

Published in [The Jury Expert](#), May 2011 (response to emotional blunting article by Winterich).

Tammy R. Metzger Responds:

Tammy Metzger, J.D., M.A. (JuriSense.com) is based in Orange County, California and offers litigation support and MCLE trial advocacy workshops nationwide. She worked in-house at a plaintiff products liability firm for five years, with prosecutors at the local, state and federal levels and at UC Santa Barbara as a researcher and instructor.

The appraisal-tendency framework (ATF) sheds light on tried and true trial practices, including two newer, effective trial approaches: *Rules of the Road*, by Rick Friedman & Patrick Malone and *Reptile*, by David Ball & Don Keenan. This mechanism helps explain juror decision-making in surprising verdicts, which I describe in two case studies. Utilizing the ATF can help attorneys optimally sequence evidence and make their strongest points when jurors are most open to reconsider their assessments. It also clarifies how jurors perceive risk, causation, blame, and guilt. I believe the ATF offers enormous potential for advancing communication strategies.

Dr. Winterich and her colleagues have taken an important step towards understanding how emotions affect subsequent emotions and verdicts. They provide us with a better understanding of how jurors become angry or empathetic, i.e., want to punish or help. (Empathy is often related to sadness, which is discussed below.) I was impressed with the authors' robust statistical analyses in the original journal publication (Winterich, Han & Lerner, "Now That I'm Sad, It's Hard to Be Mad: The Role of Cognitive Appraisals in Emotional Blunting," *Personality and Social Psychology Bulletin*, 2010, 36, 1467-1483). By integrating these findings with knowledge from other fields and utilizing additional methods to measure emotion and decision-making, mock trial research provides unique insight into the human mind and practical, powerful applications for attorneys.

## **EMOTIONS AND THEIR COGNITIVE APPRAISALS**

Research from the neurosciences tells us that all judgments are a blend of emotion and reason and that without input from our unconscious, emotional "primitive brain," people are unable to make the most mundane decisions. (See *How We Decide*, by Jonah Lehrer (2009), for a good overview of recent neuroscience research.) Emotional reasoning provides seasoned attorneys with their courtroom instincts. But in novel situations, such as jury service, emotions can lead to befuddling verdicts.

Even the most experienced experts can be led astray by snap judgments. Conversely, thinking too much causes us to focus on variables that don't really matter. (See *id.* at 142). A critical function of our rational mind is to make sure that our emotional judgments are properly applied to a given situation. By understanding how emotions interact and affect decisions, attorneys can help jurors make better decisions and mitigate reasoning errors.

## **Anger Motivates People to Punish, Seek Revenge and Exert Control**

Trial consultants have known that angry jurors are more punitive towards criminal defendants, and they return larger verdicts in civil cases. Our observations have provided a richer basis for

explaining how anger motivates people to punish, seek revenge, and exert control. With Dr. Winterich's research, we can further clarify that anger interferes with jurors' ability to feel sadness and to empathize with criminal and civil defendants, which can result in harsher verdicts.

Anger tells us that something needs to change. Anger is energy directed outward when there is interference with a goal, an unfair loss, mistreatment, a threat, social norms are violated, a lack of justice, a sense that something shouldn't happen, etc. Anger drives us to overcome obstacles and control our environment so we can reach our goals, instead of fearfully anticipating pain or sadly accepting a loss.

There is a strong physiological response associated with anger, as we instinctively prepare to fight, which may be why it takes so long for anger to dissipate. Long ago, anger protected us from threats of physical harm, but today it usually protects threats to our ego, i.e., our sense of self and our values.

### **Anger, a "Secondary Emotion," Masks Other Emotions**

The function of anger is often to mask our first emotion so that we appear strong, instead of wounded, scared, or otherwise weak. Psychologists call anger a "secondary emotion" because it almost always follows an initial emotion. Thus anger is not one distinct emotion and there will be somewhat different cognitive appraisals. The main features of anger are similar and it often suppresses sadness. Thus, a well-designed experiment should be able to highlight the mechanisms by which anger blunts sadness. And I agree with the Dr. Winterich's findings, that the converse is also true. Sadness, characterized by losses that are out of individual human control, can diminish anger, where there is blame or a way to remedy the situation.

