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Jurors' Views of Civil Lawyers: Implications for Courtroom Communication†

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In courtroom communication, lawyers play a key role. During presentations of opening statements and closing arguments, and through examination and cross-examination of witnesses, lawyers communicate the merits of the case that the jury is to decide. Yet there is surprisingly little systematic information about how jurors perceive lawyers' communication activities. This Article presents new information based upon an interview study with civil jurors about how jurors view and evaluate attorneys and their courtroom behavior. The results of the study are used to make recommendations about enhancing the effectiveness of lawyers' communications.

I. INTRODUCTION

A. Conceptions and Misconceptions of Attorneys

In a recent address to a conference on communication in the courtroom sponsored by The Annenberg Washington Program, Robert Sayler, Chair-Elect of the Section of Litigation for the American Bar Association, asserted that many trial lawyers miscommunicate because they hold fundamental misconceptions about juries.¹ The first misconception is that many attorneys believe that they should not be concerned about whether or not the jury likes them. Sayler claims that it does matter how jurors feel about attorneys because people accept a message more readily when they like the messenger.² The

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This Article is based on the second author's Degree with Distinction thesis under the supervision of the first author. Work on the thesis and the Article was funded by NSF Grant No. SES-8822598 and a National Science Foundation Research Experience for Undergraduates Award. The Honors Program at the University of Delaware provided additional research funding. We thank Kim Shorter and Robert Rothman for their crucial help at an earlier stage of the research, and Allan McCutcheon and Robert Warren for their useful comments. Sherry Schnell and Karen Yanny provided valuable research assistance.

** B.A., 1993, University of Delaware.
2. Id. at 1094.
second misconception is that jurors want to see a warrior or "Rambo" attorney. Sayler argues that warrior tactics reduce the attorney's credibility when it counts: An attorney who is constantly on the attack loses the opportunity to signal to the jury when he or she feels the witness really is lying. The idea that juries expect to be entertained is the third misconception that Sayler attributes to attorneys. He maintains that it is not bad to entertain, but cautions that entertaining can come to overshadow the evidence. The use of drama might cause juries to think that dramatics are necessary because the case is weak. Drama can also hurt the attorney's case if jurors do not like the theatrical presentation. Then, too, constant entertainment can become old and boring. The fourth misconception is that juries decide cases by the end of the opening statements. Sayler flatly rejects this premise, stating that although there used to be evidence supporting this view, more current work shows that jurors decide cases based on the evidence presented during trials. The idea that preparation can hurt an attorney's case because it produces nonspontaneous responses is the fifth misconception identified by Sayler. On the contrary, preparation is necessary and produces relaxed witnesses who are more credible. Finally, Sayler refutes the ideas that jurors respond to emotional rather than rational arguments, and that the trial judge does not matter. Sayler concludes that attorneys may miscommunicate with juries because attorneys simply do not know what factors jurors believe are important when making a decision. By relying on false assumptions, attorneys may not be defending their clients as effectively as they otherwise might.

Sayler appears to have based his assessment of attorney misconceptions about jurors on his own extensive experience and knowledge about the jury,
but many of the observations he makes are supported by standard trial tactics handbooks\(^\text{12}\) and by social science data.

Several studies buttress Sayler's general point that attorneys have significant misconceptions about jurors' views of them. Opinion surveys conducted by Mindes and Acock discovered divergence among (1) the public's view of lawyers, (2) lawyers' views of themselves, and (3) lawyers' views of how the public perceives them.\(^\text{13}\) These researchers polled 321 lay respondents and 305 lawyers to determine what images each group held about the occupation of the lawyer.\(^\text{14}\) Lawyers were also asked to estimate how the public viewed their occupation. There was a good deal of overlap across lay and lawyer samples in the characteristics ascribed to lawyers.\(^\text{15}\) However, lawyers believed that the public view of them was worse than it really was. Attorneys thought the public saw them as more likely to be greedy, tricky, evasive, manipulative, and overbearing than the public really did. They also thought the public saw them as less helpful, cooperative, understanding, and likable than the public actually did.\(^\text{16}\) Overall, the attorneys attributed to the public a view of lawyers that was high on "trickster" or "shyster" qualities and low on "helper" qualities. Attorneys apparently believe that their profession is viewed in a poor light, which may cause attorneys to act in the courtroom in a way more congruent with the way they think the public sees them rather than the way the public actually does.

When attorneys step into the courtroom, they may overestimate their own abilities as attorneys. In one inventive study conducted by Linz, Penrod, and McDonald, trained in-court observers watched the opening statements of fifty criminal trials and rated attorneys on factors such as friendliness, excitement, and...
and nervousness.\textsuperscript{17} The researchers compared the observers' ratings and jurors' evaluations of the attorneys with the attorneys' own self-perceptions.\textsuperscript{18} Although prosecutors showed no such difference, defense attorneys' ratings of their opening statements differed significantly from the evaluations of the courtroom observers along several dimensions.\textsuperscript{19} For both types of attorneys—prosecutors and defenders—there was no correlation between the number of trials in which they had participated or their years in practice and the observers' judgments of their rapport, enthusiasm, or articulateness.\textsuperscript{20} The researchers discovered that jurors' judgments and lawyers' self-evaluations correlated significantly for only some characteristics.\textsuperscript{21} The researchers also found that the greater the number of years an attorney was in practice, the greater the likelihood that the attorney would underestimate his or her level of nervousness, and overestimate his or her level of friendliness.\textsuperscript{22} Thus, although attorneys did not necessarily become more effective communicators as their careers progressed, they became more confident in their skills.

It is not surprising to learn that lawyers hold misconceptions about effective trial tactics or even about their own abilities and performances. One of the key factors in promoting accurate self-perception is feedback. Frequent, specific feedback increases our chances of learning what others think of us.\textsuperscript{23} Yet the trial situation is one that precludes attorneys from learning what the key decision makers, the jurors, think about them and their actions. True, the jurors reach a verdict in each case, but that verdict reflects the multiple influences of the merits of the evidence, the strengths of the witnesses, the idiosyncrasies of the individual jurors, and the lawyers' impact.\textsuperscript{24} Litigators are often stymied in learning from experience because it is difficult to

\textsuperscript{17} Daniel Linz et al., \textit{Attorney Communication and Impression Making in the Courtroom}, 10 LAW \& HUM. BEHAV. 281, 281 (1986).
\textsuperscript{18} \textit{Id.} at 288-89. One difference between observers and the other two groups is that the observers were only present during the opening statement, while the jurors and attorneys were present throughout the entire trial. \textit{Id.}
\textsuperscript{19} \textit{Id.} at 292. Linz, Penrod, and McDonald explained this divergence between prosecuting and defense attorneys by pointing out that often prosecutors try their cases with other colleagues from the office, and thus are more likely to receive feedback about their performance than defense attorneys trying their cases alone. \textit{Id.} at 299-300.
\textsuperscript{20} \textit{Id.} at 291.
\textsuperscript{21} \textit{Id.} at 294. Again, prosecutors appeared to have somewhat better insight; on three of six personality dimensions, their evaluations significantly correlated with jurors' judgments of them, while there was a significant correlation between defense attorneys' judgments and jurors' judgments on only one of the six dimensions. \textit{Id.}
\textsuperscript{22} \textit{Id.} at 294-95.
\textsuperscript{23} \textit{Id.} at 284.
\textsuperscript{24} \textit{See generally} Vinson, supra note 12.
disentangle the different factors producing a favorable or unfavorable outcome in a case.\textsuperscript{25}

It would be valuable, then, to know what is in the minds of jurors as they observe attorneys' courtroom communications. A few studies have looked at the impact of lawyer characteristics on juror outcomes by examining actual jury trials and verdicts. In Kalven and Zeisel's landmark study of judge-jury agreement,\textsuperscript{26} the researchers asked trial judges presiding over criminal jury trials to indicate whether the attorneys were evenly balanced or whether the defense or the prosecution was superior. In 76\% of the trials, the judges viewed the attorneys as evenly matched, and approximately the same percentage of defense and prosecuting attorneys were seen as superior (11\% versus 13\%, respectively).\textsuperscript{27} Additional analyses led Kalven and Zeisel to conclude that in only a little over 1\% of all trials did the presence of superior defense counsel cause the jury to reach a verdict that was different from one that the judge would have reached had the judge been trying the same case without a jury.\textsuperscript{28}

While Kalven and Zeisel had to rely on global judicial evaluations of attorney behavior, another study conducted by Norbert Kerr correlated student observers' in-court ratings with the case outcomes in 113 criminal jury trials in San Diego.\textsuperscript{29} Kerr found that specific ratings of the defense and the prosecuting attorneys were in some instances significantly related to which side won the case.\textsuperscript{30} The greater the defense attorney's working knowledge of the evidence, the more convincing the arguments the defense advanced, and the more supportive the defense was toward the prosecutor, then the more likely the defense was to prevail.\textsuperscript{31} In a counterintuitive set of findings, the more supportive the prosecutor was toward the defense attorney and the more

\textsuperscript{25} Linz et al., \textit{supra} note 17, at 299-300. In this context, it is useful to reiterate Linz, Penrod, and McDonald's point that prosecutors, or any attorneys who try cases with other attorneys, may have better access to regular and accurate feedback. \textit{Id.} at 285, 300.


