Praise for *Winning Case Preparation*

"From four of the country's leading thinkers on trial advocacy comes a book that describes a powerful model for preparing a case for trial. The analysis on focus groups is brilliant. I especially like the observation that we should keep asking questions of the focus group members until we understand not just what they think, but also why. This is one of the books that should be read by every lawyer before beginning to prepare a case for trial."

—Mark Mandell, member of the Inner Circle of Advocates, author of *Case Framing*, and past president of the AAJ

"This book offers the reader, whether a lawyer preparing their first case for trial or a seasoned trial lawyer, a methodology grounded in the principles of cognitive science and years of focus-group research. The authors provide readers with the tools to apply an empirical process for constructing a winning trial narrative. I have found the Bottom Up methodology to be the most useful tool I have utilized for preparing a winning case for my clients."

—Kathleen Flynn Peterson, past president of the AAJ, member of the American College of Trial Lawyers and the International Society of Barristers, recipient of ATLA's Lifetime Achievement Award, named one of the top 500 Leading Lawyers in America by *Lawdragon*

"When a courtroom lawyer stops learning, it's time to quit. This work will stand through time in the pantheon of greatest works on human behavior, strategies, and preparation for the trial of individual cases. It is a righteous work which will keep us all learning."

—Russ Herman, past president of the AAJ, past president of the Roscoe Pound Foundation

"I have used Winning Works since 2007. I have seen the principles and science behind Bottom Up case preparation significantly increase the value of my cases. I have completely changed the way I evaluate, litigate, and try cases as their insights have opened my eyes to the real reasons jurors decide the way they do."

—Andrew Abraham, past president of the Massachusetts Academy of Trial Attorneys, listed as a "Rising Star" in *Boston Magazine* and *Super Lawyers* in 2005

"Simply put—*Winning Case Preparation* is a grand slam. This book will take every advocate, from young lawyer to the seasoned veteran, on a journey to maximizing results for their clients. It is about grasping fundamentals, constructing foundations, and mastering strategy and persuasion. Focusing on the realities and necessities of preparation is what every advocate needs. On a 1 to 10 scale, this book is an 11!"

—John Romano, past president of the Academy of Florida Trial Lawyers, the Southern Trial Lawyers Association, and the National Trial Lawyers Association, editor of *Anatomy of a Personal Injury Lawsuit*, 4th edition

"The Overcoming Juror Bias seminars revolutionized the way trial lawyers understand juries and shed light on why good lawyers lose good cases. *Winning Case Preparation: Understanding Jury Bias* goes even further and provides trial lawyers with the tools necessary to identify, understand, and address jurors' preconceived notions of the evidence to achieve justice for our clients. A huge 'thank you' needs to go out to Bossart, Cusimano, Lazarus, and Wenner for sharing their decades worth of knowledge with all of us who exercise the 7th Amendment."

—Tad Thomas, former acting executive director in the Office of Civil and Environmental Law and assistant deputy attorney general for the Office of the Kentucky Attorney General

"The research and analysis the authors present as to the biases that jurors bring with them delivers insights that will fundamentally change how plaintiffs' lawyers prepare and try their cases. To provide the best client representation possible, plaintiffs' lawyers must understand and apply the authors' insights, concepts, and recommendations. This book describes what we need to know about jurors' thinking in a clear and engaging format. Every plaintiffs' lawyer should have this book—and have a highlighter handy when reading it."

—Jerome F. O'Neill, recipient of AAJ's Wiedemann & Wysocki Award, rated AV Preeminent by Martindale-Hubbell

"Written by the top trial strategists and jury consultants of our time, this instructional book is a must-read. *Winning Case Preparation: Understanding Jury Bias* offers a strategic framework and invaluable insight for understanding juror preconceptions and overcoming the hurdles of juror bias to succeed at trial. It's a thoughtful, intuitive, easy-to-read guide that's absolutely necessary for any practitioner who intends to be persuasive in the courtroom."

—Andrew Meyer, achieved one of the highest PI injury awards in Massachusetts history, rated AV Preeminent by Martindale-Hubbell

"From the original visionaries in understanding juror bias comes another great work where method, mapping, and testing in the Bottom Up strategy become synonymous with understanding why and how jurors decide cases. This book is an absolute must-read that's full of practical preparation pointers. It's perfect!"

—Mel C. Orchard, past president of the Wyoming TLA, rated AV Preeminent by Martindale-Hubbell

"It's the Rosetta Stone for translating the facts of your case into a compelling and winning trial story."

—Dan Dell'Osso, obtained one of the top 100 verdicts in the US in 2015, rated AV Preeminent by Martindale-Hubbell

"Finally, a book that distinguishes legal proof from jury proof. This book emphasizes the outcome determinative difference between the two. If I only had three or four books on my shelf, this book would definitely be one of them. *Winning Case Preparation* is based on science, yet it focuses on the perspectives and frames of the human condition."

—William Harper, past president of the Minnesota Association of Justice and recipient of their Lifetime Achievement Award, rated AV Preeminent by Martindale-Hubbell

Winning Case Preparation

Understanding Jury Bias

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We dedicate this book to all plaintiffs' trial lawyers, young and old, who have justice in their hearts and a passion to help injured people wronged by the negligence of others, and to all lawyers who are always willing to learn by trying new ideas to help their clients win in front of today's juries.

Contents

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Other lawyers who also helped with the development of the Jury Bias Model, either through enabling the project or working to adopt the research findings, include Jim Lees, Neal Feigenson, Mark Mandell, Howard Nations, Amato DeLuca, Larry Stewart, Margie Lehrman, and Anjali Jesseramsing. Thanks to Martin Peterson for helping us develop and use "concept" focus groups in a trial setting. There are others as well, whose contributions were valuable.

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from the patience, understanding, and tolerance of both Alice Cusimano and Bette Bossart.

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We take full responsibility for the content, along with any errors or omissions it might reveal. But the product itself owes its existence to all of those we acknowledge above.

Publisher's Note

This book is intended for practicing attorneys. It does not offer legal advice or take the place of consultation with an attorney who has appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment. Readers should also consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book), and make independent decisions about whether and how to apply such information, ideas, and opinions for particular cases.

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Introduction

Why Do Good Lawyers Lose Good Cases?

The facts and the law are important to the outcome of your case, but they are often not as important as the way you pull the facts and law together. Your trial story must be based on what jurors believe and expect. If your story conflicts with jurors' beliefs and expectations, the best facts and strongest case law won't help you. Your case must start with what the jurors believe about your facts and must follow their reasoning to a conclusion that is consistent with what the law calls for as a just outcome.

Law school teaches you to start with the facts. You learn to apply the facts to the law when you prepare a case to meet the requirements of the jury instructions and verdict form. This book presents a departure from the traditional case preparation method. We call it the *Bottom Up*™ approach.[1]

The Bottom Up approach also starts with the facts. But then it centers on how jurors will perceive and interpret those facts. It returns to the facts over and over again to study how you can add,

[1] *Bottom Up case preparation* is a term based on research coined by Gregory S. Cusimano and Winning Works, LLC.

subtract, or reorder them to have the greatest impact on the decisions jurors will make. This book is an explanation of both the how and the why of preparing your case from the bottom up.

Jurors' Beliefs Matter

You have to learn how the beliefs jurors bring to your case will affect their judgment. That is why we use focus groups (what we will later explain as *concept focus groups*) at the outset—to discover potential jurors' beliefs. But we also recommend, whenever possible, that you test your resulting trial story (which will hopefully be consistent with jurors' beliefs) using a different kind of focus group (a *structured focus group*) prior to its presentation. As we discuss Bottom Up case preparation in the pages that follow, we will make repeated reference to using different kinds of focus groups for different circumstances.

