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# Jury Signs: Coded Messages from the Jury Box

*READING THE REACTIONS OF JURORS IN THE BOX IS USUALLY A HIT-AND-MISS EXERCISE THAT YIELDS INCONSISTENT RESULTS. Jurors can look so stoic that it is difficult or impossible to read their response. And when there is some reaction, it can be hard to tell if it is just momentary and situational, or whether it belies a preference for a particular verdict. Moreover, the individuals trying to read jurors' reactions are usually lawyers, paralegals, and claims staff people who specialize in areas other than the assessment and measurement of human behavior.*

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owever, behavioral scientists have developed reliable methods for recording meaningful and predictive nonverbal behaviors. These methods were applied in a three-month trial that went to verdict to test whether those tools can detect verdict preferences of individual jurors and reactions to specific witnesses and evidence. The results showed much promise for developing a more systematic, reliable, and valid approach to trial monitoring and ascribing meaning to juror responses.



This method accomplishes two objectives:

- Identifies the behaviors that have predictive value; correspondingly, it identifies and de-emphasizes the behaviors that have little predictive value.
- Establishes a standard protocol for recording juror responses that is transferable from one trained observer to another.

### Jury signs and their meaning

#### The challenge of ascribing meaning to jury behavior

The most obvious and objective juror response is note-taking. However, even recording this simple behavior is subject to error. Observers may miss some of it, simply because jurors in the foreground obstruct the view of jurors in the background. It may be hard to tell if jurors are just doodling.

There are other behaviors with some objective value: smiles, smirks, frowns, raised eyebrows, and other expressions of surprise; glancing to other attorneys at counsel table not engaged in the examination; staring ahead/down/up without looking at either the examiner or witness; and communicating with other jurors.

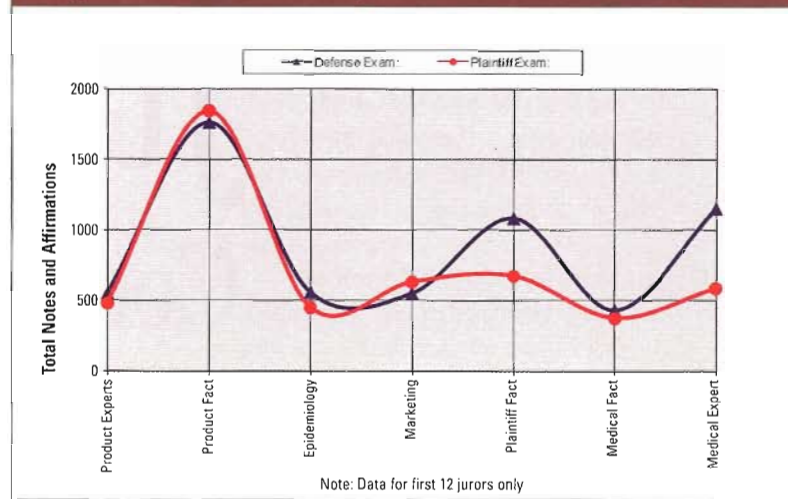
Every behavior is subject to several interpretations. Is a juror responding to the implications of the question or the answer? Is the juror even responding to the current question and answer (Q&A) or recording a delayed conclusion from a prior Q&A? Is the juror not taking a note because the subject is not important, because the juror does not typically take notes, because this witness has lost all credibility, because the attorney has lost all credibility, or because the juror's mind has wandered? The experience and sophistication of the observer will minimize errors in ascribing meaning, but there will always be some degree of inter-observer error.

### Method

#### Subjects

The "subjects" of this study were the 18 jurors who sat through nearly three months of testimony in a trial involving both a medical product and medical causation. Amazingly, all 18 jurors completed their service on this three-month trial.

Figure 1 Total Juror Responses



#### Procedure

**General recording procedure.** A trained observer recorded juror behavior. Juror behaviors included note-taking, facial expressions, and body language. Each behavior was tallied for each witness. More than 16,000 responses were recorded for the 18 jurors in this three-month trial, making this the largest study of its kind. These tallies of juror behaviors for each witness were assigned to the plaintiff or the defense examination. Graphs were then created to show how responsive jurors were during the plaintiff attorney's vs. the defense attorney's examinations.

