BUSINESS DEVELOPMENT

Building a Practice: From Solo to Multi-State
By Pamela Parker

Helpful advice on every aspect of running your practice, from opening doors through planning for retirement. This month: tips for expanding your practice—even across state lines.

Practice Management

LAWYER WELLNESS

Mindfulness 101: Tackle Your Inner Critic
What to do on those days when mindfulness is the farthest thing from your mind.

PROFESSIONAL DEVELOPMENT

Planning for Your Retirement: Ride into the Sunset or Sell?
By Terrie S. Wheeler

Invest in the marketing efforts and the technology updates necessary to find a buyer for the asset you worked your entire career to build: your practice.

Technology

PRACTICE TECHNOLOGY

Ask Techie

In this month’s installment of our technology Q&A column, our panel of experts answers your questions about how to secure your wireless network and whether you need to encrypt all your e-mails to clients—and if so, how to go about doing it.

PRACTICE TECHNOLOGY

TAPAs: More Tips on Billing Systems
By Jeffrey Allen and Ashley Hallene

Technological And Practice Advice to help you become more efficient and effective. This month: additional tips for choosing and setting up a billing system.

Substantive Law

IMMIGRATION

Expectations of an Immigration Hearing: How to Prepare, Part 3
By Julie Houth

The third and final part of our series provides perspective from current immigration attorneys regarding the Merits Hearing, what to do in case an order to be removed occurs in absentia, and post-decision activity.

TRIAL PRACTICE

A Once-in-a-Trial Opportunity: Effective Voir Dire
By Paul H. Jepsen and Daniel Wolfe
Learn how to identify and remove the most potentially dangerous prospective jurors.

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**ETHICS**

Searches of Electronic Devices: Recent Developments and Judges’ Ethical Responsibilities
By Keith Fisher

What are the ethical obligations of judges regarding potential searches of confidential information on their portable electronic devices by U.S. Customs and Border Protection and Immigration and Customs Enforcement?

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**CHILDREN’S RIGHTS**

Ten Tips for How Judges Can More Effectively Communicate with Children in Court
By Judge Samuel A. Thumma and Chloe Braddock

Communication errors with children in court are widespread and can often be attributed to poor questioning techniques and the use of confusing language. Follow these tips to ensure clear and accurate dialogue with children.

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**IMMIGRATION**

Access to Counsel in Immigration Proceedings
By Matthew S. Mulqueen

Appointment of counsel for indigent and minor respondents draws support.

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About GPSolo eReport

GPSolo eReport is a member benefit of the ABA Solo, Small Firm and General Practice Division. It is a monthly electronic newsletter that includes valuable practice tips, news, technology trends, and feature articles on substantive practice areas.
After more than a decade of happily running my solo law practice, I made a personal decision that would drive all sorts of new energy and growth into my business: I decided to relocate my family to another state. The ultimate, and very unexpected, result for my law firm was a multi-state practice.

I had built my solo practice in a clearly identifiable niche (special-needs families), and much of my success at bringing in business was due to my ability to identify with the clients I served. They liked me because I was like them. Of course, good work and respectful service matter, but clients approached me because they felt comfortable talking to me. I don't think of my firm as handling a specific type of law, rather, it serves a specific type of person—in my case, parents of children with special needs. I didn't want to lose the pipeline of clients I had built up over the years, and I was really concerned about the time it would take to recreate that in a new location so that my income would be sufficient for my family’s needs.

After considering several different scenarios for my firm, I decided that the best approach would be having multiple offices in multiple states. The simplicity of that sentence disguises the complexity of the decision making, but the actual process of setting up the multi-state practice was very straightforward.

Multiple States, One Practice

I chose to keep the original office and hired an attorney to work in it. I chose an additional office location in the area where I planned to move, and I hired an attorney licensed there to handle the clients in that location. I chose a third location in an adjacent state but a short driving distance from my new home, and I hired an attorney licensed in that state to work with the clients there. Before being chosen, all the locations were researched as to population levels, income levels, and other attorneys in the market. The closeness of the two new locations would allow me to make personal appearances for speaking and client development purposes. With multiple offices, I
could keep my income at an acceptable level and leverage the strength of the firm’s somewhat unique niche as well as my own strength as a rainmaker.

The Big Question was whether my personal approach to clients would still work when not everyone in the firm was me in the same office. I had considered and rejected the idea of hiring only attorneys with special-needs children. I decided it was more important to look for attorneys with an ability to empathize and communicate with clients the way I wanted. I trained each attorney about the lives of our clients as much as I did about the area of law they would be working in. I created a new client intake system that includes initially speaking with me on the phone, which allows me to create a rapport and trust in the firm before the new clients meet with the attorney who will actually represent them. So long as their attorney continues to treat them in the same manner that I do, the clients continue to feel that the “firm” understands them, and this feeling is important to our client experience and to the ultimate trust the clients have in the work that we do for them.

A big advantage of having multiple offices rather than expanding one location is the ability to work with smaller client lists and still have a viable firm overall. There is an unmet demand for part-time attorney positions. I had many qualified and eager applicants for my part-time attorney postings, applicants who really wanted part-time employment. This frees you to open in locations with smaller populations or to work with types of clients who are a smaller percentage of the population. It also reduces the pressure to bring in a high number of clients in any one location to make your office fiscally viable. With administrative support centralized, several offices with smaller numbers of clients can support the staff as well as a larger, single office can.

