor. Martindale found that the defense attorneys who negotiated at home obtained significantly shorter penalties than when the prosecutor had the home advantage.

Based upon the results of several studies, Rubin & Brown (1975) make the following suggestion:

> [T]he advantages gained from bargaining on one's own territory represent potential sources of strength that are likely to increase both the assertiveness of, and the outcomes obtained by, the site controller. In contrast, a bargainer who is a guest may come to view himself as occupying subordinate status and may thus be induced to behave less assertively or even deferentially toward his host (p. 83).

Based upon the indications of the research, and the suggestions offered by practitioners, we propose the following regarding the location of the bargaining: (6)

The negotiations should be conducted at a neutral site, in order to avoid the possibility of either side gaining an unfair advantage due to an artifact of the physical surroundings.

What role should my client play in the negotiations?

Whether the attorney is representing a criminal defendant, prosecuting on behalf of a crime victim, or representing a civil client, the attorney must remember that he or she is ultimately working to achieve satisfaction for the client--goals, for instance, ought to be formulated in the best (and probably realistic) interest of the client. What role should the defendant play in the negotiating process? This question of "constituency surveillance" is probably best considered in light of research relevant to discussion of plea bargaining reform. A common suggestion for reform is to include the judge or defendant in the negotiating process (Morris, 1974). One line of research suggests that such a reform might not be in the defendant's best interest. Negotiators become increasingly concerned with their appearance as tough or competent representatives when they are being observed by an audience (Brown, 1968, 1977). This concern with one's appearance has been shown to lead to more competitive bargaining than would otherwise occur--marked by more threats, greater positional commitments and reduced outcomes (Carnevale, Pruitt, & Britton, 1979). However, there is also research which is more supportive of increased defendant participation in the bargaining process. Thibaut and Walker (1975) have proposed that the procedure used to resolve a conflict can affect defendant satisfaction with the settlement independent of the outcomes obtained. Results of a study by LaTour (1978) revealed that subjects preferred those adjudication procedures which allowed them to choose their own attorneys. Research by Houlden (1981) showed that actual defendants preferred plea bargaining procedures which allowed their participation. Overall, research on disputant satisfaction with settlement procedures and outcomes obtained indicates that increased involvement in the procedure leads to increased satisfaction with the fairness of the procedure and the outcomes obtained. Thus, attorneys seem to be faced with a dilemma. Allowing client participation might increase the client's satisfaction with the procedure but can also decrease the attorney's effectiveness. How can this dilemma be resolved? First of all, it may not even be a very serious problem, since most of the research on constituent surveillance has used undergraduates as subjects rather than professional negotiators. Professionals might be more practiced at maintaining a flexible negotiating style in the presence of their clients. The individual attorney is probably the best judge of his/her ability to be flexible in the presence of a client. In those situations where a client's presence might make the attorney uncomfortable, the best strategy might be to keep the client well away from the bargaining table but well informed regarding any settlements. If the attorney can negotiate comfortably in the client's presence, the client may be more satisfied with the eventual settlement. On the basis of this evidence, we would formulate the following principle: (7) If the attorney can maintain a flexible negotiating style, there may be benefits--particularly to the client--in both keeping clients well informed about negotiations and in fostering client involvement.

How should I formulate my opening offer and subsequent concession strategies?

One of the most important salient tactical considerations for any negotiator, whether negotiating over the price of an automobile, the sentence to be served by the defendant, or the damages to be awarded in a civil suit, is that regarding the opening offer and subsequent concession strategy.

As we indicated earlier, practitioners generally stress good faith bargaining and cooperation tactics. However, most also advocate that a negotiator set his/her initial goals high and make subsequent concessions only when absolutely necessary.

Our review of the research literature on this topic leads us to a similar view

regarding effective strategic concession making in negotiations. While we have stressed cooperative bargaining, such an approach does not imply that bargainers should be willing to settle too quickly. Rather, concessions should be made only when it is clear that a more integrative option does not exist which would meet both bargainers' original goals.

Researchers have examined strategies ranging from extremely generous (i.e., making concessions larger than the opponent's, Wall, 1977; to extremely tough bargaining behavior, Siegal & Fouraker, 1960). More moderate concession strategies have been proposed, such as exactly reciprocating an opponent's concessions (Gouldner, 1960) or making the first offer a fair one and not making any subsequent concessions (Schelling, 1960).

One important consideration for any bargaining strategy is impression management. According to Bacharach and Lawler (1981), ". . . concessions are cues from which the opponent infers a party's aspirations, expectations, intentions, and the like. . . . concessions are clearly tactical behavior" (p. 82). Consistent with this view are studies indicating that a very generous concession strategy may foster the impression that a negotiator is weak and may invite exploitative behavior (Esser & Komorita, 1975). A very tough strategy can lead to attributions of unreasonableness or exploitativeness and may evoke a competitive reaction from the opponent (Esser & Komorita, 1975; Rubin & Brown, 1975).

Numerous researchers have suggested that a negotiator should attempt to foster the impression that he/she is negotiating in a tough, yet fair manner (Chertkoff & Esser, 1976; Esser & Komorita, 1975; Komorita & Esser, 1980; Lawler & MacMurray, 1980). A study by Lawler and MacMurray (1980) manipulated the toughness of a negotiator's opening offer and his subsequent concession strategy. They found that the most effective strategy was one in which the bargainer combined a tough initial stance with a matching or reciprocal concession strategy. According to these authors, such an approach was effective because it struck the appropriate balance between appearing too tough or too soft. Besides evoking the most concessions from the opponent, the tough-fair bargaining strategy also resulted in a 70% settlement rate between the negotiators, compared to an agreement rate of 20% for negotiators who combined a tough opening offer with a tough concession strategy.

The research on integrative bargaining suggests a similar strategy for maximizing the negotiators' joint gains. According to Rubin and Brown (1975), ". . . one of the potential pathologies of an otherwise beneficial, mutually cooperative relationship is the possibility that cooperators, in their concern with taking the role of the other, may develop and act upon incorrect expectations about the other's preferences and intentions, and the result may be mutually detrimental miscoordination" (pp. 271-272). Pruitt and Lewis (1977), based upon their own and others' research, suggest an approach which they call flexible rigidity. In studies which allowed for integrative outcomes, they found that bargainers were most likely to maximize their joint profit when they started out with high expectations, and remained relatively rigid with respect to those ends, while being more flexible regarding the means for attaining those ends.

Based upon the results of research regarding distributive tactics (in which the overriding concern is to elicit concessions from one's opponent) and integrative bargaining, we would propose that: (8) The most effective strategy for opening offers and concession making is to open the negotiations with a demanding offer and to remain firm regarding initial goals until all possible options for meeting those goals have been discussed. If none of these options are successful, then concessions should be offered only as necessary, until the most mutually satisfactory agreement is discovered. By starting high and conceding slowly yet reasonably, a negotiator can accomplish two major objectives: (a) he/she will appear strong and firm, yet

reasonable, so that the opponent will respect his/her needs; and (b) he/she will facilitate an approach which is most likely to discover any creative solutions which are available and are mutually beneficial to the negotiating parties. Are coercive tactics effective at eliciting concessions?

While a discussion of threats or coercive tactics is likely to raise the eyebrows of many attorneys, the implicit or explicit use of threats plays an important role in many bargaining sessions, and negotiators should be aware of their potentially beneficial or destructive consequences.

Defense attorneys can threaten to take a case to court if they feel that the prosecutor is unwilling to make a fair sentencing offer in return for a guilty plea from the defendant. Alschuler (1975) likens the power of defense attorneys to take cases to court to the power of unions to strike, and Greenberg (1982) suggests that the ultimate power of defendants and their attorneys lies in their potential to overburden prosecutors by taking every case to trial. Prosecutors can likewise threaten to prosecute on a more serious charge unless the defendant pleads guilty to a lesser charge. In Bordenkircher v. Hayes (1978) the prosecutor warned the defendant that unless he accepted the prosecutor's offer of a five year prison sentence in return for a guilty plea, he would probably face a life sentence under the State's "habitual criminal" statute. The defendant refused and was subsequently found guilty by a jury and sentenced to life in prison. The Supreme Court held that the prosecutor did not violate the Constitution in his efforts to induce a plea of guilty. In Brady v. U.S. (1970) the Supreme Court held that a prosecutor must not threaten prosecution on charges that are not justified by the evidence, but when justified by the evidence, threats are a salient tactical option for prosecutors as well as defense attorneys.

What are the likely consequences of using threats?

Early research examined the effects of providing one or both of the conflicting parties with the capacity to threaten their opponent with harmful consequences unless they complied with the threatener's demands. The results of this research led the authors to several conclusions: (a) if threat is available to either party in a conflict, it will be used; (b) the use of threat will initiate a threat-counterthreat aggressive sequence; (c) the effects of this increased aggressiveness will be to reduce the joint profits of the conflicting parties (Deutsch & Krauss, 1960). Subsequent research has cast some doubt on the validity of these early conclusions (Gallo, 1966; Kelley, 1965; McClintock & McNeel, 1966) and the more contemporary view is that threat can be an effective means of gaining compliance from one's opponent if the threat is both credible and believable to the target (Tedeschi & Bonoma, 1977; Tjosvold, 1974). However, this is not to say that coercion is an advisable means of compliance gaining, since such tactics always carry a sizable risk of retaliation and harmful consequences for both parties. Furthermore, any agreement which is reached coercively is unlikely to be satisfactory to either parties, and thereby unlikely to satisfy our definition of bargaining effectiveness. Thus, the first and most important suggestion regarding the use of threats is: (9) Threats should never be used until all possible attempts at cooperative solutions have been made and have proven unsuccessful.

While recognizing the risk of employing such tactics, the negotiator might still confront situations in which there is no clear alternative but to threaten the prosecution or the defense with alternatives more costly than reasonable bargaining. The problem becomes one of maintaining the credibility and believability of the threatened consequences, such as litigation or a more severe prison sentence.

In order to be effective, a threatener must appear credible. One easy way for a target of a threat to assess his opponent's credibility is to examine his opponent's track record. In other words, has the defense attorney demonstrated a willingness to

try cases in the past? Or has the prosecutor demonstrated a penchant for the successful prosecution of other defendants? Ultimately this translates into an attorney's willingness to enforce his/her threats when necessary. Thus, another consideration when making threats effective would be that: (10) Threats should not be made unless the threatener is fully prepared to follow through with the threatened consequences for noncompliance.

Apart from the objective credibility of the threatener, a related consideration is the threatened party's subjective perceptions of the believability of the threat. Believability is clearly influenced by the credibility of the source, and to the extent that a threatener is credible he is more likely to provoke compliance from the target (Bonoma & Tedeschi, 1973). However, the believability of a threat is also influenced by other factors.

Schelling (1956) suggests that threats are more believable if the threatener clearly establishes his commitment to carry out the threat unless the target complies. Schelling (1966) has also postulated that compellent threats, which specify the actions that the target must perform, will be perceived as more hostile, coercive and exploitative, and hence more believable than deterrent threats, which specify the actions that the target should not perform. These suggestions have received support in a study by Schlenker et al. (1970). Of course, the long range effects of being perceived as hostile yet believable would undoubtedly be to put a strain of any future attempts at cooperative bargaining. Since most attorneys are likely to be "repeat players" (Galanter, 1974), such long range costs lend further support to our suggestion that threats be used only as a last resort.

Other factors which have been shown to be positively related to the believability of a threat and therefore to compliance are the status (Faley & Tedeschi, 1971) and the expertise (Tedeschi et al., 1975) of the threatener; these factors, however, are not very easily controlled by the threatener.

Additionally, in order to be believable, a threatener must convince his opponent that he has the necessary evidence to back up any threatened action. Just as management is unlikely to believe that a poorly organized union can carry out its threat to strike, so is an attorney with all the facts on his/her side unlikely to believe that an adversary is prepared to go to trial.

On the basis of the reviewed research, another principle regarding threat effectiveness is: (11) Threats will be more believable and therefore more likely to produce compliance if they are stated in a compellant rather than a deterrent fashion, if they are backed with sufficient resources (i.e., evidence), and if they are issued from a source who is perceived to be high in status and expertise.

Finally, there is some evidence evidence that threats will be more effective if the threatener combines the threat of negative consequences for defiance with a promise of rewards or cooperation for compliance (Bonoma & Tedeschi, 1973). Therefore, the final suggestion we would offer is exactly that: (12) Threats are most likely to yield compliance if the threatener offers a promise of cooperation for compliance together with the threat of negative consequences for defiance.

What is the impact of time pressure on bargaining behavior?

In recent years, as court dockets become increasingly overburdened, one popular notion has been that plea bargaining is an escape mechanism for prosecuting attorneys who find themselves unable to keep up with mounting case pressure. While this notion has been called into question (Heumann, 1975), few practitioners would be likely to contest Coffin's (1973) advice that a negotiator should avoid hurrying through any phase of the negotiations.

The research evidence bearing on this topic is abundantly clear -- when either bargaining party is under pressure to settle quickly, the magnitude and frequency of that party's concessions are likely to increase significantly (Komorita & Barnes, 1969; Komorita & Brenner, 1968; Pruitt & Drews, 1969; Pruitt & Johnson, 1970; Yukl, 1974).

While we are not warning that concessions should not be made, we maintain our earlier stated position that negotiators should remain firm on their original demands until it is clear that there is no available means for satisfying them.

Rubin & Brown (1975), based upon their review of the research literature, suggest that as time pressures increase, aspirations and demands decrease. The point we wish to make is that demands should be lowered as a function of limited options rather than as a response to time pressure.

Time pressures might exert the greatest strain on a fair settlement when only one of the two negotiating parties is facing a deadline. A study by Komorita and Barnes (1969) is suggestive of the potential consequences of unevenly distributed time pressures. In that study, a tough bargaining strategy produced larger concessions than a more generous strategy only when the recipient was under pressures to settle. In light of this evidence, a final suggestion we would offer is: (13) Negotiations should be initiated well in advance of any impending deadlines (i.e., trial date) to assure there is sufficient time for both attorneys to search for a satisfactory settlement option. By starting early, each attorney may be confident that concessions will be offered in the spirit of cooperation rather than expediency.

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III. Juries and Jury Selection

If plea bargaining has failed to produce a satisfactory agreement for a criminal defendant, then one of the first things that has to be considered before going to trial is the problem of jury selection. Most attorneys in most cases--whether prosecutor or defense attorney--give little consideration to the jury until the jury selection for the trial actually begins. This may be a serious mistake, for under some circumstances careful planning for jury selection may make a difference at trial. Indeed, in some cases it may be desirable to begin thinking about the jury well before the trial would begin--particularly in cases where the defense attorney wishes to raise a challenge to the composition of the jury pool or desires a change of venue.

Should I challenge the composition of a jury pool?

Most jurisdictions in most states have made significant progress in the direction of establishing jury pools that meet constitutional standards. Nonetheless there are jurisdictions in which the methods of composing juries may still be challenged. One of the best resources to aid in making the judgment whether a jury pool can be challenged is a volume edited by Bonora and Krauss (1979) entitled Jury work: Systematic techniques. Although this Bonora and Krauss volume is not intended to discuss legal matters per se, because social scientists are often involved in challenges to jury pool composition it may be useful to note (principle number 1) that successful challenges often seek to demonstrate (a) that the source list from which the jury pool is drawn does not represent a representative cross section of the community, (b) the method of selecting jurors clearly does not produce a cross-sectional representation of the community, and (c) the procedures do not comply with statutory mandates governing jury selection in the local jurisdiction. For example, if jury officials are giving unauthorized excuses from service or failing to follow procedures designed to assure random selection, then the jury selection system is vulnerable to challenge.

A second major basis for challenging the composition of a jury pool is a demonstration that the selection system discriminates against a "cognizable class" such as race and ancestry, lower socioeconomic status, religious affiliation and gender.

Demonstrations of defective procedures or discrimination in a jury system will likely require statistical evidence and demonstrations. This is one of those instances in which a social scientist (such as a social psychologist, sociologist, or demographer) may be of substantial assistance to the attorney. A social scientist may conduct the necessary statistical analyses of the community and the jury pool and may testify as an expert witness to explain their results. The first step should be to locate an appropriate social scientist at a local university.

Should I seek a change of venue?

Continuing debates over the extent to which the media ought to cover criminal cases prior to trial has prompted several social scientists to investigate the possibility that juror verdicts will be affected by the pretrial publicity to which they are exposed. Although the number and quality of these studies leave much to be desired, a cautious reading of their results suggests there may be some reason for concern about the impact of pretrial publicity and the ability of the courts to remedy these impacts through curative instructions. Studying the impact of pretrial publicity is rather difficult and even the best existing studies have not looked at the effects of such publicity in actual cases. For example, while Simon & Eimermann (1971) found that jury-eligible voters were relatively informed about a highly publicized murder trial (three-quarters of those surveyed were about to supply details about the case) and that better informed respondents were more inclined to believe the

defendant was guilty, informed jurors still thought they could judge the case fairly. Unfortunately, it was impossible to determine when informed and uninformed jurors would judge the case differently. Various other studies of actual cases have reported similar links between pre-trial knowledge and pro-prosecution leanings (McConahay et al., 1977; Constantini & King, 1981; Vidmar & Judson, 1981; Neitzel & Dillehay, 1983), but none of these studies have demonstrated that pre-knowledge has actually affected juror verdicts.

The only reliable way to determine whether pre-knowledge would affect verdicts is through experimental techniques and several researchers have used trial simulation methods to address the question. A few researchers have shown that negative pretrial information about such factors as confessions (Hans & Chaffee, 1966) and prior convictions (Huistendahl, 1979) can produce pretrial biases against a defendant. Whether these biases affect jury verdicts is another question. Simon (1968) found that pre-trial information did not affect jury verdicts in her simulation study. On the other hand, Sue, Smith & Gilbert (1974), Kline & Jess (1966), Sue, Smith, & Pedroza (1975), Padawer-Singer & Barton (1975) and Padawer-Singer et al. (1975) all found that pre-trial information affected simulated jury verdicts despite judicial admonitions to jurors cautioning them not to consider the pre-trial information when arriving at a verdict.