All of us have experienced the fatigue of sadness and know firsthand that we are less likely to then feel or sustain a high-energy emotion, such as anger. This is because we generally conserve energy when we do not know what to do, by not getting angry about things out of our control or not worrying (*Reptile* elaborates on this). Consequently, we do not prepare to act, and we try to ignore the issue.

Emotions can combine and coexist together or alternate in rapid succession, whereas certain combinations, such as sadness and anger, can interfere with each other. Our emotions are usually unconscious, where they direct our attention, which drives learning, memory and problem-solving.

### **APPLICATIONS TO TRIAL ADVOCACY**

The ATF mechanism is constantly at work, during trials and in our daily lives. Case Study 2 discusses this blunting of anger in a benzene case, after defense attorneys pointed out to jurors that they, like the plaintiffs, are unavoidably exposed to the same chemicals that gave rise to the plaintiffs' lawsuit. Jurors are less inclined to want to punish a defendant when no action is required, i.e., when expending energy will not return a benefit.

The emotional risk calculation occurs in the unconscious mind, where thinking is done in black and white, and risks are not distinguished by severity. Therefore, jurors assume that if the benzene off-gassing from the courtroom walls (out of their control) is nothing to worry about, then the benzene that the plaintiff was exposed to is similarly nothing to get angry about because nothing could have been done to protect the plaintiff's (or the jurors') safety. (See *Gut Feelings: the Intelligence of the Unconscious*, by Gerd Gigerenzer (2007), which explains decision-making heuristics; i.e., "rules of thumb," often unconscious.)

Pointing out other exposures also reduces jurors' certainty that the defendant's product actually caused the harm, which also reduces anger and the desire to punish (although jurors in Case Study 2 assumed causation, as described below). Conversely, Case Study 1 discusses a trial where jurors' extreme anger towards the defendant actually resulted in a defense verdict, probably because their anger blunted jurors' ability to empathize with the plaintiff.

### ***Rules and Reptile Approaches Activate Cognitive Appraisals for Anger***

The *Rules of the Road* and *Reptile* are two, well-known, effective trial advocacy approaches that activate cognitive appraisals for anger: certainty, external human control, and a bad outcome. I believe this anger is mostly unconscious, where it drives verdicts by motivating jurors to punish and exert control over their environment, to stay safe, achieve goals, help others, etc.

*Reptile* approaches focus on community safety and emphasize how the defendant's unnecessary actions (and similar actions by others) endanger members of an entire community. This activates cognitive appraisals of certainty (with so many people at risk) and outside control, which both increase anger. As described below, anger and fear are closely related emotions and fear causes people to impose higher standards of care on parties that control bad outcomes.

The *Rules of the Road* approach helps attorneys define relevant, clear rule violations, thereby increasing jurors' certainty of fault. Rules can come from industry standards, product labeling, statutes, contracts, jury instructions, expert testimony, procedures manuals, professional literature, ethical codes, common sense, etc. (*Rules* at p32.) The *Rules* approach gives jurors a sense of certainty, whereas many legal standards are fuzzy.

I wholeheartedly agree with the premise stated on page 1 of *Rules of the Road*: "The defense wields three weapons to defeat plaintiffs' cases that should be won: Complexity, Confusion and Ambiguity." The ATF and other research summarized above help explain why this is true. Certainty and outside control activate anger, which subsequently increases jurors' certainty of their judgments and results in larger verdicts.

This certainty leads to more plaintiff verdicts and higher damages awards, in part, because it is activating an anger appraisal. The methods explained in *Rules of the Road* also activate outside control appraisals in a way that elicits anger, without appearing overtly emotional or manipulative. Jurors are probably not consciously aware of the emotions activated by the *Rules* and *Reptile* approaches; nonetheless, these emotions motivate jurors to control and punish behaviors that wouldn't otherwise cause them concern.