In a perfect world, we would perform focus groups at several different stages throughout the process of preparing a case. However, most cases do not merit that kind of expenditure, and many don't merit the expense of even a single professionally conducted focus group. We encourage the reader to understand that if you learn the lessons of this book about building a case from the bottom up that's focused on jurors' beliefs, you can apply this approach to *any* case.[2] We have successfully applied this approach to cases regardless of their value, whether a commercial tort or other dispute, and whether a jury or a bench trial. Though we write this book from the perspective of a jury trial, it turns out that the things that drive jurors' decision-making also drive judicial decision-making. As it happens, judges are people too.

[2] To illustrate this, we use numerous case examples that range from rear-end collisions to medical malpractice.

Same Information, Different Conclusions

Many of us like to believe that there is a single, universal truth waiting to be discovered by those who have all of the necessary facts. We like to think, "If only the jurors are able to understand this set of facts, the conclusion will be obvious and truth and justice shall prevail." There is a certain comfort in believing that if everyone had access to the same information, everyone would agree. Yet the human experience, and the experience of participants in our justice system, proves otherwise.

In reality, different people, all with access to the same information and the same presentation of facts, reach different conclusions. People reach different conclusions about what is *true* because they start from different places. We each have different beliefs that influence how we perceive and assemble new information about the world around us.

Our belief systems begin forming as soon as we become aware, and they continuously develop, providing structures through which we understand the world. But as our belief systems grow, they also become more rigid and less tolerant of competing theories. We are all selective when we interpret and accept new information. We are much more likely to accept as *true* information that fits within our belief systems, and reject as *false* information that does not. Thus, with greater life experience, we become more and more committed to our belief systems and more likely to reject new information that challenges our sense of how we think the world works.

While each of us likely believes there must be some underlying truth in the universe, what each of us perceives that truth to be will not always be the same. What we each accept as true is highly dependent on the belief systems we have developed. And if

different people have different beliefs, and if each of us therefore understands the truth a bit differently, how can any of us be sure that what we know to be true is actually true? More important to the trial lawyer, how can we be sure what we perceive to be true is consistent with what jurors will perceive to be true? Simply giving all the jurors access to the same facts won't do the trick.

For instance, consider a malpractice case where a patient was admitted to an outpatient surgical center. The patient was supposed to undergo a short outpatient surgery and return home the same day. During anesthesia, the patient went into cardiac arrest and could not be resuscitated. The plaintiff's anesthesia expert reviewed the case and concluded that the anesthesiologist was negligent in administering the anesthesia. The expert opined that, because of the patient's anatomy, the possibility of an obstruction was foreseeable. Therefore, the anesthesiologist should have protected the airway during the induction.

The expert could well have been right. But focus group participants almost all believed that the patient had an allergic reaction to the anesthesia, leading to the cardiac arrest. Jurors believed one causal explanation while the expert believed another.

The expert did not account for an allergic reaction in his analysis. As a result, this case is unwinnable with this expert, unless the expert frames his opinion around the jurors' beliefs. The jurors' narrative about cause and effect outweighs the expert's opinion. The expert's testimony doesn't matter, even though the expert may be right. If the expert's interpretation of the facts conflicts with the jurors' perception, the jurors' perception wins. The jurors' narrative trumps everything else, including the facts that the expert testifies to and the lawyer presents.

Our Approach

There is no shortage of information on how lawyers can become better communicators, better at persuading jurors, better at arranging the facts of their cases, and better at "connecting with" juries. But most of this work, piled on top of the countless volumes on how to better perform the technical tasks of being a lawyer, misses the mark when it comes to dealing with the reality that jurors come into the courtroom with different beliefs and life experiences that cause them to react differently to the same information.

The authors of this book approach this problem by following aspects of the scientific method. Rather than putting together an approach based solely on instinct, intuition, and anecdotal experience, we have based Bottom Up case preparation on research in the areas of psychology, social science, cognition, decision-making, persuasion, and communication. We do not offer our *sense* of what works in a trial setting. We present a framework for how to systematically approach trial preparation (including preparation for settlement, arbitration, or mediation) in a way that takes advantage of scientific research findings that can help you better understand how jurors make decisions.

At the heart of our approach is the conviction that there is no magic formula or incantation. While some popular approaches to trial preparation suggest there is one way to present every case, regardless of the facts and circumstances, we believe each case is unique. Our approach applies a systematic method based on the sciences to discover what will work best in each case.

The Origin of Bottom Up Case Preparation

Winning Works is a research-based trial consulting firm. We, the principals of Winning Works, have decades of experience in developing persuasive messages that move opinion across a variety of settings. In addition to being accomplished litigators, Greg Cusimano, David Wenner, and David Bossart are nationally recognized experts on the psychological biases and motivations that individuals bring to their assessments of facts. Cusimano and Wenner created the Association of Trial Lawyers of America's® (ATLA®) groundbreaking Overcoming Juror Bias (OJB) education programs. Bossart, Cusimano, and Wenner have been principal contributors to the OJB program's further development since its inception.[3]

Edward Lazarus spent close to a dozen years as one of the nation's leading Democratic political pollsters and campaign strategists. After moving on to expand his work beyond the candidate realm, Lazarus (in addition to advising many political and public relations clients) worked as a consultant to ATLA as well as to roughly two dozen state bar associations and several state courts. During that work, he compiled the largest-known database on public attitudes toward the civil justice system.

In the early 1990s, Cusimano and Wenner (along with others) were concerned with why good lawyers were losing good cases. ATLA tried to address this problem by creating a blue-ribbon committee that Cusimano initially chaired and Wenner later co-chaired, and in which Bossart was very active.

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[3] The Association of Trial Lawyers of America adopted a new name, the American Association for Justice® (AAJ®), in 2007. We refer to the organization as ATLA because the work being referenced occurred when it was called the Association of Trial Lawyers of America.

At an ATLA CLE program on focus groups in 1994, more than thirty trial lawyers from around the country attended and analyzed more than sixty focus groups. Clear patterns emerged on how the focus-group respondents were processing information. This research, conducted in a scope and volume impossible for any individual trial lawyer or consultant to achieve, led to further examination of the academic literature. The goal was not to be able to report anecdotes about individual trial experiences or focus-group findings, but to develop generalizable theories of juror behavior based in social science, particularly in cognitive and social psychology, relying heavily on Wenner's background in psychology. The theories that emerged were the foundational hypotheses that formed the Jury Bias Model™.

Later, when Lazarus was working in-house at ATLA to coordinate political and legislative efforts and strategies, Cusimano, Wenner, and Bossart discovered that their work and Lazarus's led to the *same substantive conclusions about the art and science of persuading jurors*. Thus, Winning Works was born. Since the creation of Winning Works in 2005, the authors have been involved in some of the largest plaintiffs' verdicts in the country, totaling more than $4 billion.

The Jury Bias Model

Before Wenner and Cusimano joined with Bossart and Lazarus to create Winning Works and Bottom Up case preparation, they tested the hypotheses of the Jury Bias Model in hundreds of focus groups across the country. They analyzed and honed the model, until they finally defined the five biases that often work against plaintiffs:

1. ***Suspicion***: Jurors are suspicious of everyone in the courtroom, but particularly of the plaintiff, the plaintiff's attorney, and the plaintiff's claims.
2. ***Victimization***: Jurors are worried that they or others will somehow be victimized by the outcome of the trial.
3. ***Personal Responsibility***: Jurors are not going to hold a defendant responsible if they feel the plaintiff has behaved irresponsibly.
4. ***Stuff Happens***: As the facts or circumstances of the claim become more complicated, it becomes easier and more likely for jurors simply to write off an act of negligence that caused very real harm to the plaintiff as one of those unfortunate things that happen in life.
5. ***Blame the Plaintiff***: Jurors tend to overemphasize the plaintiff's role in what went wrong, even in cases where there is a clear pattern of misconduct on the part of the defendant that led to the plaintiff's injury.