\textsuperscript{27} KALVEN \& ZEISEL, \textit{supra} note 26, at 354, tbl. 82.

\textsuperscript{28} Id. at 368-72.


\textsuperscript{30} Id. at 274-75.

\textsuperscript{31} Id. at 274.
interested and respectful the prosecutor appeared to be, the less likely the prosecutor was to prevail. 32

Because many different factors varied, along with attorneys, in both the Kalven and Zeisel study and the Kerr study, it is difficult to make causal inferences about how the specific tactics or characteristics of an attorney influence case outcomes. Several mock-juror research studies, most using college students as subjects, have looked at aspects of attorney behavior or characteristics that appear to influence mock jurors. 33 These studies have an advantage in that only one or a few characteristics are varied in a single study, making causal inferences possible. But, they are limited in that the evaluations are based upon hypothetical cases, and most use college students as subjects, representing a skewed group of respondents.

Although trial tactics manuals evidence great interest in juror perceptions, this brief summary of the available research shows that few studies, aside from the one conducted by Linz and his colleagues, 34 have taken a systematic look at actual jurors’ perceptions of attorneys and their communication strategies, indicating the value of the present project.

B. Opening Statements and Closing Arguments

An opening statement can win the trial of a lawsuit. . . . Jurymen, in cases tried by effectual advocates, have been prone to say that once the opening statements were made there was nothing left to the case. 35

32. Id. at 275. Kerr had difficulty explaining why the factors relating to the defense attorney seemed to make good sense while the factors relating to the prosecutor were opposite or counterintuitive. He offered the post-hoc explanation that prosecutors who show interest in the proceedings may seem overeager; and that being supportive of the defense attorney may have led jurors to react more favorably to the defendant when that was not their initial inclination. Id.

33. One issue that has been explored using mock juries is the gender of the attorney, which is of considerable interest to researchers and legal practitioners as the number of female attorneys has increased in the last two decades. See Barbara A. Curran, American Lawyers in the 1980s: A Profession in Transition, 20 LAW & SOC’Y REV. 19 (1986); see also David L. Cohen & John L. Peterson, Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts, 9 SOC. BEHAV. & PERS. 81 (1981) (finding that high school students found defendants guilty less often when the defense attorney was female or white); Shari Hodgson & Bert Pryor, Sex Discrimination in the Courtroom: Attorney’s Gender and Credibility, 55 PSYCHOL. REP. 483, 483 (1984) (showing that, in contrast to male college students, female college students rated female attorneys lower than male attorneys on six of twelve credibility scales, and subjects were more likely to say that they would retain a male attorney as opposed to a female attorney); Mary V. McGuire & Gordon Berman, Individual and Group Decisions in Response to a Mock Trial: A Methodological Note, 7 J. APPLIED SOC. PSYCHOL. 220, 224 (1977) (finding that mock jurors were more supportive of male as opposed to female defense attorneys). The side that an attorney is representing, and the use of “dirty tricks,” can also have an impact on juror decisions. See Saul M. Kassin et al., Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury, 14 LAW & HUM. BEHAV. 373 (1990); see also infra part I.C (discussing attorney impression management).

34. Linz et al., supra note 17.
35. JULIEN, supra note 12, § 1.01, at 2.
Perhaps the most significant vehicle for in-court attorney communication is the presentation of opening statements and closing arguments. There is a good deal written by attorneys about how best to present the opening and closing. Moreover, there are sound theoretical reasons to expect that the opening statement in particular will play a very strong role in jury decision making. Many psychological experiments have demonstrated a "primacy" effect, in which information that is presented first has stronger impact. In addition, recent scholarship in cognitive and social psychology indicates the persuasive value of providing a framework, "story," or "script" for jurors in the opening statement. One of the most influential theories of jury decision making is Pennington and Hastie's Story Model, which hypothesizes that jurors actively organize the information presented to them during the trial into a coherent framework or story. This interpretation or story is based on the trial evidence, knowledge about similar events, and other assumptions, such as the goal-orientation of human action. Such story frameworks are highly useful and can shape juror decision making in several ways: by drawing attention to factors consistent with the story, by facilitating memory retrieval, and by organizing new information. The story model has some clear implications for trial attorneys. Linz and Penrod point out that "[i]nsofar as the attorney provides jurors with a meaningful comprehensible story, complete with characters who are assumed to have specific goals and plans, she may be contributing to the natural process by which jurors reason in deliberation."

A 1981 mock-juror study by Pyszczynski and Wrightsman examined the effects of brief versus extensive, detailed previews of trial evidence during opening statements. They discovered that when the prosecution used extensive opening previews, it resulted in more guilty verdicts; when the

36. See, e.g., ARON ET AL., supra note 12, at 240-54; BAILEY & ROTHBLATT, supra note 12, at 113-26; JULIEN, supra note 12; KEETON, supra note 12, at 270-77; TRAIL TECHNIQUES, supra note 12, at 17-22.
37. For an excellent discussion of the primacy effect and its relevance to the opening statement, see Daniel G. Linz & Steven Penrod, Increasing Attorney Persuasiveness in the Courtroom, 8 LAW & PSYCHOL. REV. 1, 8-11 (1984).
39. Pennington & Hastie, supra note 38, at 521.
40. Id. at 522-23.
41. Linz & Penrod, supra note 37, at 5; see also Pennington & Hastie, supra note 38.
prosecution's extensive statements were paired with extensive opening statements by the defense, the number of guilty verdicts decreased.\textsuperscript{44} The more elaborate opening statement may have created a thematic framework or story, which operated to promote one side of the case.

Pyszczynski, Greenberg, Mack, and Wrightsman found in another study that when an attorney promised testimony proving the defendant's innocence, the jurors were more sympathetic to the defendant even though the evidence was never presented.\textsuperscript{45} They suggested that this was another instance where a thematic framework could influence the outcome of a case.\textsuperscript{46} Jurors may have used a framework to process the information in the case, and those who heard the promise of the testimony were more likely to recall hearing actual testimony, even though they had not.\textsuperscript{47} This effect could be reduced, though, if the prosecuting attorney pointed out that the material had not been presented.\textsuperscript{48}

There is a good deal of debate about whether jurors actually make up their minds right after the opening statements or remain open to evidence and arguments. Sayler pointed out that at least some attorneys believe that the case is virtually decided after the opening.\textsuperscript{49} It is possible that this belief originated with, or at least was supported by, the results of a 1940 study by Weld and Danzig.\textsuperscript{50} In their study, mock jurors watched a live mock trial and made liability judgments at eighteen different points in the trial. The subjects' final verdicts were quite consistent with their earlier judgments made right after the opening statements, leading to the inference that subsequent stages were unimportant. Trial consultant Donald Vinson claims that "research on the impact of the opening statement consistently reveals that as many as 80 to 90 percent of all jurors have reached their ultimate verdict during or immediately after opening statements."\textsuperscript{51} But Linz and Penrod observe that the trial situation presents a two-sided communication environment, and it is not unusual with two-sided communications for people to resist early persuasion attempts before they have heard both sides.\textsuperscript{52}

\textsuperscript{44} Id. at 301.
\textsuperscript{46} Id. at 442-43.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Keynote Address, supra note 1, at 1094.
\textsuperscript{50} H.P. Weld & E.R. Danzig, \textit{A Study of the Way in Which a Verdict is Reached by a Jury}, 53 AM. J. PSYCHOL. 518 (1940).
\textsuperscript{51} VINSON, supra note 12, at 171. Vinson did not provide a specific citation for the research on the opening statements that he used to make his claim.
\textsuperscript{52} Linz & Penrod, supra note 37, at 13-14.
Lind and Ke point out that the scholarly research seems to support the prime importance of the opening statement, whereas many trial attorneys appear to feel that the closing argument is most significant. Even a major proponent of the importance of the opening statement, Alfred Julien, reportedly devotes twice as much trial time to the closing argument as to the opening statement.

The story model of jury decision making suggests that it would be useful to return to the framework or story that an attorney has already advanced in the opening statement during the closing argument. However, one disadvantage of a lengthy closing argument is that at the conclusion of the trial jurors may be tired or distracted, and consequently experience difficulty paying attention.

In sum, general theory, attorney experience, and several studies with mock jurors all suggest that opening statements and closing arguments can be very influential. One of the purposes of the present study is to assess the likely impact of these attorney communications by asking jurors to provide their reactions to them.

C. Attorney Impression Management

Sayler argues that the overall impression that an attorney conveys can create a favorable or unfavorable response from jurors. Indeed, there are many demonstrations in social psychological research literature showing that likability and attractiveness are influential factors in persuasion. High credibility, expertise, and a position of power enhance a person’s ability to persuade others.