Efforts to test whether voir dire might reduce these effects have indicated that voir dire is ineffective (Sue et al., 1975; Padawer-Singer et al., 1974). Similarly, deliberation does appear to have a curative effect (Kline & Jess, 1966; Zanzola, 1977).

In sum, a cautious reading of the research findings (1) suggests reasons for concern about the negative effects of pre-trial publicity and (2) raises concern about the likelihood that traditional trial methods such as voir dire, judicial instructions and deliberations can offset the negative effects. The conservative recommendation must thus be to (3) give serious consideration to a change of venue whenever substantial pre-trial publicity has portrayed a defendant in a negative light. Most commonly the studies use simulated jury trials with students or adults playing the role of jurors. Some of these jurors receive information about the case they will decide prior to watching or reading the trial. Several of these studies demonstrate that exposure to pretrial information does affect jurors' expectations about guiltiness (e.g., Padawer-Singer & Barton, 1975; Simon, 1968; Zanzola, 1977). While those studies do not provide clear evidence that pretrial exposure affects verdicts after deliberation, other studies (e.g., Hoiberg & Stires, 1973; Sue, Smith & Gilbert, 1974) do suggest the possibility that the pretrial bias will persist even through deliberations. In any event there may be circumstances where the pretrial publicity has been so adverse to a defendant that it is deemed desirable to obtain a change of venue. This is another instance in which a social scientist can be of substantial assistance to the trial attorney. Bonora and Krauss (1979), Hans and Vidmar (1982) and note that several forms of evidence may be presented to the trial court in order to establish the basis for a change of venue. Among the most common forms of evidence are public opinion surveys which establish the general level of community familiarity with a case. Researchers recommend that surveys actually cover two or more jurisdictions: the first jurisdiction would be the one in which the case is to be trial and in which there is concern about pretrial publicity. A second jurisdiction can be selected to: (a) demonstrate lower levels of knowledge and prejudgment of the case and (b) establish an alternative jurisdiction to which the trial might be moved or from which jurors might be "imported."

The second form of evidence consists of systematic analyses of the content of the pretrial publicity designed to establish what kinds of references to or characterizations of the defendant and the crime have appeared in the media. Finally, evidence may be offered in the form of interviews or testimony from members of the

community who might be called upon to report the impressions that they have formed about the defendant and the case. Social scientists can be helpful in collecting this systematic data that is needed for surveys and content analyses.

What size jury should I prefer?

One of the first problems that an attorney may confront is the question of how many jurors will try the case. In a number of jurisdictions there may be a possibility of choosing between juries with six, nine or twelve members. There has been a substantial amount of litigation around the question of jury size and jury decision rules (Ballew v. Georgia 435 U.S. 223, 1978 and Birch v. Louisiana, 99 S.Ct. 1623, 1979) and to some extent the arguments about appropriate jury sizes and decision rules have turned on social science research.

A number of studies have examined the impact of jury size on jury decisionmaking. A variety of methods have been employed. For example, when Bermant and Coppock (1973) compared a total of 128 six and twelve-member juries deciding Workman's Compensation cases in Washington state, they found no differences in verdicts (indeed, virtually all the existing research indicated that variations in jury size are not associated with differences in verdicts). However, critics noted that attorneys were allowed to select the size of their juries and this fact may have affected the results. Indeed a New Jersey study (Institute of Judicial Administration, 1972) demonstrated that attorneys did prefer six-member juries for certain types of cases (i.e., smaller and less complex cases such as automobile negligence as opposed to malpractice) and these preferences might explain why six-member juries reached verdicts more rapidly, with more unanimous decisions and smaller awards.

A Michigan study by Mills (1973) avoided attorney-choice problems and found no definitive differences between six and twelve-member juries. And, while a study in New England (Beiser & Varrin, 1975) avoided attorney choice problems, other research deficiencies make it difficult to determine whether the (1) shorter deliberation times, (2) tendency to find for defendants, and (3) smaller damage awards associated with smaller juries are "real" effects.

Experimental laboratory studies using simulated juries which do not decide actual cases have pointed to some differences between large and small juries. Friedman and Shaver (1975) found that six-member juries completed deliberation more rapidly than twelve-member juries--a result confirmed by Padawer-Singer, Singer, and Singer (1977) and Valenti and Downing (1975). In a very well done study Saks (1975) also found that small juries generated less discussion during deliberation recalled less of the trial evidence and also reflected less diversity of viewpoints when compared to larger juries. In addition, Padawer-Singer et al. (1977) found that smaller juries were less likely to deadlock as did Valenti and Downing (1975). This is the only "outcome" difference that has emerged from this research on jury size. Finally, there is some evidence (Roper, 1980) that jurors in a minority position are more likely to prevail over an opposing majority in a six-member jury (a result that is consistent with a large body of small group research--Tanford & Penrod, in press). It is also clear that with the smaller jury it is less likely that the jury will represent a cross-section of the community that the jury is drawn from. To the extent that it is desirable to have a diversity of experiences, expertise, values and even prejudices on the jury, a 12 member jury is to be preferred. Furthermore, if it appears that there may be minority viewpoints (with minority used in the broadest sense of the term) that need to be expressed on the jury, a 12 member jury is also to be preferred, and to the extent that it is desirable for the jury to render a collective judgment that most closely resembles the judgment that most people in the community would prefer, then the larger jury size is also most desirable. More generally, research on juries and other small groups indicates that as the size of the group increases the performance

of the group, as measured by the quality of its decisions and productivity, also increases (Shiflett, 1979). Part of the explanation for this effect is that with a larger number of jurors it is more likely that one or more of the jurors will remember critical evidence, legal instructions, or be able to provide solutions to problems that arise in the course of deliberations. It is also the case that the influence of jurors who might have idiosyncratic against the prosecution or defense will be diluted in larger juries.

In sum, if these is a choice between six and twelve-member juries, existing research does not yield particularly compelling reasons to prefer one jury size over another. On balance, however, larger juries appear to do a somewhat better job insofar as they consider a wider range of evidence. When this factor is considered in combination with the tendency for twelve-member juries to deadlock slightly more often than six-member juries, defense attorneys may reasonably prefer the larger jury

Generally when an attorney thinks about voir dire what he or she thinks about is the problem of selecting a fair jury. There are wide variations in the extent to which the trial attorney can take an active role in voir dire--in the federal courts the trial judge generally conducts voir dire without the participation of the trial attorney, while in most state courts the trial attorney may be given substantial opportunity to pose questions directly to prospective jurors. The extent of the opportunity to scrutinize jurors varies significantly from jurisdiction to jurisdiction. Under the most limited of circumstances the trial attorney may have to be satisfied with a few statutorily mandated questions presented to jurors as a group by the trial judge. On the basis of the responses to these questions together with the very limited information about individual jurors, the trial attorney will be expected to exercise challenges for cause and peremptory challenges. The number of challenges may also be severely restricted (Van Dyke, 1977). In most jurisdictions trial judges may be willing to expand the scope of attorney participation in voir dire if the attorney makes an aggressive case for expanded voir dire. Of course, if the attorney does not have a clear sense of his or her objectives during voir dire, or how to achieve those objectives during voir dire, then it will probably be a waste of effort to press for an expanded voir dire. On the other hand, if the attorney has thought through the voir dire process and recognizes that there are a variety of objectives that may be realized during voir dire--above and beyond simply securing the information that is necessary to conduct challenges for cause (and peremptory challenges), then it may be highly desirable to seek an expanded voir dire. In most of the following discussion we assume that the trial attorney is given substantial latitude in the voir dire and we will outline some of the objectives, tactics and methods that the attorney might employ under relatively relaxed circumstances. More restricted circumstances obviously will make it difficult to realize some of the objectives that are discussed.

How important is it to secure a large number of peremptory challenges?

If the attorney is prepared to expend the effort necessary to use voir dire effectively, then it is probably desirable to seek the maximum number of peremptory challenges possible. In all trials both sides have a minimum number of peremptory challenges, but the courts generally have the discretion to increase this number. Probably the most common basis for requesting additional peremptory challenges is that there has been extensive pretrial publicity. Later in this section we discuss the use of survey and other social scientific techniques to support motions for changes of venue in such circumstances. Particularly if the motion for a change of venue has been denied the attorney may be in a strong position to argue for increased peremptory challenges.

There is a clear general consensus that voir dire is appropriately used to elicit information from jurors which can be the basis for challenges for cause (and provides information useful for the exercise of peremtory challenges). In later sections we also point out that voir dire can be used for educational and persuasive purposes and that because voir dire is the first opportunity the attorney has to make contact with the jury, it can be a very critical point in establishing rapport or personal contact with the jurors. All of these objectives are furthered when the attorney is given the opportunity to conduct extensive voir dire--by which we mean that the attorney has an opportunity to interact with and elicit a substantial amount of information from prospective jurors and is given some latitude in the areas of voir dire inquiry. Ginger (1975) and Jurywork (1983) both contain very useful advice on the preparation of pretrial motions and briefs that may be prepared by the attorney who is interested in conducting an intensive jury voir dire.

How desirable is it to voir dire jurors individually?

There may be substantial benefits to the attorney who successfully argues for voir dire in which the attorney is allowed to individually examine prospective jurors outside the presence of other prospective jurors. According to Suggs and Sales (1980-1981) jurors are likely to be more forthcoming or honest in response to questions posed to them by attorneys rather than judges. They note that because the judge occupies a position of greater status in the courtroom, jurors may be far more hesitant to express opinions and potential biases that may result in the disapproval of the higher status judge. They further point out that in group voir dire where questions are directed to a whole group of prospective jurors, it is far more difficult for one individual to volunteer that they have a bias or interest in the case. It is relatively easy to see that if jurors are being voir dired on an individual basis and questions are put to them as individuals, they are far more likely to respond than if they are merely one of many individuals who are asked a general question such as: "Is there anyone among you who believes he or she would be unable to give the defendant a fair trial as a result of pretrial publicity?" Suggs and Sales further note that the imposing formal qualities of a courtroom (such as the fact that the judge may be seated in an elevated box, wearing a special robe, that the jurors sit in a jury box which may also be enclosed and separated from the remainder of the courtroom, the use of ritual oaths in the presence of various court officials), may also inhibit jurors from responding forthrightly to the questions put to them by the trial attorneys. In contrast a voir dire conducted in a smaller, private and more comfortable room may increase the likelihood that prospective jurors will disclose information that may be useful in formulating challenges for cause and exercising peremptory challenges.

Nietzel and Dillehay (1982) examined voir dire practices in a series of thirteen murder trials comparing challenges for cause that resulted from individual sequestered voir dire of prospective jurors as compared to group voir dire in the open courtroom. What they found was that there were significantly more sustained challenges for cause when the voir dire was conducted using individual sequestration. Although these results may also be attributable to differences in the cases (which could have served as the basis for the judge's decisions concerning the nature of voir dire), the results certainly suggest that sequestered individual voir dire conducted by the trial attorney is more likely than other methods to elicit from jurors the necessary information upon which to base successful challenges for cause--and also to secure information that may be used in the exercise of peremptory challenges. One caveat may be entered to this general conclusion and that relates to a point that is made below--there are some circumstances under which the attorney may wish to secure individualized commitments from jurors (e.g., a pledge to maintain an open mind through the course of the trial, or "stick to their guns" when defending their reasonable doubts or interpretations of the evidence during deliberation). These commitments may be more effective when they are made publicly and in the presence of

other jurors. Research on attitude change has clearly demonstrated that public commitments make people more resistant to the persuasion efforts of others (Kiesler, 1971). Thus, it may be desirable to attempt a mixture of both individualized, sequestered voir dire and group voir dire in which the jurors are first individually examined and then perhaps the final panel or near final panel is voir dired as a group. If this is not possible--and indeed it may try the patience of the court--then (5) individual voir dire is probably to be preferred since any commitments secured from jurors during voir dire are likely to be made in the presence of the judge, the attorneys and the defendant and a reminder about those commitments may be offered during closing arguments.

If individualized voir dire of prospective jurors by the attorney is not possible, the trial attorney should not abandon hope for using the voir dire successfully. Even if jurors are examined in group sessions and only a limited number of questions can be asked, if the attorney is the one who is given the opportunity to interact with the jurors, it may still be possible to achieve some of the objectives outlined below. Even if the trial judge is the one who conducts voir dire, the lawyer may be well served by encouraging the court to pose critical questions (e.g., concerning exposure to pretrial publicity) to jurors one by one. Certain forms of questions--particularly when they are posed to jurors as a group--are especially unlikely to elicit forthright responses from jurors (Suggs & Sales, 1980).

What should my voir dire objectives be?

As has been noted above, there is a general consensus that it is appropriate to use voir dire to detect juror biases which may serve as a basis for challenges for cause. Beyond this general purpose there is substantial disagreement about whether voir dire may appropriately be used to realize other objectives including the intelligent exercise of peremtories (Bermant and Shepard, 1981). We obviously cannot resolve these disputes, but we can point out that whenever a trial attorney and a juror interact in the voir dire setting, certain things will inevitably happen: (1) Jurors will form initial impressions of the trial attorneys and (2) jurors will begin to learn about the case they may decide.

What should I do during voir dire to insure that jurors form a favorable impression of me and that I establish a personal rapport with the jurors?

As in other social settings, jurors will begin forming impressions of an attorney at the time of their first contact (Schneider, Hastorf, & Ellsworth, 1979)--there is nothing an attorney can do to prevent jurors from forming an impression, but the attorney can shape these initial impressions. Initial impressions are extremely important, for they tend to shape jurors' reactions to the attorney throughout the remainder of the trial. What kinds of impressions would you like jurors to form of you? You are probably more effective in the courtroom when jurors trust you, when they regard you as an expert, and when they are attracted to or interested in you and what you have to say. The impressions we convey to others are carried through our verbal and nonverbal communications and both types of communication are under our control. Just as we choose how to dress, we can with practice, choose our verbal and nonverbal communications. Communication skills are important in many phases of legal practice—not just in the courtroom (Feldman and Wilson, 1981; Matlon, 1981 & 1982; Marshall et al., 1982).

Some aspects of voir dire involve common sense. For example, jurors should understand the questions that are put to them. Questions should avoid technical language or legal jargon, or else make an effort to explain technical language to jurors. In fact, explanations or definitions of legal terms that are critical to the case can serve to educate jurors about these concepts, and may help to enhance your expertise.

Care should be taken to avoid offending jurors when dealing with matters that might embarrass jurors or might ask them to acknowledge socially undesirable prejudices. It will be useful to introduce the question in a way that reduces the possible embarrassment or social stigma. For example: "Now all of us have probably had experiences which might cause us to be prejudiced against particular individuals or types of people. I know that I've had such experiences and I hope that you will be honest with me in reviewing your experiences." This type of introduction has the effect of validating admissions of prejudice and serves to make jurors feel more comfortable about their own prejudices. An extra benefit is that this type of questioning involves self-disclosure on the part of the trial attorney and self-disclosure is an effective method of conveying one's own trustworthiness.

An effort should be made to show a genuine interest in each juror. The attorney who simply reads a series of questions to the prospective jurors and displays little genuine interest in the responses or fails to take note of the fact that the juror is clearly made uncomfortable or nervous is likely to alienate jurors.

Part of the process of putting jurors at ease is explaining to them exactly what is going on in voir dire and perhaps during the course of the rest of the trial. Jurors often come to the courtroom with no prior jury experience and may be confused and frightened by what is happening to them. The experienced trial attorney is obviously used to being in the courtroom, has a good sense of what is going to happen, and has developed a sense of confidence about his/her ability to maintain professional control over courtroom events. The juror is in exactly the opposite position and the trial attorney will be far more effective in establishing rapport with prospective jurors if he/she shows sensitivity to the problems of being a novice in the courtroom.

The trial attorney's nonverbal behavior plays a crucial role in shaping jurors' impressions. Among the nonverbal factors that can influence such perceptions are: eye contact or gazing; body orientation and leaning; facial expressions; various aspects of speech such as duration, interruptions, volume, rate and tonal qualities; and openness of posture. All of these nonverbal characteristics contribute to what social scientists have termed "impression management" and it has been argued by some that nonverbal aspects of communication can be far more important than the verbal content of communications in influencing impressions (Walker, 1977). Researchers have examined the influence of these nonverbal characteristics on perceptions of status, dominance, expertise, liking, and trust--all characteristics that the trial attorney may wish to promote during voir dire. The relationship between these nonverbal behaviors and impressions have been examined in a variety of contexts such as: employment interviews, counseling, social influence situations, and "getting acquainted" situations.

Several clear generalizations emerge from this research (Edinger & Patterson, 1983). Generally an attorney will benefit from the following behaviors: smile at jurors whenever it is appropriate, particularly when interacting with jurors during voir dire try to place yourself close to the jury box--do not "invade" the personal territory of any particular juror by standing too close, but if possible move within several feet of the jurors and don't merely remain seated behind counsel's table; nod your head in an approving manner when that is appropriate--smiling and nodding serve to reaffirm what speakers are saying and will encourage them to be even more expansive in their comments; if you are seated maintain an "open" posture that will foster a sense of openness and receptiveness (what this means is avoid crossing your arms and legs in front of your body or maintaining a stiff and tight posture--try to be fairly relaxed with arms apart and legs spread slightly); if you are seated you should also be leaning forward slightly rather than leaning back in you chair--the forward lean will foster the impression that you are interested in what the jurors have to say to you; orient your body so that you are not turning your back or shoulder to jurors;

maintain eye contact (though don't attempt to stare anyone down) while interacting with the jurors--in fact it may be helpful to try to avoid reliance on notes because use of notes will reduce the amount of eye contact that can be maintained; use appropriate gestures; and try to avoid a stiff or unmoving presentation--a high level of activity and animation will be more engaging for the jurors.

