



The bias beneath: Uncovering juror bias in sexual assault cases

Seven types of juror biases: Uncovering and dealing with them

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You are called to represent a woman who was raped in the stairwell of her apartment building at 2:00 a.m. She is barely 22, never finished high school and works as a cocktail waitress in a seedy bar. Her attacker is a college student who frequents the establishment regularly. The management company for the building knew the stairwell was poorly lit and several tenants requested that the building install additional lights as a safety precaution after a robbery. Witnesses testify and your client admits that she had a gin and tonic after her shift but maintains that she was not drunk. You are bringing a case against the landlord, claiming that they knew the stairwell was dangerous but did not take adequate measures to protect tenants.

How will you convince a jury that the landlord is to blame when she was raped by a good-looking assailant? How do you show the landlord could have reasonably foreseen a third party's criminal act? How do you prevent jurors from blaming the victim? What hidden biases do they bring? And how does that impact their view of the case? How do you uncover predispositions that present challenges to your case?

In response to these prevalent biases, trial attorneys and jury consultants have increasingly drawn on insights from the

field of social psychology to use in voir dire and trial strategy in order to identify and move jurors past the underlying biases they hold.

These susceptibilities include the "availability" bias, the "confirmation" bias, the "belief persistence" bias, the "norm" bias, the accountability or responsibility bias, and the processes of "defensive attribution," "fundamental attribution" and "just world" thinking. What follows is a brief synopsis of each of these mechanisms, the way it impinges on juror understanding or decision-making, and its lessons for jury voir dire and trial preparation, particularly in cases of sexual assault implicating third-party culpability.

Juror bias in sexual assault cases

Wise counsel will try to harness or subvert the biases, using voir dire to tap into jurors' conscious and unconscious decision-making processes. In order to effectively diffuse biases, one must be familiar and able to draw them out of potential jurors. Effective voir dire not only identifies the usual excludable biases (consanguinity, affinity, employment or other close relationship to a party, inability to be fair or familiarity with the case) but addresses biases which jurors themselves may be unaware of or unwilling to acknowledge.^{1,2}

In sexual assault cases, such biases include: suspicion of plaintiffs, myths regarding perpetrators and victims of sexual assault (she wore a short skirt and was

asking for it/he's a nice looking guy/ doesn't look like a rapist) and a predisposition to blame the victim³.

Uncovering juror biases in voir dire

Voir dire is the time to begin to educate jurors and dispel salient myths and stereotypes regarding sexual assault including: consent, resistance, reporting, false accusations, absence of witnesses, absence of evidence of injury. Questions regarding juror expectations of assailants, victims, false accusations, responses to bullying, and persuasive evidence can help jurors shed stereotypes and articulate appropriate standards of behavior.

Expert consultation or evaluation can shape the case to dispel the myths (provocation, resistance, outcry, prompt reporting, false accusation, assumption of risk, lack of witnesses, lack of injury) attached to sexual assault, and/or to identify the defendant's patterns of behavior or show that standards of care were not met.

Voir Dire questions: Juror expectations & preconceived notions in SA litigation

- How do you think a person would act if they falsely accused someone of rape or sexual assault?
- Has anyone had the experience of being bullied at school? Did you report it? Why? Why not?
- Have you ever had to tell other people about a traumatic, painful or humiliating experience that happened to you? Tell me about that. How did you feel?
- When I say the word, "rapist," what images come to mind? Tell me about that.



- What evidence would you need or like to see in sexual assault cases?
- Would the victim's testimony be enough or would you require more evidence? What kind of evidence?
- If you only had her word and no "hard evidence," how would that impact the way you view the case?

Reframing case to accommodate juror predispositions

Trial counsel can make use of voir dire, not only to uncover the pre-existing norms against which jurors are assessing the conduct of victim and perpetrator, but to explore alternative norms that may reshape jurors' thinking about standards of conduct.

While voir dire can help uncover biases, "overcoming" them is a difficult process as they are generally deep-seated. The attorney must approach it as such and craft a trial strategy that takes biases into consideration. Instead of seeking to change a juror's mind about a long-standing belief, the attorney must, instead, reframe arguments and show the juror why *this case* is different.