Feldman and Wilson conducted a study in which subjects viewed videotapes of lawyers using different levels of relational skills and legal competency when interacting with clients. They found that attorneys’ legal competency and relational skills influenced jurors’ opinions of attorneys. Attorneys were

53. Lind & Ke, supra note 38, at 238-42.
54. Id. at 232.
55. Lind and Ke report that Alfred Julien, the author of *Opening Statements*, spends twice as much trial time on the opening as opposed to the closing statement. *Id.* at 237.
56. Id. Keeton makes the same point that jurors are less receptive at the end of the trial, and recommends that the closing argument should be much shorter than the opening statement. *Keeton, supra* note 12, at 275.
57. *Keynote Address*, supra note 1, at 1095.
58. Linz & Penrod describe a number of the studies. Linz & Penrod, *supra* note 37, at 35-42.
59. *Id.* at 29-35, 41-42.
viewed more positively when they demonstrated a high level of legal competency or relational skills. The presence of at least one of these factors led to the attorneys being viewed as having a high degree of expertise. A high level of relational skills coupled with a high level of legal competence resulted in an attorney being rated most expert, attractive, trustworthy, helpful, likely to charge a fair fee, likely to have a client follow advice, likely to have repeat business, and likely to be recommended to others by his or her clientele. Lawyers with high relational skills and low legal competence ranked second. Somewhat surprisingly, an attorney with high relational skills was seen as trustworthy and satisfactory by clients regardless of the attorney’s legal competence, suggesting the prime importance of relational skills.

One problematic issue confronting attorneys is how to conduct themselves during the cross-examination of key witnesses. Hostility in questioning could lead to perceptions that the attorney is not a likable individual, or could cause sympathy for the person being cross-examined. Indeed, in one study, college student subjects viewed attorneys who used a hostile style or leading questions during cross-examination of an expert witness as less effective than attorneys with less hostile styles. But in contrast, attorneys who used a nonhostile style of questioning coupled with nonleading questions were seen by these same college students as the least effective of all attorneys. These attorneys were considered to be acting in a fashion that did not fit with the expectations of the mock jurors. Attorneys apparently need to find a balance between hostile and passive tactics. In a juror simulation study, Robin Reed found that in those criminal cases where there is a high level of incrimination, the risks of using impeachment tactics may be greater than any possible benefits. Only in a case where there is a low level of incriminating evidence do impeachment risks become worthwhile.

61. Id. at 317.
62. Id. at 320.
63. Id.
65. Id.
67. Id. at 72.
D. Summary

Although general psychological research literature suggests a number of ways for attorneys to enhance the persuasiveness of their courtroom communications, and although trial advocacy handbooks are replete with recommendations on how to do so, surprisingly little systematic research specifically exploring the factors that do influence a juror's opinion of an attorney has been conducted. Even more significant, with only one or two exceptions, very few of the available studies have examined the perceptions and views of actual jurors. Many of the studies described above are limited by the use of student subjects, who tend to be younger and better educated than the general public, and who may hold different preconceived notions about attorneys than those who would normally be selected from a jury pool. The use of mock juries or public opinion evaluations of lawyers means that the conditions under which the subjects evaluated the lawyers would not be the same as in a real trial. In addition, most of the research on perceptions of attorneys has been limited to the criminal, as opposed to the civil, context.

In light of the limited research in the area and the misconceptions that attorneys appear to hold about jurors, it is important to look more methodically at what qualities and actions impress jurors during actual cases. We attempt to identify some of these factors in our analyses of interviews with civil trial jurors.

II. RESEARCH METHOD

A. Cases and Participants

This study of jurors' views of civil lawyers, based on a total of ninety-nine tape-recorded interviews, is part of a larger interview study examining the reactions of 269 jurors to cases with business and corporate parties. During a one-year period in a state court of general jurisdiction, every civil jury trial that involved a business or corporate party was identified and included.


69. One pre-test case that was not conducted during the one-year period was also included. Cases that were settled during the trial and two cases involving a conflict of interest were excluded. As a stipulation of their cooperation, trial judges requested that the anonymity of the cases be maintained to the maximum extent possible. Therefore, the exact start and end dates of the trials and the names of the cases and parties have been withheld. All of the trials took place between 1989 and 1991.
With the trial judges' permission, the names, addresses, and telephone numbers of jurors were obtained from the court files. Letters were sent to jurors on University of Delaware stationery requesting them to participate in an interview study about their experiences as jurors. Following the initial letter, a research assistant telephoned each juror. In an effort to contact the jurors, up to ten telephone calls and two additional letters were sent to the jurors. Only a small percentage of jurors could not be contacted by these methods.

The overall response rate of the jurors was sixty-four percent, with an average of seven out of twelve jurors on each case agreeing to participate. In total, there were 269 participants from thirty-six cases involving businesses and corporations. There were twenty-eight tort and eight contract cases. The subjects of the cases consisted of disputes over contracts, job-related injuries, consumer injuries, product liability, automobile accidents, and medical malpractice.

Although data collection in the interview study was complete when this Article went to press, the transcription of the juror interviews was not. Therefore, this Article concentrates on data from fourteen cases for which the transcription of the interviews with the jurors had been completed. All quotes and data used in this Article are from the tape-recorded interviews with ninety-nine jurors in these particular cases. In the fourteen cases that are being used, one or more plaintiffs sued business, corporate, or professional defendants. Nine of the cases dealt with personal or consumer injuries, four with contract disputes, and one with medical malpractice. The plaintiffs were successful in twelve of the fourteen cases, a success rate similar to that in the total sample of cases. The juror response rate for the cases used was comparable to the overall response rate for the entire project.

Forty-one attorneys were listed in court records as participating in the fourteen cases. Twenty-two represented defendants, and nineteen represented plaintiffs. One attorney represented a defendant in two cases. Using the Martindale-Hubble directory of lawyers, state bar directories, and telephone contacts, the law schools attended by thirty-six of these attorneys were identified. The remaining five attorneys could not be traced using any of these methods.

Although many consider the ranking of law schools impossible and inaccurate, the U.S. News and World Report annual ranking was used to estimate the quality of the law schools that the plaintiffs' and defendants'
attorneys attended. This report ranks schools in quartiles based on academic quality, reputational surveys, student selectivity, placement success, and faculty resources. According to this survey, the plaintiffs’ and defendants’ attorneys in this study were almost evenly matched in the quality of law schools they attended. Forty-eight percent of the defense attorneys and forty-seven percent of the plaintiffs’ attorneys attended schools ranked in the top two quartiles. Similar numbers of plaintiff and defense attorneys attended the schools ranked in the top and bottom quartiles.72

B. Procedure

Jurors were interviewed individually using a semi-structured interview format. In the interviews, jurors were asked to give their reaction to the parties, attorneys, and evidence in their case.73 The interviews were audi-taped and open-ended responses were allowed. A lengthy set of questions were used to determine the factors that jurors considered significant in reaching the verdict in their case.

Several questions asked jurors to evaluate the attorneys who tried the case, and to estimate the persuasiveness of their opening statements and closing arguments. The following are examples of the questions the jurors were asked. However, given the semi-structured nature of the interviews, the exact wording of the questions sometimes differed. In some instances, questions were not asked, particularly questions about the closing arguments.

* What do you recall about the opening arguments of each side?
* How did you feel about the opening arguments of each side?
* Were you drawn to one side or the other after hearing the opening arguments?
* What did you think of the closing arguments of both sides?
* Did they have an impact in convincing you or in changing your mind?
* What was your reaction to the lawyers in the case?
* Which was the better attorney?

72. Unpublished data on file with the first author.
73. Jurors had the choice of being interviewed at the university or at their home. The jurors were compensated $15 for the interview, the same amount they were paid for a day’s jury duty. Those who came to the university for the interview were paid an additional $5 to cover parking and transportation costs.
III. RESULTS

A. Data Analysis

In each of the ninety-nine transcribed interviews, all comments that referred to the opening statements and closing arguments, attorneys, and lawyers were selected. The transcribed interviews were entered into a word processing program, and a computer search was used to look for passages that contained the terms “opening,” “closing,” “lawyer,” or “attorney.” These comments were then coded using a coding scheme that provided categories for analysis of the jurors’ responses to the specific questions listed above. To measure the reliability of the coding system, a second person used the same coding scheme to evaluate the same comments. The responses of both coders were compared; their overall agreement rate was ninety-four percent.

B. Influence of Opening Statements

In the interviews, the jurors were asked if they were drawn to either the plaintiff’s or the defendant’s side after the opening statements, or if they had remained neutral. While trial consultant Donald Vinson and others claim that most jurors’ minds are made up after the opening statements, sixty-three percent of the jurors we interviewed maintained that they had remained neutral after the opening statements. In ten of the fourteen cases in our sample, the majority of jurors in those cases indicated that they were not drawn to either side after the opening statements. In two other cases, the majority of jurors interviewed reported being drawn to the plaintiff, while in the final two cases there was no clear majority position.

1. Why Jurors Said They Tried to Stay Neutral

In responding to the question about whether they had been drawn to one side or the other by the opening statements, jurors indicated a number of factors that led them to try to remain neutral. In their accounts, jurors cited the following factors: the judge’s instructions, the lack of evidence at that

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74. This search method also located numerous comments by jurors on attorneys’ fees, which jurors reported considering in a majority of cases. Although interesting in itself, the subject matter of attorneys’ fees is outside the scope of this Article’s focus on communication, and thus is not included. A full account of jurors’ reactions to attorneys’ fees may be found in Krista Sweigart, Jurors’ Views of Civil Lawyers: Results of an Interview Study (1993) (unpublished B.A. Degree with Distinction thesis, University of Delaware).

75. VINSON, supra note 12, at 171; see also supra text accompanying notes 50-53.
point in the trial, the fact that they were genuinely undecided, or a desire to resist the impulse to be swayed by their emotions.