Tips for Multi-State Practice

For anyone thinking about growing their firm through multi-state offices, below are a few key areas to consider, along with needed adaptations:

- **Marketing.** Marketing materials that are based on issues rather than discussions of specific laws can be used in multiple states. Strive to keep your materials focused on the problems and needs of your clients, and you will not have to build separate marketing libraries for each state. You should still do online material that includes your location keywords, and you should still have a plan to know and interact with referral sources in each location.
○ **State ethics rules.** In the planning stage, a review of each state you want to locate in and a side-by-side chart of the areas relevant to practice management is very helpful. Compare rules related to advertising, IOLTAs, fee agreements, types of fees, letterhead, and attorney identifications, among other issues, to find common areas to incorporate into firm standards and practices and to clearly flag areas that need to be handled on a state-specific basis. Write those areas into firm policies and procedures.

○ **Training and communication.** Because staff in the new firm will be physically separated from other offices, have a way to connect everyone. Employees need to communicate with and work with each other. Group bulletin boards, scheduled conference calls, even methods for individual attorneys to talk with each other directly are all important. The managing attorney should drive regular communication among all employees to be sure no one becomes isolated.

○ **Client experience.** Processes to ensure that each client has “The Firm” experience are needed. Written procedures on client management and communication are critical so that everyone has the same experience, even if they are two thousand miles apart. Regular discussion and feedback with employees is important to clarify and emphasize the importance of these procedures and processes. Think as a firm, not as a collection of individual offices.

○ **Attorney training, supervision, and support.** The intent is to have a single firm rather than a marketing machine with referral attorneys, so a working relationship with each attorney is necessary. The associates bring practice expertise for their respective states, but the founder of the firm brings Big Picture expertise about how to work with firm clients. The strategic approach to client matters should be directed and driven from the managing attorney to ensure consistency across the firm.

○ **Employment issues.** Each state, and some localities, have employment laws that need to be followed. A payroll service operating in all states will take care of much of this, but research each potential location for additional laws regarding benefits, working conditions, and the like. Associate attorneys should be employees, not contractors, both to give you the control over their work that you need and also so that you can operate the firm in a state where you are not personally licensed. Pay for employees can be on a per-project basis rather than on a guaranteed salary, which provides a lower start-up cost while building business in a new location.
Final Thoughts

Getting clear on your priorities for yourself makes all the other decisions easier. If you are growing, you might as well grow in a way that gives you the type of work and life you like best. Leverage what you do well. Design what you want. Careful thought and planning allowed me to open additional offices with very little start-up money. Growth can happen if you are clear about where you are headed.

Authors
It’s February. Christmas is over, and the work has begun. Winter has us in its final grip. We know spring is around the corner. New clients have decided to move forward with their cases, and old cases have concluded. The office is busy. Our home lives are busy. We have been doing pretty good on our self-care routines. We haven’t gotten around to meditating yet, but we are still thinking about it. We will get to it someday. We hit the gym a couple of times in January, but gosh, February is really busy. Trials are coming up, and every time we turn around there is another deadline. We think that we have a weekend off, and then something we forgot to do comes into focus.

*Sound familiar?* I bet you can add lots of examples to my list.

Amid all the busyness of every day, have you ever had one of those days where everything goes wrong? All day long. Where by the end of the day you feel like you have been run over by a truck? Where no matter how competent, how appropriate, how prepared you are, something happens that makes you realize how totally incapable you are and how your preparation was not enough? Your competence was not enough? Things spiraled out of control before you knew it?

As lawyers, we know that the practice of law is a very stressful profession. As much as we love it and thrive on it, we know it is hard. We are prepared for those days, right?

*My recent Mindfulness Torture Chamber*

I had one of those days last Friday. I went into court on a minor settlement hearing. The protocol is simple, and everyone knows their job. Simple stuff. Not in this case. The plaintiff’s lawyer told me that it was my job to prove up the case and that he wasn’t going to do his questions. I knew that he just was too scared to do it himself. This young man did not show me an ounce of respect or thanks for what I had done for him and his clients.
This experience was far from my normal, and it felt terrible. My inner critic began trying to figure out what I had done to create it. My mindfulness voice whispered not to take it personally or go down the rabbit hole of self-criticism. Thankfully, I listened and hoped the day would improve. It didn’t.

I got back to the office and received a client letter that was different than what I expected—the fee was paid but the retainer was not what it was supposed to be. Another tough situation to deal with. Low blow number two.

The final catastrophe of the day was a doctor’s appointment. I took off early to go across town in heavy traffic. I got there on time and began to fill out my paperwork. The front desk told me that they didn’t have my referral, and by the time they looked for it and found they had it, they announced that I needed to reschedule. Now I was without the prescription for the treatment I need and was stuck across town at 5:00 pm. Low blow number three.

I dubbed the day the “Mindfulness Torture Chamber.” With all these hits today, can’t I have a pity party? Can’t I break down and cry and complain and tell everyone all about it? If I am so “mindful,” why do I feel so dejected? If I am so “mindful,” how do I deal with this? Other people had let me down all day long. Was it me? What did I do to be treated so bad? Maybe this is my fault? Am I just over the hill now? The inner critic runaway mine train could well have taken over, and I could have just gone down that path and stayed there as long as I wanted to keep the pity party going.