Juror predispositions: Suspicion bias

Understanding juror bias begins with recognizing that there is widespread suspicion against plaintiffs and plaintiff lawyers. The media provides fodder for such distrust, often featuring scandalous cases and reporting outlandish jury awards that affirm the negative plaintiff stereotypes.

The *suspicion bias* stems from several assumptions or presumptions people generally have about plaintiffs, namely: they are too quick to sue, have ulterior motivations, blame someone else for their own irresponsibility, are trying to win the "litigation lotto," or that their suit will penalize or "tax" the jurors' own pocketbooks by increasing costs, such as health care.

Jurors predisposed to suspicion bias are defense-orientated. They are moti-

vated to hold the plaintiff to a higher standard of accountability and focus their attention on the plaintiff's choices or behavior rather than the defendants. Jurors holding this bias are suspicious of the plaintiffs' motives, quick to assume the lawsuit is frivolous and require a high burden of proof. They are strong defense jurors and their perception of the case can be described as "guilty until proven innocent" – not "innocent until proven guilty."⁴

In sexual assault cases, the suspicion bias is likely to be reinforced through powerful visceral responses to the plaintiff's case and based on the jurors' own prejudices. Variables such as racial or gender bias, belief in common myths regarding perpetrators or victims, personal similarities or psychological identification with one party or the other, or the physical attractiveness or charm of the plaintiff, defendant or the attorneys impact how each juror views the case.

The most effective way to identify jurors with suspicion bias is to create a safe environment in voir dire that encourages jurors to share negative information and ask them how they feel about lawsuits and people that file them.

Positively reinforce negative information and use it as a platform to hear from other jurors. Remind prospective jurors that they are under oath and ask short, open-ended questions that do not imply the "right" answer.

Voir Dire questions: Suspicion bias

- My brother thinks that people who sue companies are trying to win the "litigation lotto."

My wife, on the other hand, believes most people have a legitimate reason for filing a lawsuit.

What do you think? Are you more like my brother or my wife?"

- A lot of people I know think corporations are sued because they have "deep pockets".

Who agrees? Tell me more about that.

- In a civil lawsuit the burden of proof is different than in criminal cases.

The law says that I only have to prove my case 51 percent to win. That's it. Fifty-one percent.

How do you feel about that? Who thinks that you would probably need a little more proof? How sure would you need to be? Give me an approximate percent.

Juror predispositions: Monocausality heuristic

In cases where sexual assault implicates a third party, like the landlord of premises where an assault occurred, gender biases and acceptance of myths about sex crimes may be compounded by another bias which psychologists call the "*monocausality heuristic*."

The *monocausality heuristic* bias, rather ironically, is defined by simplicity. It maintains that people tend to prefer simple explanations to complex ones and are more likely to accept a succinct singular story that appeals to their sense of logic over a complicated one, even if it is the best answer. As a result, they are resistant to accept that an event may have multiple causes or may be caused by multiple parties because it is difficult to understand.

Social science research on jurors' decision-making shows, and trial attorneys know, that jurors with a monocausality heuristic bias are difficult to detect in voir dire⁵. Lawyers should expect jurors to hold this bias and craft a case story that caters to it. Find a simple case story that makes sense and flesh it out with detail. Presenting evidence without providing a context complicates the case. Spoon-feed information to jurors using laymen's terms, preferably using the same language that mock jurors did if the case was tested in a mock trial. Graphics simplify complex information and should be utilized to keep jurors, and lawyers, focused on key case elements.

Juror predispositions: Availability bias

The *availability bias* contends that whatever occupies the jurors' attention during trial will receive disproportionate



focus in deliberations. Otherwise stated, jurors will use the information available to them to find fault with a party. If the plaintiff is the central character, they have more information on his/her actions, thus more opportunity to find fault.

Jurors filter information in a way that attributes fault, and jury research suggests that the first story presented is subject to the heaviest scrutiny as well as given greater weight in deliberations. Jurors are more likely to focus on inconsistencies, patterns of behavior or deviations from “normal” conduct in the first scenario. When they hear the second story, jurors are already trying to reconcile information and determine “what really happened.”