The main reason jurors said they were undecided after the opening statements was that they were following the judge's instructions to remain neutral. One juror who wanted to be careful to heed the judge's instructions stated: "[T]he whole idea that really stuck with my mind was that the opening [statements] were to be something you heard, but really didn't hear; you didn't base your decision on what was said in an opening [statement], but more what was going to come later." When maintaining that they were undecided after the opening statements, jurors often referred specifically to the instructions the judge had given them. A male juror explained, "The judge instructed us at the beginning not to take sides . . . but to just . . . soak up the information. Take your notes and think about it." Jurors who mentioned the judge's instructions regarding opening statements support the contention that most jurors strive to be responsible, to be "good jurors," and to follow the instructions they are given as closely as possible.

Other jurors who did not choose sides following the opening statements expressed a desire to be as neutral as possible. A forty-seven-year-old male juror showed a keen understanding of the nature of the adversarial process when he stated: "I was keeping an open mind throughout, because I know there's always two sides to a story, and sometimes you can be drawn [to one], and then later on see more evidence and sway to the other . . . ." A female juror with some college education wanted to wait to make a decision until she had heard from the plaintiff and the witnesses. She did not want to base her decision solely on the lawyers' opening statements: "I got an impression of both the lawyers themselves, but I kept on trying to repeat to myself that it's not those particular people that we were judging, and so I would have to say that that [was not] a deciding factor."

Lack of evidence was the second reason jurors commonly gave for remaining undecided after the opening statements. Without any proof to back up what the lawyers were saying, the jurors were unwilling to make even a tentative decision. One juror from an asbestos case said, "I had no feeling because I didn't have enough detailed information to really draw a conclusion one way or the other . . . ." The unwillingness of the jurors to take the lawyers' words at face value may be due to a distrust of lawyers. In the same asbestos case, another juror expressed some suspicion when he stated that he was not favoring one side over the other because "I wanted to hear the actual

76. This quote, as well as all others, is taken from transcripts of the tape-recorded interviews. They have been edited slightly to improve readability. Valerie P. Hans, Jurors' Views of Business and Corporate Responsibility (1993) (unpublished transcripts on file with the first author).
evidence . . . to see what was actually presented and whether they could back up their statements . . . [to see] if they were true or not."

Another rationale jurors gave for not being swayed by the opening statements was that the jurors understood the lawyer’s job was to sway them, and they intended to resist being influenced so early in the case. When one male juror was asked if he had been “drawn to one side or the other,” he responded, “That’s what they wanted us to [do]. They were drawing us out, they were choosing sides, that’s what the lawyers were trying to do.” A sixty-year-old male juror with a high school diploma said that he did not want to make a premature decision:

At that stage of the game, no. Not until I actually had in my hot little hands the documents that the lawyers were presenting, back and forth. Because they’re great at picking up a piece of paper and reading off what they want you to read, and then . . . when it’s time for rebuttal, they read what [the other lawyer] read, and then they read the rest of it. So, actually between lawyers, as far as I’m concerned, it’s all a big act.

The juror saw that the attorneys were trying to sway him, and he wanted to wait for the actual evidence to make a decision.

Some jurors genuinely felt that they were not drawn to either side during the opening statements because both sides sounded so convincing. These jurors frequently mentioned that they felt both lawyers had brought out good points in their openings.

[H]e made such a convincing introduction that before the other man got up, you would think, “Well, boy, I know I’m going to be on this guy’s side.” Or, “I know that this really sounds right.” But, then when the other guy got up, he made such convincing statements, which were just the opposite, that you said, “Oh, well, I didn’t think of that before.”

With persuasive information from both the plaintiffs’ and the defendants’ attorneys, the jurors chose to remain undecided because, for them, there was no clear choice of who should win. A female juror explained, “I was half and half. There was a time I was gone for the plaintiff, and then there was a time I was gone for the defendant.” A male juror also felt it was difficult to choose between the two sides. He said, “it got to the point where it was hard to figure it out . . . which way to go.”

One element that some jurors felt was inappropriate in the opening statements was an exceptional amount of emotional appeal. This foreshadowed the jurors’ negative reaction to excessive emotional appeals in later stages of the trial. Although most conceded that emotional appeal was an inevitable part of a case involving an injured plaintiff, they refused to make it their sole basis for being swayed by the opening statements in most cases. When one juror was asked if she favored one side or the other, she responded:
No. I felt that the opening [statements] were a lot of sob stories, and they weren’t that, especially on the plaintiff’s part, they wanted you to really feel sorry for these guys . . . [to] draw you into their personal lives, and I was determined I wasn’t going to get drawn in, so no, I personally was not swayed by the opening [statements].

A young female juror discussed how her neighbor had suffered problems from asbestos similar to the ones the plaintiff had experienced in the case in which she was a juror. She felt an emotional urge to side immediately with the plaintiff, but she was firm when she stated, “I can’t let my emotional feelings interfere with what . . . I’m supposed to be doing.”

One can observe from these statements that jurors struggled to resist efforts to appeal to them emotionally. This resistance is reminiscent of some of the psychological research on how people react to one-sided persuasive communications in a two-sided communication context.77

2. Why Jurors Said They Were Drawn to One Side After the Opening Statements

In a minority of instances, jurors reported being swayed by one side or the other by the opening statements. Overall, twenty percent of the individual jurors interviewed sided with the plaintiff following opening statements, and eight percent sided with the defendant.

In one case in which the majority of the jurors reported being drawn to the plaintiff’s side after the opening statements, the defense attorney was trying his first case and was painfully nervous. Jurors cited this factor as the reason they were drawn to the other side. In another case where the jurors were drawn to the plaintiff’s side, the defense attorney was viewed by many of the jurors as especially slovenly and obnoxious. The jurors were offended by his demeanor and chose early on to side with the plaintiff.

Other jurors reported that after the opening statements, it seemed clear that the side they had chosen was right. One juror favoring the plaintiff said that she had decided, right from the beginning: “I don’t know why. I thought that it seemed reasonable, how the accident happened, and I didn’t have any trouble with it. I sort of leaned right to his side from the very beginning.” Another juror agreed with the plaintiff following the opening, but he pointed out that his choosing a side did not predetermine his final decision: “I was drawn towards the plaintiff’s case with the opening [statements] but it wasn’t that strong of a thing . . . [I]t didn’t have a whole lot to do with what I

77. See Linz & Penrod, supra note 37.
thought later on in the case, because my opinion changed completely . . . .”
Thus the minority of jurors who admitted being drawn to one side or the other after the opening reported that either attorney demeanor or the merits of the case had influenced them. What is most striking, however, is how few jurors acknowledged that they were drawn to one side or the other by the opening statements.

C. Influence of Closing Arguments

Near the end of many of the interviews, jurors were asked if the closing arguments had an impact in convincing or changing their minds. In 44% of the interviews, the question was either not asked or not answered. This was usually because, in the course of the interviews, many jurors stated their preference before the interviewer reached that question so the question was omitted. However, 80% of those jurors who were asked the question said that the closing arguments had not caused them to be drawn to one side or the other. In many cases, the jurors had already decided what side they were going to favor before the closing arguments.

Of the jurors asked about closing arguments, those who reported being drawn to the plaintiff’s side and those who reported being drawn to the defendant’s side by the closing arguments were nearly even. Eleven percent of the jurors said they were drawn to the plaintiff’s side, while 9% reported being drawn to the defendant’s side. In none of the fourteen cases did a majority of the jurors report being drawn to either one side or the other by the closing arguments.

Some jurors reported not being swayed by the closing arguments because they saw them more as a summary of the case than an actual argument. They realized that the attorneys were trying to remind them of all that had transpired during the case. Some jurors expressed disappointment that the closing arguments were not as exciting as those they had seen on television or in the movies. One juror explained: “They weren’t as strong as I thought they would be. Basically, it was just a brief summation from what went on. . . . [I]t was nothing glorifying, like you see on Perry Mason.”78 Some jurors

78. This was not the only time that a juror compared the courtroom proceedings with those of a television program. For a discussion of the influence of media portrayals of lawyers on the attitudes of jurors and the public, see Valerie P. Hans & Juliet L. Dee, Media Coverage of Law: Its Impact on Juries and the Public, 35 AM. BEHAVIORAL SCIENTIST 136 (1991). This juror’s comment might suggest that attorneys should emulate TV lawyers, contrary to Sayler’s assertion that aiming to entertain jurors can backfire. Keynote Address, supra note 1 at 1097; see supra text accompanying notes 5-7. But comments by other jurors show that they are suspicious of attorneys who appear to be “acting.” See infra part II.E.3.
did feel that the attorneys were trying to sway them: "They were, at that point, both trying to leave their impression upon us, to convince us one way or the other. If the evidence didn't do it, possibly their last remarks would." These jurors often mentioned the fact that the plaintiff's attorney not only gave a closing argument, but also could rebut the defense attorney's closing argument. They felt it was unfair that the plaintiff had "two shots" at the jury:

The [plaintiff] had the last word if I remember right, and I think he did. I think the last words said [are] what sticks in the jurors' minds the most; he's got the opportunity to contradict everything that [the defense attorney] said in his closing argument and I think that stuck with most people. I think he had a distinct advantage there.