**Exceptions.** When it was apparent to the observer that a juror's behavior indicated a preference for the side other than the one doing the exam, that behavior was reassigned. For example, if a plaintiff's witness was making a strong argument during the defense cross-examination and the juror's response clearly indicated receptiveness to the witness's argument, that response was reassigned to the plaintiff's exam. Those reassignments were made only when the behavior was clear and unambiguous.

Most behaviors were recorded once. However, it was sometimes apparent that an argument, by an attorney or a witness, was particularly meaningful to a specific juror. Such a response was recorded twice so that it would receive a weighting appropriate to its significance.

### Results

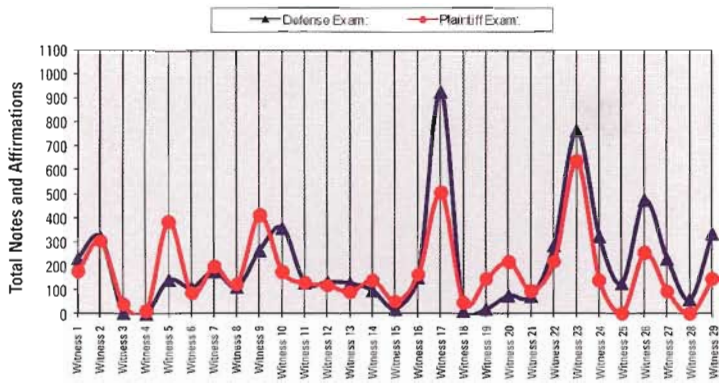
#### By witness category

To assess how jurors were responding to different types of witnesses, the witnesses were assigned to one of seven categories (see Table 1). The number of notes and other affirmations were directly related to the number of witnesses presented in

Table 1 Witness Categories

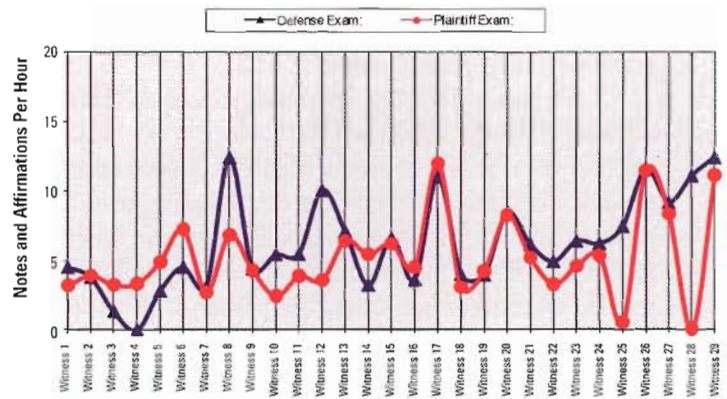
Product Expert	Product Fact	Epidemiology	Product Marketing	Medical Fact	Medical Expert	Plaintiff Fact
Witness 1	Witness 3	Witness 7	Witness 9	Witness 13	Witness 10	Witness 12
Witness 2	Witness 4	Witness 16	Witness 22	Witness 14	Witness 11	Witness 15
	Witness 5	Witness 27		Witness 19	Witness 24	Witness 17
	Witness 6			Witness 25	Witness 29	
	Witness 8			Witness 28		
	Witness 20					
	Witness 21					
	Witness 23					
	Witness 26					

**Figure 2 Total Juror Responses**



Note: Data for first 12 jurors only

**Figure 3 Rate of Juror Responses**



Note: Data for first 12 jurors only

each category. The only omission from this nomenclature was Witness 18, the plaintiff’s economist.

Figure 1 shows that “Product Fact” witnesses elicited more juror responses. However, that was primarily a function of the number of Product Fact witnesses relative to other types of witnesses. The more telling feature of Figure 1 was the difference in how jurors responded during plaintiff vs. defense examinations of Plaintiff Fact witnesses and Medical Expert witnesses. Post-verdict interviews confirmed that these witnesses were pivotal to the verdict.