*Have you ever spiraled? A small event gets magnified and all the sudden it’s the end of the world?*

Luckily, with my regular mindfulness practice, I was able to get intentional about what was going on and did not get upset. I was able to compartmentalize it to a certain extent and did not let it get to me so deeply. I could see immediately that I have improved since I began to really dig into my practice, and I felt better immediately. Old patterns do fall away with practice and consistency.

In these types of situations, we can easily blame ourselves and take things personally. The inner critic activates, and we focus on how we were at fault, how this kind of thing always happens to us, how we are not worthy and that is why these things happen.

The way I look at it now is as a test. How well do I handle adversity and not let it make me lose my peace or steal my joy? Am I able to stay calm and loving amid attack and unfairness? A mindful
person does. A mindful person doesn't take things personally. A mindful person does not get attached to outcomes. A mindful person just says, “Life happens.”

Judy Carter, in her *Power of Purpose* podcast, did a fantastic talk on the “inner critic.” She talks about the need for us to “get out of our own way” in creating our purposeful lives. Often when adversity hits, if we really think about it, we can pinpoint our responses to an event that happened to us as children. Our subconscious brain has all that stored up, and when a situation today looks and feels the same, the old feelings and emotions can surface. The inner critic begins talking. “See, what did I tell you, no one cares about you. You are too old, and your time has come and gone. Go ahead, have your pity party.” Judy tells us that we must “never let the inner critic have the final word.”

The practice of mindfulness can help you overcome these events that occur in daily life more quickly and efficiently than you might have before. I can surely tell a difference in how I responded Friday over my response in years past. I was able to laugh about it and really began to think about my feelings and emotions that day for clues as to what I can do better in the future. One thing I have learned in the book I have recommended so often, *The Telomere Effect*, is in Chapter 6. Authors Elizabeth Blackburn and Elissa Epel say, “Don’t believe every thought you have.” They have scientific evidence to back up the premise that how we treat our thoughts determines how long we live our lives.

If we let that inner critic loose in our brains during the course of any one day, we are actually shortening our lives. True statement. This is enough to make me really monitor my thoughts. And to put a tight rein on my inner critic. When you realize that your thoughts become things and that there is immense power in our thoughts, and you become mindful enough to really edit and review them, it becomes much easier to navigate through a Mindfulness Torture Chamber like the one I found myself in Friday. I handled it in the best way I could, I didn't take it all personally (for long), and I was able to maintain my peace and practice compassion and forgiveness.

Meditation and mindfulness practices like gratitude and uncommon appreciation are the key to my new type of response. It is not that I don't have those moments anymore. It is not that my life is perfect now. It is just that I have committed to a practice that gives me knowledge and ability to come out of it quicker. It surely makes the stressful practice of law easier.

How did that Friday night go? I stopped by the Verizon store and upgraded to an iPhone X. Then I met my precious niece at the house and we talked and laughed and played spa all night. A bad day
doesn’t define me, and my inner critic didn’t win.

Until next time . . . namaste. Please let me know if you have any tips, sources, or experiences with mindfulness you want to share at melanie@bragglawpc.com.

“You should sit in meditation for 20 minutes a day, unless you’re too busy; then you should sit for an hour.” — Zen proverb
You might be wondering why a marketing consultant is writing about succession planning for your practice. The truth is that you lawyers who graduated from law school in the 1980s are now facing the difficult decision of whether to slowly ride off into the sunset or take the steps necessary to bolster and sell the asset that is your practice. You worked hard for more than 30 years—sometimes more—to build a profitable practice. As you approach retirement, you have two primary options:

- Learn to ride a horse and head off into a picturesque sunset
- Invest in technology and marketing and find a buyer for the asset you worked your entire career to build
The first bullet doesn’t really require any marketing expertise, just basic equestrian skills. But the second is 100 percent marketing.

Ready to Move On?

Many lawyers like you may grow tired of the grind of private practice. After building a successful career as a lawyer, you may decide to transition out of private practice to go into semi- or full retirement. You have labored long and hard to build your solid reputation, resulting in a successful, lucrative practice.

At parties and bar association events, your contemporaries are using the R-word quite regularly, causing you to pause and ask yourself, “What does retirement mean to me?” At this stage in the game, many lawyers begin to look with enthusiasm at the idea of scaling back, hitting the links, traveling, and spending more time with family. As you look at the next phase of your career, keep in mind that you are your practice. Clients hire lawyers, not law firms. You don’t want to simply walk away from the valuable relationships you have built with colleagues, referral sources, and clients. These relationships are an important ingredient to being able to successfully sell your practice to a firm interested in the value you have built. In fact, most law firms will rely on you staying on board in an “of counsel” capacity to transition these valuable relationships to lawyers in the new firm.
Tips to Increase the Value of your Practice

Now is the best time to maximize and leverage your years of experience and name recognition to maintain and even grow your practice. The valuable client and referral relationships that you have cultivated over the course of your career thus far will be key to setting the stage for future success as you ultimately transition out of practicing law. In fact, in this scenario, client loyalty can be transferred and will increase the overall value of your practice. As you look at transitioning your practice, consider the following ideas to help you maximize the asset that is your practice versus simply riding off into the sunset and hoping for the best.