Another juror responded:

I guess it's ... having the plaintiff get two shots at you in the closing arguments; [it] sure gives them an advantage. I mean because [the defense attorney] got to see what the plaintiff said first, and then he got a chance to defuse it all, but then the plaintiff's lawyer still has a chance to throw it back at you again. And he can try to defuse how the defense defused him. That's just what they did, they went back and forth. [The plaintiff's attorney] laid down the case in his closing argument the first time; [the defense attorney] tried to defuse it; and then he came and tried to defuse the way [the defense attorney] tried to defuse it . . . .

Overall, the jurors expressed some disappointment in the closing arguments. They were frustrated that they were once again hearing what they had already heard in the opening statements and in the actual case. Some had envisioned climactic endings to their trials and were let down to realize the closing arguments were basically a summation of the facts. A retired female juror said, "Well, they were very much the same . . . rehashed over the same things. It was such a repetition." By the end of the trial some jurors also seemed disheartened by the adversarial nature of the cases. A juror complained that the closing arguments were "too long, too drawn out, too predictable. You knew what [the plaintiff] was going to say, you knew what [the defendant] was going to say, the complete opposite."

D. Creating a Framework

Although most jurors reported that their preference for one side or the other was not influenced exclusively by the opening statements and closing arguments, it would be a mistake to infer that the opening and closing had no impact. Further analysis of jurors' comments revealed that the opening and closing were critically important in providing a framework. Many jurors mentioned that the opening statements and closing arguments created a
framework within which they viewed the case, and gave the case a clear structure that it might have otherwise lacked. By outlining in the opening statements the ideas that they were going to advance and later summing up the facts in the closing arguments, the attorneys gave the jurors a coherent idea of what to expect in the trial and of what they had delivered. This use of attorney communication is, of course, quite consistent with the story model of jury decision making described earlier.  

The jurors used the opening statements to help them determine what they should be looking for in the case. After hearing the statements, the jurors felt they had a good idea of what was going to happen throughout the case. As a male college graduate explained:

The plaintiff went first. He told the general overview of the case, and how he was going to try to prove his point. And the defense did the same thing. He gave a general overview of the case and how he was going to prove his point, who he was going to call, [and] that we were going to have some taped testimony on videotape.

A female high school graduate saw the opening as a “preview of [the attorney’s] opinion and style of judging, and the types of things they were going to point out. Kind of taking all the information that we were going to hear and trying to put it in a chronological order.” Similarly, a twenty-year-old juror felt that the opening statements were an attempt to “set the stage” of the case.

Many of the jurors thought the closing arguments were useful to clarify issues that had become confused during the trial. A female juror said the closing argument “was just summing things up to me and refreshing my memory. Kind of like making me go back to the beginning, to make me remember what was important down the road until this point for me.”

Lawyers also had the opportunity in closing arguments to show the jurors the consistency of their arguments throughout the trial. A juror in a personal injury case said, “I believe the [plaintiff’s attorney] put a lot of things back together as far as what he tried to do right from the start and how it paralleled his introduction.” Without the closing arguments, jurors may not have been able to sift through the information the attorneys presented. Especially in long trials, jurors apparently began to confuse the arguments presented by the plaintiff and the defendant. One juror expressed the importance that the closing arguments held for her:

I think it sort of just tied up some loose ends; it reiterated some stuff that was said in the beginning that I might have lost track of along the way.

79. See supra text accompanying notes 38-42.
And it also led me to realize that they were boxing heads, solidified in my mind that they had actually two sides. Because when you get to hear all these plaintiffs and witnesses, and folks are up cross-examining each other, you begin to think, “Well, just who was for who, what was for what?” And you’re taking down all the facts, but you have to go back and look over your notes to just really decide what you’re going—you know, what your idea is, or what your thoughts are. However, in the closing arguments, it sort of brought it all back into perspective... [and made] you... remember that there are two sides.

Even if jurors reported that they stayed neutral during the opening statements and closing arguments, an attorney who clearly expressed the structure of the case appeared to have an advantage in encouraging jurors to focus on and recall the material that supported his or her client.

E. Jurors’ General Views of Attorney Qualities

In addition to asking specific questions about opening statements and closing arguments, we also asked jurors to provide a general evaluation and ranking of the attorneys in their cases. Slightly more jurors reported favoring the plaintiff’s attorney (thirty-seven percent) than the defendant’s attorney (thirty-one percent). The remainder expressed no opinion or thought that the attorneys were evenly matched. Similarly, in five of the fourteen cases in the sample, a majority of jurors chose the plaintiff’s representative as superior, compared to three cases in which jurors chose the defendant’s attorney as the superior one. The small number of cases precluded us from conducting a statistical test to determine whether the perceived superiority of the attorney translated into a favorable case outcome.

1. What Made One Attorney Better

Issues that appeared to influence the way jurors evaluated attorneys were the credibility and demeanor of the attorneys, the emotionality of their arguments, and their organization of the case. Attorneys who were not credible, had poor demeanor, used excessive appeals to the jurors’ sympathy, or were poorly organized tended to alienate the jurors.

80. Thus, in 68% of the trials, jurors expressed preferences for one attorney over the other. Compare this to the Kalven and Zeisel study, in which judges reported that in 76% of the trials the attorneys were evenly matched. Kalven & Zeisel, supra note 26, at 354, tbl. 82. Kalven and Zeisel asked the judges in their studies about the relative experience of trial counsel (Sample 1) or asked the question, “Was the case tried equally well on both sides?” (Sample 2). In contrast, jurors in this study were asked to rate the attorneys, and the jurors, in expressing a preference for one lawyer or the other, presumably did not limit themselves to the lawyers’ experience or legal ability.
It is interesting to note that jurors expressed ambivalence about emotionality in the arguments. They liked a small amount, but resented extreme appeals to their sympathy. In addition, the level of emotionality in argument was evaluated against the severity of injuries claimed in the case.

These points are best illustrated by specific examples from cases in which one attorney was considered to be better than the other. In one case involving a sports injury that left the plaintiff paralyzed, the majority of the jurors who favored the plaintiff’s attorney referred to the level of the attorney’s organization in explaining why they preferred him. Since he appeared to be better organized, the jurors concluded that he was a better attorney. Moreover, the defendant’s lawyers did not seem to be as involved in the proceedings. A female juror explained:

[The defense attorney] used the plaintiff’s material so often, I felt that he was not as prepared as the other lawyer. He was forever leafing through, like he was confused, he wanted to find this, he wanted to find that. . . . And I felt that the lawyer from the company, as the time went on, he was not there a hundred percent of the time. But when he was there, he just didn’t . . . seem to be interested.

The plaintiff’s attorney came across as more likable. He used an amount of emotional appeal that the jurors felt was appropriate in this particular case. Although he tried to evoke the jurors’ sympathy, his approach was not viewed as excessive given his severely injured client. None of the jurors felt he was exaggerating the injuries in order to play upon their emotions. A male juror said, “His was more of an emotional plea, whereas the other man was more of a legal correctness, who made a mistake and who didn’t.” This approach, focusing on the legal aspects of the case, tended to make the defense attorney appear unsympathetic to the plight of the severely injured victim. Throughout the interviews, the jurors described the defense attorney as “cold,” “calculating,” and “callous.”

Even though no juror favored the defendant’s lawyer over the plaintiff’s, jurors did not believe that he was a bad attorney. The jurors simply tended to favor the approach of the plaintiff’s attorney. A male juror explained the differences between the two lawyers:

They were both good lawyers, and the thing of it was that they both have opposite personalities. One man was . . . a more story-type, personable, warm-type guy, and the other man was very legal and precision-minded, very dry, cut and dry, unemotional. . . . [The plaintiff’s attorney], he was more positive and more flowery and descriptive and colorful and story-type. The other man was negative. He was . . . looking for everything that was wrong all the time, picking out all the dark, negative things, and enlarging on them deliberately. He seemed to be like one of these birds in the air that fly over, he never sees any beautiful scene, he just sees a dead
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... cat on the ground or something like that. You know, always seeing the bad, the negative. So . . . those . . . were . . . their two different approaches.

In the case mentioned previously in which the defendant's attorney was trying his first case and was apparently very nervous, his nervous appearance put him at a disadvantage in the jurors' minds. The majority of jurors evaluated the plaintiff's attorney more positively. A male juror with graduate school experience explained:

I thought that [the plaintiff's lawyer] had a better composure; I don't know that he displayed more skill or more insight or more intelligence about the case or the way to handle a case. Nor do I think that he displayed less. I thought in those respects they were equal, except [the defendant's lawyer] was a lot more nervous.

A female juror felt similarly:

[The defendant's attorney] knew what he was talking about, but it just didn't come out for him, a lot of times because he was nervous, and he even said he was. Hands were even shaking. I mean, he knew what he was talking about, he just had trouble getting it across.

Throughout the interviews with jurors from this case, the main topic in the discussions of the quality of the attorneys was the defense lawyer's extreme nervousness. His nervousness was so intense that it made some jurors uncomfortable. A female juror said, "I felt embarrassed at the defendant's lawyer because he was new and he was making all these mistakes." The plaintiff's attorney may have looked better in relation to the defendant's attorney simply because he was more composed, but there are suggestions in some juror interviews that the nervousness also detrimentally influenced the organization of the case presentation. A thirty-five-year-old female compared the attorneys:

There was a great difference. I mean, [the plaintiff's attorney] knew what he was doing or appeared to know what he was doing, and he was very cool and very collected and had all his facts together. I mean, he went through every witness and you could tell that his questions were pre-planned. And when he crossed he had everything written down and went right down in order. . . . [The defendant's attorney], on the other hand, had a very confusing way of addressing everything. He would put a chart up as to certain dates when the accident occurred, when she was released from the hospital, the first time she went to the doctor, and he would just put them up there in sort of a jumbled fashion. And he would bounce around, and it was very distracting at first, until you got used to him. And he was very, very disorganized all through the whole thing.