**By individual witness**

The data was further scrutinized by how jurors responded to individual witnesses. Figure 2 shows how the jury responded to individual witnesses. This analysis clearly showed which witness got most of the attention of jurors and whether jurors were more responsive to the plaintiff attorney’s examinations or to the defense attorney’s examinations. Consistent with the data shown in Figure 1, Figure 2 showed that several Product Fact witnesses (Witnesses 5, 23, and 26), one Plaintiff Fact witness (Witnesses 17), and three Medical Experts (Witnesses 10, 24, and 29) generated the most activity from jurors.

**By length of exam**

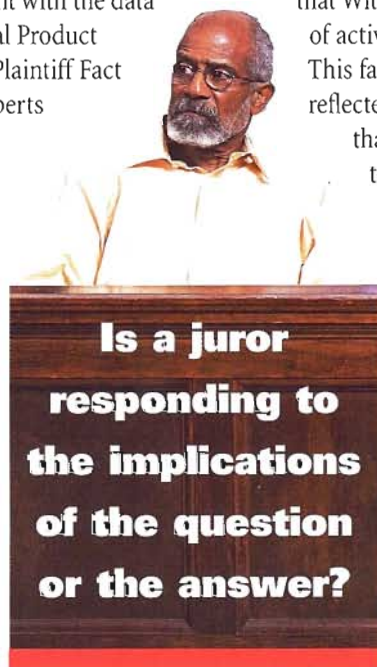
However, the total number of responses recorded for a given witness was related not only to how important the witness was to a particular juror, but also to the length of time that witness remained on the stand. More responses to one exam relative to another did not necessarily mean that the exam getting more responses was more persuasive. Therefore, graphs of total juror responses during each exam were reformulated to reflect responses per hour. Those graphs attempted to control for the length

of each exam and just focus on how responsive jurors were to each exam. To do this, it was essential to remember to record the length of breaks and sidebars as well as the beginning and ending times of each exam. This analysis revealed whether jurors were more responsive during the plaintiff or defense exams; it also showed the extent to which those patterns changed over time or by category of witness.

Figure 3 shows that jurors began responding more during the defense exams in the latter part of the trial. This graph tells a different story. Whereas Figure 2 showed that Witness 17 produced more responses during the defense exam, in fact, jurors were more responsive to the plaintiff attorney’s examination than to the defense attorney’s examination per hour. Figure 2 was skewed by the fact that the defense attorney’s exam was so much longer than the plaintiff attorney’s exam. That did not mean that it was necessarily more effective.

Moreover, a comparison of these two graphs showed that Witness 8, a product fact witness, generated a flurry of activity for the brief period he was on the stand. This fact does not show up in Figure 2, but it is clearly reflected in Figure 3. More generally, Figure 3 indicates that the jurors were significantly more responsive to the defense attorney’s examination of two Medical Fact witnesses (Witnesses 25 and 28). Many trial consultants contend that the case is over after opening statements; in fact, post-trial interviews confirmed that these were pivotal witnesses in determining the jury verdict, even though they were presented very late in the trial.

Another way to gauge the impact of any given witness, and the overall trend in juror responsiveness throughout the trial, is shown in Figure 4. The total number of responses during defense exams was subtracted from the total number of responses during plaintiff exams. Positive totals reflect more



responses during defense exams; negative totals reflect more responses during plaintiff exams.

A polynomial trend line was calculated to show that there was a slight but significant increase ( $r=.46$ ;  $p < .001$ ) in juror responsiveness to defense exams, relative to plaintiff exams, over the course of the trial. To some extent, this finding could be expected, since the defense commanded more court time during its case in chief, and there was more opportunity for jurors to respond to defense exams during this portion of the trial. However, it also confirmed the importance of several Medical Fact and Medical Expert witnesses, presented toward the end of the trial, as shown in Figure 3.