The Need for Bottom Up Case Preparation

Many lawyers still prepare in a largely intuitive way, relying on their training and knowledge of the law, as well as the objective *truth* as defined by fact witnesses, expert witnesses, and the rules of law that apply to their case. They will argue that the defendant had a duty to the plaintiff or the public, the defendant then breached that duty, and a compensable harm resulted.

We encounter far too many instances where an attorney is so confident that the science, the medicine, or the engineering make the defendant's liability so abundantly clear that the lawyer fails to consider how the biases jurors bring into the courtroom

might derail the case. Perversely, the stronger lawyers think their case is, the harder it is to force themselves to take the necessary time to consider the impact of juror bias.

As we have previously discussed, jurors do not necessarily make up their minds based on the rules of law or the fact pattern as presented by the attorneys on both sides. Jurors make up their minds based on what makes sense to them, according to their own beliefs and life experiences. No matter how good you are at following the law, it is the jury (most of whom have no experience with the law or the rules of evidence) who get to decide the outcome of your case. Unlike you, the attorney, who has had anywhere from many months to several years to become deeply immersed in the case (during which time you inevitably lose your sense of objectivity), jurors come to the case fresh, with far less knowledge. Their decisions will be made much more on how things appear to them at first rather than how things appear to you after months or years of familiarity.

Doesn't it make sense, therefore, to build your case around the jurors' reality rather than around your reality? If the trial were a commercial marketing effort, the jurors would be the end consumers who decide whether to buy your product or your competitor's. If the trial were a political campaign, the jurors would be the voters who decide to vote for your client or for the opposition. In both of these contexts, the communications effort (the marketing campaign or the political campaign) is designed around how the product or candidate best meets the needs, goals, and expectations of the consumer or voter. Such campaigns are not based on the technical aspects of manufacturing a product or mounting an effort to be elected. Yet many lawyers still focus their case preparation almost exclusively on managing the technical side of their cases, with little or no consideration of jurors' unique perspectives.

Any business has a host of technical components. But mastery of the technical components does not matter if consumers do not

buy the product. The business will fail. To the trial lawyer, the jurors are the consumers. If jurors do not believe in your product, you will fail.

Consider the business of running a restaurant. A lot of behind-the-scenes effort goes into making a restaurant work. The owner has to worry (among other things) about creating a menu, designing a dining room, equipping a kitchen, sourcing quality food reliably and affordably, and staffing the kitchen and dining room professionally. But in the end, the business will fail, regardless of how well all of the technical, unseen aspects of the restaurant are run, if the customers say the food is no good. You cannot operate a successful restaurant without worrying about whether diners will enjoy the food.

Similarly, you cannot hope to be consistently successful at trial without holding paramount the concern over how the jurors will accept the case. You cannot rely exclusively on good law, good facts, and good evidence. You have to understand how the evidence and its presentation will strike the jurors.

A similar dynamic exists in the political realm. Any quality candidate has a host of policy goals, but spends time learning which of those goals best captures the imagination and will of the voters. The policy goals and issue positions of the candidates in a political campaign are akin to the facts surrounding a case. Just as political operatives must master the issues and issue positions in a political campaign, you must know the facts as you develop a strategy. But knowing the facts of a case backward and forward isn't enough—any more than knowing the issues is enough to win an election. Knowing how to order the facts, which ones to emphasize and which to de-emphasize in order to most persuasively put together your trial story, is similar to knowing how to talk about the issues and frame the debate in the most favorable light during the course of a political campaign. In political campaigns, focus groups and surveys give the voters a seat at the table so their views can inform the candidate's narrative.

With the Bottom Up approach, you will give the jurors not just a seat at the table but a foundational role in how you build the case and the trial story. You will approach your cases from the bottom up. You will learn the case's facts but never entirely leave them; instead, you will research how jurors are likely to react to those facts, and reframe and resequence them if necessary. This enables you to build the core of the case—your understanding of what is important to potential jurors and what you need to show to win your case.

These elements go into developing your trial story. You won't assume it is right the first time you put it together. You will test and modify your case core and trial story with further jury research, enabling you to learn from mock jurors how close you are to presenting your case in a way that fits into the worldview of a random cross section of people with no prior knowledge of the case.

You will structure the story and layer it in such a way that it fits within the belief systems of those who are naturally plaintiff-friendly as well as those who are naturally hostile toward plaintiffs and the kind of claim that underlies the case. Only after that juror-centric process is complete will you go back and begin the process you learned in law school—applying the law to the case and understanding how the evidence works its way into the narrative.

The Bottom Up approach makes cases more winnable because it structures cases to best communicate the information that is most important to those who decide the case—the jurors. Our effort is designed to take full advantage of the science behind the Jury Bias Model by focusing on the elements of proof that are important to the jury. You still need to prove your case legally, but you also need to prove it to the jury.[4]

[4] For further discussion on the differences between proving your case legally versus proving it to the jury, *see* chapter 4, "Investigating the Facts."

For a dramatic example of the limits you face when relying on just the facts and the evidence to win the day without considering the jurors' belief systems, let's return for a moment to the scientific method. It consists of the following steps:

1. Question
2. Research
3. Hypothesize
4. Test
5. Analyze
6. Conclude

Now consider the following: There remains very little doubt within the scientific community that climate change is occurring and that human activity is a contributing factor. Even ExxonMobil acknowledges that human activity, particularly related to the energy industry, has led to an increase in greenhouse gases and resultant climate change.[5]

Yet despite the scientific evidence, and the agreement of the world's largest corporation (which would seem to have a larger vested interest than any other entity on the planet in denying the reality of climate change and its human component), vast numbers of Americans deny that climate change is occurring or, if it is, that human activity is in any way related. In other words, here is an issue that science tells us is of major social importance on a global scale, yet one-third of Americans believe the problem does not exist at all, and roughly half believe that to the extent the problem exists, human behavior has nothing to do with it.[6]

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[5] *See* "Our Position on Climate Change," ExxonMobil Corporation, last accessed June 7, 2017, www.corporate.exxonmobil.com/en/current-issues/climate-policy/climate-perspectives/our-position.

[6] Cary Funk and Brian Kennedy, *The Politics of Climate* (Washington, DC: The Pew Research Center, 2016), www.pewinternet.org/2016/10/04/the-politics-of-climate/.

The same process that demonstrates the reality of climate change (the scientific method) also allows us to understand how, and why, so many Americans (potential jurors) deny climate science. Psychological principles discovered through the scientific method enlighten our understanding of those who don't believe in climate change. Climate science does not fit within their worldview. The same principles of the scientific method enlighten the Jury Bias Model. Bottom Up case preparation is nothing more than following the scientific method:

1. Question the case.
2. Research the facts.
3. Form hypotheses about your case.
4. Test the hypotheses with research.
5. Analyze the results.
6. Use those results as your trial story.

Ironically, one can appropriately call the scientific method itself a belief system, even though adherence to the scientific method requires one to be agnostic about beliefs. Essential to the scientific method is accepting that whatever the data show is what the data show, regardless of any beliefs one carries into the process. Still, those whose belief systems allow no room for climate change or evolution will likely reject the science on which the Jury Bias Model rests, because they simply do not believe in the scientific method.