## **The Rules within a Reptile Framework Prompts Motivating Anger**

One of the reasons *Reptile* and *Rules* approaches work well together is because they both activate the same cognitive appraisals for anger, certainty and outside control. I believe this sense of certainty transfers (via an appraisal tendency) into greater juror conviction of their own judgment, which results in larger verdicts.

David Ball suggested that I distinguish motivating anger (*certainty* and *outside control* appraisals) from impotent anger (probably *avoidance* appraisal). In *Emotional Awareness* (2008), the Dalai Lama and Dr. Paul Ekman define anger as avoidance, i.e., pushing away an obstacle. They also briefly distinguish an aspect of motivating anger, speculating it is a product of individual intelligence, resilience and vitality. David's advice is more practical:

### IMPOTENT (Static) VERSUS MOTIVATING (Dynamic) ANGER:

There are (at least) two kinds of anger: impotent anger, which is anger in the face of a situation you can do nothing about; and motivating anger, which is anger in the face of a situation you can do something about. Use of the Rules in a Reptilian advocacy framework quickly turns the former into the latter by showing that the danger was not an inadvertent "mistake" or "error" -- but was, rather, a knowing and volitional act. As a result, a verdict against the defendant is seen to decrease the chances that other people or companies will violate the same rules. This is an unlikely result when the bad act is seen as inadvertent, which creates impotent not motivating anger, because you "you can't fix inadvertent" so there's nothing to be motivated to do. Many plaintiff's attorneys make the error of thinking that anger is enough; it's far better when the anger moves from impotent to motivational, and the most fool-proof way to accomplish that is by means of the Rules with a Reptile framework. There are other ways to do it but none as reliable.

The "Rules within a Reptilian" approach does not scare jurors; instead it enables them to make themselves safer -- with motivating anger usually (not always) as the catalyst. The result is the emotional change from anger to such emotions as pleasure, satisfaction, revenge fulfilled, pride and a sense of importance, etc. Hard stuff for a defense to fight.

All this is well beyond the theory stage; the neuroscience folks have seen it, and the string of verdicts (along with what jurors say afterwards) over the past 30 months shows that properly done, the defense is usually powerless to derail it.

I think all these views on anger are correct and that the *Rules* and *Reptile* approaches are the products of intelligence, resilience and vitality. They are also blueprints to further direct intelligent, vital energy. Like appraisal tendencies, I think the converse is also true, that when attorneys utilize these approaches, it augments their own motivating anger, which helps focus and energize their efforts. The attorneys, in turn, transfer this motivating anger to the jury as

certainty (in their judgment) and a strong desire to control the defendant's behavior, which empowers juries to return larger verdicts.

### **Lead Characters are Blamed for Controlling Bad Outcomes**

Another common trial strategy, framing the case around the other party, may be more fully understood through the ATF lens. People tend to blame the lead character in the story for causing the bad outcome because that person is perceived as having control over the situation. Accordingly, both sides focus on the other party, opening their story and keeping attention directed there until jurors have attributed blame. Now there is evidence that this framing *alone* augments angry emotions because it activates cognitive appraisals of external human control and certainty (the jurors already know what happened to the plaintiff).

### **Anger Limits Our Ability to Consider Opposing Information**

Once jurors are angry, it is difficult to get them to reconsider who is to blame. Emotions limit our ability to consider contradictory evidence that challenges that emotion. The limbic system overrides the rational, conscious mind, thereby sustaining the emotion and its bias. It is unclear how long this information filtering effect persists, probably through the refractory period of emotions, when we discount or ignore knowledge (new and known) that challenges the activated emotion.

The duration of the refractory period varies from seconds to hours, possibly days for very strong emotions, and begins again each time the emotion is reactivated. (See *Emotions Revealed*, by Dr. Paul Ekman (2003), an excellent introduction to emotions and facial expressions.) This may go on until the issue that's creating the emotion is resolved, e.g., when there's a verdict. Strong emotions reduce the windows of opportunity to persuade.

### **Anger Causes People to Accept Higher Risks**

The role of cause and effect of emotions and cognitive appraisals can be reversed, where emotions actually cause the cognitive appraisals. Winterich et al. discuss "appraisal tendencies," giving the example of the woman, who was angry at the driver who cut her off, later making riskier judgments regarding unrelated matters because the cognitive appraisals of human control and certainty were activated. This would lead an angry person to view risk in a more optimistic way, i.e., accepting higher risks because she assumes that she controls her health.