When the plaintiff’s story is told first, the focus is on what the plaintiff did wrong. This allows jurors to judge the victim’s decisions leading up to the assault, such as, her decision to drive home late at night or take the staircase in the apartment building rather than the elevator. Conversely, when defendant’s actions are highlighted, it’s easier to identify faults and draw a causal connection between the defendant and the crime⁶. In sexual assault cases, the third party had the ability to foresee potential hazards but failed to take any preventative action. Warning signs are most effective when they establish a pattern of behavior and can include a history of multiple crimes on the premises, frequent police calls, a refusal to install door buzzers, video cameras or a key-operated garage door despite requests from residents to incorporate these safety measures.

In the case of sexual abuse, the availability bias may be diffused by frequently repeating key words or themes the attorney wants jurors to adopt and begins in voir dire. Conversation with potential jurors about the themes and issues of the case during jury selection highlights essential language, paradigms and norms which focus on the defendants’ failure to take action. Before the trial starts, the lawyer can tap into the *availability heuristic* and reframe the case in a manner which is beneficial to him.⁷

Voir Dire questions: Availability bias

- Has anyone heard of the term “date rape”? How would you describe it?
- Is anyone familiar with the concept of “consent”? What is it?
- Have you ever had an experience where you felt fear or shame?
- Is anyone familiar with the concept of “standard of care”? In your own words, tell me what it means.
- Do you believe events can have more than one cause?
- What do you think about large corporations?
- Some people believe that companies put profits over safety while others think they are an important part of the community. What do you think?

Juror predispositions: Confirmation bias

The *confirmation bias* asserts that jurors tend to search for evidence that confirms their beliefs and tend to scrutinize or disregard evidence which does not fit with prior beliefs. When presented with ambiguous evidence, jurors tend to interpret it in a way that is consistent with what they already think or retrofit information to support their decision. They tend to search for evidence that confirms prior beliefs, interpret ambiguous evidence in line with beliefs, question or disregard evidence that does not fit with prior beliefs. Studies show that jurors are more likely to remember evidence that either confirms their prior beliefs or clearly shows a party’s blameworthiness by deviating from them.

The lawyer’s goal is to show the jury that the defendant’s conduct was out of line with their beliefs and the plaintiff’s behavior is consistent with them.

Confirmation bias thus speaks to the framing of the case – finding a theme or paradigm that is consistent with jurors’ values and taps into their predisposed attitudes. For example, anti-corporate sentiment is a commonly held bias. Most people are willing to believe that a company puts profits over safety. Therefore, a theme that involves corporate responsibility

or a company’s failure to adhere to the standard of care is compelling to jurors because they are already primed to believe corporations are driven by profits and will cut corners to save money. By identifying a theme that coincides with the lens they see the world through, jurors are naturally inclined to favor that side because it confirms what they already “know.”

Again, this is a particular challenge in cases of sexual assault, where generic biases against plaintiffs are compounded by gender and sex-role prejudices, common myths about sex crime perpetrators and victims, and a preference for a simple, or monocausal, explanation. While it is possible to appeal to their sense of corporate responsibility by showing deviations from the standard of care or promoting deterrence, lawyers may find it more helpful to test individual cases in a mock trial focus group. This enables the trial team to see how mock jurors react to the case, which values they identify with, the language they use, themes that resonate, landmines in the case and arguments that are most compelling⁸.

Juror predispositions: Belief persistence bias

The “*belief persistence*” bias involves jurors’ tendency to cling to an initial story, particularly one consistent with their underlying beliefs, *despite contradictory evidence*.

Jurors do not report to jury duty as a “tabula rosa” or blank slate. They filter information through their own life experiences, paradigms and prior knowledge. An important caveat to note is that prior “knowledge” can be *factually incorrect*. For example, everyone “knows” that bigger lumps in breast tissue are more dangerous than small lumps. In fact, this is completely false. A lump can be sizable but benign while smaller lumps are dangerous. When presented with conflicting evidence, jurors rely on what they “know to be true” to make decisions. Lawyers must be aware of such common beliefs in order to properly dispel them or use it to their advantage.



The *belief persistence* bias invites counsel to put forward strong themes and a strong case story early in the trial process so that jurors are primed to latch onto evidence that validate their beliefs and downplay ambiguities or inconsistencies⁹.

Juror predispositions: “Norm” bias

The “*norm*” bias can be defined as the tendency to attribute blame and causation to behavior that is considered abnormal. It often involves the conscious or unconscious positing of counterfactual scenarios. If only “X” had been different, the outcome would have been different. Research shows that jurors search the evidence for the “X” that caused the injury and conduct that deviates from the norm is often linked with causation. The more deviant the conduct, the more blameworthy and causative it will be deemed.