The defense attorney did help his situation somewhat by informing the jury that it was his first trial. A male juror reported:
I thought it was wise of him at a point in the trial to indicate to the jury that, "this is my first trial." But not come out and say, "I'm nervous because this is my first." [While examining a witness,] he very wisely pointed out that, "You're very nervous. Are you normally like this?" And she said, "No, I've never been on trial before." And he said "Well, I've never been on trial either, this is my first trial so we're both nervous." And they kind of kept going. But I thought it was excellent of him to point out to us, "I'm nervous because this is my first trial, not because of the case."

The lawyer's comments about his first trial let the jurors know that he was nervous for a reason other than the quality of his case. Otherwise, the jurors could have misread his nervousness to be an indication that he was not confident about the information he was presenting.

The preparedness of the lawyers was an important issue to the jurors in many of the cases. Not surprisingly, a well-prepared case tended to appear stronger. In a contract dispute case in which seventy-five percent of the jurors favored the plaintiff's attorney, the plaintiff presented a significantly greater amount of evidence than the defendant. Jurors saw this as an indication that the defense attorney was either too confident or had no case at all. A female juror said:

> The plaintiffs attorney was definitely well-prepared. There's no doubt about it, he definitely had enough [evidence]. As a matter of fact he had too much information as it kept getting him into trouble. If he wouldn't drop it, he'd be looking for it, constantly fumbling through all pages looking for what he was looking for. He reminded you of the absent-minded professor, but he presented his case very well, needless to say. The defense attorney, I think they thought the case was cut and dry, that they didn't have to present anything to us.

Although the plaintiff's attorney may have been a bit disorganized, his huge volume of material impressed the jurors enough to make up for it. The defense attorney's lack of material to present made him appear cocky or arrogant. A seventy-one-year-old male juror felt the same as the previous juror:

> Well, the attorney for the couple that was suing, I thought he did a very good job in presenting the case and the arguments. Whereas, the attorney for the defense . . . seemed like he was too sure of himself. I mean the way he would stand and the way he would pose more or less, to me seemed like he was too sure of himself. And I thought that he could have presented the case a little more than he did . . .

A female juror with some college experience also felt that the defense attorney was doing the minimum necessary to present the case:

> All along I felt that the defense attorney just—really, I don't know, . . . he really was defending. I mean he was doing what he was supposed to do
but, it was not like a proactive kind of an argument. It was just, "Well you said this, but . . . ." He wasn’t as strong as [the plaintiff’s attorney].

In another personal injury case, many of the jurors did not perceive the defendant’s attorney as professional or credible. Four of the six jurors who chose the plaintiff as the superior lawyer mentioned that the appearance or demeanor of the defendant’s attorney was inappropriate. A male juror stated: "The key issue had to be appearance, demeanor, credibility. [The defendant] or his attorney did not come across as professional, trustworthy, honest. We all said this in that courtroom. It was not very difficult to reach a decision."

The difference between the two attorneys was clear to that juror:

You had the clean-cut, professional-looking attorney, and you had this guy, [the defense attorney,] who certainly didn’t appear—he did not have the credibility he should have had, because of his appearance. . . . I think his appearance took away from a lot of what he had to say. . . . His shirttails were hanging out, his shirt was wrinkled. He really did not have a professional [attitude].

The plaintiff’s attorney, on the other hand, was well-respected by the jurors. A female juror said, "I thought he did an excellent job. He kept to the facts and didn’t exaggerate anything and didn’t make it emotional or anything."

An unusual aspect of this case was the fact that the defendant himself was an attorney. The defendant tended to get involved in the defense of his case, and two of the six jurors who sided with the plaintiff’s attorney mentioned that his involvement had disturbed them. A male juror explained:

I think [the defense attorney] was a puppet and he was doing what he was told to by [the defendant]. Because [the defendant] was at his side, and anything that the plaintiff would present, [the defendant] would go ahead and tell [the defense attorney] what it was, he would whisper in his ear a bunch of things. [The defendant] would write something down and would hand it to him and he would get up there and talk. It seems he was doing what he was told to by [the defendant].

These jurors felt that the defendant’s attorney should have controlled the case, not the defendant. The defense attorney’s lack of control in the case made him look weak in the jurors’ eyes.

The final case in which the plaintiff’s attorneys were viewed as better by a majority of jurors was an asbestos case. No single issue arose that marked the plaintiff’s attorneys as superior; rather, the jurors generally felt they were better lawyers. Unlike another asbestos case in our study, the plaintiff’s attorneys did not suffer in this instance because they specialized in a

81. See Hans & Lofquist, supra note 68, at 94.
particular type of claim. In the other asbestos case, jurors were hostile to the idea that a lawyer would bring numerous asbestos claims. They saw this practice as attorneys “manufacturing” cases in order to make more money and described the plaintiffs’ attorney as an “ambulance chaser.” In contrast, in this case, jurors actually saw it as an advantage to specialize: “I know that there are lawyers that specialize in different fields—[prosecuting] murderers, suing, corporations, paperwork, and that kind of thing. I know there must be at least a half dozen categories or whatever it is. And when you specialize in that one field you become good at it . . . .” In this case, jurors did not seem at all disturbed by the idea that the lawyers were repeatedly bringing one type of claim. They rejected the notion put forth by the defense that this practice was unfair. A female juror said: “There was a little conjecture, and the defense tried to point out that there was a conspiracy of some sort. But as the trial progressed, we all came to the conclusion that there was damage that had been done to these people, and it really wasn’t their fault.” The defendants’ attorney suffered because he did not appear as knowledgeable about cases involving asbestos injuries. A male high school graduate explained:

This other fellow, [the defendant’s attorney], he didn’t know it that well. It just seemed like he took a crash course in it and got as much information pertaining to it and had to study it the night before to come in prepared. But the other guy, he knew his stuff.

There were three cases in which the defendant’s attorney was considered the better attorney. In all three cases, calm defense attorneys opposed very emotional plaintiffs’ attorneys. The defense attorneys seemed to have benefitted from the comparison.

The plaintiff in one case was injured as the result of a car accident. Her attorney used many arguments that jurors felt were designed to appeal to their emotions. Although jurors recognized the woman was hurt, they felt the plaintiff’s attorney was exaggerating her injuries. It is useful to contrast jurors’ negative reactions to emotionality in this case with their more neutral reactions to emotionality in the case involving the paralyzed plaintiff in the sports injury case. It appears to be important that attorneys carefully calibrate the amount of emotion they express in a case to the seriousness of the injury. Jurors did not automatically resent emotion, but instead resisted emotion that seemed out of proportion with the injury. Since the attorney in the car accident case made the plaintiff’s injuries seem more serious than they appeared to be, he lost credibility. A male juror who works as a security officer explained:

82. See the discussion of the paralyzed victim case supra p. 1318.
He was overly dramatic. You know what I’m talking about? Since it was about the case, he kept saying how perfect her body was before the accident... he made her almost seem like a cripple, but we could all look at her and see that there was no neck brace, no wheelchair, nothin’, you know? And we’re all just like... she looks fine to me.

It appears that jurors were annoyed by the constant emotional appeals in a case that they did not consider to be very serious. Also apparent is some suspicion on the part of the jurors about the plaintiff’s claim of severe injury. Later in the interview the same juror said:

[The plaintiff’s lawyer] kept repeating: “This is our one shot. This lady has been calling for me for the last two years on the phone about this case, about her injuries, and her pain. And her pain will not go away, and this is our only shot, you people here. If we don’t win, we can’t come back. This is it.” And we were all like, “So?”

The jurors were also confused in this case by the fact that the plaintiff’s young son sat with her throughout the trial but did not testify. Six out of the eight jurors commented on this. They wanted to know why he was not in school. Many jurors saw this as a tactic to induce sympathy for the plaintiff and felt it was inappropriate. A female juror explained the reaction of the others involved in the case:

We had one woman on the jury, she said “as soon as I walked in there and saw that boy sitting at the table I wondered why he wasn’t at school.” And they had said that he was having a civics lesson, the lawyer had said that he was there because this was a good civics lesson. [The jurors] didn’t buy that, they weren’t a bit sympathetic that the boy was there.

A female juror who was a bank supervisor said, “I felt he belonged in school. I really did. I think her attorney had him sit there, a sympathy ploy, to make everybody feel sorry for her.” The son sitting with his mother seemed out of place to the jurors, and it became a major source of discussion during their deliberations. Most jurors assumed that it was a tactic or trick on the part of the plaintiff’s attorney.

Throughout this personal injury case, few jurors referred to the defendant’s attorney as a good attorney. It seemed that the jurors were rejecting the plaintiff’s lawyer rather than commending the defendant’s. The jurors seemed better able to respond to the calm, unemotional arguments that the defendant’s attorney put forth, but this fact did not mean that they thought he was a superb attorney. A female juror described him: “He asked questions, he was very to the point, said what he had to say, that type.” Another juror described him as “the lesser of two evils.”