- **Identify your time horizon.** Are you looking to scale back in one year? Three? Five? Make sure you set a realistic deadline for when you would like to reduce your time commitment and start spending more time pursuing your hobbies and passions. Try not to put off this discussion with yourself until you are tired or burned out. If you really want to maximize the value of your practice to a potential buyer, aim for a five-year window to transition. It’s a great feeling to know that you are working hard with a realistic and measurable goal in place: to sell your practice in five years at a premium to a firm committed to continuing to serve your clients.

- **Continue building relationships.** As you have noticed, many of your best referral sources are also retiring from their own careers, leaving you with an opportunity to build new relationships within those organizations. Be proactive. When you know one of your best referral sources is contemplating retirement, ask them to introduce you to others in their organization and endorse the work you do as a lawyer. Remember that you are viewed as the highly experienced lawyer you are, and use this status to keep your network fresh.

- **Transfer your knowledge and keep your profile high.** Now is not the time to slowly fade away. Redouble your efforts to expand your name recognition in the marketplace. Write
articles and give presentations. Focus your efforts on reaching groups of prospective clients and referral sources. Doing so will help you maintain your contacts and ensure your relevancy as an exceptional lawyer. If a prospective buyer of your firm goes to your website and sees your last presentation was in 1997 and your last article was ten years ago, it will be assumed that you have lost touch with current trends in your practice area and have already begun the process of fading away. Keeping your profile high is one of the best ways to ensure you will be able to negotiate the highest value for your firm. There are many strategies that work for small firms. Read the article I wrote for the GPSolo e-Report on “Stressed about Marketing? Do What REALLY Works for Solos and Small Firms.”

- **Invest in technology.** It is not cost-prohibitive to invest in the latest technologies. Now is the time to make sure you are using the latest practice management technologies. Assess your document management system, time and billing, and communications databases. If you are still using old technology, you are not going to appeal to today’s generation of lawyers who have been raised on technology gadgets and web-based solutions. Don’t respond to every e-mail you receive offering the latest new practice management tools. Rather, consider hiring a consultant familiar with all the options out there, and let that person guide your decision making. The great news is that prices have come down considerably for many law practice management solutions as they have moved to the cloud. For example, you can purchase an e-mail database such as MailChimp for around $30 per month. Need integrated time, billing, and case management? Investigate PracticePanther, Clio, Bill4Time, and MyCase. For $30 to $50 per user per month, you can automate your entire practice.

**Use LinkedIn.** Make a commitment to actively add contacts to your LinkedIn profile. At your level you should have well over 500 contacts. If not, proactively connect with everyone in your
“real” network. Then, post and comment on LinkedIn. Show contacts you are still extremely relevant by providing links to interesting information and news. Take notice of promotions, awards received, and interesting updates by commenting on your connections’ news and accomplishments. Many things have changed with social media. You may want to read the article I wrote for the GPSolo e-Report in October 2018 entitled “How to Master the New Rules of Social Media Marketing.”

- **Give your website a facelift.** Nothing will turn a possible successor off more than going to your website and seeing a blocky, visually unappealing site your nephew created for you ten years ago. With the advent of platforms such as WordPress, website development has become more accessible to smaller firms. Find a website developer in your area and invest in a new website. It underscores the perception you are creating of being actively engaged in your practice. You may enjoy an article I wrote last summer on “How to Turn Your Website into a Lead Generation Machine.”

- **Share your knowledge with video.** As a senior-level, highly experienced lawyer, you are a font of important and relevant information for clients and referral sources. Hire a professional videographer and create 20 to 30 videos to embed on your website. Many of our clients find having videos eliminates the need for “free” consultations. Here are a few examples of video rooms we have helped our clients create: Maxim Law Video Consultation Room, Micklin Law Group Videos, and Cedar Creek Energy Video Library (this last is a solar company so you can see how another type of business uses video on its website).

- **Remember that content is king.** If you don’t continuously add new content to your website in the form of blogs or other practice-specific information, you will not easily be found by prospective clients and referral sources online. Creating a steady stream of high-quality, audience-specific content is the most important component to ensure you come up high on the list of organic (versus paid) results on Google. For more ideas on adding high-quality content to your website, read an article I wrote on “Content Is King: Your Path to Increased Name Recognition and New Business.”

- **SEO is a must-have.** Search engine optimization (SEO) is no longer a “nice-to-have” part of the marketing mix—it is a must-have. At my consultancy, PSM, we would not even consider building a new website for a law firm without including SEO to ensure the right prospective clients and referral sources can find the firm when searching Google. SEO can be separated into two parts: on-page and off-page. On-page SEO is conducted when your website is being built and involves optimizing each page of the website by using appropriate keywords and
phrases throughout the content, as well as creating meta-titles and meta-descriptions that come up on Google when a page on your website is featured. Off-page SEO is accomplished by securing guest blogging opportunities and seeking out other high-quality back links (high-quality websites linking to yours). SEO is a science and an art. It is not something you will likely want to tackle on your own. For more information on this important topic, you can read an article I wrote on How to Boost Your SEO Without Breaking the Bank.