Chapters 1 and 2 provide an in-depth discussion of the Jury Bias Model, its five biases, and its ten commandments designed to combat or use the biases. Chapter 3 contrasts Bottom Up case preparation to top-down case preparation. The remaining chapters will then discuss each of the elements of Bottom Up case preparation:

- Investigating the Facts
- Conducting Jury Research
- Building the Case Core
- Developing the Trial Story
- Testing Your Case
- Understanding and Applying Beliefs

In the end, we dedicate a final chapter to listening. Listening is a vital, though often woefully undeveloped, skill every lawyer needs to properly prepare for trial. From what your client says to what your focus groups tell you, from what voir dire reveals to what your opposing counsel discloses when presenting their case, listening is an underutilized skill that, when honed, brings great value to your case.

We hope you enjoy this book and find its contents useful in preparing your cases. We have found the structure that follows to be of great use in helping our clients become more successful at what they do. Beyond that, we hope you will find, as we have, that the skills enumerated in this book are helpful far beyond the practice of law. Good communication in any context requires knowing something about your audience. At its heart, Bottom Up preparation is the art and science of learning about your audience—their beliefs, hopes, and expectations—so you can more effectively communicate with them.

1

The Jury Bias Model Part One

The Five Juror Biases

As you've probably noticed from the introduction, we're obsessed with science. It's what the Jury Bias Model and Bottom Up case preparation are founded on. We'll tell you stories to illustrate a point, but the basis for our method is scientific research, not anecdotal evidence. Everything we do is based on applying tested psychological principles to the field of trial law. When we began, many of the principles we drew on were not new to social scientists; what was different was our conscious decision to apply those principles to combat jury bias as it emerged in the 1980s and 1990s. To our knowledge, no one had applied what psychologists were learning about heuristics or emotional and cognitive biases to the practice of law and the persuasion and influence of jurors.[1] This early research for ATLA opened the door for a host of talented trial lawyers to begin approaching

[1] For more on heuristics, *see* the discussion on page 31.

the development of their cases in an entirely new way—based on science rather than on intuition alone.

Developing the Jury Bias Model

Wenner has been studying juries since 1979. His research has focused on how jurors process evidence and how that evidence unconsciously impacts their judgment and decision-making.

Before becoming a lawyer, Wenner received a master's in social work and performed individual and group psychotherapy. One of his areas of expertise was hypnotherapy, a practice he learned during his study with the groundbreaking psychologist and hypnotherapist Milton H. Erickson. The father of one of Wenner's patients at the time was a lawyer interested in borrowing from the hypnotherapy strategies that Wenner employed in his therapy practice to use for jury selection at trial. Wenner became so interested in studying jurors' decision-making that he published an article on the subject in *Trial Diplomacy Journal*.[2] Ultimately, he left his private practice and attended law school, intent on integrating his formal training in law and psychology.

Cusimano's path to the study of juror bias was a little different. By the early 1990s, he had tried 150 to 200 cases to verdict. Although Cusimano had studied many of the psychological principles relevant to decision-making as an undergraduate in marketing research, sales, and advertising, his law school professors had told him (mistakenly) to forget all that. Back then, Cusimano's only focus groups were live juries.

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[2] David Wenner and S. L. Swanson, "Sensory Language in the Courtroom," *Trial Diplomacy Journal* (Winter 1981): 13.

When Cusimano met Wenner, Wenner was working with Martin Peterson, a longtime trial consultant with a PhD in human biology and a master's in anthropology. The pair watched one of Cusimano's closing arguments. Afterward, they commented on Cusimano's effective use of heuristics, like the norm bias and belief perseverance. Cusimano replied, "Don't tell me that—I'm not aware I'm using heuristics, whatever that is. Because if I think about it, I can't do it. And I don't need to think about it." But Cusimano was fascinated, and he's been thinking about it and studying decision science ever since.

As we mentioned in the introduction, Wenner and Cusimano started the first focus group college convened by ATLA's National College of Advocacy (NCA) in Charleston, South Carolina, in 1994. More than thirty trial lawyers brought cases and participated in sixty focus groups involving several hundred people. On the final day of the college, when the faculty and attendees analyzed results from the various focus groups, they discovered similarities in the negative attitudes concerning plaintiffs' purported responsibility for their own injuries. The following year, Wenner and Cusimano led the NCA's second focus group college in Houston, Texas. The results in 1995 were identical to those in 1994. The anti-plaintiff bias was undeniable.

"How bad was jury bias?" Cusimano and Wenner wondered. In April 1995, Larry Stewart, then president of ATLA, appointed Cusimano to chair a blue-ribbon committee of trial lawyers to find out. A number of trial lawyers from around the country attended the first meeting in Atlanta. It quickly became apparent that Wenner was the only other lawyer who shared Cusimano's interest and commitment to the endeavor, so the two effectively became co-chairs of the committee.

Cusimano and Wenner conducted their research the way any scientists would. Over several years, they experimented with hundreds of different focus groups. In addition, they continued to explore, test, and confirm their ideas and findings with other

trial lawyers as they taught regularly at ATLA's focus group college, the Case Workshop, and at OJB programs.

To understand the psychological underpinnings of the behaviors they were observing, Cusimano and Wenner conducted an exhaustive review of the academic literature in several fields of the social sciences. They went straight to the leading scholars and thought leaders in the fields of law, psychology, neuroscience, cognition, decision-making, persuasion, and communication to learn all they could about the psychological principles underlying the anti-plaintiff biases they had uncovered.

They consulted with Geoffrey Garin, the president of Hart Research Associates, one of the nation's leading survey research firms. They reviewed much of the research Lazarus carried out during his service with ATLA. They met with Neal Feigenson, a lawyer who spoke at one of ATLA's earliest OJB programs and was interested in some of the same issues Cusimano and Wenner were studying. In his book *Legal Blame*, Feigenson relied on some of Wenner and Cusimano's research with focus groups to analyze how jurors make decisions.[3]

They began a dialogue with Dr. Valerie Hans,[4] one of the nation's leading authorities on social science and the law. Trained as a social scientist, Dr. Hans also used Wenner and Cusimano's focus-group research in a law review article concerning jury decision-making.[5] They also worked with Dr. Stephen Daniels, a senior research professor at the American Bar Foundation, and with Joanne Martin, a senior research fellow in liaison research, also with the American Bar Foundation.

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[3] Neal Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* (Washington, DC: American Psychological Association, 2001).

[4] Dr. Hans is presently a professor at Cornell Law School. She is the author or editor of eight books and over a hundred research articles, many of which focus on juries and jury reforms as well as the uses of social science in law.

[5] Valerie P. Hans, "The Contested Role of the Civil Jury in Business Litigation," *Judicature* 79, no. 5 (March–April 1996): 242–248.

However, things began to click into place when Wenner, and later Cusimano, began working with Stanford psychologist Dr. Lee Ross, a pioneer in research on human inference. Years earlier, Ross had published a book on human inference[6] that focused attention on the social psychological research of Daniel Kahneman and Amos Tversky. When Wenner read Ross's book, he quickly realized that Kahneman's[7] and Tversky's work had big implications for trial practice in general, and his and Cusimano's research in particular.

Out of this, Wenner and Cusimano created the Jury Bias Model, providing trial lawyers with a process for analyzing cases and determining their strengths and deficiencies. The Model is founded on psychological principles identified in peer-reviewed research, the sort that could withstand the most withering *Daubert* challenge. Cusimano and Wenner discovered what biases trial lawyers should be wary of and then armed them with tools to combat those biases. Their conclusions were not based on their own experiences or intuitions, but on thousands of hours of painstaking, independent experimentation and research.