**Responses to closing arguments**

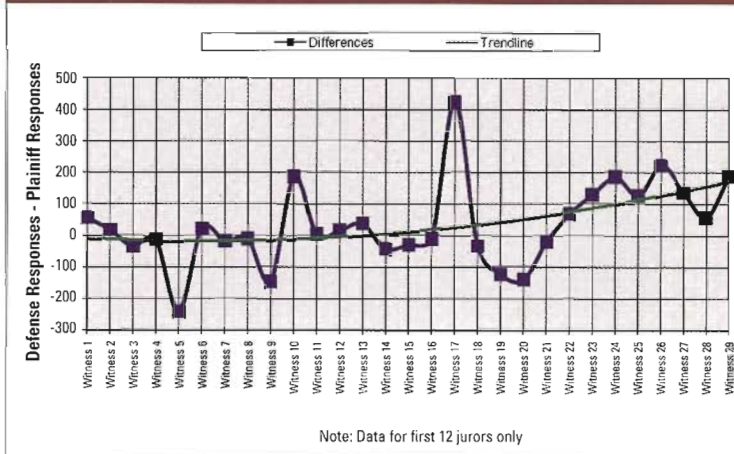
Figure 5 shows how individual jurors responded to closing arguments. This graph provided some reassurance that, going into deliberations, the defense had elicited more responsiveness from jurors than the plaintiff during closing arguments, with the exceptions of Jurors 7, 11, and a couple of the alternates, Jurors 13 and 14. As it turned out, however, this particular graph was not predictive of verdict preferences. The better predictor was the overall data patterns observed throughout the trial. This shows how misleading it can be to rely only on juror responsiveness during closing arguments.

**Verdict**

Overall, the data in this case indicated that the defense had a rough beginning, particularly for the products defendant. However, as the case progressed, the defendants' examinations started to gain some favor, particularly with its affirmative defense of comparative negligence. By the time of closing arguments, this trend was firmly established.

The defense won the case, although there were some dissenting views. Post-verdict interviews revealed that all but Jurors 4, 5, 13, 16, 17, and 18 favored the defense at the beginning of

**Figure 4 Relative Responses Between Defense and Plaintiff**



deliberations. Figure 6 shows the cumulative responses by individual jurors across all witnesses. Except for Juror 16, the patterns of responses were completely consistent with each juror's verdict preference.

**Sign language in the jury box**

This study was the largest of its kind. More than 16,000 behaviors, among 18 jurors, were recorded over a three-month trial. The methods and measurements applied in this study were not only predictive and accurate; they also highlighted the topics and issues that were driving the verdict.

Several concerns were apparent, however. Different issues may have had different meanings to different jurors. For the trained observer, it was qualitatively easy to tell when a specific juror perked up in response to a particular topic and accepted or rejected the argument. However, the present recording method of merely tallying responses is very limited for translating that information into anything quantitative or statistical. Further coding of responses by subject matter would be helpful for identifying how different jurors respond to different issues. Standardized codes for topics



**Systematic and Random Error**

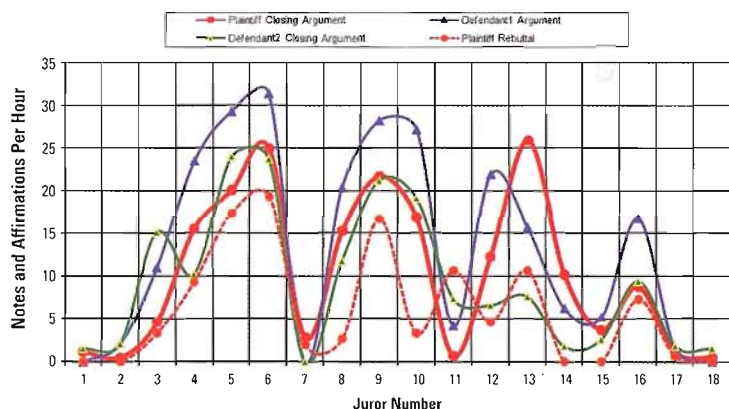
To the extent that a behavior has meaning, systematic and random errors in recording that behavior must be minimized. Here is an example of systematic error: recording more responses to a witness who was on the stand longer than another witness. The witness who got fewer responses may have actu-

ally been more important, if time on the stand is not taken into account. Here is an example of random error: failure to accurately record a juror's response, because the observer's eyes were momentarily diverted to other jurors or to his or her own notes. Random errors can be tolerated to some extent, when there is