When the plaintiff’s story is told first, jurors focus their normative or counterfactual scrutiny on the plaintiff’s conduct with predictable results. The plaintiff’s perceived risk-taking behavior (going to the bar, wearing a short skirt, trusting an acquaintance to drive her home) will be perceived as a cause or contributing factor to the injury. In contrast, the defendant’s conduct will be given relatively scant attention by virtue of the sequence of information presented. This shows how both the availability bias and belief persistence bias can work in harmony to retrofit information in a manner that supports pre-existing beliefs¹⁰.

In sexual assault cases, jurors’ ideas of what is considered “normal” are often shaped by societal myths regarding the perpetrators and victims of sex crimes. For instance, the myth that the perpetrator had an uncontrollable sex urge or that the victim’s resistance was reasonable. When a plaintiff dresses or conducts herself in a way to “invite” advances, fails to resist or does not promptly file a complaint, the norm bias leads the jurors to blame the victim and forecloses inquiry into the culpable conduct of the perpetrator or other parties.

Voir Dire questions: “Norm” bias

- When you envision a rapist, what mental image comes to mind? Can you describe it?
- How would you expect a rapist to act? Look? What would you expect his life to be like?
- How would you feel if you were told the victim was an alcoholic? For some people, it would drastically change the way they feel about the case, and they would be more likely to find for the defense. For others, it does not matter. How do you feel?
- What about if I told you that the victim was dressed in a very short skirt and not wearing pantyhose? Does that impact how you view the case? How?
- If I told you that the victim had an *extensive* list of sexual partners, does that change the way you view this case? Are you more likely to favor her, less likely or does it not matter to you?
- Would you be able to hold a corporation, a landlord or an employer to the same standard of care as an individual?

An effective way to use the norm bias in an advantageous way is to juxtapose the “normal” behavior of the plaintiff against the erratic conduct of the defense. Highlighting inconsistencies, deviations in the defendant’s conduct or showing what the defendant could have done differently is persuasive. In the case of third-party defendants, norm bias invites plaintiff’s counsel to look for the simple precautions defendants could have taken – lighting, security, a check-in/check-out policy – but failed to do which decreased safety. This enables jurors to focus on the defendant’s lapses and failures of reasonable care instead of what the plaintiff did or failed to do¹¹.

Juror predispositions: Responsibility or accountability bias

The *responsibility or accountability bias* assesses blame and causation against the party who is perceived as shirking responsibility. The more irresponsible the party

is seen as, the more he or she is blamed for causing the harm.

In sexual assault cases, jurors use the responsibility bias to blame the victim twice. First, because she is seeking recompense from the defendant or defendants and shirking responsibility for her own conduct and, second, because they assume her conduct was irresponsible and somehow invited assault. Because the victim is doubly blame-worthy, jurors are able to gloss over the defendant’s culpable conduct.

In dealing with the responsibility bias, trial counsel’s task is to frame the story in a way that paints the plaintiff as *responsible* and the defendant as *irresponsible*. To glean insight into the plaintiff’s adherence to norms of responsibility, ask about their responsibilities and the decisions they make when it is compromised (trust, for example, or refusing to drive after drinking).

Voir Dire questions: Responsibility or accountability bias

- In your life, what are you responsible for? (home, work, finances, etc)
- Who are you accountable to?
- If I were to ask your (husband, wife, brother, best friend) how safe you are, what would they say?
- When it comes to a tenant and landlord, who do you think is more responsible for safety? Assign a percentage to each party.

Juror predispositions: Defensive and fundamental attribution bias

The “*defensive attribution*” bias is the tendency to blame the victim for acts of omission or commission when the conduct is uncomfortably close to the conduct or vulnerability of the juror assessing the case. As a coping mechanism, the juror distances herself from the victim’s injuries or risk of injury.