In addition to being nonverbally responsive to what jurors are saying to you (as evidenced be your eye contact, your smiling and the nodding of your head, leaning forward from your relatively open stance with an orientation to the juror) you should also be verbally responsive. That is, you can evidence your interest in what the juror is saying to you and your understanding of what he/she is saying through the use of such techniques as restatement or interpretation. That is, you may take a response that is given by the juror and restate it in an approving manner, or you may carry his/her statement a slight step further and give it some interpretation (though obviously you want the interpretation to be consistent with the meaning that the juror is trying to convey to you).

Most of these nonverbal behaviors are already a part of most people's behavioral repertoire and the task in the courtroom is to display them at appropriate times in order to convey appropriate messages and foster appropriate impressions. Most of the behaviors that are recommended here are appropriate for use in almost all social interactions and can be "practiced" in a wide variety of social situations. It may be important to note that if you consciously set out to incorporate these behaviors into your interactions, you are in fact becoming the person that these nonverbal behaviors communicate to others. In order tte to others. In order to use these behaviors in a responsive way you do truly have to be more sensitive to what it is that others are saying and doing. You will be a better listener, you will display greater empathy and respect for them and you will encourage them to be more disclosing of their true attitudes and feelings.

How can I educate jurors about important aspects of the law?

In recent years a number of social scientists have tackled the question of whether of not juror understand the instructions regarding law which are delivered to them at the conclusion of the trial. What these researchers have found (Elwork et al., 1977; Charrow & Charrow, 1979; Elwork et al., 1982; Severance & Loftus, 1982) is that jurors have a very difficult time understanding and correctly applying jury instructions--even standardized or "patterned" instructions that have been developed in recent years (Nileand, 1979). Since the quality of jury decision making is heavily dependent on an adequate understanding of the jury instructions, it may clearly be desirable for both attorneys to assume some responsibility in assuring that the jury understands the critical legal definitions that they must use in their deliberations. On the prosecution's side it is obviously important that the jurors understand the elements of the offenses with which the defendant is charged, while on the defense side it is clearly important that the jurors understand the definitions of critical concepts such as reasonable doubt, presumption of innocence and burden of proof.

If the attorneys have some latitude in conducting voir dire it may be possible to use voir dire to educate or sensitize jurors to critical concepts. Very strong leading questions may be used to convey information to jurors about these legal concepts. For example, questions such as: "Have you heard of the term 'burden of proof'? Do you understand that the term 'burden of proof' refers to the responsibility that the prosecution has to prove the allegations against the defendant? And do you understand that the defendant does not have a burden of proving that he or she is innocent? Do you understand that if the prosecution fails to meet its burden every element of the charges against the defendant, then you must find the defendant not guilty? And do you understand that if the prosecution fails in its burden then you must acquit even if the defendant offered no evidence whatsoever?" The

effect of these questions is that the attorney is communicating the substance of the legal definition and repeating them in order to insure that the juror understands precisely what the burden of proof in a criminal case implies. Although there is only limited research on the question at present, there is some evidence that providing jurors with pre-trial instructions may not only assist them in understanding the law but also aid them in understanding evidence and the relationship between evidence and the law. Kassin and Wrightsman (1979) found, for instance, that jurors who received instructions after a trial behaved in the same way as jurors who received no instructions convicted less often and remembered more trial evidence.

Another part of education for the jury involves alerting them to what is going to be happening during the course of the trial, particularly with regard to the fact that there will objections raised during the course of the trial and that there may be arguments with the opposing counsel and with the trial judge. Jurors should understand that the objections and arguments are not directed personally at the opposing counsel or at the trial judge but that they represent an important part of the trial process. It may be pointed out to jurors that objections may be raised to testimony that might be prejudicial if admitted into evidence, to testimony that is irrelevant or repetitive, to questions that ask witnesses to speculate or express opinions rather than provide evidence, and so on. The objective in educating jurors about the trial process and in particular about objections is to reduce the possibility that jurors will infer that an aggressive attorney who frequently raises objections is trying to conceal evidence or prevent the jury from learning about crucial information (Penrod, 1982). The jury should be educated to understand that the purpose behind the objections is not to prevent evidence from coming in but to assure that the jury receives reliable evidence presented by competent witnesses.

A further aspect of education is alerting jurors to possible prejudices or biases that might influence their decision making. For instance, if there is reason to think that jurors may harbor some prejudice against the defendant--perhaps because of his socioeconomic group or his race or the fact that he is inarticulate or any other reason--emphasizing the fact that the jurors may be unconsciously and unwittingly influenced in their perceptions of the defendant as a result of possible biases, may have the effect of encouraging jurors to bend over backwards in their efforts to be fair (Friend & Vinson, 1974) and may create a climate in deliberations where it will clearly be inappropriate to make references to the defendant's prejudicing characteristics.

How can I use voir dire to increase my persuasiveness and emphasize the strength of my case?

With careful planning the voir dire can be the first step in the persuasion process. There are a variety of steps that an attorney can take during voir dire to alert jurors to the strengths of one's case the weaknesses of the opponent's case, to create a skeptical frame of mind, to minimize the impact of weaknesses in his/her own case, to alert jurors to the implications of important evidence and to "inoculate" jurors against the evidence and arguments that will be presented by the other side. Attitude change and persuasion are talked about at length in later sections of this volume but there are a few points that merit emphasis with regard to voir dire. As noted earlier, jurors are forming their initial impressions of the trial attorney during voir dire and those impressions are related to attorney persuasiveness. A long tradition of social science research on persuasion and attitude change clearly indicates that the perceived characteristics of an influence source will affect the amount of influence that source has (Hovland & Weiss, 1951; Kelman & Hovland, 1953). In particular the attorney who creates an impression of confidence, of expertise, trustworthiness and attractiveness will have greater success in persuading the jury than the attorney who fails to foster these impressions (Mills & Aronson, 1965). The attorney who is well-prepared, who wan conduct him/herself in a confident, friendly

and responsive way in the courtroom (the attorney who displays the verbal and nonverbal behavioral characteristics discussed earlier) will enjoy greater persuasive success in the courtroom.

Blunk and Sales (1977) have further argued that one way to strengthen jurors' commitments to a particular position is to link that position to other values that are strongly held by the individual. This may help to increase personal involvement and therefore strengthen resistance to persuasion (Petty & Cacioppo, 1981). In concrete terms, Blunk and Sales point out that it may be useful to establish that notions such as presumption of innocence and the requirement of proof beyond a reasonable doubt are important American values which can be linked to the constitution and are designed to assure the highest quality of justice in American courts. Linking these notions to widely accepted values may serve to assure that jurors will make a conscientious effort to apply the standards.

To a limited extent voir dire may be used to make preliminary arguments. In those jurisdictions where the trial attorney is allowed some latitude in making a short preliminary statement to the jurors--perhaps a summary of the issues and evidence that are expected to develop during the course of the trial--it may be useful to highlight those witnesses and pieces of evidence that are most critical to the attorney's case. This may have the effect of sensitizing jurors to those witnesses and evidence when they are presented during the trial. Repetition of important evidence will make it more memorable and, as is pointed out below in our detailed discussion of persuasion, a brief preliminary statement may also provide a conceptual framework that will help the jury to understand, remember, and interpret evidence as it is presented to them.

It may also be useful to call jurors' attention to weaknesses or deficiencies in one's own case. Not only may the defects look less glaring than when presented by opposing counsel, but in addition a forthright acknowledgment of the weaknesses of one's own case or gaps in the evidence may also serve to enhance the apparent trustworthiness or credibility of the attorney who makes these admissions (Walster, Aronson, & Abrahams, 1966).

Which jurors should I keep and which jurors should I challenge?

Voir dire has traditionally been designed to provide the attorneys with information about jurors that would allow the attorneys to challenge for cause those jurors who may be unable to render an objective judgment on a case. Lack of objectivity is sometimes traced to what are termed "specific biases" which are biases directed against a defendant or other participants in the trial. These specific biases supposedly arise because of family ties, economic interests, simple acquaintance with any of the parties, the attorneys or witnesses, or may arise because the juror has formed a strong opinion about the case--perhaps as a result of pretrial publicity. Nonspecific forms of biases arise not because the jurors has a bias against any particular participant in the trial, but because jurors' attitudes or prior experience may predispose them to favor one side over another. For instance, the juror who harbors racial prejudices may not have any feelings one way or the other with regard to a particular defendant but the racial prejudices may make it difficult for the juror to give the defendant an unbiased hearing. Much of voir dire has traditionally been directed to the task of identifying specific and nonspecific biases in jurors and using those biases as the basis for challenges for cause (or when those challenges fail using peremptories to eliminate jurors). The litany of juror attitudes and experiences that may be examined is quite long. For example, Ginger (1975), Jordan (1980) and Jurywork (1983) provide detailed guidance on the types of juror biases that might be looked for during voir dire and that might serve as a basis for challenges for cause. These volumes also give good examples of lines of questioning that might be used to develop and demonstrate the biases and provide

overviews of relevant case law.

It is clearly desirable to sit down prior to the time voir dire is conducted and think about possible sources of bias that might make it difficult for a juror to render an effective judgment. If there is a possibility that jurors may react unfavorably to witnesses (perhaps because of their personal characteristics, their organizational affiliations, their behavior or their appearance) or to evidence that is going to be presented at the trial or if there is substantial pretrial publicity, then it will clearly be desirable to explore these matters with prospective jurors during voir dire. If the opportunity to conduct an extensive is not available, then it may also be desirable seek an expanded voir dire that might aid in the exercise of challenges for cause.

With an ample opportunity for questioning the use of voir dire to detect juror prejudices is much easier. The process is further enhanced if it is possible to conduct voir dire on an individual basis with each prospective juror sequestered from all others.

If voir dire is quite limited, which jurors should I keep and which should I challenge?

In most trials where voir dire is limited in scope and there may be little opportunity to question jurors in a manner that would help to uncover biases that would support challenges for cause, attorneys often fall back on the use of what might be termed a "stereotype" theory of jury selection. This strategy is well illustrated by some jury selection advice supplied by San Francisco attorney Melvin Belli (Grady, 1981):

> Here in San Francisco you never take Chinese jurors for injury cases. They are stingy. The same goes for farmers and accountants. Musicians, writers, and literary people are accustomed to largess--they enjoy giving money away. I like black jurors. They're sympathetic. They like to give away the insurance companys' money because they've been screwed so many times themselves. But they're very hard on criminals. So are women, a lot harder than men. And women are very tough on each other. I don't want any experts on the jury. I want them to learn from my experts. In general, if you like Mr. X, he'll probably like you. I think a person who is well dressed for his or her station in life will tend to be liberal. But someone who is penuriously clothed probably watches every dime and collects string and pieces of tin foil. I don't want anybody like that.

Suggestions that trial attorneys make use of stereotype information about jurors as a basis for selecting them has a long, if not honored, tradition. As early as 1887 Donovan was suggesting in his trial practice textbook that attorneys should pay close attention to the occupation, age, intelligence and social status of prospective jurors. He particularly admonished attorneys to employ jurors who had been mistreated in life--his fear was that they might spread their misery for the sake of company. Jury selection stereotypes can be found in many older trial practice handbooks and articles on jury selection (e.g., Adkins, 1968, 1969; Appleman, 1952; Belli, 1966; Biskind, 1954; Bodin, 1954; Campbell, 1972; Cornelius, 1932; Darrow, 1936; Davis & Wiley, 1967; Goldstein, 1935; Harrington & Dempsey, 1964; Heyl, 1952; Karcher, 1969; Katz, 1968, 1969; Keeton, 1954; McCready, 1954; Osborn, 1937). Even more recent discussions of jury selection by experienced trial attorneys rely extensively on juror stereotypes as a basis for exercising peremptory challenges. For example, Bailey and Rothblatt (1974) advise that unless the defendant is a veteran with a good military service record, retired police officers, military men and their wives are undesirable because they have adhered to strict codes of conduct. On the other hand salesmen, actors, writers and artists are more forgiving and require greater evidence of guilt.

Blinder (1978) discusses occupational background, age, gender, religious background and race as factors to be studied when selecting jurors. Cartwright (1977) suggests avoiding "kingpins"--strong dominant people who may have undue influence with other jurors. Fahringer suggests that jurors be examined about their hobbies as a clue to their "true personalities." He cautions: "engineers, scientists, accountants, and bookkeepers are for the most part unemotional. They are trained to be objective and reach conclusions based upon facts. They would be unsuitable in a case where the defense relies upon a heavy emotional appeal, but might be acceptable in a case where the prosecution depends upon sheer circumstantial evidence unattested to by any hard facts" (p. 52). Jordan (1980) suggests that in self-defense cases the defendant may wish to have jurors to whom "life is not quite so dear. Combat soldiers, adventurers, and others who somehow live by the sword are examples of this type of juror" (p.255). Wenke (1979) devotes 20 pages of his volume The art of selecting a jury covering topics such as a stereotypical description of ideal jurors and the influence of occupation, race, religion, personality, dress, age, gender and marital status on jury decision making and provides detailed guidance upon the of jurors to be accepted and those who ought to be challenged. It would seem that the trial practitioners who give this advice are convinced that it is valid. Indeed, one former president of the Association of Trial Lawyers of America, when defending attorney-conducted voir dire, commented "trial attorneys have developed a perceptiveness that enables them to detect the minutest traces of bias or an inability to reach an appropriate decision" (Begaem, 1977, p. 78).

Not every trial guide builds voir dire around the stereotype selection strategy--Amsterdam (1976) and Mauet (1980) are examples of volumes that emphasize using voir dire to establish a basis for challenges for cause. And even volumes such as Jordon (1980) and Wenke (1979) complement their presentations with suggestions for questions that may be used to establish the kinds of prejudices that may give rise to challenges for cause.

Do stereotype strategies work?

There's actually little evidence to support the idea that stereotype strategies are effective in the courtroom. A study by Ziesel and Diamond (1978) provides some evidence that lawyers may be able to exercise their peremptory challenges in an effective manner. Ziesel and Diamond found that in five of the twelve cases they studied it seemed that the attorney's challenged strategies may have changed the first ballot votes--it seemed that defense attorneys may have been slightly more effective than prosecutors in the exercise of their challenges. However, this study has been severely critiqued (Bermant & Sheppard; 1980) and in light of the fact that some of the trial practice volumes which recommend a stereotype strategy include conflicting advise (e.g., Darrow (1936) recommends taking jurors who smile at the attorney, while Harrington and Dempsey (1969) suggest being wary of the smiling juror--their fear is that that juror wants to get on the jury and "murder you."), it would seem that the stereotype strategies ought to be viewed skeptically. These strategies tend to presume that an individual's characteristics will somehow be an unwavering and general guide to jurors' predispositions. Little allowance is or can be made for variations in case types, the type of evidence that may be presented at a trial, the types of witnesses who may appear, or the types of defendants who may represented. Perhaps more disturbing is the fact that these stereotype strategies seem to have no underlying theory or rationale, but instead are based on "common sense" intuitions, individual and probably idiosyncratic experience, or at worst simple bigotry. These strategies possess no scientific basis, and it is therefore impossible to make scientifically grounded recommendations about which "types" of jurors ought to be challenged in which cases.

Although social science research casts doubts on the viability of stereotype selection strategies, this does not mean that an attorney cannot make some use of the

information that is provided about jurors or that is solicited during the course of voir dire. If there is one unifying theme which underlies many of the recommendations to be found in the stereotype theories, it is that an attorney should seek jurors who can in various ways identify with one's clients, one's evidence, one's witnesses, and even one's self. There is a large body of social science research which indicates that various forms of similarity (e.g., similar attitudes, similar values, similar experiences, and even similarity in appearance) can increase attraction and liking for others (Byrne & Nelson, 1965; Huston & Levinger, 1978). Several social scientists have examined the role of attitude similarity between defendants and find that defendants can sometimes benefit from such similarity (Griffitt & Jackson, 1973; Mitchel & Byrne, 1973; Kerr & Anderson, 1978; Laughlin & Izzett, 1973; Bray, 1974, 1976; Gerbasi & Zuckerman, 1975; Shepherd & Sloan, 1979; Kauffman & Ryckman, 1979; Kaplan & Miller, 1979; Miller & Hewitt, 1978). One reason that similarity may affect the way in which jurors evaluate a defendant or witnesses or evidence that is presented at trial, is that similarity may affect the perspective or point of view from which the jurors' judgments are made. Recently, social psychologists have been very interested in the way in which lay people make inferences and attributions about the causes of other people's behavior. "Attribution" research clearly indicates that the point of view or role that one plays in a situation can substantially affect the attributions that one makes (Nisbett & Ross, 1980). To take a simple example, there appears to be a pervasive tendency for the actors in the social situation (that is, the people who are emitting behaviors) to place greater weight on situational factors (the behavior of other individuals, peculiarities of the situation, etc.) as causes of their behavior than do people who simply observer the behavior. That is, actors will tend to attribute responsibility for their behavior to situations while observers will tend to attribute causation to the actor him or herself. Simply viewing social events from the perspective of the actor rather than the observer will tend to change people's attributions about the causes of that behavior (Regan & Totten, 1975). Similarly, changes in perspective will also affect the information the people remember about events--even though the available information does not itself change (Snyder & Uranowitz, 1978).

Although further social psychological studies of the similarity effect are clearly needed, similarity theory has a stronger research foundation than does the stereotype theory. As a general guide to the exercise of peremptory challenges (and also as a general guide as to the way in which voir dire ought to be conducted) most attorneys will be well served by seeking jurors who are similar to their clients and witnesses. Of course, one advantage of the stereotype theories is that they point to juror characteristics that may be useful for assessing the degree of similarity between a prospective juror and one's client or witnesses. Factors such as occupational experience, marital status, education, gender, age and even hobbies may give both the attorney and the client a good feel for whether or not a prospective juror is someone who the client can relate to and vise versa.