### **Cumulative Effects of Emotions Arising from Events Outside the Courtroom**

Dr. Winterich also pointed out that emotions can accumulate, where the feelings jurors bring into the courtroom can augment their reactions to testimony. Since jurors' lives are often impacted by trial, they may be angry or anxious. People expect that jury duty will be frustrating, but if jurors start to blame an attorney for taking far too long to present the client's case, this may trigger additional anger towards that attorney, whose client may be unfairly punished.

Practice Tip: the attorney can mitigate displaced anger by humbly and sincerely apologizing to the jury for possibly frustrating them, and asking them to direct that frustration towards the attorney herself and not the innocent client. Whenever possible, attorneys should also emphasize to jurors that they are trying to save time.

### **Fear Increases Jurors' Perceptions of Situational Causation, Outside Their Control**

Fearful people are more risk-averse and more likely to attribute causation to things outside of their control, whereas angry and happy people are more risk-seeking and more likely to *assume* they control their health. (Like anger, happiness is also associated with certainty and individual control, but with a positive outcome.) Research also shows that fearful people think things through more systematically whereas happy and angry people rely more on heuristics.

Since this process is outside of our conscious awareness, it may be hard to believe that our emotions can influence judgments about our safety in such an illogical way; however, other research has confirmed this effect. (See Han, Lerner & Keltner, "Feelings and Consumer Decision-making: The Appraisal-Tendency Framework," *Journal of Consumer Psychology*, 17(3), 2007, 158–168.) Study participants were asked to hold their faces into prototypic expressions of sadness and anger, which created the target emotions.

Simply holding sad or angry facial expressions affected people's perceptions of the cause of a negative event. People making sad faces were more likely to attribute the cause of negative events to situational causes, while people making angry faces were more likely to perceive human causes and attribute blame to others. The same effect on risk-assessment was observed by showing participants subliminal images of sad and happy faces. (See Yang & Tong, "The effects of subliminal anger and sadness primes on agency appraisals," *Emotion*, 10(6), 2010, 915-922.)

### **Case Study 1 – Medical Malpractice**

#### **Anger Reduces Jurors' Ability to Empathize**

Strong emotions can produce surprising results. A recent wrongful death case provides more evidence of juror anger blunting their ability to feel sadness, which is closely related to sympathy and is sometimes a component of compassion. In this case, an 88-year-old woman died a painful, prolonged death due to an improper medical procedure, resulting in the doctor surrendering his medical license.

The jury was so angry with the defendant that several jurors ran up to the plaintiff's attorney afterwards and asked him to look into filing criminal charges against the doctor. These same jurors had just returned a defense verdict! There was a disconnect; they did not feel an attachment to this woman's family, probably because they were so angry. They explained that the decedent was old and the negligence probably didn't kill her. (See Don Keenan's Reptile Superstar blog on Tommy Hastings at <http://www.keenantrialblog.com>. Click on "Older Entries.")

As seen in this instance, anger is a double-edged sword that is dangerous to both sides because anger limits jurors' ability to analyze problems, is contagious and motivates strong action, not just to punish but also to control. When we add the findings of Dr. Winterich's research, that anger can blunt sadness, we can also infer that it can blunt empathy for an injured person or innocent defendant. If jurors are angry for an extended period of time, be it from testimony or frustrations from their own impacted lives, they may fall into an angry mood that interferes with their ability to empathize and remain open to testimony. This state may last for days or perhaps the length of the trial.

## **Case Study 2 – Products Liability**

### **Jurors Follow Their Innate, Emotional Sense of Morality and Fault**

In every trial, jurors decide cases with their own emotional sense of morality and fault, rather than following legal standards to arrive at their verdicts. Moreover, strong emotions often lead jurors to parse factual dichotomies and impose burdens of proof to unreasonably favor one side over the other.