This serves to protect a juror’s belief in a *safe, just or predictable world* and blame individuals rather than circumstances. By assigning fault to the victim through her characteristics or decisions instead of situ-



ations, jurors can take comfort that the harm could *never happen to them*. These mechanisms allow jurors to believe that the victim “asked for it” so as to minimize the threat that there may be criminal depravity or danger lurking in familiar situations¹². It is too frightening to think that this event could happen to them; therefore, jurors make a point of finding something the plaintiff did that they wouldn’t have done to protect themselves from the possibility that the harm could have happened to them.

Women serving as jurors in sexual assault cases are particularly prone to the *defensive attribution* and *just world bias*. In sexual assault cases, defensive attribution makes women similar to the victim (age, demographics, background, physical characteristics, etc) the least desirable jurors for the plaintiff. Instead of relating to the plaintiff, women distance themselves from her to preserve their own sense of safety. However, even jurors that are widely dissimilar from the victim may utilize psychological mechanisms such as the “fundamental attribution” error or the “just world” defense to blame the victim.

Personal experience, not demographics, is the most predictive method to evaluate which side a juror is likely to favor. For example, not all women are strong defense jurors. Those who have been assaulted themselves and felt blamed for it or had special training in this area are sympathetic towards victims of sexual assault.

Counsel might be able to bypass defensive attribution, fundamental attribution, and “just world” biases by focusing, not on the plaintiff’s story or injuries (however sympathetic these may appear), but on the defendant’s conduct. By violating the law or not meeting the standard of care, the defendant put the plaintiff, as well as all other people in the plaintiff’s position, at risk. In cases that involve third-party responsibility, it is important to reframe the case in a way that appeals to the jurors’ sense of fairness and empowers them to make decisions for the greater good, not simply for or against

the victim. Entrusting the future safety of the community to jurors is far more compelling than cultivating sympathy for the plaintiff.

However, lawyers should not count on being able to bypass these biases. They should expect that blaming the victim will be part of jurors’ discussion in deliberation and prepare accordingly. Focus group research can help determine what juror life experiences will exacerbate or dissipate biases, what language and rules will be well-received by the jury.¹³

In trial, the victim must tackle biases head-on in her direct examination and answer questions jurors are likely to ask such as: Why were you out so late at night? Why didn’t you call the police? Why did you get into a car with a man you just met? Knowing which judgments jurors are likely to hold in a particular case through the use of focus group research allows the attorney to have a response ready at trial.

Suspicion of the plaintiff, tendencies to blame the victim and assume that she is irresponsible can be offset by showing she carried out responsibilities in her workplace, home or through family and community involvement. By investigating the defendant’s history, it is possible to uncover choices and deviation from normal patterns of behavior such as, a landlord’s or employer’s violations of regulations, protocols, or standards of care, which allow the jury to scrutinize defendant’s conduct, choices and intent.

Use of supplemental juror questionnaires (SJQ)

Supplemental juror questionnaires increase juror candor, decrease jury contamination and assist in the selection of fair and impartial jury. Written answers to sensitive issues are more amenable to confidentiality orders than oral responses to questions in an open and crowded courtroom. Whereas the pressure of a courtroom situation might lead a potential juror to give an inaccurate or incomplete response to a voir dire question, the questionnaire provides an opportunity

for prospective jurors to respond more accurately and completely, especially when coupled with assurances that their responses will be kept confidential.¹⁴

In voir dire, many jurors feel social pressures to give the politically correct response in order to maintain an unbiased image or avoid shame often associated with being sexually victimized. A written questionnaire allows the jurors to express their true feelings or experiences in a more confidential manner, allowing for more candid responses.¹⁵

Use of supplemental juror questionnaires is highly recommended for sexual assault cases. Questionnaires provide jurors a safe outlet to share highly sensitive personal information and protect their privacy. Victims of sexual assault may unknowingly expose themselves to harm by failing to disclose their previous experience. Although sexual assault victims are favorable jurors for the plaintiff, reliving the experience could re-traumatize the juror and trigger PTSD symptoms in trial.

Witness preparation: Victims of sexual assault

Witness preparation is essential to credibility, whether the witness is the plaintiff or an expert. The plaintiff’s truthfulness, clarity, and appropriate emotion should be made evident to the jury. She should provide significant details of her life and persuasive and consistent details regarding the incident.