Should I avoid or prefer experienced jurors?

There is a common notion that experienced jurors--particularly those who have sat on a jury which convicted a defendant--are more likely to convict than jurors with prior jury experience (Skolnick, 1966). Although there have been studies which suggest a relationship between prior experience and conviction proneness (Reed, 1965; Jurow, 1971; Dillehay & Neitzel, 1980), other studies have found no relationship (Mapley, 1982) and some have even detected reversals in the relationship--with experiences jurors less likely to convict in a second case (Nagao & Davis, 1980).

The Nagao and Davis study suggests that jurors may be affected by a "contrast" effect--mock jurors who decided a serious case (sexual assault) were more likely to convict on a less serious charge (vandalism) than were mock jurors who had no prior experience. When mock jurors first decided the vandalism case the were less likely to

convict in the sexual assault case.

Most of the results on prior experience effects comes from studies of mock jurors, but not all. Perhaps the most compelling data on the influence of prior experience comes from studies of the percentage of guilty verdicts returned by jurors in the first, second, third and fourth weeks of service (Center for Jury Studies, May 1981 and September 1982). These studies indicate that jurors are no more likely to convict later in their service than they are early in their service.

Of course, these results may mask the contrast effect reported Nagao and Davis, so that the safest course (when the appropriate information is available and there are challenges to spare) may be to assess the severity of the charges in cases jurors have already decided in order to determine whether any contrast effect might be harmful or beneficial and challenge accordingly.

Can a social scientist help me select a good jury?

In recent years a substantial amount of attention has been given to the use of social science techniques in jury selection. Stories about social science methods of jury selection have abounded both in the popular press (Andrews, 1982; Friedrich, 1981; Hunt, 1982; Press & Foote, 1982; Totenburg, 1982; and in professional publications also add to the list Lewin, 1982, and Bennett, 1979). The social science method that has received the greatest amount of attention makes use of public opinion surveys (or what some people have termed "marketing surveys") in which members of the community from which the jury is to be drawn are polled prior to the trial and an effort is made to identify particular types of jurors who may be predisposed to favor the prosecution or the defense. The same opinion survey can be used both to support the motion for a change of venue and to guide jury selection.

Not only are public opinion survey methods an expensive way to establish criteria for selecting juries, a number of social scientists have questioned whether the techniques are effective (Berman & Sales, 1977; Hans & Vidmar, 1982; Penrod, 1980; Saks, 1976a, 1976b; Zeisel & Diamond, 1976). Recent studies by researchers interested in assessing the relationship between juror characteristics and juror voting patterns have found only weak relationships (Hepburn, 1980; Horowitz, 1980; Moran & Comfort, 1983; Constantini & King, 1980; Penrod, 1979; Mills & Bohannon, 1980; Hastie, Penrod, & Pennington, 1983; Penrod & Linz, 1982). Although large numbers of personality characteristics, attitudes and demographic characteristics have been examined in this research, no general or strong relationships have been identified. Thus, it would appear that if survey methods have value in jury selection it may be necessary to conduct a separate survey for every trial, in an effort to identify any characteristics that might be systematically linked to juror predispositions with regard to that particular trial. This is obviously not a practical alternative in most cases.

In addition to the lack of strong general relationships, there are other problems with the survey method. First, the public opinion survey will inevitably ask survey respondents to evaluate a case without the benefit of hearing the evidence that will be presented at trial. Except in those instances where there has been substantial pre-trial publicity, the survey responses may reveal little about how jurors will respond to the actual trial evidence. Even if the survey could reliably measure predispositions that would affect the respondents' decisionmaking, there may be problems in generalizing from survey respondents to particular jurors. Although a public opinion survey may establish that certain personality characteristics or attitudes in the community are generally associated with a pre-trial bias in favor of or against one party to a trial, it is not clear that information could be used successfully at trial. In most cases it will be impossible to assess the personality characteristics or general attitudes of prospective jurors during voir dire. Thus,

even though a survey might detect general trends among persons eligible for jury service, there may be substantial difficulty in securing information about particular jurors' personalities and attitudes.

At this point a reasonable assessment of the public opinion survey method is that such surveys may marginally improve the ability of the trial attorney to detect and challenge jurors who might be predisposed to vote against the attorney's client. However, the benefits of the methods are probably only marginal--even the advocates of public opinion survey methods have been rather circumspect in the claims that they make for the technique--and the practitioner clearly has to weigh the possible benefits against the costs.

Although there seems to be little consistency in the types of characteristics associated with juror predispositions, there are two possible exceptions to this general rule. First, research indicates that individuals with authoritarian personalities (that is, people who subscribe to conventional morality and are intolerant of those who do not) may be slightly more likely to convict defendants who violate conventional morality (e.g., Bray & Noble, 1978). Second, recent research also indicates that attitudes about sexual assault which display a lack of empathy with rape victims may indicate a greater willingness to acquit sexual assault defendants (Deitz et al., 1982). Once again, even though authoritarianism and calloused attitudes toward rape victims appear to be generally (although not strongly) related to juror verdicts, it is difficult to identify individuals with these characteristics through traditional voir dire methods.

The second major social scientific methods of jury selection which has received substantial attention is the examination of jurors' nonverbal behavior during the voir dire session. For instance, Bonora and Krauss (1979) suggest observing the jurors' posture, their hand movements, their eye contact, and their visual expressions. The implicit assumption is that by watching each of these characteristics it may be possible to determine whether prospective jurors are lying while giving responses to voir dire questions, to assess whether or not a juror is intimidated by the attorney or the judge or the courtroom setting, to assess whether a juror is nervous or uncomfortable, aggressive or deferential, moody or hostile. Suggs and Sales (1978) also suggested that so-called paralinguistic cues such as hesitations, inappropriate laughter and stuttering, long-winded or rapid answers may also reveal nervousness. Suggs and Sales suggest that careful attention to all these nonverbal cues may assist an attorney (or perhaps psychologist who possesses expertise on such matters) to use these forms of nonverbal communication to help assess whether a particular juror is anxious about his or her role (indeed, many jurors are in fact intimidated by courtroom settings and are intimidated by the voir dire process), to determine whether a juror might have a predisposition against the client, or to determine whether the juror is lying in response to the voir dire questions. Unfortunately, there is not much evidence that these nonverbal cues could be used to assess juror predispositions with regard to the upcoming case. While it is clear (as we noted earlier) that certain nonverbal behaviors can indicated whether a person is nervous, it is generally necessary to have some sort of baseline information about a prospective juror's nonverbal behavior--that is, does a juror seem to be displaying more nervous behaviors during voir dire than they would display at other times? It may be impossible for the trial attorney or an expert to determine whether or not the juror is displaying more nervousness during voir dire than they would at other times. It is also not clear that is will be possible to determine the source of the nervousness--as noted earlier, jurors, and particularly jurors who have never served before, often do not know what to expect during the course of voir dire or during the trial, they do not have a good sense of what their responsibilities are, and they may feel as though they are being put of the spot during voir dire. All of these things may make the juror nervous but may have no effect whatsoever on their ability to function as an unbiased juror. Furthermore, extensive reviews of the research on nonverbal behaviors which might

reveal that a person is being deceptive (among the best is Miller & Burgoon, 1982) indicates that observers are generally unsuccessful in determining whether or not a person is being deceptive. Most studies indicate that people do only slightly better than guessing (Miller & Burgoon, 1982; Edinger & Patterson, 1983). As we underscore at a later point in this volume, it does appear that people do use certain verbal and nonverbal behavior to assess whether or not a person is telling the truth. Unfortunately, some of these cues can be grossly misleading in the sense that observers may infer that somebody is not telling the truth when in fact the witness is only nervous. At present, there is no scientific foundation for the claim that nonverbal cues can be used to predict juror behavior.

Should I follow my intuitions about jurors?

Finally, the best jury selection principle may be a very straightforward one--take those jurors that you and your client feel comfortable with. You will have to look at those jurors throughout the course of the trial; you will have to address them in opening and closing arguments; you will be watching them and their reactions to your witnesses and the witnesses of the opposing counsel. If you select a jury that makes you feel as comfortable as possible, then you will probably be a more effective advocate. Audiences do affect performances. If a juror is going to cause you worry--and therefore possibly undermine your performance, then that juror should probably be eliminated even if voir dire has not revealed clear-cut reasons for eliminating the juror. Similarly, the client's interests have to be considered in the matter and it may be desirable to give the client a significant role in selecting the jury.

How can I anticipate how jurors are going to react to my case?

One of the problems that any trial attorney confronts when preparing for trial is that the attorney may find it extremely difficult to anticipate how jurors will react to, interpret and understand the evidence the testimony that is presented during the trial. The attorney has the advantage of possessing most of the information that is going to develop during the course of the trial before the trial begins. And this means that the attorney--if preparation begins early enough--will have a well-formed theory about the case and a solid understanding of how the evidence fits into that theory even before the trial begins. On the other hand this is a disadvantage insofar as the attorney, to use an old phrase, "may not be able to see the forest for the trees." That is, it may be impossible for the attorney to think about the case and the evidence and the witnesses from the perspective of the naive juror. While it may be perfectly clear that some witnesses are more critical to the case than others, it may be difficult to anticipate which witnesses the jury will regard as most and least credible, which evidence will have the greatest impact on the jury and which gaps in evidence will be most problematic. In recent years social scientists have promoted the use of two techniques that help the attorney acquire some insight into the kinds of problems that may be confronted by the trial jury. Unfortunately, these methods have not been systematically evaluated, so they are offered with caution.

In the pretrial simulation method a case is pretested prior to the trial. An entire case may be presented to a group of naive jurors-- preferably drawn from the population in which the real jury will be drawn. Just as an example we can imagine that the defense in a criminal case chooses to mount pretrial simulation in order to evaluate its case and anticipate problems that may arise when the case is presented to the jury. The defense attorneys can assume the same roles that they will play in the actual trial and use colleagues to role play the prosecution. Other attorneys or actors may be recruited to play the role of prosecution witnesses while the defense makes use of the actual witnesses that they will present during the trial. Yet another attorney may play the role of the trial judge. If the "prosecuting attorneys" and all of their "witnesses" are prepared in advance and all the participants' schedules can

be appropriately arranged, it may be possible to "pre-try" the case before a group of naive jurors in one or two evenings or over the weekend (though this obviously depends upon the complexity of the case and the number of witnesses who have appeared). It may, however, both be more convenient and also advantageous to videotape the separate components of the trial and separate witnesses and then assemble them into a complete "trial" which can be viewed repeatedly by the attorneys and witnesses and can also be presented to more than one simulated jury. If the simulation method is used well in advance of trial, it may be possible to use the feedback supplied by the videotape evaluations and by the mock jurors to change or reorganize opening and closing arguments, to adjust examination or cross examination of witnesses, to add or delete witnesses, etc. These modifications can themselves be videotaped, substituted for the original versions and the new trial videotape can once again be evaluated by a new group of naive jurors.

The simulation method is obviously time consuming and expensive, but it does have the advantage of providing systematic information about attorneys, witnesses, evidence and arguments that would otherwise be unavailable to the attorney. Furthermore, the method has the advantage of providing information that may be of use in trying other cases--for instance, the style of presentation used by an attorney is likely to generalize across cases, but can be analyzed on the basis of a performance and a pre-trial simulation. The videotaped pre-trial simulation offers the opportunity to secure systematic information about a trial from the perspective of the participating attorneys and witnesses, and most importantly from the perspective of naive "jurors." Not only is it possible to have a group of role playing jurors view the trial and then deliberate (these deliberations can be observed or videotaped), but the role-playing jurors can also provide systematic feedback about the witness and attorney performances. A social scientist can help to design and analyze questionnaires assessing witness and attorney performances and impact. Further analyses can be directed at evaluations of the trial evidence to determine which are the strongest and weakest points of the prosecution and defense cases; which evidence is best remembered and regarded as most credible; what the major gaps in the evidence are; and what inferences jurors are likely to make regarding those gaps.

The varieties and quality of information that can be obtained from the pre-trial simulation is limited only by the imagination of the trial attorneys and/or the social scientist who assists them in evaluating the simulations. Unfortunately, to date there have been no truly scientific evaluations of the pre-trial simulation method. However, the pre-trial simulation technique is very similar to the educational methods used in many classrooms and in a number of continuing education programs for trial attorneys. From an educational perspective "hands-on" simulations clearly provides trainees with a type of experience and feedback that is otherwise not generally available. Pre-trial simulations carry the classroom methods one step further in that they can provide systematic feedback about a particular case (in addition to general skills of advocacy) and that feedback can come from individuals similar to those to whom the case will actually be presented.

Is there anything I can do to evaluate my performance and my impact on witnesses while the trial is actually underway?

Many trial attorneys have had the experience of having a colleague assist them at trial. Often these colleagues are used as sounding boards for what the attorney plans to do in the courtroom and sometimes the colleagues can provide a running commentary reporting their impressions of how the trial is going. In recent years a few social scientists have carried this method one step further. Instead of having a colleague observe the trial and report perceptions of the witnesses and the evidence, the social scientists have used so-called "shadow jurors" who sit and observe the trial from the perspective of the actual jurors. Again, there have been no systematic evaluations of the use of the shadow jury, but it is likely that if enough shadow

jurors are available to watch the trial and are encouraged to provide their impressions of the case in collaboration with one another (but probably avoiding direct contact with the trial attorney) useful information can be elicited and adjustments may be possible even in the middle of the trial. The advantage of having several shadow jurors is that the attorney can obtain information that is validated by several opinions and avoid being mislead by the possibly idiosyncratic impressions of one or two shadow jurors. Again, a social scientist who is experienced in collecting and analyzing systematic data can be a useful adjunct to the shadow jury procedure.

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IV. Opening Statements

More and more individual state courts are moving toward a limited voir dire. This means that my opening statement will provide the jurors with their "first impression" of me as an attorney. What can I do to create a good first impression, and how can I counteract the effects of a bad first impression?

The research in the area of first impressions can be summarized as follows: first impressions are lasting ones (Asch, 1946; Luchins, 1957a; Anderson, 1974; Jones & Goethals, 1971), we have a tendency to weight first impressions more heavily than subsequent ones when making an overall evaluation (Anderson, 1965, 1974) and first impressions invoke a theme or a schema which helps us organize further incoming information about a person (Bartlett, 1932; Katz & Braley, 1933; Lingle & Ostrum, 1981; Minsky, 1975) However, this process is not immutable. Through rather simple instructions people may be able to overcome the biasing effect of first impressions and can learn to attend equally to aspects of a person's behavior or dispositions other then those perceived first (Anderson, 1974; Hendrick & Costantini, 1970; Luchins, 1957b; Stewart, 1965). From these findings several specific recommendations can be made to practicing attorneys.

First off, it is important to note that the first impressions bias can cut both ways--it may work for the attorney and it may work against the attorney. It is possible that making a good first impression during the opening will provide a kind of "halo" effect. A good first impression in the jurors mind will serve to establish a "positive context effect" in which subsequent behaviors are evaluated (Anderson, 1981). Analogously, a good opening statement which demonstrates to the jury that the attorney is a credible communicator may motivate jurors to give the attorney the benefit of the doubt when they are asked to believe something rather incredible later in the trial. Of course first impressions may work against the attorney as well. Initial behaviors which lead the jury to believe that the attorney is not a credible communicator may be difficult to overcome throughout the rest of the trial.

Juror first impressions of credibility are important not only for the attorney but also for witnesses he/she may call to the stand. If the attorney is planning to present a witness who will initially appear (perhaps because of personal demeanor) to be a low credibility one, it may be useful to devise a questioning strategy that will enable the witness to make a favorable first impression. For example, the attorney could prepare the first few questions asked of the witness so that he/she may answer in an affirmative, authoritative or enthusiastic way. It may also be useful to prepare the jury for a witness who may be making an unfavorable first impression by alerting them to the potential biasing effects of first impressions in the opening statement. The attorney should remember that the first impressions bias is a natural one--people unconsciously use first impressions as guiding ones and are seldom, if ever, able to report on the undue influence of their first impressions on their overall judgments. People can, however, if alerted and sufficiently motivated, overcome this bias.

How can I help the juror comprehend and recall the facts of the case and my arguments?

The opening statement can be used to facilitate comprehension and recall of witness testimony and attorney arguments that will be presented throughout the course of the trial. One way to facilitate information processing throughout the trial is to provide jurors with a "theme," "story" or "schema" to which they can use to integrate the facts of the case and the testimony of the witnesses (Bower, 1975).

Actions that are understood or comprehended in light of a goal are actions that are remembered best and recalled most accurately. Comprehension is nearly always

highly correlated with recall (Thorndyke, 1977).

Without knowing the character's main goal we have difficulty recalling his/her actions. Similarly, jurors unaware of the goals, plans, and motives of defendant's victims or other witnesses called to the stand during a trial will have difficulty remembering these character's actions, and reconstructing the sequence of events as they allegedly transpired. The attorney can facilitate comprehension and recall of testimony by providing the jurors with a theme or schema in the opening statement with which to integrate and understand the testimony of witnesses who will be called to the stand throughout the trial.

Insofar as the attorney provides jurors with a meaningful and comprehensible story, complete with characters who are assumed to have specific goals and plans, he/she may be contributing to the natural process by which jurors reason in deliberation (Bennett, 1978, 1979). Facilitating juror recall of trial testimony requires that the lawyer immediately develop a plausible theory of the case and effectively articulate that theory to the jury in the opening statement.