In another case pitting a calm defense attorney against a lawyer who was more emotional, one juror compared the attorneys:
I guess [the defense attorney], you'd have to say, was a slicker. If you knew what a slick attorney was, that was a good definition of him. [The plaintiff's attorney] got a little more emotional sometimes. He'd get a little loud, scream and yell. [The defense attorney] would make his subtle theatrics: raise his eyebrows up in the air, look around the room. He'd sort of say "ha" without really saying it. He didn't really say it, but the jury could see him.

Another juror explained:

Oh lord, he's a smart lawyer. He's a smart lawyer and he's a cool lawyer. When [the defense attorney] talks to you, the jury, he don't look at you as if to say, I'm trying to sway you. He just says it like it's got to be said. But the other lawyer, he's looking us right in the mouth, almost saying, "I beg you." They do that, and they can sway you, if you let them sway you.

Jurors were more comfortable with the defense attorney's approach. He was thorough, but not excessive. The following juror explained, "[h]e was the best lawyer, because he was fighting for the case, but he wasn't going to an extreme." In contrast, the jurors distrusted the excessive emotional appeals of this plaintiff's lawyer, and felt he was exaggerating in his statements. As a result, the defense attorney and his client benefitted.

The final case where a defendant's attorney was favored by a majority of the jurors was another case in which the plaintiff's lawyer was very emotional (several of the jurors described him as a "showboat"), while the defendant's lawyer was calm and quiet. A male juror in his forties described the differences between the two attorneys:

[The plaintiff's attorney] basically played on the emotional factor. Here's poor [plaintiff]: he's been damaged, he can't work, he can't bend, he can't walk, he can't stoop, he can't sit in a chair for more [than] ten minutes. Yet the guy sat in the chair for seven solid days and never moved. And he got to be quite flamboyant. And I had a little trouble with that.

[The defendant's] case was basically the facts. Here's what happened, here [are] the photographs, here's the testimony. Base your decision on what really happened in the case.

Another juror felt the same way:

They were equally bad, although in very different ways. [The plaintiff's attorney] simply wasn't particularly credible. He was so theatrical, becoming mad so quickly, and then turning it off so quickly . . . that he just didn't seem particularly credible. [The defendant's attorney] seemed perfectly credible, but she seemed inexperienced and a little nervous.

Jurors also felt that the plaintiff's attorney was exaggerating the plaintiff's injuries:

I think his attorney was a little overzealous in trying to say [the plaintiff's] life had just come to an end and that if he didn't receive this settlement his
life was going to be destroyed and he would never be able to take care of himself or his family and that ... the thing that we as good citizens just had to do was award [the plaintiff] his six hundred thousand dollars. So I started to develop kind of a negative attitude about him probably around the third day of the case. The case went for seven days.

The emotionality of the plaintiff’s attorney made him appear less believable to the jurors. They began to see him as a lawyer they could not trust. The defendant’s attorney presented a straightforward argument; although the jurors did not feel she was exciting or especially talented, they did feel she was worthy of their trust. A male juror said, “I think I probably like [the defendant’s attorney] a little better because she seemed to be playing it more legitimate than the [plaintiff’s attorney] was.”

2. Badgering the Witness

Jurors, especially female jurors, did not respond favorably to attorneys who attacked or badgered witnesses. It made the jurors feel uncomfortable and sometimes more sympathetic to the witness than they otherwise would have felt. In a knee injury case, the defense attorney badgered a female witness to the extent that a female juror began to identify with the witness and feel sorry for her:

Another thing the plaintiff’s attorney did at that point was to ask her if she had walked to the courtroom. She said, “Yes, I parked two blocks away.” He said, “Do you have high heels on?,” and she said, “No.” And he, he frankly took her shoe off, and I would have been mortified if this were me, and showed it to the jury. And there was a small heel on there, but most working women do not wear flats. Even if you’re in mortal pain, you’re at least going to get a little bit of a heel out of it. And he really tried to rake, rake her over the coals over that. ... So I really felt sorry for her there.

Another female juror felt similarly:

The defense lawyer would cut down her credibility, which I didn’t like that. I didn’t like somebody trying to make somebody else look really bad, unless they really are. But I mean she didn’t seem like she should be really cut down like that, you know, make her look like she’s a liar.

Being aggressive with a witness made the jurors dislike an attorney. A female juror described an especially forceful attorney:

He was really cocky, and sometimes he’d be really mean and ugly to those people. [One witness] had a stutter, and as soon as he got up on the stand, it really came out. You couldn’t understand him, and I thought [the attorney] was a little rude to him. I mean, I wanted to yell out, “Would you leave him alone!” But [I] didn’t. I almost felt like you’re in school. You didn’t yell out, you didn’t do any of that. You just kind of sat there, and
it was like, "Urghh, leave this guy alone!"... I wouldn't... like him at all if he came on to me that way.

Another juror acknowledged that she thought it was the role of the attorneys to try to upset and confuse witnesses, but she also understood that people cannot remember things perfectly—so witnesses are occasionally going to be inconsistent:

I guess maybe... the [defendant's attorney] did a real good job of confusing him with dates and things like that which was annoying. He was kind of picking on him, but that's [his] job. And [the witness] was getting confused about some of the dates and the way that it had happened a long time ago. Anyone would be fuzzy about certain dates, when he had a doctor appointment and all that stuff.

In a case in which the defense attorney was reported by the jurors to have badgered a medical witness, the witness performed well under the circumstances and increased his credibility in the minds of many jurors. A male juror said:

The lawyer kept baiting him, and baiting him, and baiting him... He was getting pretty mad at the end. I think we all sympathized with the guy, so after a while the lawyer hurt himself more than anything because the doctor came with fixed straightforward answers, but he kept trying to bait the guy.

By constantly pressing the plaintiff's witness, the defendant's attorney made the jurors feel uncomfortable and sympathetic to the witness. Because the witness was consistently able to answer the attorney's questions during the cross-examination, the attorney actually increased the witness's credibility, instead of decreasing it.

Thus, in these cases the attorneys seemed to gain nothing from badgering a witness. The jurors were more likely to sympathize with roughly treated witnesses, and less likely to believe, when witnesses were badgered, that inconsistencies in their testimony were a result of weaknesses in the case.

3. Actors and Tricksters

Many of the jurors did not believe that the attorneys’ actions were worthy of their trust. The word “actor” came up repeatedly throughout the interviews. Some jurors did not believe that the behaviors or the arguments of the attorneys were genuine; rather, they suspected the attorneys of playing a role in each case. Emotional displays by the attorneys were especially suspect. A male juror with some college experience said:

When [the plaintiff] was on the witness stand, [the lawyer] started to break down in tears himself. Which I don't know if that... came natural, or
whether that was part of the act. I don’t know ... when she started breaking down, he did too.

The juror had trouble believing that the lawyer might feel sympathy for the plight of his client. In the case with the nervous defense attorney, a female questioned his nervousness: “I just wondered, ‘Is this a ploy to get our sympathy?’, because he was so nervous or ‘Is he really like that?’, and that’s the one thing that really stuck out in my mind, more than anything else.” Instead of believing the attorney was nervous, the juror suspected the attorney of lying. Lawyers who showed excessive emotion—even nervousness—during the trial were considered by some jurors to be acting to elicit the jurors’ sympathy.

Attorneys were also considered to be acting when they deviated from a straightforward approach while trying the case. Raised voices or abrupt actions were supposedly part of an act. A female juror said: “They were both very good at their theatrics, as far as hopping around, making faces. It was kind of funny. [The attorney] for the plaintiff—little guy—he’d get all fired up and hoot and holler. [The attorney] for the defense was very quiet.” A male juror with college experience also saw these types of actions as part of an act:

I enjoyed watching the lawyers go back and forth and some of the tactics that they would use. And, you know, the way they would roll their eyes . . . . I was really quite interested in the way the different attorneys played to the jury and played against each other. It was, it was very good. They must have been in drama class at one time.

Jurors seemed to neglect the possibility that the attorneys might actually get excited or frustrated during the progress of their case. Extreme displays of emotion appeared frequently to lower the attorney’s credibility in the jurors’ eyes.

Sometimes jurors suspected the attorneys of outright lying. They saw the lawyers as tricksters who would lie or try to manipulate the jury in order to sway them to their sides. A female homemaker said: “I think sometimes lawyers try to play games with your mind to try and make you, well, think their way. And I think it gets to the point where the jury has to decide who’s lying.” A juror from another case explained:

[A]nd he was a lawyer, which was in the back of my mind too ... because I kind of think . . . lawyers try to take you over. Maybe that was in the back of my mind too. [Lawyers] know the ins and outs to the whole thing, you know. While [the plaintiff] was just, a first time thing for him, he had an entirely different background.

Jurors also thought that attorneys might persuade plaintiffs to lie or to exaggerate their injuries. A juror who was a high school graduate thought the
attorney had done this. "I think that [the plaintiff's] lawyer told her how to act and react. . . . She was very emotional and upset about it. I mean, she acted like it was yesterday when his hand got cut." The presentation of evidence by adversary attorneys thus appeared to alert jurors to be on guard for ways in which the evidence itself might be influenced by the attorneys.