In summary, have a conversation with yourself about how much longer you want to practice law. Give yourself plenty of time—five years hopefully—to begin planning your transition by investing in both the technology and marketing strategies that will maximize the value of your law firm. Don’t sell yourself short—you have worked for more than 30 years to build the empire you have today. Now is the time to commit to the investments in your practice that will show prospective buyers you are still relevant and continue to offer your experience and knowledge to clients, prospects, and referral sources.
Welcome to the latest installment of our monthly Q&A column, where a panel of experts answers your questions about using technology in your law practice.

This month we answer readers’ questions about how to secure your wireless network and whether you need to encrypt all your e-mails to clients—and if so, how to go about doing it.

Q: What can I do to secure my wireless network?

A: If you’re not feeling the love from hackers, you can take measures to secure your wireless network with these three easy steps:

1. Change your network name and the default administrator password
2. Enable WPA2 encryption; and
3. Use a strong password for your wireless network.

These changes can all be made from your router settings; refer to your router’s user manual for instructions on how to access this from your web browser.

—By Ashley Hallene, Technology Subcommittee Chair/Deputy Editor, ahallene@hallenelaw.com

Q: Do I have to encrypt sensitive e-mails and attachments to clients? If so, what should I use?

A: To be safe, yes, you should use e-mail encryption or another secure method to send sensitive messages and documents.

ABA Formal Opinion 477R, revised May 22, 2017, provides guidance but not an absolute requirement to use encrypted e-mail for all client communications. (For analysis of the opinion,
see the Litigation News article “New ABA Guidance on Electronic Client Communications.”

What are your options for securely sending sensitive messages and documents?

- Client portals in many cloud practice management systems allow you to securely exchange documents and messages saved as documents.

- Tutanota offers a free service for sending and receiving encrypted e-mails and attachments from a private webmail account. Using this simple application, you give each client a password they will need to open your secure e-mails delivered to their in-boxes. For $1 per month, a premium account sends notification e-mails to your main e-mail address when clients send you secure e-mails.

- RMail has a free plan that lets you send five secure messages per month. The professional plan ($14.99 per month annually) lets clients open secure e-mails without a password in most cases. All plans include registered mail that proves delivery.

- ShareFile at $10 per month for one user or $77 per month for five users (with advanced features) is a popular service for professionals. Unlike most other options, it does not require your clients to use a password.

- File-sharing features of cloud services can create password-protected links you can send to your clients. Box has the best reputation. The well-known services Dropbox and OneDrive have been successfully exploited by hackers.

- Microsoft Outlook can support the transmission of encrypted e-mail, but it can be complicated to set it up.

For simplicity of setup and no or low cost, Tutanota wins. For more powerful capabilities and for avoiding required password use by your clients, consider some of the other options.

—By Wells H. Anderson, JD, Contributing Technology Editor, info@securemyfirm.com

What’s YOUR Question?

If you have a technology question, please forward it to Managing Editor Rob Salkin (robert.salkin@americanbar.org) at your earliest convenience. Our response team selects the questions for response and publication. Our regular response team includes Jeffrey Allen, Wells H.
Anderson, Jordan L. Couch, Ashley Hallene, Al Harrison, and Patrick Palace. We publish submitted questions anonymously, just in case you do not want someone else to know you asked the question.

Please send in your questions today!
Billing is the heart of the business side of the practice of law. No matter how well you practice law, if you do not bill and collect for your services, you will soon find that your business has failed. This month we have some additional suggestions to help you select and implement a billing system. (For our introduction to the topic, click here.) Whether you plan to open your practice next month or have an established practice, you want a billing system that optimizes your ability to collect for your efforts.

Tip 1: Reach for the Clouds!

We have had cloud-based billing systems available for some time now. Many of them have evolved into efficient means of recording time and generating bills for your practice. We recommend that you use a cloud-based system for several reasons—in particular, the ability to access them from anywhere you have an Internet connection.

We prefer the cloud-based systems because they enable you to bill from wherever you happen to find yourself. A good cloud-based system saves you the time of recording the information on a note somewhere in or out of your computer and then re-entering it when you get back to the office. In the best of all worlds the system will have an app that works with your smartphone so that you do not need to connect through a browser (which may not have optimization for use on a smartphone). Additionally, a cloud-based system should allow you to generate the billing from anywhere in the world that you have an Internet connection. We like to get bills out by the tenth of the month at the latest, and being on vacation is not an excuse for getting them out late. As a result, we have been known to generate bills from locations throughout North America, South America, and Europe (we plan to expand that list over time).

Note: In looking at a cloud-based system, make sure that your provider will safely and securely encrypt and store your information as well as back it up for you. Check out the backup
arrangements, and make sure that you find them secure and functional. Also make sure that they comply with the requirements of the state bar for every state in which you hold a license.

**Tip 2: Keep It Simple!**

You want to find a system that makes it easy to record time and expenses. The more easily and quickly you can record information, the greater the likelihood that you will do so concurrently with your work. The more quickly and easily you can generate bills, the more likely you will get them out regularly and in a timely manner.