During a benzene litigation conference in New York City, I noticed that every time warning labels were shown to mock jurors, they reacted negatively to the plaintiff even though plaintiff's attorneys were making clear, strong points regarding the warning defect legal issue. (This was measured via perception analyzer dials that record jurors' self-reported moment-to-moment positive or negative affect throughout the trial.)

The fact pattern was set up to demonstrate effective direct and cross-examination of live experts, so causation was a disputed issue. This strict liability case did not legally depend on negligence or fault; however, the jurors assumed causation without discussion and focused on fault instead.

The jurors agreed that the labels should have included more information, that the defendants knew that their solvents caused cancer and that the solvents caused Plaintiff's cancer--well beyond the factual findings required to find liability. However, the jurors returned a defense verdict and said they would not award any damages to the plaintiff, even though they strongly favored the plaintiff and blamed the defendants after closing arguments. During deliberations, jurors blamed the employer for being mostly at fault.

### **The Structure of the Verdict Form and Deliberations Will Affect Jurors' Judgments**

During deliberations, the jurors changed their feeling judgments, which are often difficult to explain because they are formed in the unconscious. To explain our feeling judgments, we invent rationalizations that can sometimes be easily challenged. Jurors can arrive at different verdicts depending on whether they begin deliberations by simply voting for which side they favor or explaining what evidence was most important to them. Trial research has also shown that general verdict forms can increase findings of liability because these feeling judgments tend to favor the plaintiffs more than the defense. Special verdict forms, which require that jurors answer specific fact questions, result in more defense verdicts.

Practice Tip: to protect favorable jurors' feeling judgments, attorneys should arm them with concisely worded arguments and rebuttals. (See Practice Tips section below for more information.)

Soon after deliberations commenced in Case Study 2 and before a vote on which side jurors generally favored, a juror brought up the fact that the plaintiff did not wear gloves. This elicited much discussion and eventually strong agreement from other jurors that the plaintiff should have worn gloves. Since the discussions centered on what the plaintiff and his employer did wrong, they were blamed instead of the defendants. Jurors did not know how to argue against this point or reframe the discussions to another issue.

If the discussion had begun with a vote as to which side jurors generally favored, they would have seen that about 12 of the 16 jurors favored the plaintiff (some votes will change due to group dynamics). This would probably have resulted in jurors changing the focus to facts that supported the plaintiff, such as the inadequate label—facts under the defendants' *control*. Anger and blame (control) are closely dependent upon each other, with intensity of anger correlated with intensity of agency appraisal (See Harmon-Jones, "Anger and the Behavioral Approach System," *Personality and Individual Differences*, 35, 995-1005.) Hence, the more jurors believe a party controlled the bad outcome, the angrier they become and want to punish that behavior. The angrier they are, the more they assign blame and the less open jurors are to opposing information. It's a positive feedback that can lead to extreme verdicts.

### **Uncertainty Regarding Rule Violations Led to Defense Verdict**

Jurors want clear boundaries that delineate right from wrong, and they will rely on bright-line rules, even when they are irrelevant. Jurors will gravitate towards familiar, objective standards, such as Occupational Safety and Health Administration (OSHA) regulations, to determine if any parties are at fault.

It's very likely there would have been a different outcome had the plaintiff's attorneys coordinated a *Rules of the Road* strategy and presented alternative standards, i.e., evidence of unambiguous, *certain* examples. For example, a labeling expert could explain to jurors what information is required on product labels, compare defendants' labels with warnings on similar solvents and reconstruct defendants' label-making process, including information that was intentionally omitted.

### **Fear Caused Jurors to Assume Causation**

I believe that fear of the warning labels caused jurors to assume causation in this example. Although the labels lacked required cancer and benzene warnings, two displayed a fire symbol and read "DANGER! HARMFUL OR FATAL IF SWALLOWED. EXTREMELY FLAMMABLE." I noticed that these simple labels scared several mock jurors and probably affected others on an unconscious level. As explained earlier, fear drives people to assume there are greater risks outside of their control. When in a state of fear, people assume a dangerous product must have caused the known injury. Only one of these 16 jurors questioned whether the solvents caused Plaintiff's cancer during deliberations, and this one juror dialed in neutral reactions throughout

most of the trial and then strongly sided with the plaintiff after the medical causation experts testified.