The first part of the Jury Bias Model identifies five recurring attitudes that most often negatively influence the public's perception of plaintiffs. Those biases, as mentioned in the introduction to this book, are as follows:[8]

1. Suspicion
2. Victimization

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[6] Richard E. Nisbett and Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (Englewood Cliffs, NJ: Prentice-Hall, 1980).

[7] In 2002, Kahneman received the Nobel Prize for his contributions to the field of Economic Sciences. In 2011, *Foreign Policy* magazine named Kahneman to its list of top global thinkers. His book *Thinking, Fast and Slow* was a *New York Times* bestseller. In 2015, *The Economist* listed Kahneman as the seventh most influential economist in the world.

[8] *See* "Introduction," page 8.

3. Personal Responsibility
4. Stuff Happens
5. Blame the Plaintiff

In the second part of the model, Cusimano and Wenner assembled a list of counteractive measures to those biases—psychological principles to incorporate in trial preparation and in trial. Called the *Ten Commandments of the Jury Bias Model*, Wenner and Cusimano tested these principles in hundreds of additional focus groups to ensure their efficacy in case preparation and in trial to help trial lawyers overcome jury bias.

The Five Juror Biases

The first part of the Jury Bias Model is based on Cusimano and Wenner's observations during their focus-group research for ATLA. Particularly, they noticed that jurors had similar anti-plaintiff attitudes that had developed largely because of the public barrage of tort reform rhetoric over several decades. Most of these biases are not naturally occurring psychological phenomena, like Monday-morning quarterbacking or loss aversion. Tort reformers have taught the public these anti-plaintiff and anti-plaintiff's lawyer biases. Corporate defendants, Republican strategists, the Manhattan Institute, the American Tort Reform Association (ATRA), the Chamber of Commerce—all have succeeded over the last thirty years in portraying trial attorneys as greedy lawyers who manipulate the courts to line their own pockets at the cost of ordinary consumers.[9] Jurors have heard the rhetoric so long and from so many sources that tort reform slander has worked its way into their belief systems.

[9] Stephen Daniels and Joanne Martin, *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (Lawrence, Kansas: University Press of Kansas, 2015), 3.

Why the vicious attacks? Several reasons. Plaintiffs' lawyers provide access to the legal system for people who could not otherwise afford a lawyer.[10] In addition, they influence the development of liability law by advancing and honing new legal theories for holding accountable those whose negligence has harmed others.[11] Trial lawyers further help to establish the "going rate" that injuries are worth—the amount that a jury would be likely to award at trial.[12] Without trial lawyers, laws protecting ordinary people would never develop and consumers would remain uncompensated, or undercompensated, for their injuries. For organizations like the Chamber of Commerce, that's the goal.

To that end, tort reform proponents have worked diligently and systematically to shape the public mind and the cultural environment concerning civil litigation.[13] One aspect of this campaign is to prejudice the minds of potential jurors long before they ever receive a summons for jury duty.[14] Another is to discourage lawsuits in the first place by persuading the public more broadly that each of us must assume personal responsibility for the misfortunes we suffer.[15] "Stuff happens." As part of this effort, tort reformers have, for decades, used radio, television, billboards, and now internet marketing campaigns to convince the public that everyone is threatened by personal injury litigation because we all must pay higher prices to cover the cost of sizeable jury verdicts.[16] Lawsuits, tort reformers claim, lead to victimization of the public.

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[10] *Id*. at 10.

[11] *Id*. at 8–11.

[12] *Id*. at 14–15.

[13] *Id*. at 20.

[14] *Id*. at 21.

[15] *Id*. at 22.

[16] *Id*. at 22–26.

During their early work for ATLA, Cusimano and Wenner conducted their own research to tackle the problem. Through focus groups, case workshops, and hundreds of interviews with trial lawyers all over the country, they labored to identify and catalog jurors' deleterious beliefs. They learned that tort reformers had been highly successful in either creating or exploiting five recurring anti-plaintiff attitudes. These biases often caused plaintiffs to lose at trial, though the lawyers trying the cases didn't know why. At the start, Cusimano and Wenner referred to the biases as *untried issues*. The biases were there in the courtroom whether the trial lawyer recognized them or not. Calling them what they were—untried issues—served to motivate trial lawyers to address the biases when they arose. Here, we explore each of the five anti-plaintiff biases trial lawyers must still identify and defuse today.

Bias One: Suspicion

During their research, Wenner and Cusimano observed that focus-group respondents were filled with *suspicion* from the outset—particularly toward the plaintiff, her attorney, and her claims in the lawsuit. Roughly 80 percent of their focus-group members believed there were too many lawsuits, and 68 percent felt that lawyers encourage plaintiffs to file unnecessary lawsuits.

Their findings are consistent with other researchers' observations: only a third of jurors believe most plaintiffs have legitimate claims.[17] Yet jurors do not harbor the same suspicion of defendants and do not scrutinize their actions as rigorously as they do plaintiffs' conduct.[18] The suspicion bias puts you in the position

[17] Valerie P. Hans, "The Contested Role of the Civil Jury in Business Litigation," *Judicature* 79, no. 5 (March–April 1996): 242–248, 244.

[18] *Id.*

of a sales representative on a used-car lot; you know the people you're trying to persuade come through the door with little or no trust in what you say. Although it's not as intense, jurors tend to be suspicious of all lawyers and the judicial system in general.

The Jury Bias Model encourages you to research whether some aspect of the plaintiff's conduct raises jurors' suspicions, causing them to mistrust your client and the case. Be careful, however, as invoking this negative tort reform frame sometimes reinforces it. Applying this negative frame to your case preparation can keep you vigilant about watching for potentially suspicious behaviors from the plaintiff, but it can also cause you to over-focus on defending the detrimental aspects of the plaintiff's conduct.

The better solution is to create a positive frame that helps you focus on building a stronger case, rather than defending against the worst case. Suspicion can be reframed as credibility by identifying conduct that establishes the plaintiff's trustworthiness and by presenting her as a protagonist and witness to the story's events.

A case in which Bossart debriefed the jury for a friend illustrates the debilitating effect of juror suspicion. The lone plaintiff in the wrongful death case was the adult daughter of a sixty-two-year-old man. Everything went so well at trial that the lawyer thought victory was assured. That was prior to the defense verdict.

Bossart was fortunate to be able to review the issues with all six jurors at the same time. After discussing a number of issues, Bossart inquired, "Was there ever a turning point in the trial?" Every single juror smiled. "Okay, somebody say something," Bossart pushed.

"Well, yes," said the foreperson. "The tide turned when the plaintiff got on the witness stand. Just before she started to testify, she pulled the Kleenex box over to her."

Bossart played dumb. "What are you telling me?"

The foreperson replied, "Well, she was getting ready to cry for us."

That's the suspicion bias at work. The plaintiff lost her case because the jurors were so suspicious they doubted her sincere grief over the loss of her father.

Certain types of cases, such as slip and fall and minor impact, heighten juror suspicion, particularly when the plaintiff did not see a doctor or call the police immediately after the incident that caused the injuries. In one of Bossart's own cases, a pickup truck rear-ended his client late one night in what the client thought was a minor crash. The plaintiff exchanged phone numbers with the other driver, but he didn't call the police. That made the jurors suspicious. People assume that if you don't call the police, you're not really injured.

Adding to the jurors' suspicion in Bossart's case was the fact that the plaintiff did not immediately seek medical attention. He waited until the next day when he realized he was really hurt. This is another red flag for jurors. Suspicious jurors will assume that if the plaintiff didn't go to the doctor immediately, he must not have been hurt very badly.