**Tip 3: Check Out Its Features**

You want to find a system that does what you need it to do and does so in a way that makes your professional life (and that of your staff) easier, not more difficult. Your billing system should allow you to easily record time, record expenses, generate bills, and record receipts. Ideally, it will also integrate with whatever accounting system you or your accountant chose for your firm. If it does, you save the hassle of having to enter some information into two different systems separately. The system should allow entry from all billing personnel and should make it easy for you to generate bills to send out to clients. If the billing system you like best does not integrate with your accounting system, that does not mean you should necessarily reject it. Rather, you should weigh the amount of work necessary to handle the additional entries against how much you prefer that system to one you may not like as much but that interfaces well with your accounting system.

Your favored system may well prevail despite that deficiency. We have seen some systems that provide full accounting functions and also include a billing module. You may find one that works optimally for you. In reviewing the system, make sure that it will properly handle IOLTA accounts and comply with whatever rules each state in which you have a license requires (remember that if you have more than one license to practice law, you need to keep in compliance with the rules of every state in which you have a license).

**Tip 4: Protect Your Information**

Make sure that you secure access to your information by using a strong password and requiring that everyone in your office that gets access to the system uses a strong password. Also make sure that you secure the access to your devices that will access the system (computers, tablets, smartphones) with good, strong passwords. Make sure that all passwords for devices and access get stored securely by everyone in your office to minimize the risk that someone can get access to
your information and your clients’ data. You have an ethical obligation to protect the confidentiality of your clients’ information.

Tip 5: Use It Properly

Starting up with a new billing system can prove frustrating and traumatic. But it does not have to create that reaction. You can minimize the frustration and trauma through good planning for implementation and by giving yourself and your team the opportunity to test out and learn the new system before you implement it as the billing system for your office. Once you have worked with it and feel comfortable with it, the conversion happens more smoothly and easily. One final comment: Studies have shown time and again that the failure to record your time concurrently with the work results in lost time. If you bill for your time on an hourly basis, the failure to record your time converts to lost billings and lost receipts. We prefer a cloud-based system as it promotes concurrent billing by making it easy to access the system anywhere you have a connection to one of your Internet-accessing devices.
Immigration matters are often confusing and overwhelming to a non-attorney, especially now given the changes to the laws. This article is the third and final installment of our series discussing the procedure of immigration hearings and how to prepare. In this series current attorneys who practice immigration law in solo and small law firms in the United States provide guidance and advice about this stage of the immigration proceedings. Individuals and lawyers should be aware that immigration laws often change, especially in the present political climate. This article addresses immigration procedures that are applicable now.

Pre-Immigration Judge's Decision and Immigration Judge’s Decision

Once an individual receives a Notice to Appear (NTA), he or she will need to appear in immigration court, formally known as the Executive Office for Immigration Review (EOIR). More information on what to do when an individual receives an NTA can be found in Part 1 of this series.

After an individual receives an NTA, there are generally three stages in an immigration hearing: (1) the Master Calendar Hearing (MCH); (2) the individual hearing, also known as the Merits Hearing; and (3) post-hearing proceedings. More information on an MCH and how to prepare for a Merits Hearing can be found in Part 2 of this series.

At the Merits Hearing, the immigration judge will either (1) grant relief or (2) issue orders of voluntary departure or removal. The immigration judge sometimes will state the decision immediately in open court, but in some cases the judge will choose to continue proceedings in order to provide a written decision.

Attorney Nallely Abad of Velasquez Immigration Law Group in Las Vegas, Nevada, provides some background, stating, “If the decision is going to be in writing, your client will just have to await a decision.” Attorney Daven R. Ghandi of Smotritsky Law Group, PLLC, in New York City further adds,
"At the conclusion of the individual hearing, the judge will issue his or her decision. They will articulate the reasons why the client either won or lost their case.”

After an individual has gone through stage one and stage two, he or she will be in stage three, the post-hearing proceeding stage. At this stage, an individual's hearings have come to an end, but there could be more proceedings in the future. Whether an individual will take future actions in his or her case will depend on whether he or she is satisfied with the immigration judge's decision.

Order to Be Removed in Absentia

Individuals should make every effort to appear in court when requested; unfortunately, some individuals miss their hearing, and the consequence can be very severe. According to Ghandi, “If an individual fails to appear for their immigration court hearing, an order to be removed will occur in their absence. Some reasons individuals miss their hearing date include not receiving a notice of hearing from the government; the individual was involved in an accident; the individual has poor health; or other personal problems. They may have received ineffective assistance of counsel where their attorneys failed to advise them of their court date.”

Attorney Ian M. Seruelo of the Law Offices of Ian M. Seruelo in San Diego, California, says in his experience, “When a respondent fails to appear in a scheduled removal proceeding, the immigration judge will first determine if there was proper notice to the respondent. The Department of Homeland Security (DHS) has the burden to establish by clear and convincing evidence that proper written notice was provided. DHS will also have to show, under the same burden of proof, that the respondent is removable. If DHS is able to meet its burden, then the immigration judge would order the respondent removed in absentia.”