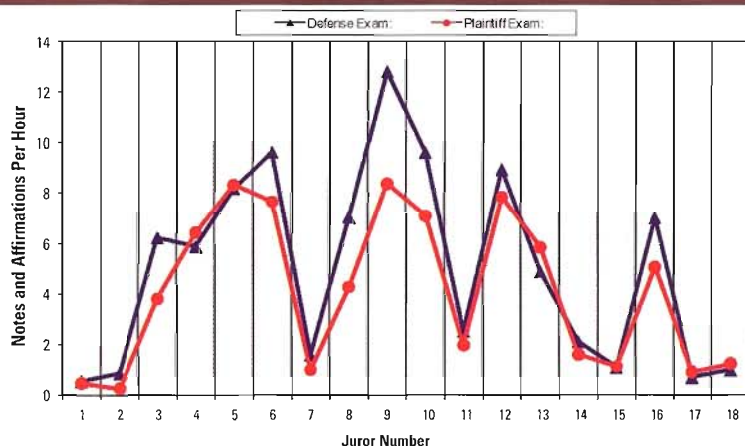
sufficient volume of data collected; it can also be minimized by using trained and experienced observers.

Another way to reduce systematic error is to subject observations to a statistical analysis that incorporates time on the witness stand, or topic/issue as factors.

**Figure 5 Comparison of Closing Argument Response Rates**




**Figure 6 Overall Response Rates**

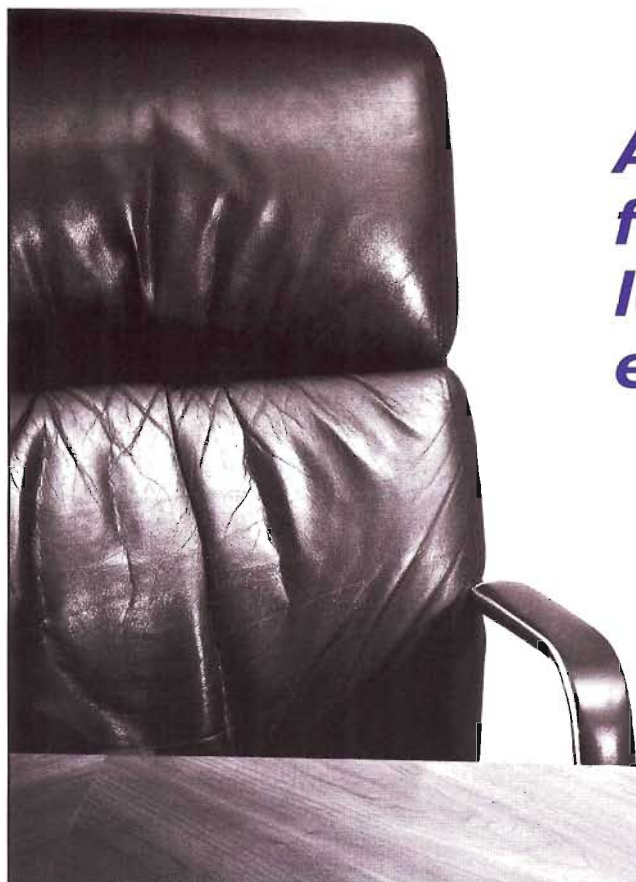


in these types of cases should be developed and tested.

Finally, "shift happens." Individual jurors can oscillate in their verdict orientations from one witness to the next or even during the examination of a specific witness, depending on the topic and who is asking the questions. Statistical techniques that have been used in single-subject research, e.g., time-series analysis, should be explored for their usefulness in deciphering these oscillations.

This study pioneered a new method for a more standard-

ized approach to trial monitoring. To be broadly applied, it must be objective, replicable, and transferable from one trained observer to another. In the broader scheme of things, a centralized database could be developed wherein data from many trials would be compiled and analyzed. Once we have gained measures of initial verdict orientation from the post-verdict juror interviews, we can subject the present and future databases to statistical tests of the value of this approach for evaluating juror responses to the evidence, and for predicting verdicts. 



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