### **Fear Can Also Raise the De Facto Standard of Care for the Party in Control**

I also think the dangerous-looking labels, which warned consumers to avoid skin contact, caused jurors to attribute more fault to the plaintiff and his employer for causing Plaintiff's cancer. In deliberations, jurors blamed the plaintiff for not wearing gloves, presumably because jurors believed they (as reasonable people) would have protected themselves from *cancer* by wearing *gloves* to avoid skin contact with the products that warned it was *flammable* and possibly lethal if *ingested*.

This doesn't rationally make sense, especially since this was a strict liability case, not negligence. But the untrained, unconscious, feeling mind does not distinguish varying levels and types of risk, nor complicated legal standards. It uses simple rules of thumb and recognizes that "FATAL" is something to be avoided. While fearful, jurors are more likely to apply their risk-averse standard of care onto the party they deem most in control of the bad outcome: in this case, the plaintiff who used the solvents without gloves.

Practice Tip: sequence evidence that might scare jurors after evidence of what the other party did to control the bad outcome. Also, avoid showing evidence of your client's control while jurors are still in the refractory period of fear, when they are more likely to impose a higher standard of care.

### **Lack of Anger Reduces Punishment**

After assuming causation, where fault was not at issue, jurors had to go through mental gymnastics to get through the verdict form and find for the defense. In the post-deliberation debriefing, jurors said they would award nothing to Plaintiff, a likeable actor. At first, I thought this was due to unclear rule violations and a lack of empathy from the fear of the labels, but it probably was not. The \$0 damages reaction was too extreme for too many jurors, and the fear would have dissipated by the time jurors were asked to decide a hypothetical award, had they decided for the plaintiff. I think jurors refused to punish an "invisible" chemical company because they *liked* it, or perhaps I should say *him*.

After I wrote a post-trial analysis of this surprising verdict, *Dissection of a Defense Verdict in a Benzene Lymphoma Trial*, one of the defense attorneys, Ted Ray of ExxonMobil, contacted me (and permitted me to quote him). He explained the defense had coordinated their efforts and actually planned and executed the mechanisms I described, as an experiment. Their "experiment" seems to have been partly based on their trial instincts, i.e., their intuition, not a reasoned, deductive application. Therefore, Ted was interested in my analysis of how their framing worked, and we both learned quite a bit from the mock trial and our communications. (I also inferred that Richard Gabriel, a talented trial consultant, contributed new ideas for their experiment, which Ted wanted to understand more completely.)

Practice Tip: plaintiffs' attorneys should clearly and repeatedly define the civil burden of proof throughout the trial or jurors will impose a much higher burden of proof, approaching the

criminal standard. Also, other legal standards, such as “substantial factor,” must be clearly defined or jurors will impose civil standards (or higher) for that element.

### **Emotional Framing Can Drive Decision-Making**

Ted wrote that they intended to create an “emotional frame” of the chemical companies as innocent criminal defendants—who should be exonerated. And that this is “a very noble function!” He added that their factual framing was to distinguish benzene from the “real product,” defendants’ solvents (the benzene content was minimal). I had written about the various effects of this framing, but now I understand another aspect of the “Not-Our-Benzene” defense (because it clearly was). As previously mentioned, jurors were told that they are unavoidably exposed to benzene throughout their lives. They did not feel that they had the ability to protect themselves from this threat, so they did not get angry with the defendants.

Interestingly, jurors *lowered* the defendants’ de facto standard of care regarding the warning labels. Not one of these educated jurors challenged the foreperson when he unjustifiably said, “We would love to know if your product is going to kill us. But if you don’t have to tell us, I don’t expect you to tell us.” Two other jurors actively argued for this assertion, and others seemed to also support it. I think this was because the jurors didn’t think about how labels are created and that the defendants *control* that process. Jurors also said they thought OSHA regulated the labels and product formulation, which is incorrect. Thus jurors did not get angry with the defendants for their failure to warn because jurors didn’t understand what defendants did wrong, according to their individual moral standards.