<u>If I have a complex case with many facts and much testimony, what can I do in my opening statement to facilitate better information processing and recall?</u>

The vast majority of adults can only hold somewhere between five and nine bits of information in short-term memory at any give point in time (Miller, 1956). However, what seems to determine mow much information can be included in a single bit is the meaningfulness of those bits. If people are presented with the following list of letters, then asked to recall them, they will have difficulty remembering more than seven or so: I A T N R W F B S A L C. But if the same letters are presented in a few meaningful bits, such as ABC, NFL, TWA and IRS, most people will be able to remember all of them. The implications for trial practice are obvious. Attorneys' presentations and arguments will be most memorable if they can be summarized into five or fewer meaningful themes or categories.

Once information is collected into short-term memory it must be transferred to long-term memory in order to be retained for more than a few moments. There are many factors which influence long-term retention. For instance, there is some evidence that people find arguments cast in concrete, easily visualized terms easier to remember and more persuasive than arguments cast in more abstract terms (Nisbett and Borgida, 1975; Petty and Cacioppo, 1980). This clearly indicates that attorneys' courtroom presentations will be best remembered when they focus on concrete facts rather than abstract ideas. Although some trial practice textbooks emphasize primacy effects, the notion that we remember best what we learn first, evidence suggests there is an even stronger recency effect in most situations (Murdock, 1962; Petty and Cacioppo, 1980). People seem to remember best what they learn last, second best what they learn first, and least well of all what comes in the middle. This has clear implications for the timing of presentations of particularly important points or exhibits. Finally, rehearsal or repetition of major points may help people to remember them as long as the points are complicated and the repetitions are few (Petty and Cacioppo, 1980). Jurors may well resent an attorney who repeats a simple argument, and many repetitions have little impact on improving recall beyond the effects of a few repetitions.

But probably the most important factor that will facilitate long-term recall of your case is its overall meaningfulness (Craik, 1979). When attorneys can tie up all the disparate points and arguments in their case into a thematic story, long-term retention will be greatly enhanced.

Social psychological research on the effects of message modality has demonstrated that there is an interaction between message complexity and message

modality. Complex messages are better remembered when written down, whereas a simple message may be best remembered when spoken (Chaiken & Eagly, 1976).

If the attorney has prepared an opening statement that is simple, with few propositions or facts, jurors will probably remember it if it is spoken. For more complex opening statements, however, it may be better to write down the major points and post them where the jurors can see them while the attorney is making his/her opening statement. The attorney must, of course, determine from his/her opponent if he/she intends to oppose the admission of such an exhibit in advance of making the opening. Where no objection is anticipated, or where it seems probable that the exhibit summarizing the testimony will be admitted into evidence, the attorney should press for use of the exhibit during opening statement. The sooner the jury is provided with a graphic organization of the story of the facts, the more likely the witness testimony, when presented, will be meaningful, and the more likely this testimony will be recalled during deliberation.

<u>What about withholding my opening statement and the "principle of primacy," the idea that we tend to believe most deeply that which we first hear, and whichever side of an issue is presented first will have a greater influence on opinion than an equally strong but later presentation of the opposite side?</u>

According to this reasoning, the prosecution automatically has the advantage in a criminal case since he/she presents the first opening statement. We have already discussed the social psychological research on primacy and first impressions of personality. As we noted, the research in this area has established fairly conclusively that there is a primacy effect for personality perception. The social psychological research on primacy and persuasion is, unfortunately, less conclusive. While people commonly use the first bits of information they receive to form an impression of personality, they are not always persuaded by the first arguments or statements they hear. In fact, there is some evidence to support the notion that what is presented last, not first, will be most persuasive, particularly when there is a long delay between the first and second presentation as would be the case if the defense were to withhold his/her opening.

The social psychological research seems to suggest that if traditional procedures were followed in the courtroom, with the prosecution presenting the first opening statement and the defense following, a slight primacy effect would immediately be obtained. On the other hand, if the defense were to wait and present his opening later in the trial, the content of his opening may be better remembered by jurors than the prosecution's opening and thus be more persuasive due to recency effects (Miller & Campbell, 1959).

The message heard first is most effective. If, however, there is a time delay between messages, the message heard last will be most persuasive; a substantial portion of the first argument will be forgotten, but the second will be more fresh in the recipient's mind.

If the defense delayed opening until later in the trial and jurors were quizzed immediately after the defense's opening as to the effectiveness of both openings, they would remember best and be persuaded most by the defense because of the long time delay between the two. This, coupled with research which suggests that listeners are willing to suspend judgment until they have heard both sides of an issue, should make the attorney less hesitant about withholding opening statements.

The attorney contemplating withholding the opening should balance this consideration against the missed opportunity of making a good first impression during the opening statement. The other consideration for the attorney is whether or not an opening statement is supposed to be persuasive at all. Legally speaking, the opening

statement must not contain any arguments for one side or the other. The issue of who has the persuasive advantage in this situation may not matter if one is not permitted to be persuasive. In light of these considerations it is probably a good idea for the attorneys not to concern themselves with persuasive impact in the opening. Instead the attorney may be better advised to use the opening statement as a vehicle for making what is to follow more meaningful and thus more memorable to jurors, making a good first impression on the jury, and forewarning the jury about upcoming events.

It is possible in some jurisdictions for the attorney to waive his/her right to make an opening statement, or for a defense attorney to withhold his/her opening until after the prosecution has presented their side. What advice can the social psychologist offer the attorney who is pondering withholding his/her opening statement?

A fair amount of research has been conducted in the area of one versus two-sided communications that seems applicable to this question. Since the criminal trial is a forum explicitly designed to air both sides of an issue, and withholding an opening allows jurors to only hear one side of an issue, social psychological research which examines the impact of hearing only one side of an issue may provide some direction for the defense attorney contemplating letting jurors hear only the prosecution's side of the argument.

People that oppose a particular position or who are at least aware of an opposing position (the better educated) are more likely to perceive a one sided argument as being biased and are more cautious about believing it (Hovland, Lumsdaine & Sheffield, 1957). When people are aware that there are two sides to an issue (precisely the situation the juror finds himself/herself in), a one sided presentation is seen as a biased communication (Chu, 1967). One might argue that jurors, charged with the responsibility of hearing both sides of an issue and rendering a fair verdict would be willing to suspend judgment on one side's argument until both sides have presented their case. Thus, the attorney who withholds his opening statement, until the prosecution rests his/her case may not be putting himself/herself in as much jeopardy as one might suppose.

"Psychological Reactance" may be another reason why people are reluctant to fully accept the conclusions of a one sided communication (Jones & Brehm, 1970). Reactance is aroused when the pressure to adopt a certain position in a two sided situation will be perceived as threat to the listener's freedom to decide and choose for himself or herself. One way for the individual to restore feelings of freedom is to adopt a position highly discrepant from the one sided position advocated (Jones & Brehm, 1970; Sensenig & Brehm, 1968; Worchel & Brehm, 1971).

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V. Witnesses

I would, of course, like the jury to be persuaded to my point of view, and to be persuaded by the statements of the witnesses I call to the stand. What factors have been found to be important determinants of a source's persuasive impact on a listener?

Many variables have been found to be associated with a person's persuasive impact. Most important among these are: credibility, attractiveness and power (Kelman, 1961). People who are perceived to be highly credible, personally attractive or who are in a powerful position are usually more persuasive when they deliver a message (Hass, 1981; McGuire, 1969). The factors which underlie listener perceptions of credibility, attractiveness and power have been investigated extensively, as have the psychological processes by which credibility, attractiveness and power operate to increase persuasiveness.

If a listener perceives a source to be an "expert" on the topic at hand, and "trustworthy" communicator he/she will deem the source a "credible" one. As a person listens to an argument from a credible source, he/she begins to believe the message, incorporate it into his/her value system or as social psychologists have termed it, "internalize" the message, and the source has a greater persuasive impact on the recipient of the message. A different process may operate should the listener be exposed to a message from a "powerful" source. In this case the listener may simply comply with the source's message or recommendation while not actually believing or internalizing it. In the case of an "attractive" source the listener may "identify" with the person delivering a message and thus be persuaded.

I would like my witnesses to appear credible when they are on the stand. I, too, would like to appear as a credible source of information to the jury. What underlies listeners' judgments about the credibility of the source of a communication?

The primary determinants of credibility are expertise and trustworthiness. "A credible source is one who is perceived to have information that is 'correct' and who is perceived to be willing to communicate that information without bias" (Hass, 1981; Hovland, Lumsdaine & Sheffield, 1949; Hovland & Weiss, 1951; Sherif, 1935).

Further research has established that if a source is perceived to have something to gain from the position he/she is advocating he/she will be perceived as less trustworthy and the message will be less persuasive (Walster, Aronson & Abrahams, 1966). In one experiment, for example, subjects listened to a convicted criminal argue in favor of a stronger police force, and a prosecuting attorney argue for more lenient sentencing of criminals. The results indicated that subjects were more persuaded by messages coming from sources who appeared to be arguing against their self interest. Another study found that if advertisers admitted that their products had weaknesses, listeners rated the remaining claims as more believable (Settle & Golden, 1974).

Studies have shown that listener perceptions of expertise also determine whether a source will be believable (Aronson, Turner & Carlsmith, 1963; Cook, 1969; Sternthal, Dholakia & Leavitt, 1978; Sternthal, Phillips & Dholakia, 1978).

There are several other factors that may limit the impact of even the most expert and trustworthy communicator. Two of these are: the discrepancy between the listener's position on an issue and the position advocated by the source, and the level of listener involvement with the communication topic (Aronson et al., 1963; Bochner & Insko, 1966; Insko, Murashima, & Saiyadain, 1966; Johnson, 1966; Peterson & Koulack, 1969). The crucial difference between high and low credibility sources is the point at which a listener's belief begins to dip back down to the pre-message

level. The high credibility source is able to produce more belief change even though his position may be further away from the listener's than the low credibility source, but only up to a point. Even the most credible source cannot produce belief change if he/she advocated a position that falls outside of the listener's "latitude of acceptance" (Sherif & Sherif, 1967).

If a listener is personally involved with an issue, the impact of a source's credibility will also be reduced (Aspler & Sears, 1968; Rhine & Severance, 1970; Sherif & Hovland, 1961; Sherif, Kelly, Rodgers, Sarup, & Tittler, 1973). When an issue is important, people are more motivated to consider it thoroughly. Consequently, people are less likely to accept the message at face value just because it comes from an expert and persuasion will be affected more by the content of the message than source (Petty & Cacioppo, 1979).

The implications of this research for the criminal trial lawyer are quite straightforward. To appear credible, the attorney must convince the jury that he/she is an expert on the case and that he/she can be trusted. The way to become an expert on the case is to prepare extensively before the trial. This advice should come as no surprise to most successful practicing attorneys. There is nearly unanimous agreement both among practicing attorneys and authors of trial practice handbooks that the bulk of the case is won before the trial in the preparation stage. Several handbooks offer useful organizational methods for insuring that every aspect of the case has been thoroughly prepared before the advocate steps into the courtroom. We will not discuss these organizational methods here but refer the interested reader to some of the more recent handbooks available on trial practice.

Trustworthiness can also be viewed as a matter of preparation. The attorney should know before the trial what portions of his/her case will appear weak or unconvincing to the jury. It may be an effective strategy to immediately and directly admit these potential weaknesses to your jurors. This will serve two purposes. First, it will diffuse the impact of the discrepancy or inconsistency when the prosecution brings it forward, as he/she inevitably will. Second, the social psychological research suggests that admitting the weakness, even if your opponent does not bring it up, may make you appear to be a more trustworthy and credible communicator. Thus, when the attorney asks the jurors to believe him/her concerning a more critical argument or piece of testimony later in the trial, they may feel that he/she is trustworthy enough to do so.

It is useful for the attorney to remember the qualification stemming from social psychological findings in source credibility. First, to the extent that jurors take their obligations seriously, they will hopefully be attending more to the content of the statement, argument or testimony than to the source. The research suggests that when people are involved with the message they are hearing, they attend more to the message than to the source of the message. The suggestion that the attorney attend to the impressions of expertness and trustworthiness he/she may be making does not imply that the content of the message can be neglected. In this same vein it is useful for the attorney to keep in mind that no matter how much expertise and trustworthiness he/she conveys, it will do little good if the attorney is advocating a position that is highly discrepant from the jurors' own position on the matter (i.e., it may be impossible to convince a male chauvinist juror that rape is an act of violence and not sexual in nature). The important point here is that the message and the source combine to create persuasion in the listener. Obviously, a convincing message from a credible communicator will be highly effective. An unconvincing or ill-thought out argument will probably not sway jurors no matter how credible the speaker.

What about the other source factors, besides credibility, that will affect whether or not my witness will persuade the jury to his or her point of view?

Another major factor which affects the source's persuasive impact is attractiveness. Attractiveness has generally been defined in two ways by social psychologists who study persuasive communication: (1) as perceived physical attractiveness or the physical beauty of the source of a message (Snyder & Rothbart, 1971); and (2) as the communicator's perception of his similarity to a communicator (Back, 1951; Berscheid, 1966; Brock, 1965). Research has demonstrated that physically attractive individuals are generally, but not always, more persuasive than unattractive ones. Research on similarity has yielded more consistent results in the direction of greater persuasiveness. The reasons attractive individuals are more persuasive are fairly simple: we naturally try to identify with attractive people, we like them and consequently are more likely to agree with what they say. The idea that people we can identify with are more convincing than people we can't identify with has not escaped the attention of trial practice lawyers. Morrill (1973), for example, in a discussion of jury selection techniques, states:

> The same membership (as the defendant) in a club, church, community, occupation, or some other ethnic group should be considered as a favorable mark. There can be invaluable background experiences that would create a tendency to identify with a party. Because of the unlimited possibilities here, with practice and thought, the lawyer will find himself selecting a better juror to try the facts of his case (p. 19).

What makes a person physically attractive? Social psychological research has tended to confirm most of our common sense notions of physical attractiveness. For example, most people think excessive weight is physically unattractive (Lerner & Gellert, 1969). People who smile often are also judged attractive (Kleinke, Staneski & Berger, 1975). More importantly, however, social psychologists have demonstrated that an observer infers a wide range of positive attributes to the physically attractive individual. We assume that physically attractive people have a more pleasant personality are more successful in their occupations, have better marriages, are more intelligent, friendly, competent and warm (Cash, Begley, McCown, & Weise, 1975; Dion, Berscheid & Walster, 1972; Marks & Miller, 1980; Snyder, Tanke, & Berscheid, 1977). We also assume that an attractive person is more outgoing, high in self-esteem and that the attractive person's attitudes are similar to our own (Adams & Huston, 1975; Schodel, Fredrickson, & Knight, 1975).

Some of these stereotypes about attractive people turn out to be true. Physically attractive children do have higher levels of self-esteem than unattractive children (Maruyama & Miller, 1975). Physically attractive people are also less shy, more assertive more socially skilled and better adjusted (Cash, Kehr, Polyson, & Freeman, 1977; Curran & Lippold, 1975; Goldman & Lewis, 1977; Jackson & Huston, 1975). In fact, nearly the only disadvantages to being attractive are that one is perceived to be more likely to engage in extramarital affairs and more likely to be judged vain or egotistical by others (Dermer & Thiel, 1975).

Physically attractive defendants are also treated more leniently by jurors in simulated trial experiments. McFatter, for example, compared physically attractive and unattractive individuals across ten different crimes (McFatter, 1978). He found that even when mock jurors were provided statements stating that defendant was guilty they still gave attractive persons more lenient sentences than unattractive ones. Efran and others have found that physically attractive male and female defendants received lower guilt ratings than unattractive defendants (Efran, 1974). This advantage may disappear, however, when the defendant is perceived to have used his or her attractiveness to facilitate the crime (Dane & Wrightsman, 1982) or when jurors are given specific instructions to ignore defendant attractiveness when reaching a verdict (Friend & Vinson, 1974).

Similarity between the source and the recipient of a communication also

influences attraction and persuasibility. The more similar the source and recipient the more persuasive influence the source has on the recipient. Social psychologists have found, for example, that a stranger who expresses similar attitudes is liked more than one who expresses dissimilar attitudes (Schachter, 1951). The relationship is quite straightforward and one of the most consistent in social psychological research. As the proportion of similar attitudes increases, liking increases (Schonemann, Byrne, & Bell, 1977), and this relationship holds for children, college students, high school drop outs and senior citizens (Byrne, 1971). While liking is nearly always facilitated by greater similarity, persuasion is somewhat more complex. For attitude change to occur, communicator-communicatee similarities must be relevant to the influence attempt. Irrelevant similarities have little effect on persuasion.

In summary, physically attractive people are perceived as more intelligent, competent, successful, and friendly and, some of the time, more believable than unattractive people. Second, if the recipient of a message perceives himself/herself to be similar to the source of the message along dimensions that are relevant to the communication topic at hand, the source will be liked better and be perceived as more convincing. This research, particularly the findings on similarity, is important to the trial practice attorney for what it suggests not to do at trial. For example, it is probably fruitless for the attorney to try to determine the attitudes, traits, background, characteristics, occupation of the jurors in hopes of finding those characteristics similar to the defendant with which jurors can identify. Only attitude similarity which is specifically related or pertinent to the topic or crime at hand would be of any use. We would dare say if the attorney could determine before hand that the juror will agree with the defendant's specific opinions, the prosecutor in the case probably would have plea bargained the case long before it came to trial. The advice not to worry about general juror attitudes not specifically related to the issues of the trial is directly contrary to the advice of some trial practice handbooks. To quote one of the most recent publications:

> The key to effective jury selection lies first with one's ability to select jurors who are like the client and can identify with that client. . . . Therefore the profile (of the juror) should first be developed to mirror the client and his characteristics. The profile should include traits, characteristics and elements of psychological make up that will be receptive to the client and the evidence presented (Berscheid, 1966, pp. 410-411).