Other suspicions are more pernicious. Focus-group participants always ask, "When did the plaintiff contact the lawyer?" Here, you're trapped between Scylla and Charybdis. If the plaintiff called her attorney the day after she was injured, jurors are suspicious that her first thought was "jackpot justice." But if she waited eighteen months to contact a lawyer, jurors assume that a friend must have told her that she could turn that old injury into an underserved windfall. Any possible answer to this question creates suspicion.

These issues—whether the plaintiff called the police or when she sought medical attention—are not determinative of the defendant's liability or the plaintiff's injuries. But psychologically, they can be pivotal. When you have an issue like this in your case, prepare to alleviate jurors' suspicion by presenting the plaintiff as a responsible person in all aspects of her life. Distinguish your client from the jackpot-justice prototype jurors envision so that,

during deliberation, someone volunteers: "I don't think Jane is the kind of person who would make something up." Distinguish yourself from the prototype people have about trial lawyers who bring frivolous lawsuits.

To be believable, the plaintiff's story must be consistent with jurors' life experiences. Is the plaintiff a credible witness? Are her verbal and nonverbal behaviors congruent? The plaintiff must appear to be open-minded and personally responsible. You have to show that she accepts the consequences of her injuries, especially in instances where jurors are likely to assign her blame. Present the plaintiff as someone who, even in her injured condition, continued to apply for work and asked her doctor to release her for work. Determine if there is something in the plaintiff's background that screams of her good character and honesty. Does she work with the underprivileged? Has she ever found a wallet full of money and turned it in to the lost-and-found? Get the idea? Even having your client admit to something on the stand that doesn't work to her benefit can reflect credibility and responsibility.

All jurors possess an intuitive sense of fairness. They must *feel* that holding the defendant accountable is fair. Jurors measure their perceptions of the fairness of the plaintiff's demand for justice against their views of the wrongfulness of the defendant's conduct and the harmfulness of that conduct to the plaintiff. Jurors want to feel the plaintiff *truly deserves* and needs help.

The more jurors like the plaintiff, the more they are inclined to help her. Simple guidelines should inform the plaintiff's conduct in the courtroom. For instance, people who smile are more likeable than people who frown, so having the plaintiff smile when introduced to the jury for the first time is socially appropriate and encourages jurors to like her.

The bottom line: focus on presenting the plaintiff as a credible, likeable witness to create a positive, hopeful frame that effectively eliminates suspicion.

Bias Two: Victimization

Victimization is the second juror bias that Cusimano and Wenner identified in their research. People have been conditioned to believe that they, their families, and their communities will somehow be victimized by plaintiffs' personal injury lawsuits. They worry that large verdicts will increase their personal insurance rates, that verdicts against medical professionals will reduce the availability of local health care, or that the cost of their household products or medications will rise. Jurors fear that compensating the plaintiff will bring them harm.

Victimization, the tort-reformer's frame, looks like this: Rewarding the plaintiff only encourages people to be irresponsible and blame their problems on someone else. This leads ultimately to an unsafe world with no accountability. A defense verdict, by contrast, maintains a safe world in which people agree to watch out for themselves.

Some people will think the plaintiff is acting like things "just happened" to her and she had no control over any of it. That's scary and not what some jurors want to believe. Further, jurors want to believe people will "make do and get through" or "get over it" and go on with their lives. Many jurors will resent it if they think you are painting your client as a "victim."

Don't put your client's picture in the victim frame. Reframe the case: The plaintiff is a responsible person who will make do no matter what. It was the single act of this particular defendant that caused the harm, and the defendant should be accountable. By focusing on the defendant alone and his aberrant misconduct, jurors need not worry that a large verdict will encourage more lawsuits. Show jurors that a sizable award in your client's lawsuit will not raise their insurance rates or the cost of their products because this case is the exception, not the rule. Demonstrate that

if jurors don't hold the defendant accountable, the world they thought was safe will become a little more dangerous.[19]

Bias Three: Personal Responsibility

Americans believe strongly in the value of *personal responsibility*.[20] Many see the world as rewarding those who are personally responsible and punishing those who are not. As applied to plaintiffs, this means that injured people get what they deserve. Or that if only the plaintiff had acted responsibly, he would not need a handout from the hardworking defendant. That's the personal-responsibility bias. Cusimano and Wenner saw this over and over in focus-group respondents, concluding that personal responsibility was revered in all demographics. For juries, it is easier to side with plaintiffs who seem personally responsible (people who would, therefore, not file a lawsuit just for the money) than with those who do not.

Wenner and Cusimano observed that focus-group members tended to initially assume that the plaintiff had not behaved responsibly. Jurors often conclude that they would have been more responsible than the plaintiff had been and would have avoided the damage. In general, people tend to overestimate their own abilities and what they would do when compared to others. When they do so, they tend to blame others for being irresponsible.[21]

This assumption leads jurors to impose responsibility for the plaintiff's injuries on the plaintiff rather than the defendant.

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[19] For a discussion on how to use loss framing to combat the victimization bias, *see* chapter 2, page 56.

[20] Andrew J. Cherlin, "I'm O.K., You're Selfish," *New York Times Magazine*, October 17, 1999.

[21] This is often referred to as the Lake Wobegon Effect. Lake Wobegon appeared in Garrison Keillor's radio series *A Prairie Home Companion*, where "all the children are above average."

Jurors will not hold the defendant accountable unless you first establish that the plaintiff is a responsible person. What's more, jurors hold the plaintiff to a higher standard of personal responsibility than the defendant. This is especially true when the plaintiff is a person and the defendant is a company.

People know how other people should behave, but they may not be sure how a corporation should act. In voir dire and opening statement, you need to explain how the concept of personal responsibility applies to corporations. If you don't do it then, it will never happen—the jury will not make that connection for a corporation.

Counteract the personal-responsibility bias just as you would the suspicion bias or the victimization bias. The plaintiff must be über-responsible—in her family, work, and community. In your case preparation, develop concrete examples of each, including the plaintiff's personal responsibility even in the wake of incredible adversity. Reclaim the moral high ground. Otherwise, the personal-responsibility bias will work against your clients in virtually every case.

For example, we had one case where the plaintiff, Mike Sherman, was on his Harley motorcycle when a pickup truck made a left turn in front of him. He was unable to stop and hit the side of the truck. The pickup truck driver said Mike had to have been speeding around the curve in the road because he hadn't seen him. At that time of day, the sun would have been in the truck driver's eyes, but he claimed he would have been able to see Mike if Mike hadn't been speeding. Mike suffered a traumatic amputation of his foot in the crash.

Focus-group participants initially seemed to think Mike was a stereotypical biker and tended to blame him for his own injuries. Then we fleshed out the facts revealing Mike's character. Once we explained that Mike was a district manager for a telephone company who rode only on the weekends to get out of doors and away from the suit and tie he wore to work, the participants' views generally changed.

However, when the participants learned Mike was a soldier who was decorated for carrying a fellow marine to safety for a quarter mile after an IED exploded, they completely shifted for the plaintiff. They believed him when he said he was traveling below the speed limit and was on his way home. His personal responsibility and apparent bravery carried the day and his case.

Bias Four: Stuff Happens

Stuff happens is the fourth juror bias. In many cases, people are likely to assume that no one was at fault and shrug their shoulders, saying, "Stuff happens." These jurors might be comfortable explaining the 2011 meltdown of three nuclear reactors in Fukushima following a 9.0 earthquake and tsunami as God's will. Stuff-happens jurors are also likely to believe that "everything happens for a reason."[22] Other comments we've heard over the years include "That's the way the cookie crumbles," "You reap what you sow," and "The chickens came home to roost."