Even if individuals miss their hearing, both Ghandi and Seruelo suggest that the individuals or their attorney file a written motion with the court to reopen the case. Ghandi further advises, “The respondent must file a motion to reopen within 90 days of the date of entry of a final administrative order of removal. However, orders of removal entered in absentia by an immigration judge may be rescinded within 180 days upon a showing of ‘exceptional circumstances.’ However, there are no time limitations if respondent’s failure to appear was because of a lack of notice. If that were the case, the respondent may file a motion to reopen at any time.” Lastly, Ghandi says, “An immigration judge’s decision to deny a motion to reopen may be appealed to the Board of Immigration Appeals (BIA). However, there is no automatic stay of removal or deportation pending the BIA’s determination.” These wrinkles in the law can really alter an individual’s case. Thus, even though the complexity of each case may differ, retaining an
immigration attorney who is familiar with the individual’s circumstance could make a huge difference in whether the individual prevails.

Post-Decision Activity

After the immigration judge’s decision, the government or the individual can elect to challenge the immigration judge’s decision. A motion to reopen or a motion to reconsider can be made to the immigration court or through appeal with the BIA. If the DHS attorney reserves appeal, it could mean that more proceedings are on the way. Note that reserving appeal is not the same as filing an appeal. To reserve appeal means that the attorney wants the right to follow up in a given timeframe and file an appeal to the BIA. The sections below discuss what to expect when a party wants to appeal the immigration judge’s decision and what to expect if relief is granted.

Appeals: Challenging an Immigration Judge’s Decision

Abad, Ghandi, and Seruelo share their experiences and advice on when and how to challenge an immigration judge’s decision.

Abad says, “If a decision is not in your client’s favor, then they have the ability to appeal, but they have to do so within 30 days of the decision. Otherwise the decision becomes final.” She further provides a timeline of events: “If relief is not granted, then you have an order of removal. Government officials including U.S. Immigration and Customs Enforcement (ICE) will notify individuals of a date and time of when they must report for deportation. If the individual files for appeal, it acts as an automatic stay from the order until the BIA has made its decision. Depending on the issue that is being appealed, an individual can take the matter up to the circuit court as well. The process with the BIA can take anywhere from six months to a year. The process with the circuit courts vary. If there is a legal issue that might provide relief in appeals, then we notify our clients of this option.”

Ghandi dreads hearing these words from the judge, “Accordingly all relief is denied,” especially when he knows that the worst would happen. He says, “It is essentially a death sentence to my client where they are forced to return to their home country and be exposed to their persecutors. However, this is not the end. Take good notes of the judge’s decision. At the end of his or her decision, the judge will ask whether the respondent wants to appeal. If the attorney reserves appeal, they would have 30 days to submit the appeal. Appeals are made to the BIA. Once the appeal is filed, expect long wait times for a decision from the BIA.”
Seruelo also has experience with the BIA and has had to advocate for his clients zealously at this stage. He says, “If the immigration judge denies relief, then as long as you were able to reserve appeal, that option would be open for your client to pursue. Within 30 days from the date of the decision, you should submit a notice of appeal to the BIA. A motion to reconsider is another option if there are grounds to assert that the immigration judge made a mistake of law or fact in making his or her decision.”

The appeals process can be complicated and time consuming, so it is always helpful to face the appeals process with an attorney who is an expert in immigration law and can dedicate the time to ensuring the best outcome.

Relief Granted: Cancellation of Removal and Adjustment of Status

There are many different scenarios that can happen even after relief is granted. Seruelo and Abad briefly share their experiences below.

“If the immigration judge grants the relief that your client applied for, then the one thing that you need to do is to assist your client in accessing the benefits that comes with that relief. Provide information on the legal requirements in maintaining such relief or any other information that would benefit the client in his/her new status,” advises Seruelo.

Abad says, “If a decision is rendered in your client’s favor, then you would apply with U.S. Citizenship and Immigration Services (USCIS) for the granted status. If relief is granted, there is still a process that must be completed depending on the relief. For cancellation of removal for certain non-permanent residents, the individual must also schedule an appointment for what is called Citrix processing. This all depends on whether they were immediately granted this benefit or whether they are waiting to be eligible for the grant because there is an annual limitation on how many grants can be made.”

The scenarios above are just a few different outcomes an individual could experience, but if an immigration judge grants relief, the individual is another step closer to obtaining legal status.

Final Thought

Every immigration case is different, and legal advice from an immigration lawyer should be sought in order to proceed with caution. Although individuals may fear the unknown outcomes of their case and the financial burdens that come with hiring a lawyer, these concerns do not outweigh the
need to have legal help. Abad suggests, “Lawyers should consult the Immigration Court Practice Manual and stay up to date with the new decisions coming out from the BIA, circuit courts, and Supreme Court.” As discussed in the previous installments, there are ways to get help, including nonprofits such as Legal Aid immigration clinics and immigration law firms that could offer a reasonable attorney’s fee. “For attorneys new to immigration law or new to Immigration Court proceedings, they should volunteer and take pro bono cases with the Immigration Justice Program of the ABA or other nonprofits providing free legal services to those in removal proceedings. These groups provide some form of training to help one get acquainted with the tasks and procedures in defending an individual in Immigration Court,” advises Seruelo. Ghandi provides his final thoughts on this matter by saying, “If lawyers want to take on a case, I would recommend signing up with one of the many legal organizations that offer pro bono opportunities. These organizations often offer excellent trainings, materials, and guidance to attorneys. I would also challenge bigger law firms to (1) create a pro bono programs; and (2) turn their pro bono efforts toward immigration.” He concludes by referencing the following quote from a poem titled *Home* written by Warsan Shire, a Somali-British writer and poet: “No one puts their children in a boat unless the water is safer than the land.” Ghandi shares that he once read this poem that was written about asylees and how it reminds him of the important work that we lawyers do. The need for strong and competent lawyers in the immigration field grows every day. The legal community should continue to do its part to advocate for those in need.
A Once-in-a-Trial Opportunity: Effective Voir Dire

By Paul H. Jepsen and Daniel Wolfe

Voir dire presents a critical opportunity to influence the outcome of a trial. Only during voir dire do counsel have the opportunity to listen to the panel members and to identify and remove potentially dangerous jurors.