While it is doubtful that trying to match defendant with juror will render the defendant more believable, the "power" of personal attractiveness (defined in terms of similarity or physical attractiveness) should not be underestimated by the attorney. As we have noted, there are a substantial number of research findings in social psychology which indicate that the physically attractive attorney or witness will probably have an advantage in terms of juror liking, ratings of competence, attribution of success and adjustment and other positive attributions. In light of this it is probably unwise for the attorney to call the defendant or other witness to the stand without making some attempt to blunt the impact of immediately noticeable characteristics that are vastly dissimilar to jurors' (i.e., dress, hair length, obvious indications of social status, etc.). To fail in this regard may result in unnecessary bias against the client even though his testimony may be extremely credible. Likewise, the attorney is probably safe in not hesitating to bring a physically attractive witness to the stand.

Which witness factor is more important -- attractiveness or credibility?

Recent research suggests that it is not enough simply to be attractive. Under most conditions attractive sources also have to possess expertise and/or provide supporting arguments in order to persuade an audience (Horai, Naccari & Fatoullah, 1974; McCrasky, 1970). Maddox and Rogers (1980), for example, conducted a more clearly

designed experiment than the experiment by Norman (1976) which found that experts needed to present several arguments for his opinion to be accepted while an attractive source can simply state his belief without supporting arguments and be equally persuasive. These researchers failed to find support for the idea that the impact of an attractive source does not depend on the number of supporting arguments. Maddox and Rogers found that even though the attractive source in their experiment was evaluated as more sociable, interesting, warm, outgoing, poised, strong, responsive and interpersonally attractive (findings consistent with previous research), he was not more persuasive. In fact, Maddox and Rogers suggest that subjects are unwilling to succumb to influence attempts made by exceptionally beautiful or ugly sources (e.g., "He was so ugly I tried to bend over backwards to evaluate what he said fairly"). These authors suggest that there is a curvilinear relationship between attitude change and attractiveness. Moderately attractive individuals may be more persuasive than either extremely attractive or unattractive persons.

To further complicate matters, it is probably true that attractive individuals have also learned many behaviors that make them appear more credible than an unattractive person even though they may both be delivering essentially the same message. Chaiken (1979) has conducted a field experiment which illustrates this point. Chaiken compared attractive and unattractive sources in actual interpersonal persuasion situations (those situations not artificially constructed in the laboratory). She found that attractive communicators were better communicators, had attained greater levels of education, and were more confident than unattractive sources. Chaiken suggested that many of the behavioral characteristics of attractive sources make them appear credible and help facilitate internalization of the source's position as well as produce persuasion through identification. This study and the others we have cited in this section suggest that it is not easy to determine exactly how an attractive source persuades the listener to his/her position. Part of the process may entail listener identification with the source and part may entail the behavioral characteristics of the attractive communicator which render him/her more credible.

From a practical point of view these qualifications to the research on attractiveness should present the trial practice attorney with few difficulties. First, the evidence to date suggests that the unattractive defendant or other witness may be liked less, but will probably be just as believable as the attractive witness provided he/she communicates well. Secondly, in keeping with our earlier theme of making the juror a better information processor, it is heartening to realize that even beautiful attorneys and witnesses still need to bolster their messages with sound arguments in order to make them believable. The attorneys need not worry that simply because a beautiful witness says it, the jury will believe it. Thirdly, the research which has found that attractive people are also more skillful communicators should further encourage the attorney with respect to putting the attractive witness on the stand. No matter what the witnesses' testimony, if he/she is attractive it may at least be skillfully communicated.

Are there any characteristics of the witness's style of delivery or my own style that may influence credibility?

The style with which a speaker delivers a message has been found by psychologists and communication researchers to be related to listener perceptions of speaker credibility, dynamism, and persuasiveness. Some of the most notable features of a communicator's style are: the speed or rate of speech (e.g., the number of words spoken per minute); powerful vs. powerless speech styles; and the number or rate of non-fluencies presented by a speaker. We will discuss each of these in turn.

The cultural stereotype of the fast talker is not a good one. The old saw is that the fast talking salesman, for example, seems slippery and shallow (MacLachlan, 1979).

Trial practice attorneys are often not sure of the pace at which they should proceed during the trial, and trial practice handbooks often offer contradictory advice. Morrill (1973) for example, advises the practicing lawyer:

> It should be a general rule that whenever an extremely favorable point is made, or a telling blow is given to the other side, all systems should be "go" so that the case will be in the hands of the jury as soon afterwards as possible.

But, in the same paragraph, Morrill admonishes the lawyer:

> When making a favorable point, travel slowly so that it will "stick." This is comparable to writing it on stone rather than in water (p. 42).

The social psychological research has demonstrated that faster talkers are perceived as more persuasive and that listeners learn more from faster talkers in a given amount of time (Miller, Maruyama, Beaber & Valone, 1976). The point is that the average listener can comprehend a message much faster than a person can speak it at a normal rate. Furthermore, MacLachlan has determined that message retention is also greater for subjects who have listened to accelerated messages.

Social psychological research has also been directed toward other paralinguistic message factors. Miller and Hewgill (1964) have reported that as the number of nonfluencies (vocalized pauses such as "uh" or repetitions) present during a speaker's delivery increases, the lower the speaker is rated by listeners for credibility, dynamism and competence. Lind and O'Barr (1979) have found that when people fall into "powerless language modes" including: the use of "hedges" ("I think. . .," "maybe. . .," "perhaps"); rising intonation at the end of a sentence; use of intensifiers ("I was very angry" rather than "I was angry"); and a high frequency of references to authority figures; they are perceived as less believable, less intelligent, less competent, less likable and less assertive.

What do these findings imply for the attorney's in court behavior? First, it would seem that jurors will respond favorably to the attorney's opening statements and closing arguments if they are delivered at a rapid pace. The attorney who is speaking at a faster rate probably does not need to be overly concerned about the jurors not comprehending his or her arguments (at least with respect to the rapidness of delivery, they may be incomprehensible for other reasons). Second, as any good high school speech instructor would advise, it is probably a good idea to train oneself to avoid vocalized pauses --the most common of which is the sound "uh"--between sentences or thoughts. Finally, a more powerful speech style is a more convincing one. The attorney should, whenever possible, come directly to the point and not hedge his or her points with extensive qualifications. The same holds for witnesses the attorney calls to the stand. The witness should be encouraged to answer questions in the most direct and powerful way possible. All of these are relatively simple behavioral modifications that can probably be easily adopted by the attorney and witness with a minimal amount of practice.

There has been some interesting research conducted on the effects of witness speech styles in addition to the work we previously cited on powerless vs. powerful modes of speech by O'Barr and his colleagues (Lind, Erickson, Conley & O'Barr, 1978). In particular, the research on the effects of narrative versus fragmented styles of speech and hypercorrect versus formal styles of speech may apply to the testimony of both expert witnesses or any other witness. O'Barr and colleagues (O'Barr, 1982) define "formal speech" as that which continues basically standard usages and does not include unnecessary technical or "quasi-technical" vocabulary -- the characteristics of "hypercorrect" speech. Formal speech is also less wordy than hypercorrect speech. A person speaking in a hypercorrect versus a formal mode may, for example, substitute the terms "seventy-two hours" for "three days," the word "comatose" for "unconscious,"

"transport" for "move" and substitute phrases such as "the patient was not ambulatory" for "Mrs. Davis was not able to walk." O'Barr and colleagues (O'Barr, 1982) taped the testimony of witnesses who engaged in hypercorrect speech in several actual trials. The investigators then reconstructed the witness testimony replacing the hypercorrect speech forms with the more standard or formal forms while keeping the content in both tapes constant. Two groups of mock jurors then listened to one or the other tape. The subject-jurors evaluated the "hypercorrect" witness as significantly less convincing, competent, qualified and intelligent than the witness who used the standard form.

The same technique was used by O'Barr to study the effects of narrative U.S. fragmented speech styles in witness testimony (O'Barr, 1982). In the narrative style the witness volunteers an answer which is detailed and which provides the listener with facts not specifically called for in the question. For example, O'Barr gives the following courtroom example of the narrative style:

Q. Now, calling your attention to the twenty-first day of November, a Saturday, what were your working hours that day?

A. Well, I was working from, uh, 7 a.m. to 3 p.m. I arrived at the store at 6:30 and opened the store at 7:00 (p. 76).

In contrast, a fragmented style of speaking in the courtroom may look like the following:

Q. Now, calling your attention to the twenty-first day of November, a Saturday, what were your working hours that day?

A. Well, I was working from 7 to 3.

Q. Was that 7 a.m.?

A. Yes.

Q. And what time that day did you arrive at the store?

A. 6:30.

Q. 6:30. And did, uh, you open the store at 7 o'clock?

A. Yes, it has to be opened by then.

Lind, Erickson, Conley and O'Barr (1978) found that when subject-jurors judged the witnesses for social dynamism and competence, witnesses with a fragmented style were viewed less favorably.

O'Barr (1982) offers the trial practice lawyer and his witnesses several strategies based on the research findings. First, he advises the lawyer in light of the research on narrative styles:

> Allow more opportunity to one's own witnesses on direct examination to give longer, narrative versions of their testimony. . .
> Avoid interrupting your witness whenever possible. Interrupting a responsive answer may be a damaging as (any anticipated damaging) content of the answer.

To this advice we may add, in light of the research on hypercorrect speech, that the attorney should carefully prepare with his/her witnesses beforehand, especially expert witnesses, to eliminate the possibility of damaging the witnesses' testimony through

negative juror evaluations. A listener will probably more favorably rate a witness who does not use an artificially precise or pseudo-scientific speaking style. The expert should be cautioned to avoid unnecessary jargon. We may add the speculation that the attorney him/herself may also suffer negative evaluations for excessive use of legal jargon either when questioning witnesses or during other phases of the trial.

So far we have been discussing what social psychologists have called "paralinguistic" aspects of witness testimony, that is, factors associated with the tone, rapidity or general speaking style of the witness. Are there other non-content elements of a witnesses' style of delivery that may affect witness credibility?

Social psychologists have compiled a large body of research on those non-verbal behaviors which enable a person to: create a favorable impression, increase persuasiveness and convey a sense of expertise and trustworthiness. Social psychologists have also investigated those nonverbal behaviors that may lead an observer to conclude that an actor is trying to be deliberately deceptive. Both of these areas of inquiry may provide the trial attorney with useful information about the nonverbal behavior of his/her witnesses when on the stand which may enhance the jury's perception of the witness in a favorable light, and useful information about those witness behaviors which may serve to undermine the credibility of an honest witness before the jury.

Nonverbal behaviors are extremely important in impression formation, particularly with respect to perception of credibility. Mehrabian and Werner (1967) found that as much as ninety-three percent of the variance in impressions about other people was accounted for by non-verbal information alone. Although other researchers (Ekruda, Friesen, O'Sullivan and Scherer, 1980) have suggested that the actual level of influence is much lower, the fact remains that these non-content aspects of communication do influence our perceptions of other individuals and their role may be even more acute in courtroom settings where persons are intentionally asked to make judgments about witness credibility.

First, let's talk about those nonverbal behaviors that can facilitate a favorable impression. One of the most persuasive findings in the nonverbal literature has been the finding that gaze or eye contact results in favorable evaluations. An individual will be judged to be more likable, pleasant, and interesting as he/she engages in greater amounts of eye contact (Scherer, 1974). In fact, in a courtroom simulation study Hernsley and Doob (1978) found that witnesses who averted their gaze from the questioning attorney when testifying were perceived as less believable and the defendant for whom they were testifying was more likely to be judged guilty

Researchers have also determined that one of the primary aspects of believability or persuasiveness are non-verbal behaviors that communicate a sense of confidence to observers. Maslow, Yoselson, and London (1971) for example, videotaped law students presenting views about a case in a kinesically confident, doubtful, or neutral manner. The experimenters then presented these videotapes to three groups of subjects. Subjects who saw the kinesically confident presentations were more likely to rate the defendant in the case as not liable. What sort of behaviors lead an observer to conclude that a speaker is confident? La Cross (1975) and Edinger and Patterson (1983) suggest that smiling, positive head nods, hhand gesticulations, eye contact, direct (0 degree) angle of shoulder orientation and 20 degree forward body lean. Conveying a sense of expertness can also be accomplished through non-verbal channels. Siegel and Sell (1978), for example, found that judgments of expertness in a counseling situation were positively related to certain non-verbal behaviors such as increased eye contact, shoulder and body lean, and hand gesture directed toward the client. Objective indicators of expertise, such as the presence of diplomas and state licensure certificates in the Siegel and Sell experiment in combination with non-verbal indicators results in the highest level of expertness. In the related work

on the effectiveness of non-verbal behaviors in counseling situations, Claiborn (1979) has demonstrated that subject perceptions of expertise, trustworthiness, attractiveness, and greater ability to influence others was related to non-verbal cues such as head nodding, eye contact and hand gestures. An expressionless face with little head nodding, eye contact less than half the time, and no gestures resulted in observers deeming the counselor less trustworthy and less expert.

Implicit in all of this research is the idea that non-verbal behavior is an important factor in any persuasion of social influence situation. Second, non-verbal behaviors are not necessarily unconscious body or facial movements spontaneously emitted by the actor. As Edinger and Patterson (1983) point out non-verbal behaviors can be deliberately involved or purposely presented by one person in order to influence another.

What does this area of inquiry have to offer the trial practice attorney interested in presenting his/her witness in the most favorable light possible?

The research to date indicates that there are several specific non-verbal behaviors that are important in fostering impressions of expertness, attractiveness, and persuasiveness. These behaviors usually involve eye gaze, head movement, and hand gesturing. The individual who looks directly into the eyes of another, nods frequently, and expressively gestures while making a point will generally be more convincing than a less animated individual. These findings imply that the attorney may profitably spend his/her time preparing a witness not only to present his/her testimony as accurately as possible but as expressively and enthusiastically as possible through the use of those non-verbal behaviors that facilitate listener impressions of persuasiveness and expertness. On a practical level this would probably entail pre-trail activities that would allow the witness to become sufficiently comfortable with his/her testimony and courtroom procedures so that those non-verbal behaviors associated with impressions confidence, enthusiasm, and expertness will naturally be emitted by the witness when called to testify.

What can the attorney do if his/her witness appears untrustworthy even though he/she is telling the truth?

So far we have discussed one important dimension of witness credibility — namely, competence, expertness or persuasiveness. The other important component of credibility, as we have noted previously, is trustworthiness. The witness may be suspected of offering untruthful testimony by the jury because of the exhibition of certain non-verbal behaviors associated with non-trustworthiness and deception. Social psychologists (Ekman and Friesen, 1969) have been concerned for some time with those behavioral cues associated with deception. In a survey of this literature Miller and Burgoon (1982) conclude that the dissembling individual tends to use a low level of eye contact, has a relatively high pitched tone of voice (compared to his or her normal pitch), hesitates and pauses when speaking, and appears nervous and fidgety. On the other hand, trustworthiness is indexed by increased eye contact, closer interaction distances, few hesitations or pauses in speech, and illustrative gestures. Other non-verbal cues have been found to discriminate between deceptive and honest presentations. Harrison et al. (1978) reported that subjects who were truthful responded more quickly and gave shorter answers to questions than subjects who were being deceptive. Further, observers tend to perceive hesitant and lengthy answers as deceitful despite their actual veracity.

Although these non-verbal behaviors are exhibited when a person is actually lying or telling the truth, further research suggests that people are usually not able to detect actual deception because they rely too heavily on facial expressions as cues to deception whereas bodily cues may be more accurate indicators. Ekman and Friesen (1974) have found, for example, that the typical observer is about sixty-four percent

accurate (only fourteen percent better than expected by chance) in detecting deception from visual cues. Miller and Burgoon (1982) estimate that the mean accuracy rate across all studies in their review is about fifty-five percent, only five percent above chance. A field study by Kraut and Pue (1980) provides an excellent illustration of peoples' inability to detect actual deception. These researchers recruited airline passengers to participate in a customs inspection. The experimenters gave half of the passengers "contraband" and were submitted to questioning by actual customs officials. The questioning sessions were videotaped and later shown to student subjects who were asked to guess which subjects should be searched. The results indicated that neither the students nor the customs officials could identify which passengers were lying when questioned about contraband.

These research findings suggest that the attorney may have a serious problem with the witness who displays non-verbal behaviors associated with deception. Jurors are no more accurate than other lay-persons at judging when an individual is lying and are just as susceptible to the misconceptions about those non-verbal behaviors that are typically believed to indicate lying but which may have little actual relationship with actual deception. The attorney may be faced with a decision of putting a client witness on the stand who will display to jurors many of the behaviors associated with deception when, in fact, the truthful client is only displaying nervousness. There are several things the attorney might do to reduce the chances that the jury will unjustly infer deception because of a witnesses inappropriate demeanor: instruct the witness to answer questions immediately without pause and to give brief precise answers rather than lengthy explanations; instruct the witness to engage in maximum eye contact with the questioning attorney; instruct the witness not to fidget or make unnecessary movements while on the witness stand; and finally, encourage the witness to present themselves with a mild amount of enthusiasm and gesturing.

<u>How do characteristics of the victim, such as physical attractiveness or social standing, influence jurors' judgments?</u>

There have been many studies in which characteristics of rape victims, such as whether or not they were married, employed, physically attractive, or sexually active, have been varied (See Albin, 1977; Deming & Eppey, 1980; Krulewitz, 1982, for reviews). However, virtually all of these studies have been conducted in rather contrived laboratory settings, where people receive relatively little information about the rape and the rape victim. As such, they would seem to have only limited application to jurors' judgments in trials. In addition, They have produced very inconsistent results: some times more respectable victims or more attractive victims are blamed more for the assault, and sometimes less. If characteristics of the victim do influence the judgments of others, they do not appear to do so in any consistent manner.