As with all witnesses, the victim should understand that her non-verbal behavior also weighs with the jury and that she can help control her nervousness by attending to factors such as dress, posture, mannerisms, tone of voice, and sincere expression of emotion. Although jurors can be asked, in voir dire, to imagine the plaintiff’s (or any witness’s) nervousness or hesitancy to discuss intimate matters, they expect witnesses to be prepared and can be unforgiving or quick to judge a witness who stumbles in her responses or is evasive.

While testifying is a stressful experience for anyone, it can be traumatizing for



sexual assault victims. Victims of sexual assault have to openly share deeply personal and often shaming information with a group of strangers whose purpose is to judge her. Therefore, it is extremely important to have a mental health professional present. If she has a therapist, see if the therapist can help prepare the victim to testify and offer coping strategies for anxiety. Lawyers often don't realize how traumatizing it can be for a victim to talk about being sexually violated and should plan multiple witness preparation sessions to allow time for stress-related setbacks.

One way a lawyer can prepare the victim to testify is by asking her to write out her narrative of what happened that night, as if it is happening in the present tense. Include as many sensory details as possible. What did she see? What did she hear? Could she smell anything? This helps her hone the details of what happened that night, and details spawn credibility. Telling the story in the present tense makes it more powerful and helps jurors picture the event happening in their own minds. Ask questions in present tense during direct-examination and transition the witness.

Witness preparation for SA victims

- Schedule multiple sessions
- Builds rapport between lawyer & client
- Retelling/reliving event could be traumatic → go slow
- Enlist help of her therapist or mental health counselor

Include therapist in witness preparation sessions

Therapist should be in courtroom for direct and cross-examination

- Keep hands clasped
- Helps avoid fidgeting/Looks more composed
- Make eye contact

Jurors associate avoiding eye contact with having "something to hide"

- Have victim write out narrative and include as many sensory details as possible
- Testify in present tense and recount event in story format
- Details increase credibility

- Ask questions in present tense and offer prompts (direct)
- **DO NOT** conduct mock cross-examination

Ask partner or another lawyer to conduct the mock cross-examination. Even as a witness preparation exercise, victim should never view attorney as an adversary

Example direct-examination questions: SA victim

- "It is May 10th 2004. You are walking out of the restaurant towards your car. Tell the jury what happens next."
- "Now you are on the ground looking for your keys. What happens next?"

Conclusion

The psychological biases and mechanisms discussed above are unlikely to be articulated, much less eliminated, during voir dire. Many elements of the plaintiff's case can be primed in voir dire which allows biases of availability, confirmation, norm-identification, responsibility, and attribution to work in plaintiff's favor. Reframing the case early on and introducing themes invites jurors to hold the defendants accountable for violation of standards and empowers them to restore safety to the community.

Theme development and story framing should begin long before trial and is an ongoing process that starts with case information and follows through when witnesses are interviewed, discovery requests are prepared, responses are analyzed and focus groups are conducted. An early theme that addresses jurors' stereotypes, biases, or habits of thoughts by focusing on defendant's behavior and plaintiff's responsibility, trustworthiness and positive values can be used at voir dire to prime the jury to look more critically at defendant and be receptive to plaintiff's story¹⁶.

Insights from social psychology can help attorneys put voir dire and juror questionnaires to effective use in uncovering and harnessing juror bias. Research in social psychology strongly suggests that trial preparation is essential and recom-

mend the use of focus groups to identify case strengths, weaknesses and biases. As in all personal injury cases, mastery of fact is key to understand the way the jurors react to the case and to dispel rampant biases jurors may have against plaintiffs and plaintiffs' counsel¹⁷.

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¹ The wide range of issues determined by a jury assessment of "reasonableness" or proportionality makes juror bias of special concern in civil cases. See, Arthur H. Patterson and Nancy L. Neuffer, "Symposium: Juries: Arbiters or Arbitrary? Redefining the Role of the Jury: Removing Juror Bias by Applying Psychology to Challenges for Cause," 7 Cornell J. L. & Pub. Pol'y 97 (Fall 1997), James H. Underwood et al., "Demographics in Civil Trials: Biases and Implications," Journal of Business & Economic Research, vol. 7, no. 2, p. 33-42 (February 2009).