The stuff-happens bias is one manifestation of the *just world* fallacy.[23] People like to believe that there is no such thing as undeserved suffering. They tend to attribute horrific events to a larger force for order, justice, or moral balance. Even unconsciously, they may rationalize that bad things don't happen to good people. Or they might conclude that, when bad things happen to good people, it is God's will or just a part of life and that human efforts to try to rectify the harm are misplaced.

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[22] Paul Thagard, "Does Everything Happen for a Reason?" *Hot Thought* (blog), *Psychology Today*, February 11, 2010, https://www.psychologytoday.com/blog/hot-thought/201002/does-everything-happen-reason-0.

[23] Leo Montada and Melvin. J. Lerner, eds., *Responses to Victimizations and Belief in a Just World* (New York: Plenum Press, 1998), vii–viii; and Adrian Furnham, "Belief in a Just World: Research Progress over the Past Decade," *Personality and Individual Differences* 34 (April 2003): 795–817.

Cusimano once conducted a concept focus group in Las Vegas that he began, as he generally does, by providing very little information: "A wreck happened at the corner of Las Vegas Boulevard and Tropicana Avenue. What do you think happened?"[24]

His exchange with the focus group is a classic example of the stuff-happens bias at work:

FOCUS GROUP: Somebody saw a truck coming and thought they'd get rich. Yeah, she was lucky; she might have been hurt worse if she hadn't been stopped at the intersection.

CUSIMANO: Actually, she had the green light and the other driver ran the red light.

FOCUS GROUP: She probably wasn't wearing a seat belt.

CUSIMANO: Would that make a difference to you?

FOCUS GROUP: Yes.

CUSIMANO: She had on her seat belt.

FOCUS GROUP: I bet she was driving some tiny little sports car.

CUSIMANO: No, it was the largest Oldsmobile land barge they make.

FOCUS GROUP: Hmm. They just don't make cars like they used to. Oh well, stuff happens.

This focus group was not ruling for the plaintiff, no matter the facts. Stuff-happens jurors believe that you just can't compensate

[24] We discuss concept focus groups in chapter 5, "Conducting Jury Research," page 89.

everybody who's hurt—injuries are part of life. The more uncertainty in the liability case or the more complex the fact pattern, the more likely it is that jurors will excuse the defendant's wrongdoing by concluding that stuff happens.

Psychologists Daniel Kahneman and Amos Tversky have published numerous articles about *heuristics*—mental shortcuts that allow us to think through a problem quickly and effortlessly, if not always accurately. Heuristics quicken our decision-making by letting us operate without deliberate thought about the next step. But because heuristics are shortcuts, they can lead us to make inaccurate judgments. Building on the work of Kahneman and Tversky, psychologists Susan Fiske and Shelley Taylor developed the *cognitive miser* theory to help further explain this behavior.[25]

Struggling to resolve a complex problem can lead to considerable anxiety. One way to escape that discomfort is to assume that no solution is required because all events are part of some overarching plan. Another way out is to throw up your hands in a stuff-happens gesture. The stuff-happens bias that Cusimano and Wenner identified in their research is really just a heuristic—a thinking substitute.

An indication that you're up against the stuff-happens bias is when your focus-group members pelt you with questions seeking more information. And at trial, you know you have a stuff-happens juror when someone demands a much higher level of proof or responds to closed-ended questions like this: "Well, I need to hear the whole case before I can answer that. I need more information." Panel members who are resistant during voir dire will likely be resistant stuff-happens jurors during closing argument.

It is unlikely you will change the minds of stuff-happens jurors during the course of a trial. Use voir dire or supplemental juror questionnaires to identify and strike them when you can. If you

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[25] Susan T. Fiske and Shelley E. Taylor, *Social Cognition*, 2nd ed. (New York: McGraw-Hill, 1991).

find yourself with jurors who might be stuff-happens jurors, consider using *if only* or *counterfactual thinking*.

The idea is to look not only at the way things are, but also at how they could have been. Counterfactual thinking happens when we imagine how the damage could have been avoided. If we can conjure up numerous alternatives as to how the defendant could have acted differently to avert the damage, then the damage appears a greater tragedy and weakens the stuff-happens conclusion. The harder it is for jurors to think of a different result, the easier it is for them to conclude, "stuff happens." However, if you suggest several alternative decisions or actions that were available to the defendant and would have changed the outcome, this can lead jurors to think that "if only the defendant had . . ., then this wouldn't have happened." Getting jurors to think "if only" about the defendant's actions will invariably help your plaintiff's case. The more alternatives the defendant had to avoid the injury, the more likely the jury will find the defendant liable.

In considering the stuff-happens attitude, ask yourself these questions: Did the plaintiff contribute to his own harm or the tragic event and, if so, to what extent? Will the jury readily believe or imagine the result could have been easily avoided and, if so, by whom? Look for ways you can frame the facts to your advantage.

Bias Five: Blame the Plaintiff

The fifth juror bias is the *blame-the-plaintiff* bias. In hundreds of focus groups, Cusimano and Wenner learned that jurors are frequently and unjustifiably likely to find fault with the plaintiff, even when contributory negligence is not an issue. Other researchers have also documented the existence of a blame-the-plaintiff bias. In one survey, 80 percent of people complained that plaintiffs are

too quick to sue rather than settle disputes.[26] In another study, researchers found a blame-the-victim phenomenon in the trial context.[27] There are ample studies available on victim blaming.

One study by Neal Feigenson, Jaihyun Park, and Peter Salovey clearly illustrates the blame-the-plaintiff bias. Participants determined liability and damages based on the following general facts:

> Hocon Gas, the defendant, provided propane fuel to Mr. and Mrs. Roe's residence. There was a thirty-year-old valve that controlled the flow of propane from the tank (owned by Hocon) to the Roes' appliances in the house. Hocon's insurance company had asked Hocon to replace all valves that were over fifteen years old. Unfortunately, the Roes' valve had not been replaced.
>
> One day, Mr. Roe smelled gas and heard a hissing from the kitchen. A telephone repairman was working outside on the property, so Mr. Roe asked him if he would help investigate. When they entered the kitchen, the noise was so loud the repairman yelled, "Let's get the hell out of here!"
>
> The house exploded as they ran from it. The repairman was not injured, but Mr. Roe was and he died seven days later. Thankfully, Mr. Roe was the only one home though Mrs. Roe had just had a baby five months previously.[28]

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[26] Valerie P. Hans, "The Contested Role of the Civil Jury in Business Litigation," *Judicature* 79, no. 5 (1996): 242, 244.

[27] Kelly G. Shaver, "Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident," *Journal of Personality and Social Psychology* 14 (February 1970): 101.

[28] Neal Feigenson, Jaihyun Park, and Peter Salovey, "Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases," *Law and Human Behavior* 21, no. 6 (1997).

When they analyzed the results of their experiment, the researchers discovered that jurors decided the case based on legally irrelevant matters that were harmful to the plaintiffs' case. At times, study subjects made up evidence—the plaintiff caused the leak or the plaintiff was responsible for the faulty valve—even though the facts did not permit such inferences. Psychologists have long known that people fill in the gaps of a story to fit their own view of the facts.[29]

In the 1960s, British psychologist Peter Wason published the results of a number of studies exploring what Wason termed the *confirmation bias*, the tendency of people to interpret information in a way that confirms their preexisting beliefs.[30] Other researchers refer to the phenomenon as the *myside bias*, since people evaluate and generate evidence in a way that supports their side and refutes or ignores the opposing side.[31] The science confirms what Wenner and Cusimano observed: people will repeatedly invent facts that are detrimental to the plaintiff's case.