<u>Do features or characteristics of the assault itself influence juror judgments?</u>

There are both better and more consistent findings in this area. Generally speaking, features of the assault which would make the victim's possible agreement or voluntary involvement in the incident less likely have been found to be consistently associated with less blame for the victims and more blame or longer preferred sentences for the accused rapists. Sexual assaults that involve more violence, are committed by strangers, and are not preceded by potentially provocative behavior on the part of the victim such as hitchhiking or being alone in a bar are judged as more stressful and provoked by the victim and more worthy of punishment for the defendant (Field, 1978; 1979; Krulewitz & Payne, 1978; Krulewitz, 1982). Given that little consistency has been found in studies looking at the effects of victim characteristics on others' judgments, but there is consistent support for the nature of the assault influencing such judgments, this combination of research indicates that others tend to judge rapes on the basis of the facts of the case rather than pre-existing beliefs

about certain types of victims. However, jurors may still hold certain stereotypes or prejudices about sexual assaults themselves, which could lead to less than objective judgments despite their attempts to focus on the case facts.

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VI. The Role of Memory in Eyewitness Testimony

In almost every trial there will be witnesses who testify on the basis of their memory about events that have taken place months, and sometimes years, before the trial. Particularly in cases where there is not a substantial body of real evidence to support one side or the others' version of critical trial issues, the witness and the witness's memory may be all important to the outcome of the trial. Although psychologists have been interested in human memory for over as century (Ebbinghaus, 1885) and despite the fact that some of the earliest research on eyewitness memory took place at the turn of the century (Cattell, 1895; Munsterberg, 1908; Stern, 1910; Gross, 1911; Whipple, 1909), the vast bulk of research on eyewitness reliability has been conducted within the past fifteen years and this recent research serves as the basis for social scientific knowledge about the strengths and weaknesses of eyewitness testimony (Penrod, Loftus, & Winkler, 1982).

Psychological research has concentrated on the problems of eyewitness identification; however, many of the problems involved in face recognition are general problems of human memory and even a cursory understanding of how human memory works can be of substantial assistance to the trial attorney who wishes to elicit effective witness testimony based on memory or discredit that testimony during cross-examination. Problems of witness memory are of critical concern to trial attorneys who must rely on witness memory during direct examination and frequently strive to challenge that memory during cross examination. Further reasons for concern can be found in the research findings of psychologists interested in eyewitness identifications. That research indicates, among other things, that eyewitnesses are not nearly as reliable as many people believe (Loftus & Deffenbacher, 1982; Yarmey & Jones, 1983). Indeed, the Loftus and Deffenbacher and the Yarmey and Jones research indicates that the average layperson (including the average juror, the average trial attorney, and the average trial judge) has a poor understanding of the ways in which human memory works and further tend to regard eyewitnesses as being more accurate than would be justified on the basis of empirical research findings. Some researchers have found evidence that it can be very difficult to effectively discredit a witness (Saunders, Vidmar, & Hewitt, 1983). A further disturbing problem with the eyewitness is that jurors seem to be relatively insensitive to information that might aid them in assessing whether or not a witness is reporting accurately from memory. Wells and his colleagues have found that jurors are very poor at distinguishing between accurate and inaccurate eyewitnesses (Wells & Lindsay, 1983 review these studies) and appear to rely quite heavily on witnesses expressions of confidence about the accuracy of their own testimony.

Heavy reliance on expressions of confidence is disturbing because there are many research studies which indicate only a weak relationship between the accuracy of an eyewitness identification and the confidence that the witness expresses (Deffenbacher, 1980). In light of the findings reported elsewhere in this section which indicate that observers also tend to rely upon nonverbal communication as a basis for assessing whether or not a witness is telling the truth--but that these nonverbal forms of communication are unreliable indicators of truthfulness--the trial attorney may wonder how it may be possible to aid the jurors in discriminating between witnesses who provide truthful and reliable testimony and those who do not. Wells and Lindsay (1983) argue that jurors may rely on three types of information to infer or evaluate the credibility of an eyewitness. These are: 1) the conditions under which the original observations were made and later reported; 2) the consistency of memory reports--both the consistency of reports made by a single witness and the consistency of reports made by different witnesses; 3) statements of confidence and admissions of previous memory errors. These distinctions are helpful because they highlight the kinds of strategies that may be used during direct and cross examination to either bolster or reduce the credibility of witnesses who are testifying from memory.

How can I use direct or cross examination to test a witnesses memory?

In the past several years a number of volumes and chapters reviewing psychological research on eyewitness reliability have appeared (Clifford and Bull, 1978; Loftus, 1979; Penrod, Loftus, & Winkler, 1982; Levine & Tapp, 1982; Shepherd et al., 1982; Lloyd-Bostock & Clifford, 1983; Yarmey, 1979). Although a few psychologists have raised questions about the conclusions to be reached from research on memory and eyewitness reliability (McCloskey & Egeth, 1983) a clea consensus about basic issues emerges from the review pieces enumerated above. Corporately these volumes provide a thorough discussion of the conditions that can affect eyewitness performance, beginning with basic problems of human perception through difficulties encountered when a witness attempts to retrieve information from memory. Some of the conditions affecting witness reliability are quite commonsensical and have traditionally served as a basis for direct and cross examination of witness testimony (e.g., the quality of viewing conditions and the length of time since events took place). However, recent research on witness reliability has pointed to a number of conditions which seem to lie outside everyday experience and suggest new bases for questioning the credibility of a witness testifying from memory. In this brief presentation it is possible only to highlight major issues--the interested reader will find each of these issues (and a variety of others) considered in greater detail in the aforementioned sources.

What are the conditions that affect witness memory to enhance or reduce the credibility of trial witnesses?

The conditions affecting witness reliability can conveniently be broken into four stages corresponding to commonly acknowledged stages of human memory. These are: perception, encoding, storage, and retrieval. In the next few pages we highlight some of the major threats to accurate memory that arise at each of these stages. But first, it should be emphasized that the conditions or factors affecting memory performance at each of these stages are two-edged swords: for example, there is now a growing body of research (Deffenbacher, 1983) which indicates that a witness who is under a high degree of stress or arousal while viewing or participating in some event is likely to retain less information about that event than the person who is at a moderate or normal degree of arousal. Juror knowledge of this relationship may work to enhance the credibility of a witness who was only moderately aroused but undermine the credibility of a witness who is highly aroused. Thus, a knowledge of the conditions that affect memory can be useful both for direct examination and for cross examination. On direct examination it may be possible to strengthen a witness's testimony by underscoring that obvious threats to witness memory were not present and could not have affected the witness' memory performance. On cross examination it may be desirable to do just the opposite--to emphasize the presence and the importance of those factors which are known to undermine memory performance.

All of this, of course, presumes that the jury is going to understand the relationship between the quality of memory and the presence or the absence of conditions that threaten memory and will therefore be in a better position to evaluate the reliability of a witnesses testimony. Unfortunately--as noted earlier--lay people do not seem to understand how some of these conditions affect memory and the attorney may be confronted with a situation in which it is desirable, indeed necessary in light of the facts of the case, to bring in an eyewitness expert who can explain to the jury how certain conditions can undermine witness performance. Some researchers have gone so far as to suggest that jurors are not sufficiently skeptical of witness testimony in general (Wells, Lindsay, & Ferguson, 1979; Lindsay, Wells, & Rumpel, 1981; Brigham & Bothwell, 1983 among others but see McCloskey & Egeth , 1983 for an opposing view) and this lack of skepticism may be sufficient grounds for bringing in an expert in any case where the outcome of the trial may turn upon the testimony of a witness whose memory performance is open to any doubt.

At the perception stage what factors will affect a witnesses memory for an event?

In a surprisingly prescient discussion of the implications of defects in human memory for the conduct of cross examination Wellman (1936) observed:

> It may even be that, if the jury only knew the scanty means the witness has had for obtaining the correct and certain knowledge of the very facts to which he has sworn so glibly, aided by the adroit questioning of the opposing counsel, this in itself would go far in weakening the effect of his testimony.

In age where almost everyone owns a camera and virtually everyone has had the experience of watching videotaped instant replays on television, it's not uncommon to find people who believe that there is a strong analogy between such devices and the mechanisms of human perception, such that the eye works in a manner that's similar to a camera and that memory has characteristics similar to those of videotaped recordings. When we introspect about our memory we often have the subjective sense that we are able to replay the events that we have witnessed or been part of. Unfortunately the analogy is a poor one and it breaks down from the very beginning stages of human perception. Although there is some disagreement among psychologists about how human memory works and how it is organized (Alabut & Hasher, 1983) there is general agreement that perception is a constructive process in which some incoming stimuli are selected for processing, the information in that stimuli is abstracted and interpreted, and then assembled into some integrated memory representation. At the other end of memory the common scientific view is that information retrieved from memory undergoes a selective reconstruction in order to arrive at a meaningful characterization or report of what has been previously experienced.

Virtually everyone has the experience of "accurately" retrieving and reporting information from memory--indeed it appears that our memory is well suited to the kinds of informational demands that are typically made of it, but there is substantial evidence that when these normal conditions are exceeded, perception and memory will reveal their shortcomings (Penrod, Loftus, & Winkler, 1983).

The constructive nature of perception can be illustrated with vision. As noted before, the eye does not operate like a photographic or electronic camera. Aside from the crude mechanical differences, a crucial dissimilarity is that our eyes cannot instantly capture or register a detailed mental "image" of a scene. Only a small portion of the eye's visual field can detect detailed visual information (one reason we must move our eyes while reading). To form a mental picture with details akin to those in a photograph requires that the details be perceived, interpreted (a process that draws upon our previous experiences with similar stimuli) and assembled or constructed into a detailed image. Perception is merely the first step in the formation of memories. Information that is perceived, unless subsequently encoded, may never reach memory.

Of course, we frequently do not perceive stimuli even though they are available for perception. Our sensory systems (vision, taste,touch, hearing and smell) are constantly bombarded by stimuli and we are confronted with the possibility of being overloaded by stimulation (indeed most of us have had the experience of being in a setting in which there was "too much going on at once" --this can be both disorienting and overwhelming). One way in which we--our sensory systems and our information processor (the brain)--overcome this problem of sensory overload is through selective attention to stimuli. In essence, we choose to ignore certain stimuli (e.g., the reader is probably not attending to the temperature of his/her office or library because the temperature is within tolerable limits). Of course, certain stimuli are attention-getting. Bright and flashing lights, moving objects, loud sounds, strong odors and flavors and surprising events all command our attention and are therefore

more likely to be remembered.

Most people understand on the basis of their everyday experience that there are limitations to what can be perceived: there must be sufficient illumination in order to see objects, an observer must be standing near enough to objects to detect relevant details, observers must, in some loose sense of the word, be paying "attention" to relevant events, sounds and voices must be loud enough to detect, etc. Ellison and Buckhout (1981) point out, however, that certain characteristics of perception are probably not well understood by the public. It is not clear, for instance, whether the public understands that color vision is lost under poor illumination, that it can take a very substantial period of time for the eye to adapt to dark conditions, that it is necessary to move the eye around over a scene in order to pick up details about that scene, and so on. Furthermore, most of us probably do not have sufficient appreciation of the difficulties observers have in interpreting or judging some stimuli. For instance, estimates of distances, size, acceleration, speed, and the duration of events can be particularly difficult (Cattell, 1895; Gardner, 1933; Grether & Baker, 1972; Buckhout, 1974). And, most people are aware of the fact that optical illusions can give rise to erroneous interpretations of what we see.

Although, many people believe that someone who's very frightened by an event will form a better memory of the event and the people who participate in the event, there is evidence that the victims of violent crimes provide less detailed reports about their assailants (Kuehn, 1974) and that the victims of crimes in which weapons are used may actually focus on the weapon rather than on the person who is carrying the weapon (Johnson & Scott, 1976). These effects may arise both because stress undermines performance generally (Deffenbacher, 1983) and, in the case of the weapons effect, because the victim/viewer's attention is directed to the weapon rather than to the person holding the weapon.

Research by Yarmey and Jones (1983) indicates that the public has a poor understanding of the impact of stress, violence, and weapon focus on witness memory. The lay person seems also not to appreciate the problems in estimating the duration of events.

<u>What happens during the encoding phase of human memory and what conditions affect a witnesses encoding of information?</u>

In another of his astute observations, Wellman (1936) noted:

> It may appear . . . that the witness had the best possible opportunity to observe the facts he speaks of, but had not the intelligence to observe these facts correctly. Two people may witness the same occurrence and yet take away with them and entirely different impression of it; but each, when called to the witness stand, may be willing to swear to that impression as a fact.

The encoding stage of memory is that point a which perceived stimuli are interpreted or processed in such a way as to get the information into memory. Students preparing for an examination encode the information they believe they will need for the exam. Psychologists sometimes talk about the depth of processing or encoding of information (Craik & Lockhart, 1972) and what they refer to is, in a sense, how well information has been studied. Information that is studied only in a very shallow way (e.g., by a student who merely memorizes information without achieving any understanding of that information) will be less well remembered than the same information which is encoded or processed in depth (e.g., as when information is studied in depth to provide a true understanding of the information). The public may well have an appreciation for the influence of exposure time and frequency of exposure on the ability of a person to remember what they have experienced (experimental

demonstrations of the nature and strength of these relationships date back as far as the work of Ebbinghaus, 1885), but it must be emphasized that frequent and lengthy exposures to forces or other information is not guarantee to accurate memory.

The characteristics of events will have an impact on the type and quality of information that's encoded about those events. Very early research demonstrated that insignificant features of stimuli are often not attended to and, therefore, are poorly remembered (Meyers, 1913). For example, we have all handled and perceived coins, currency, telephones and our wrist watches; yet, most people are unable to make accurate drawings or answer even general questions about these objects (e.g., which letters of the alphabet accompany the '3' on the telephone dial? What is in the center on the back of a $1 bill?). Although we have had many exposures to these objects, we do not "use" or encode detailed information about these objects. We use gross cues such as size and color of metal to discriminate pennies from dimes; we almost always use the numbers on the phone dial, not the letters; we read the time from our watches and have no use for and therefore do not encode knowledge about the style of the manufacturer's logo.

The kinds of encoding, thinking or judgments we make about stimuli will affect what we can later remember about the stimuli. A number of researchers have, for instance, shown that people have better memories for faces that have been "deeply encoded." Thus, faces judged for their honest likableness were better remembered than faces judged for gender (Bower & Karlin, 1974). Judging faces for personality characteristics was more effective than judging physical characteristics (Patterson & Baddeley, 1977). Similar findings have been reported by Mueller, Carlomusto and Goldstein (1978) and by Mueller, Bailis and Goldstein (1979).

It is also not clear that the layperson understands the potent role that expectations play in determining how we interpret our perceptions (Allport & Postman, 1945; Clifford & Bull, 1978). The role of expectations is brought home every year during the hunting season when hunters are mistakenly shot by other hunters. It appears that hunters are alert to moving objects of a particular size and speed. When minimal conditions are met, the hunter may fire even though the moving object is another hunter rather than a deer.

Although one would imagine that experience with stimuli would help observers perceive correctly, there do appear to be limitations to training effects. Although the experienced sports fan may well "see" more of the subtle action in a sporting event, efforts to train people in person recognition have been largely unsuccessful (Malpass, 1982; Baddeley & Woodhead, 1983). One comparison of police and laypersons indicated that the police were no better as witnesses and, in fact, had a tendency to falsely identify crimes in a filmed street scene (Tickner & Poulton, 1975).

The importance or seriousness of an event will also affect the amount of attention and encoding that's given by a witness (Leippe, Wells, & Ostrom, 1978; Greenberg, Wilson, & Mills, 1982). As noted earlier, Deffenbacher (1983) has reviewed a number of studies examining the relationship between the stress or arousal that a witness is under and the amount of information that they retain. He finds evidence supporting what has been termed the Yerkes-Dodson (1908) which holds that for any task--including a witnesses memory for experienced events--there is an optimum level of arousal that will insure optimal performance. If arousal is either too high or too low, then performance will fall off.

<u>Can a witnesses memory be affected during the time that it's stored?</u>

As Wellman aptly observed in 1936:

It is one thing to have the opportunity of observation, or even the

> intelligence to observe correctly, but it is still another to be able to retain accurately, for any length of time, what we have once seen or hear, and what is perhaps more difficult still--to be able to describe it intelligently. Many witnesses have seen one part of a transaction and heard about another part, and later on become confused in their own minds, or perhaps only in their modes of expression, as to what they have seen themselves and what they have heard from others.

Although most laypersons probably recognize the fact that the amount of information that can be recalled from memory decreases as time goes by (Shepard, 1967; Saslove & Yarmey, 1980; Lipton, 1977; Egen, Pittner, & Goldstein, 1977), they may not be aware that memory has certain "dynamic" qualities. What this means is that even if information has been accurately perceived and encoded in such a way that an accurate memory has been created, there's no guarantee that that memory will remain unchanged during the period between encoding and later retrieval. Loftus and her associates have demonstrated that exposure to new or false information after an event has been witnessed can affect the information that is later retrieved by a witnessed (Loftus, 1975; Loftus, Miller, & Burns, 1978; Loftus, Altman, & Geballe, 1975; Loftus, 1977; Cole & Loftus,1979). These studies all illustrate that memory can be tampered with through the use of misleading or irrelevant "information," through mischaracterizations of events, and even through procedures that encourage witnesses to guess about information that they cannot comfortably recall about an event. A typical outcome from these studies is that a witness to an event who receives this misleading "information" will later report seeing or experiencing things that did not happen or will inaccurately characterize their experiences. Similarly, there are demonstrations that underlying "original" memories can be altered by asking witnesses to make inferences or guesses about information they may not have been exposed to original. Such inferences and guesses witnesses may later report and believe that they actually experienced events that, in fact, they only inferred or guessed about.