### **Anger and Fear Inhibit Compassion**

I think the \$0 damages in Case Study 2 makes it pretty clear that jurors lacked compassion for the plaintiff. Compassion is on the opposite spectrum of the control appraisal as fear, where fear is characterized by situational, outside influences and compassion is within the individual’s human control. But I think another cognitive appraisal may be at work, and perhaps another mechanism entirely, since compassion is not technically an emotion, but a state of readiness for action, based on emotional or cognitive empathy.

We can identify additional cognitive appraisals by reading Buddhist teachings on emotions. Mindfulness techniques permit greater awareness of our emotions, and Buddhist philosophy explains how emotions combine and inhibit subsequent emotions. For example, Buddhists believe that anger and fear are very similar, largely defined as an aversion or a repulsion to an object or person. Attachment is its opposite, an attraction. Therefore, fear and anger block our ability to empathize with others. This is important because anger, fear and compassion are the strongest emotional factors that drive jury verdicts.

### **PRACTICE TIPS**

#### **Focus on Other Party’s Control and What “Should” Have Been**

Just as you fight bias by presenting evidence that contradicts the elements behind that bias (e.g., irresponsible teenage driver assumption refuted by evidence of good grades), you have to

present additional facts that challenge the cognitive appraisals that are activated by emotion. In Case Study 2, jurors responded most favorably to plaintiff's closing when the defendants' knowledge and *control* of their products was emphasized.

This point was not legally or rationally as important as many others, such as the fact that the labels didn't inform consumers how to protect themselves from cancer. But it shifted jurors' attention back to defendants' control, which made them (momentarily) blame defendants. Focusing on defendants' control probably also angered jurors and motivated them to punish the defendants. If defendants' knowledge and control had been emphasized throughout the trial, I think there would have been a verdict for the plaintiff. Similarly, having a label expert talk about how the labels *should* have been written would focus the story on who had control. Thinking in terms of how things *should* be also makes us angry and motivates action to affect change, such as arguing for your side.

### **Greater Certainty Leads to Larger Verdicts**

The more certain jurors are of causation and fault, the greater the verdict. Jurors are absolutely confused by legal definitions and the verdict form. They do not understand *substantial factor*, *defective*, *significant*, *knowingly*, *negligence*, *reasonable*, *malice*, etc. Any ambiguity and confusion diminishes the certainty appraisal required for anger. You must simplify your case so that everything is easy to understand.

Attorneys already know that simplicity is best, but they still slip back into using unnecessary jargon and otherwise complicating their cases. Trials invariably confuse jurors, but it is critically important that your *Rules* are clear. For example, in Case Study 2, a labeling expert should specify what must be on a label, with concrete examples.

Sequence your *Rules* testimony after clear evidence, rather than anything that is confusing, preferably regarding something that is certain and controlled by outside, human influences. (The *Rules of the Road* explains how to do this well.) This sense of certainty (and control) is cumulative and will cause jurors to form a greater appraisal of certainty. This sense of certainty and anger can transfer, as an appraisal tendency, into larger verdicts.

### **Fortify Favorable Jurors' Feeling Judgments**

Feeling personality types have difficulty defending their emotional judgments, so attorneys should arm them with concisely worded arguments and rebuttals to expected counter-arguments. In closing, walk jurors through the verdict form, show them how to apply the law to the facts and clearly explain all legal terms. List your favorable facts and give jurors time to also write them down. Specify the verdict form question numbers to which these facts pertain. Also give your jurors short answers, talking points with just 5 or 6 words, to rebut expected arguments. Say it slowly, so they write it down. (If no one is writing, try to settle the case.) You should conduct focus groups before trial so you know which facts and arguments jurors will find most compelling.

### **Repeatedly Distinguish the Civil v. Criminal Burdens of Proof**

It is worth repeating that plaintiffs' attorneys should clearly and repeatedly define the civil burden of proof throughout the trial or jurors will impose a much higher burden of proof, approaching the criminal standard. Since many jurors will use their emotional reasoning and do this unconsciously, you will have to repeat this many times to overcome their internal sense of fairness. (See *David Ball on Damages 3*, by David Ball (2011), for a good preponderance technique, as well as a thorough list of motivations and excellent trial advice.)