² While trial literature often refers to these habits of thought as "biases," the literature of social psychology from which they are drawn often identifies them as "heuristics," or common problem-solving strategies or shortcuts that often lead decision-makers to reach false conclusions. For ease of understanding, this paper will continue to use the familiar term "bias," although it should be recognized that the "bias model" can unwittingly serve to perpetuate a negative frame for the plaintiff's case, and thus to perpetuate suspicion against plaintiff's case and plaintiff's counsel. See, David Wenner, Gregory S. Cusimano, "Reframing the Model," 44 Trial 26 (March 2008).

³ See, *Id.*

⁴ See, David A Wenner and Gregory S. Cusimano, "Combating Juror Bias," 36 Trial 30 (June 2000); Elizabeth F. Kuniholm, "Representing the Victim of Sexual Assault and Abuse: Special Considerations and Issues," 2 ATLA ANNUAL CONFERENCE REFERENCE MATERIALS 1889 (2006), available at 2 Ann.2006 ATLA-CLE 1889 (Westlaw);

⁵ See, Patterson, *supra*; Wenner/Cusimano, "Combating," *supra*; Kuniholm, *supra*; Lynn Hecht Schafraan, Esq., "What the



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research about rape jurors tells us," in *Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases*, online at <http://www.mincava.umn.edu/documents/usvpros/fmanual/usvpros/fmanualday3.html> (downloaded 4/9/09); Tom Lininger, "Is it Wrong to Sue for Rape," 57 *Duke L.J.* 1557 (2004), n. 254-257 (citing research and legislative findings that jurors particularly distrust sexual assault victims); M. Erian et al., "Juror verdicts as a function of victim and defendant attractiveness in sexual assault cases," *Am. J. of Forensic Psychology*, vol. 16, iss. 3, p. 25-40 (1998).

⁶ For examples, see, Barrett, supra; Wenner/Cusimano, "Combating," supra; Neil R. Feigenson, "Legal Meaning in the Age of Images: Accidents as Melodrama," 43 *N.Y.L. Sch. L. Rev.* 741 (1999-2000), discussing trial counsel's use of a third-party's back story to win a plaintiff's verdict in *Faverty v. McDonald's Restaurants of Oregon, Inc.*, 892 P.2d 703 (Ore. Ct. App. 1995), a case against the corporate employer of a young driver who fell asleep at the wheel and rammed plaintiff in a cross-over accident after back-to-back cleaning shifts.

⁷ See, Feigenson, supra, discussing trial counsel's repeated use of "corporate greed" language and imagery in successful

litigation against third-party defendant McDonald's; see also, Barrett, supra.

⁸ See, Wenner/Cusimano, "Combating," supra, and studies cited therein; Lininger, supra, citing studies on juror values-consistency; see also, Shari Seidman Diemod, "Essay: Beyond Fantasy and Nightmare: A Portrait of the Jury," 54 *Buffalo L. Rev.* 717 (Dec. 2006) (also citing studies); and see, Kuniholm, supra, suggesting focus group questions.

⁹ See, Wenner/Cusimano, supra.

¹⁰ See, Feigenson, supra; Barrett, supra.

¹¹ Barrett, supra; Feigenson, supra.

¹² Barrett, supra.

¹³ Barrett, supra; Wenner/Cusimano, "Combating," supra; Feigenson, supra.

¹⁴ Barrett, supra; Feigenson, supra; Kuniholm, supra.

¹⁵ See, Wenner/Cusimano, "Reframing," supra (putting a positive spin on jury bias, using concepts of loss framing and priming).

¹⁶ Barrett, supra; Kuniholm, supra; Amanda A Farahany, "Juror Bias in Sexual Assault Cases," Powerpoint Presentation, downloaded 4/26/09.

¹⁷ Wenner/Cusimano, "Reframing," supra.

¹⁸ Barrett, supra; Kuniholm, supra; Wenner/Cusimano, "Combating," Wenner/Cusimano, "Reframing," supra.

¹⁹ Barrett, supra; Kuniholm, supra; Wenner/Cusimano, "Combating," supra.

²⁰ Krauss & Bonora, supra note 1, Section 2.08, at 2-44. ("Jurors who might hesitate in the public setting of the courtroom to reveal private information relevant to their jury service are more likely to be candid in filling out a private questionnaire.")

²¹ Bigelman and Winter, *Thirteenth Annual Survey Of Sixth Circuit Law: Federal Taxation*, 1992 *Det. C.L. Rev.* 451, 499 (Summer, 1992).