What accounts for this laser-like focus on plaintiffs' conduct to explain the cause of their injuries? Several different principles are at play, including: *defensive attribution*, *ideal self*, and the *fundamental attribution error*.

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[29] Scott Plous, *The Psychology of Judgment and Decision Making* (Columbus: McGraw-Hill, 1993).

[30] Peter C. Wason, "On the Failure to Eliminate Hypotheses in a Conceptual Task," *Quarterly Journal of Experimental Psychology* 12 (July 1960): 129–140.

[31] Keith E. Stanovich, Richard. F. West, and Maggie E. Toplak, "Myside Bias, Rational Thinking, and Intelligence," *Current Directions in Psychological Science* 22, no. 4 (August 5, 2013): 259–264.

Defensive Attribution

When someone is injured, people (this proclivity is not limited to jurors) are inclined to blame the person who was hurt.[32] This act of defensive attribution helps us to dodge the fear that the same thing could happen to us through no fault of our own. Some research shows that the more alike a person may be to someone who was harmed or involved in a tragic event, the more likely that person is to blame the injured party. The degree of the similarity changes the attribution of blame placed on the person harmed.

As discussed before, people feel a need to believe in a just world—a place where bad things do not happen to good people. They want a predictable world over which they have some measure of control through their actions. When a good person suffers undeservedly, their image of a just world is at risk of disappearing. Rather than acknowledge that injustice, people resort to condemning the injured plaintiff. The worse the plaintiff's injuries, the greater the likelihood that people will raise the shield of defensive attribution.[33] Cusimano's stuff-happens focus-group respondents were likely motivated to create repeated stumbling blocks to the plaintiff's recovery because accepting the idea that anyone could be injured or killed on a sunny day in Las Vegas when another driver runs a red light frightened them. Many of these anti-plaintiff attitudes, including defensive attribution, make people blame the plaintiff.

Defensive attribution can lead to harsh results. In one of the focus groups Cusimano and Wenner conducted for a breast cancer case during their ATLA research, a male participant asked,

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[32] Indeed, trial lawyers are also guilty of the defensive-attribution bias, as we discuss in chapter 5, page 101.

[33] Melvin J. Lerner and Julie H. Goldberg, "When Do Decent People Blame Victims?: The Differing Effects of the Explicit/Rational and Implicit/Experiental Cognitive Systems," in *Dual-Process Theories in Social Psychology*, eds. Shelly Chaiken and Yaacov Trope (New York: Guilford Press, 1999), 627–640.

"This woman had three children and a husband. Shouldn't they at least receive something to cover the burial expense?"

A forty-year-old woman in the group retorted, "She should have thought about those children when she chose not to see another doctor. Besides, everybody dies and everybody has funeral expenses." Wenner had an extremely difficult time processing this response on a moral level. The woman's ostensible cruelty, in fact, is what prompted Wenner to seek out psychologist Lee Ross at Stanford. Defensive attribution has the power to destroy all empathy in an otherwise decent human being.

Ideal Self

When jurors judge a plaintiff's behavior (or anyone's behavior), they reflexively compare the plaintiff's conduct to what they would have done in the same circumstance. The hitch is that jurors make that assessment based on what their best or ideal self would have done—not their real, flawed self. For example, when someone else's child runs unsupervised through a restaurant and bumps into your chair, sending a twelve-dollar glass of Malbec onto the Italian silk tie your daughter gave you for your birthday, it's easy to forget the time your five-year-old sprayed apple juice through a straw at an elderly couple.

Jurors generally do not approach their task with the self-awareness required to ask, "Have I ever acted like that?" Instead they muse, "How would I act if confronted with that situation?" By judging the plaintiff's conduct against the hypothetical actions of their ideal self, jurors fail to acknowledge the human frailty to which everyone is prone. As a result, they tend to blame the plaintiff.

Countering the defensive-attribution and ideal-self biases requires thought and planning. One way to do this is to create a way for jurors to place themselves in a similar situation to the plaintiff in the abstract, before they are given the facts of the case. For example, you can use voir dire to educate the jury on

a normal reaction to a situation. In a slip and fall case, you can help jurors understand that the plaintiff's response was normal by asking them to think of a time when they may have slipped or missed a chair they planned to sit in and immediately tried to recover without acknowledging the mishap. You can ask if they were embarrassed and got up quickly, hoping others didn't see what happened. When jurors realize the plaintiff's conduct was normal, it may help them understand why someone didn't report a fall immediately or seek immediate medical help.

Fundamental Attribution Error

The fundamental attribution error, a term coined by psychologist Lee Ross, leads people to attribute a person's choices and conduct to some personal shortcoming or character flaw rather than the situation in which he finds himself.[34] As psychologists describe the bias, the person is more "salient" in the jurors' minds than the situation. This leads people to blame the plaintiff.

For instance, people may assume that a plaintiff who tripped in a department store was injured because he was careless and inattentive. Our natural focus is on the person and not on the situation—the department store's oversized color poster advertising a semi-annual underwear sale was placed above a water spill on the white marble floor caused by a leaking drinking fountain. The fundamental attribution error causes jurors to focus on the plaintiff's inattention and not the distracting store displays and wet floor that caused him to trip. The phenomenon is called the fundamental attribution error because of its pervasiveness and because we are unaware of its effect on our judgment.

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[34] *See* Lee Ross, "The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process," in *Advances in Experimental Psychology,* ed. Leonard Berkowitz (Academic Press, 1977), 10: 173–220; and Lee Ross and Richard E. Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (McGraw-Hill, 1991).

The way to combat the fundamental attribution error is to build a case that explains the plaintiff's conduct in terms of his situation, helplessly distracted by the department store's deliberately provocative displays (situation more salient than individual). The defendant merchant, on the other hand, was more focused on profiting from lingerie sales than keeping the store's flooring safe for its unsuspecting patrons (individual more salient than situation).

In any lawsuit, all three of these principles—defensive attribution, ideal self, and fundamental attribution error—may combine to create the blame-the-plaintiff bias. Unfortunately, the principles are far more likely to damage the plaintiff's case than the defendant's. The antidote for the blame-the-plaintiff bias, as we will discuss,[35] is to reframe your case by developing facts and crafting a trial story that removes focus from the plaintiff's conduct and directs attention toward the defendant's.

Suspicion, victimization, personal responsibility, stuff happens, and blame the plaintiff are the five biases, or attitudes, that Cusimano and Wenner identified twenty years ago in their original research for the Jury Bias Model. In this age of continuing assault on plaintiffs and the civil jury trial, it is not possible to build an effective case without identifying, understanding, and combatting these biases.

We should recognize that these attitudes that often operate as anti-plaintiff are not necessarily distinct and independent. They interact and are entwined. It is possible to see all five in a fact pattern or—more likely—to see two or three. Try to analyze and recognize them in your case so you can counter their influence if they work against you and enhance their effect if they work for you. Using the Jury Bias Model's Ten Commandments, as explained in the next chapter, will help you reach the result you seek.

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[35] *See* discussion on page 56.

What We Have Learned

Cusimano and Wenner based the Jury Bias Model on thousands of hours spent studying the academic literature and consulting with some of the nation's leading scholars. In addition, the pair conducted hundreds of focus groups in which they tried and tested the application of well-documented psychological principles to the arena of plaintiffs' tort litigation.

As you begin preparation in any case, be mindful of the five jury biases described in the model:

1. Suspicion
2. Victimization
3. Personal Responsibility
4. Stuff Happens
5. Blame the Plaintiff

The next chapter will discuss the Ten Commandments of the Jury Bias Model—counteractive measures designed specifically to combat the five jury biases and strengthen your presentation.