IV. DISCUSSION

A. Strengths and Limitations of the Current Study

Before describing the implications of this study for lawyer communications, it is important to address some of the pluses and minuses of the juror interview methodology. The use of actual jurors, the good participation rate, and the fact that the study included a range of civil cases all make this a uniquely valuable study of jurors' perceptions of lawyers. Perhaps the most significant strength lies in our semi-structured interview method, which permitted us to obtain answers to specific questions about lawyers while at the same time allowing jurors to put their evaluative comments in their own words.

The major limitation of this interview study is that we are dependent on jurors' subjective, post-hoc evaluations of their judgments about lawyers. Like everyone else, jurors are quite likely to be affected by the passage of time, limited self-knowledge and insights concerning the factors that influence them, the need to present themselves in a socially desirable light, and hindsight bias. It may be particularly difficult for jurors to disentangle the separate effects of attorneys' qualities from the merits of the cases that the attorneys argued.

Despite the probability of errors and biases in jurors' post-hoc evaluations of the attorneys in their trials, the present study contributes worthwhile information to the body of research on jurors' views of attorneys. By analyzing interviews of actual jurors, we have been able to determine which factors jurors themselves mention most often as being significant in their evaluations of attorneys. Future studies using a complementary methodology

may be able to discover what part these factors play in shaping jurors' verdicts and awards.

B. Opening Statements and Closing Arguments

One of the most interesting sets of findings pertains to the jurors’ estimates of how they were influenced by opening statements and closing arguments. Most jurors rejected the idea that they were strongly swayed by such arguments alone. They offered a variety of explanations for why they were not drawn to one side or the other after the opening statements. The most significant, of course, were judicial instructions to remain neutral. Closing arguments were similarly judged by jurors as not being particularly influential.

It is always difficult to evaluate the accuracy of people’s responses to questions when strong cues indicate the socially desirable answer. The judge instructed the jurors that they must not allow themselves to be swayed by the opening statements, and thus it was clear what the court wanted them to do in order to fulfill their role as good jurors. Some jurors might well have been strongly influenced by the opening statements and closing arguments, but still attempted to maintain that they were not influenced—or reported to us that they were not—because of the judicial admonition. Yet the jurors’ comments about trying to remain neutral have a compelling and realistic quality. Many jurors revealed some mistrust of the opening statements and expressed a desire to see whether or not the evidence would support these statements. This reported resistance to persuasion has also been found among subjects in studies of one-sided and two-sided communications.86

Jurors remarked that the prime value of opening statements and closing arguments was that they provided a framework within which jurors could evaluate the cases. In this relatively subtle way, attorneys were able to affect jury decision making. By outlining the arguments they were going to advance, attorneys gave the jurors a way to order information in the case. The jurors’ descriptions of the impact of opening statements in this study converge nicely with the findings of Pyszczynski and his colleagues87 that opening statements create cognitive schemata that structure the jurors’ processing and interpretation of evidence. In addition, the jurors’ descriptions about the impact of opening statements correlate well with the theoretical arguments of other scholars about the importance of a story or script for ordering trial evidence.88 Many jurors mentioned that the opening statements and closing

86. Linz & Penrod, supra note 37, at 13-14.
87. Pyszczynski et al., supra note 45.
88. See supra text accompanying notes 38-42.
arguments helped them to understand and recall information—but they did not consider this to constitute "influence." Attorneys, of course, might well disagree!

The comments by jurors showed that the summary statements were quite helpful to them in organizing the evidence. In this light, it is worthwhile to note that jury experts have recommended that, to enhance jury comprehension, attorneys should be permitted to make mini-summary statements throughout the trial in addition to their standard opening statements and closing arguments. The results of our study suggest that such statements would have maximum impact if they help to generate a strong framework within which jurors may organize the ongoing evidence.

Although jurors are affected by opening statements, in that they use them to create stories or frameworks to organize the evidence, the jurors' comments that they were not swayed by the opening statements strongly support Sayler's contention that jurors do not make up their minds right after the opening statements. In contrast to the claims of some trial consultants and attorneys, our study suggests that instructed jurors are aware of the adversary pressure during the openings and try to resist early persuasion attempts. The judge's forewarning about the opening statements appeared to alert jurors to attorneys' efforts to persuade them. This is an interesting finding in that many studies on the impact of judicial instructions upon jurors have shown them to have little effect on jury decision making. To test whether jurors who are admonished are actually more apt to resist persuasion attempts during the opening statements, or whether they are simply responding in a socially desirable way by reporting that they were not swayed by the openings, one could conduct a mock-juror experiment that includes or excludes a judicial instruction concerning opening statements and then observe whether jury decision making is affected thereby.

89. In June of 1992, a group of scholars, judges, lawyers, and other interested parties met to discuss the future of the civil jury system. The meeting was convened by the Brookings Institution and the Section of Litigation of the American Bar Association. A majority of the participants favored the recommendation to permit mini-summary statements throughout the trial. CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM: REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM 5 (1992).
90. See supra note 8 and accompanying text.
91. See VINSON, supra note 12, at 171; SMITH, supra note 12, § 1.13.
92. The classic citation on jury problems with judicial instructions is AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982). It is possible that the judicial admonition about the proper treatment of opening statements was more understandable and accessible than typical judicial instructions about substantive law; also, the judicial instruction was reinforced by the adversarial nature of the trial, in which jurors no doubt anticipated persuasion attempts by the lawyers.
C. Qualities of Good Attorney Communication

Returning to Sayler’s comments about how jurors respond to attorney communications, many of his points about jurors are confirmed by the juror interview results. The jurors in this project reported that the primary factors that influenced their opinions of an attorney were the attorney’s credibility, organization, demeanor, emotionality, and treatment of witnesses. Jurors evaluated positively those attorneys who were credible, well-organized, and moderate in their use of emotion. Poorly prepared or extremely emotional attorneys, and attorneys who badgered witnesses, were all viewed negatively by jurors. This fits well with Sayler’s recommendation to steer clear of “Rambo” lawyering, and to avoid relying exclusively on emotional—rather than rational, evidence-based—appeals.93

In a related vein, our study reinforces one public opinion poll’s findings that some people perceive attorneys as “tricksters.”94 Jurors thought that many of the attorneys were behaving unnaturally, acting out a role specific to the case rather than behaving truthfully and naturally. Jurors were cognizant of the adversary nature of the trial and the opposing roles of the attorneys, and considered these roles in responding to lawyers’ communications. The jurors’ comments and reactions show the hazards of employing excessive or overly dramatic trial tactics, and the value of developing a highly credible courtroom style.

One interesting pattern in this study is that attorneys who expressed emotion were not universally disliked. The most important consideration in the jurors’ evaluations of attorneys’ emotional expression seemed to be the amount of emotionality that the attorneys used in proportion to the plaintiffs’ injuries. It was necessary for an attorney to calibrate the emotionality of the argument to the level of injury or harm the plaintiff sustained. Thus, jurors viewed emotionality as appropriate when the plaintiff was severely or chronically injured, but not when the plaintiff had suffered a minor injury that could be corrected.

The peril of a defense attorney appearing cold and unsympathetic in a catastrophic injury case has been noted by the trial advocates who are members of the Federation of Insurance and Corporate Counsel.95 Recently, the Federation produced a videotape on handling sympathy in jury trials. In

93. Sayler, supra note 4; Keynote Address, supra note 1, at 1096, 1098.
94. Mindes & Acock, supra note 13, at 179.
the video, they maintain that defense attorneys in severe personal injury cases should acknowledge to the jury the natural sympathy anyone feels for a badly injured person and should treat the injured plaintiff with dignity and respect. However, attorneys should caution the jury not to decide the case on the basis of sympathy alone.\textsuperscript{96}

On the other hand, it is clear that in cases where the plaintiff suffers relatively minor injuries, the plaintiff's attorney faces many suspicious jurors who are predisposed to believe that plaintiffs and their attorneys may, and are likely to, attempt to bring frivolous lawsuits and exaggerate the plaintiff's injuries. These predispositions were revealed in an analysis of tort-juror responses to a post-interview questionnaire from our larger study of jurors in business and corporate cases.\textsuperscript{97} A majority of the jurors in the study expressed disbelief and even hostility toward personal injury plaintiffs. Eight out of ten jurors believed that there are far too many frivolous lawsuits today; only about a third of the tort jurors in the entire sample agreed that "most people who sue others in court have legitimate grievances."\textsuperscript{98} The "litigation explosion" appears to exist in the minds of jurors, if not in reality, and is currently a factor that attorneys must consider in shaping their persuasive communications in the courtroom.

\textbf{CONCLUSION}

Even with its limitations, this study contributes valuable information about how jurors react to attorneys' courtroom communications. It bolsters the importance of opening statements and closing arguments, and confirms a number of assumptions contained in trial tactics handbooks about the ways in which lawyers can most effectively present their cases to a jury. At the same time, it raises a number of interesting new questions about the impact of judicial admonitions to jurors to remain neutral during lawyer arguments, about the appropriate level of emotionality for a case, and about the specific aspects of lawyers' communications that are most crucial in determining jurors' judgments. Our hope is that others may take these findings as a starting point for additional exploration and research.

\textsuperscript{96} Id. \\
\textsuperscript{97} Hans & Lofquist, \textit{supra} note 68, at 95. \\
\textsuperscript{98} Id.