### **LIMITATIONS AND AREAS OF IMPROVEMENT**

There are some limitations to keep in mind when applying these emotional blunting research findings. For example, Dr. Winterich's original journal publication noted that there is a strong dispositional tendency to their findings. In their second study, these emotional blunting effects were only seen in people who scored low on tests that measure motivation. People who are more likely to move towards their goals did not report measurably diminished anger after first experiencing sadness. Since leaders tend to be more driven, happy people, they might simply prefer an emotional state other than sadness.

Another limitation is the type of data used. Most cognitive appraisal research is based on college students' subjective, self-reports of their emotions. This is problematic for several reasons. We often do not realize we are emotional until others point it out to us, and we tend to forget the details that triggered the primary emotion that anger masks. We usually only recall one emotion, even though multiple emotion centers can be firing away in the unconscious simultaneously, as seen in functional neuroimaging scans. In fact, emotions can alternate rapidly and blend into one facial expression.

### **Additional Cognitive Appraisals for Anger**

There are varieties of anger with differing sets of cognitive appraisals, so our understanding of what generates anger is still developing. A better understanding of anger and how it relates to other emotions, as well as additional research methods, is necessary to develop a more complete knowledge of what causes anger.

### **Facial Expressions May Add More Insight Than Self-Reports**

Most of us are unaware of what we are feeling until after we have communicated it via facial expressions, voice and other body language; we might then notice others reacting to our emotional displays. Dr. Paul Ekman's work on facial expressions provides objective means to code displayed emotions. Also, many trial consultants are trained to read facial expressions, even momentary "micro-expressions" that are often not consciously experienced. These characterizations of emotion probably offer more insight than self-reports.

### **Dials Measure Overall Positive or Negative Affect (Valence)**

Another way to improve the measurement of emotions is via perception analyzer dials, which record overall positive or negative affect moment-by-moment, i.e., visceral reactions to a trial or focus group discussion. When used properly, these numeric dials can capture the context of unexpected emotional responses that are a window into our unconscious selves.

## **TRAIN YOUR COURTROOM INSTINCTS**

Trial attorneys continually adapt to unexpected facts, court rulings, jurors' moods, and all the other surprises that necessitate changing the best-laid plans. Seasoned trial lawyers have developed solid courtroom instincts by training their emotional brain, the "supercomputer" of the mind. This is achieved through extensive preparation, thoughtful analyses, and receiving quality feedback soon enough for your unconscious to associate it with the appropriate technique.

Most of us are resistant to change our opinions, but watch what happens when you prime people in various ways, such as subtly affirming their importance, focusing the story on the other party or redirecting their attention to another topic with contrasting cognitive appraisers. Suddenly, jurors are willing to change their mind because they are not trying to defend their sense of self or their current emotional state. You can see this immediately in real-time, during trial advocacy workshops.

Observing graphical displays of jurors' moment-to-moment reactions in a mock trial is also a great way for attorneys to practice *Rules of the Road*, *Reptile*, *Damages*, and *Polarizing the Case* techniques. It's fascinating, fun and useful. The benefits you reap will be shared by your client.

### **How to Participate in Workshops and Learn More**

I enjoy collaborating with attorneys, trial consultants, and academic scholars, so if you are interested in my workshops and research, please contact me and I will share information with you, including the paper mentioned in Case Study 2, *Dissection of a Defense Verdict in a Benzene Lymphoma Trial*.

You can also visit [www.JuriSense.com](http://www.JuriSense.com) for more information, including free, online MCLE webinars and mock trial workshop opportunities. The mock trial fact patterns and workbooks can also be customized for groups, such as consumer attorneys, bar associations and law schools. The State Bar of California has pre-approved MCLE credit for these workshops (MCLE Multiple Activity Provider 14856) and I will apply for MCLE credit in any state.

Email [tammy@jurisense.com](mailto:tammy@jurisense.com), call (800) 891-6592 or visit [www.JuriSense.com](http://www.JuriSense.com).