Is the underlying memory permanently and irretrievably changed? Although the bulk of research indicates that it is extremely difficult to retrieve "original" memories, at least one recent study suggests that interference effects may be reduced through the use of careful constructed retrieval procedures. It is doubtful that the layperson understands the effects that new and misleading information can have on memory. Thus, while cross-examination may work to very effectively demonstrate the possibility that a witness (and their memory) could have been tainted by information acquired after a critical event, it may still be necessary to bring in an eyewitness or memory expert to help establish the impact that these post-event occurrences can have on memory.

What difficulties does a witness face in trying to accurately retrieve information from memory?

Once again, Wellman (1936) succinctly highlights some of the difficulties confronted by the witness:

> [The witness] attempts to recall his original impressions; and gradually, as he talks . . . he amplifies his story with new details which he leads himself, or is led, to believe are recollections and which he finally swears to as facts. . . . Although perfectly honest in their intention, they are apt . . . to complete their story by recourse to their imagination. And few witnesses fail, at least in some part of their story, to entangle facts with their own beliefs and inferences.

Everyone has had the experience of forgetting information that they "once knew." Why do we forget? The answer to that question is not now known, but we do have clues about some of the factors that influence what we do and do not remember. These

factors have some rather straightforward implications for the direct and cross examination of witnesses.

Much of the following discussion can best be understood with an appreciation of the role of "retrieval cues" in the recovery of information from memory. The importance of retrieval cues can be easily illustrated by comparing two questions and the responses they are likely to produce: If we ask most people where they had dinner on the evening of the last major holiday they celebrated (e.g., Christmas, Fourth of July or even their own birthday), most people can answer the question with only a few moments of thought. However, if we ask the same people where they had dinner on some date last month, they are unlikely to provide an answer even with a substantial amount of thought (unless that date happened to be a special day for them--such as a birthday or wedding anniversary). Special days such as holidays provide us with retrieval cues that may help us pinpoint where we had dinner: we probably were not working, we probably spent part of the day with family or friends, we may have traveled some distance we might have spent time watching special television events we may have helped to prepare a special meal--the list of retrieval cues may be very long and each one of them may lead us to information in memory that will either help us to determine where we had dinner, or lead us to other retrieval cues for the information about dinner.

Although retrieval cues are very important aids to memory, they unfortunately can mislead us. This point is illustrated by the contrast between leading and non-leading questions. One basic characteristic of the leading question is that it limits the possibilities of response by the answerer. A strong leading question will even contain the answer that is being sought: You are the person who fired the gun which killed John Doe aren't you?" It has been known for some time that the form of a question will have an impact on the type of answer that is provided. As early as 1915 Muscio demonstrated that witnesses to an event we more likely to indicate having seen a non-existent dog if they were asked whether they had seen "the" dog rather than asked whether they had seen "a" dog? Similar findings have been reported by Whipple (1909), Burtt (1931) and Gardner (1933). More recently Loftus and Palmer (1974) demonstrated similar results when, after showing "witnesses" an accident film, they asked the witnesses to estimate the speed of a car at impact. Witnesses who were asked the speed of the car when it "smashed" into the other car estimated 40.8 miles per hour. When the question ask for an estimate of speed when the cars made "contact," a second group of witnesses--who had seen the same film estimated 31.8 miles per hour. Although it is clearly impossible to crawl inside anyone's head to examine their memory processes, one possible explanation for results of this type (there is related research by Clifford & Scott, 1978 and Dooling & Christiaansen, 1977), is that the words provided to witnesses serve as biased retrieval cues. The witness asked about "smashing" cars may be searching memory for shattered glass and badly wrinkled fenders while the word "contact" implies that there might be scratches to search for. If the witness, in his/her biased search for confirming information encounters anything like shattered glass (or only scratches), they may adjust their speed estimate accordingly--of course, the witness who is searching only for scratches may never encounter their memory for shattered glass.

Biased retrieval cues have been shown to play havoc with memory in other ways. When Malpass and Devine (1980) led witnesses to a staged act of vandalism to believe that they would be viewing a lineup containing a "police suspect," 78% of the witnesses falsely accused someone from the lineup (which did not contain the actual perpetrator). Without the biased expectation only(?) Thirty-three percent made a false accusation. Similar results have been reported by Egan & Smith (1979) and Warnick & Sanders (1980). The importance or retrieval cues is understood further in research by Patterson and Baddeley (1977) which provides compelling evidence that changes in a person's appearance (disguises) can have a devastating effect on a witness's ability to identify the face of someone viewed in the past. Even efforts to

disguise a voice can prove highly successful (Saslove & Yarmey, 1980).

Buckhout (1974), Loftus (1976), Deffenbacher, Leu, & Brown (1979) and Gorenstein and Ellsworth (1981) have all demonstrated that people can become confused about the context in which they have previously viewed someone. By "unconsciously transferring" a face from one context to another, witnesses end up falsely identifying people. In these studies, in the worst of situations, innocent bystanders or people merely viewed in mugshots are mistakenly identified as the perpetrators.

How does an attorney make use of this knowledge about the importance of retrieval cue bias? One method is give close attention to the investigatory procedures employed by the opposing side. Have the investigators fostered any biased expectations on the part of witnesses? Have questions been put to witnesses in an unbiased manner? Is there anything the attorney knows about the events in question that might serve to refresh the memory of a witness (that is, provide the witness with more effective retrieval cues than the ones he or she has been using)? If there is a possibility that a witness has, perhaps unwittingly, provided information that was biased as a result of sloppy or intentionally misleading methods of inquiry, it may be particularly useful to sequester witnesses and investigators and call them to the stand separately in order to compare their recollections of the procedures and questions. Contradictions in the testimony can serve to highlight the problem of biased retrieval cues.

Do witnesses confront special difficulties when trying to identify suspects from photographic arrays or live lineups?

In fact, photographic and live lineup procedures have received a substantial amount of research attention from social psychologists that merits special comment in the context of witness difficulties with the retrieval of information. That research has pinpointed a variety of difficulties that may escape the attention of jurors unless brought forcefullly to their attention. One of the first problems is that mugshot searches may create a memory for a face that will be mistakenly identified from a later photographic array or live lineup (Brown, Deffenbacher & Sturgill, 1977). Even if a witness has not been biased by previous exposures to a face and even if the witness has not been led to believe (either as a result of police officers comments or changes in procedure--e.g., a shift from photographs to live lineups--or other unwitting communication) that a suspect is in hand, there may still be a problem with the composition of the photo spread or lineup. One common problem is that the lineup does not contain enough other individuals who plausibly resemble the actual suspect. A high degree of resemblance between members of an array helps to guarantee that an innocent suspect will not be misidentified (Malpass & Devine, 1983).

References--Eyewitnesses

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VII. Closing Arguments

What can I do during my closing arguments to increase the chances that the jury will accept my point of view and reject my opponent's arguments?

Social psychological research has demonstrated that refuting an argument or appeal even before an opponent presents it is an effective way to: (1) forewarn the audience of impending persuasion attempts by an opponent; (2) facilitate the generation of counterarguments to your opponent's postion; and (3) "innoculate" the audience against your opponent's future persuasion attempts. Underlying a good deal of this research has been researchers' belief that people are active information processors not just passive recipients of communications. Even though the jury is sitting passively listening to the statements and persuasive appeals of the prosecuting and defense attorneys, there are many times when the jurors are actively trying, in their minds, to manipulate, elaborate, and integrate the information they are receiving. The attorneys task is to facilitate this information processing. In order for jurors to reach the most fair decision possible, both attorneys must assume some responsibility for providing jurors with the "cognitive skills" necessary to actively evaluate the events of the trial as well as the persuasive appeals of the attorneys themselves. The attorney must motivate jurors to think about what he/she is saying, what they will be hearing from witnesses, and most importantly, to critically evaluate and perhaps resist the persuasive attempts of the opposing counsel. Specifically, the juror must be trained to "counterargue" each persuasive appeal. The juror must be continually reminded that he or she has the responsibility to counter one advocate's point with a point that has been, will be, or should be made by the opposing advocate. The assumption, of course, is that if each juror were to actively process the communications received during the course of the trial, decision making biases which stem from inadequately thinking about the content of arguments and testimony, will be eliminated (e.g., using first impressions about a witness or attorney rather than the content of the witness's testimony or the attorney's appeal, being convinced by a message simply because it comes from an expert, listening only to the prosecution because of the assumption that the defense attorney cannot be trusted, or is unappealing.

First, forewarning a person that they are about to hear a communication designed to make them change their minds about a particular issue causes them to generate arguments in favor of their position in order to counter the anticipated argument (Brock, 1967; Kiesler & Kiesler, 1964; McGuire & Papageorgis, 1962; Papageorgis, 1968; Petty, Ostrom & Brock, 1981). Second, if a person generates these counterarguments on his/her own, or if they are provided with the counterarguments by an outside source before hearing the persuasive appeal, he/she will be less persuaded by the appeal when it comes (Aspler & Sears, 1968; Hass & Grady, 1975; Petty & Cacioppo, 1977, 1979a, 1981). Third, it is not the case that, once they are forewarned, people selectively listen to the persuasive appeal (screening out what they do not agree with) or forget what they have heard. They remember just as much about a message as those not forewarned. The difference is they have thought more about the message, and either come up with reasons for themselves why the argument is not true or been provided reasons (Petty & Cacioppo, 1979a). Fourth, there are two factors which affect a person's motivation to counterargue: who will be delivering the appeal, and whether or not the topic of the message is a personally involving one (Rhine & Severance, 1970; Petty & Cacioppo, 1979b). A message coming from a low credibility speaker will produce more counterarguing, and a message that is of personal importance to the listener will stimulate more counterarguing (Cook, 1969; Gillig & Greenwald, 1974).

The trial practice attorney should consider each of these points in preparing his/her closing arguments. If we were to develop a checklist of strategies based on each of these important points, it might look like the following:

1. Above all else remember that the juror should be trying to actively assimilate the attorney's arguments. The more the attorney can stimulate or motivate the juror to actively process the information at trial the better the chances that the truth of the case and arguments will be realized. The juror must be "drawn in" as a "cognitively active" participant in the courtroom proceedings. The attorney's goal is to make the juror a more competent information processor.

2. After the attorney has made the important points in the closing argument, he/she should anticipate the opponent's points and refute them. This may entail: a) making an explicit statement about the fact that the opponent has every intention of persuading the jury to his/her side of the case; b) stating the important points the opponent may make (in a weakened form) and asking jurors to generate their own counterarguments to the position, as well as think about an explicit list of counterarguments that the attorney has provided them. This will help them defend against the opponent's persuasion attempts. The research suggests that it may not be enough for the attorney to simply present his/her own argument and support it -- this is particularly true for a trial. The opponent will be attacking the attorney's assumptions and arguments and the jurors will have had little practice defending his/her point of view. The more arguments counter to the opponent's position the attorney can get the jury to mentally rehearse, the better the chances that they will resist the opponent's appeal.

Accomplishing this may require a bit of subtlety on the attorney's part. As Smith (1981) notes:

> Usually, the court will not allow counsel to say directly that he is anticipating a defendant's argument. One should accomplish this goal indirectly. If one anticipates a defense of contributory negligence (civil case), it can be combated in opening argument by discussing the reasonableness of the client's action under the circumstances. But he should do what he can to anticipate the defendant's argument and, in essence, take the sting out. The rule simply is that the mosquito repellant is more effective than the mosquito bite lotion (p. 1.35).

3. Caution jurors against persuasive appeals that may come from ostensibly credible or expert sources (this may include opposing counsel, as well as expert witnesses called by the opponent -- we will talk further about source characteristics in an upcoming section).

<u>In what other ways can I improve the structure of my message during closing arguments so that jurors will more easily process the information I present and hopefully be persuaded by it?</u>

Up to this point we have discussed two important ways that the lawyer can help the juror process the sometimes confusing events of a criminal trial. First we suggested that the opening statement be especially constructed to provide the juror with a framework or theme by which to organize the subsequent trial events. Second, we suggested that the juror be brought into the trial proceedings as a cognitively active participant. To accomplish this we suggested several ways the attorney can structure his/her message to motivate the juror to mentally rehearse arguments and counterarguments. There are several other ways that the attorney can structure his/her communication to the jury to facilitate better understanding of the message.

First, it is important that the attorney draw rather explicit conclusions for the jurors concerning his/her case and arguments. We offer this advice in the face of quite a few recommendations that the attorney's case is better served by letting the jurors feel that they have arrived at their own conclusions. Smith (1981), among others, advises:

> Subtle understatement is always more effective. A stark naked woman (or we might suppose a man as well) walking into a room suddenly has great shock value, but it really does not appeal to many people's prurient interest. If she (or he) is partially clothed, however, and leaves a little to the imagination, the prurient effect is much better. So, too with argument. It is far better to let the jury's imagination do a little work. Give them the basic information. . . Make them think they have arrived at the conclusion independently (p. 1.31).

Indeed, the social psychological research has demonstrated that when several conditions are met: (1) the message is sufficiently <u>understandable;</u> (2) the person is <u>able</u> to draw a conclusion; and (3) the listener is <u>motivated</u> to draw a conclusion, not explicitly drawing a conclusion will lead to longer lasting attitude change (Lindner & Worchel, 1970; Stotland, Katz & Patchen, 1959; Thistlethwaite & Kamenetzky, 1955).

The problem with this strategy is that the attorney can never be assured that the jury is drawing any conclusions, much less the right conclusion, unless these conditions have been met. Since there is virtually no way the attorney can determine this beforehand, drawing a conclusion is helpful for the audience to understand and remember the message. McGuire, cited in Petty and Cacioppo (1981), sums up the research on conclusion drawing by noting: It may well be that if the person draws the conclusion for himself he is more persuaded than if the source draws it for him; the problem is that in the usual communication situation the subject is either insufficiently intelligent or insufficiently motivated to draw the conclusion for himself, and therefore misses the point of the message to a serious extent unless the source draws the moral for him. In communication, it appears, it is not sufficient to lead the horse to the water; one must also push his head underneath to get him to drink (p. 209).

> It may be the case that jurors at trial are sufficiently motivated and able to draw their own conclusions, for example during the closing argument. It is not necessary to make these assumptions. Instead, it is more advisable to rely on the social psychological research which has demonstrated that in most communication situations an explicit conclusion is helpful to the listener (Hovland & Mandell, 1952; Thistlethwaite, deHaan, & Kamenetzky, 1955).

Second, to help the juror accept and understand the arguments and facts at trial it is also probably useful to emply at least some message repetition. Repeating a message allows the listener to objectively consider it. If the argument is poor, the listener, hearing the argument a sufficient amount of times will come to realize it. On the basis of this research, a practical ssuggestion for the attorney could be to repeat his/her arguments a moderate number of times (three times may be optimal). These repetitions will lead to greater juror thinking and elaboration about crucial points (Cacioppo & Petty, 1979; Petty & Cacioppo, 1981; Wilson & Miller, 1968).

In addition to considering the number of times one should make a particular point or present a given argument, the attorney should also be cautious about the number of different points or arguments made. The social psychological research suggests that there is an upper limit to the number of arguments a person can present and still have a persuasive effect (Calder, Insko & Yandell, 1974). The attorney would seem to increase persuasiveness by adding three to five arguments to his/her first one or two. Thereafter, however, the effect of adding more arguments is negligible. For optimal juror information processing and persuasion, then, the attorney should limit him/herself to approximately seven arguments in the closing argument. Any more than that may have only a small persuasive effect on the jury, any less may mean that the attorney is losing potential persuasiveness.

Most attorneys feel that it is unfair for the prosecution to make only cursory remarks during his/her closing arguments in a criminal trial and save the bulk of his/her argument for the reply which can be delivered after the defense has closed. What can the defense attorney do to counteract this prosecution "sandbag" attempt to which he or she can make no reply?

Busch (1961), Dean of DePaul University Law School, offers advice to the attorney which would seem to be correct in light of the research we have just discussed on forewarning innoculation and counterarguing:

> In such a situation (the defendant) having but one opportunity to address the jury, must of necessity not only argue his own case (i.e., the evidence and law favorable to him), but also answer the argument which he apprehends his adversary will make in his closing address (p. 535).

But, as Busch notes, the attorney must consider the possible problems involved in forewarning the jurors about the opponent's summation:

> Suggestions of possible adverse arguments which are not afterwards made are likely to confuse a jury. What may turn out to have been an undue emphasis placed upon certain apprehended arguments may induce the jury to give them a weight which it would not otherwise have attached to them (p. 535).

Obviously, whether or not the defense is wise to anticipate the prosecution's arguments in summation depends on the case. If the prosecution delivers only the briefest remarks at the closing of a complex case, the defense may be correct in anticipating a "sandbag" attempt. When the defense is certain of a sandbag attempt by the prosecution the social psychological research suggests that the most effective strategy would be for the defense to articulate the prosecution's upcoming argument and offer specific counter arguments to each of the anticipated points. The defense attorney may, for example, simply say: "When you hear the prosecution say x, remember that I would have said y to that." In other words the defense attorney must provide the jurors with the specific responses he/she would make to the prosecuting attorney. Given this forewarning, and a supply of counterarguments, the jury will be better prepared or "innoculated" against your opponent's persuasion attempts. It may also be helpful to directly allude to the prosecution's strategy. For example, the attorney could remind the jury that the prosecution told them little in the initial argument. Smith (1981) suggests that the defense attorney point out that:

> [T]he prosecution's presentation was obviously unfairly withheld for the closing argument to which, under accepted court procedure, there could be no reply; [the] jurors should keep that fact in mind and when, in the closing argument, statements were make of supposed evidence upon which conclusions were based, they should, in fairness to the defendant, test such claims by their own recollection of the evidence and apply their own good sense in determining whether the conclusions drawn were warranted (p. 388).

References--Closing Arguments

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