Decades of jury research have shown that for nearly all jury pools and for nearly all cases, there will be a subset of prospective jurors who, regardless of anything, will not find in your client’s favor. If you do not succeed in voir dire in revealing and removing these jurors, the case is already lost. Once voir dire is concluded, this opportunity is gone forever. During trial, counsel will have opportunities to express key case themes and build rapport with the jurors, but the chance to learn about the jurors and influence the composition of the jury will be gone.

The most productive and effective use of voir dire is to watch and listen to the jurors talk. The principal objective of voir dire should be to identify and remove dangerous jurors rather than to argue the case or attempt to develop a relationship with the jurors.

The following practices should be employed by trial counsel, in venues across the country, to make the best use of voir dire—a truly once-in-a-trial opportunity.

Get Local Knowledge

Voir dire is often viewed as the starting line of the trial stage, the beginning of the “race.” However, it is the preparation, research, and investigation that can, and should, be done prior to the starting
line—prior to voir dire, which is the true beginning. Just as runners would not show up at the
Boston Marathon without months of training and hard work under their belt, attorneys should
not appear before a potential jury panel without already knowing a large amount of information
about the individuals they will address and their community.

The pre–voir dire investigation should start with an exploration of local customs, attitudes, and
general attributes at the community level. A thorough investigation into the community at this
general level is an important first step toward getting to know your jury, both individually and
collectively.

Know your courtroom. Visit the courthouse and courtroom before your trial begins. Walk
around; get acquainted with the security procedures, the facilities, and the overall atmosphere.
Try to experience the courthouse from the jurors' perspective. See where the jurors park. Visit the
assembly room, listen to the buzz of conversation, smell the coffee. Not only will this visit serve
you personally by providing a sense of familiarity before the trial commences, but it also will
reveal elements of the personality that your trial will likely take on.

Talk with local counsel. Work with local counsel experienced with trial work in that jurisdiction.
Local attorneys are a resource for gaining localized community knowledge and useful tips for
appearances in specific courts or before individual judges. Besides the obvious procedural
questions, use your meeting with local counsel to ask about important local issues, such as real
estate development, traffic, crime, school activities, and jobs. Ask about what is new and what has
become old hat. Ask counsel for referrals for other community leaders to contact. Sheriffs, local
elected officials, clergy, realtors, and school principals can provide useful information and insights.
Always be on the lookout for what issues are currently seen as most important in the community.

Study the small details. The smallest details may prove to be the most helpful in gaining a positive
rapport with a panel of jurors and unlocking topics that the jurors feel are important to discuss.
Listen to traffic reports in the morning, know the local terms for public transportation systems
(e.g., the Green Line), and know how the local sports teams (high school, college, professional) did
over the weekend.

Review juror lists. If for no other reason, review juror lists to learn to pronounce jurors’ names
correctly! Say each name on the list aloud several times. Not only is it a matter of courtesy to
pronounce properly the names of your panel jurors, but it also demonstrates preparation,
intelligence, professionalism, and respect. When in doubt, ask for help. And when you ask a juror
for pronunciation help, use the help—repeat the name aloud three times: “Ms. Chou—now, did I say that right? Ah, it is Ms. Chou. I think I have it right now, Ms. Chou. Ms. Chou, let me ask you . . .”

**Change the channel.** Turn off CNN, and turn on the local news. Exchange that *USA Today* for the local news, sports, and editorial sections. Research any past and present publicity on your case. Know the lead stories in last night’s local television news broadcast, the headlines in today’s local paper, and the topics of discussion this morning on the top local drive-time radio station show.

**Review community-related social media.** Review web pages, Facebook pages, Twitter feeds, and other social media content from community leaders, politicians, local news personalities, schools, and other major community institutions and employers.

**Use community surveys.** Community surveying is a powerful tool for developing your trial strategy while simultaneously gaining firsthand local knowledge about your target community. There are varying types of community surveys—from focus-group sessions to large telephone surveys of eligible jurors. Similarly, surveying may include case-specific inquiries or general nonspecific topics, such as politics, religion, family, or work experience. Regardless of the form, community surveying can reveal the opinions, feelings, and important issues relevant to your trial community—and steer the development of an effective trial strategy for your client.

Attorneys should be aware, however, of the pitfalls of community surveying. Surveying should be limited in scope to avoid unintentional influence of the jury pool. Attorneys also must remember that direct contact with potential jurors may give rise to ethical violations. While local law will vary concerning contact between lawyers and jurors or prospective jurors, a lawyer should not communicate directly with a juror or prospective juror regardless of the subject. Safety first: Check your jurisdiction’s rules before beginning any community survey. Then, hire professional help for survey work. An experienced jury consultant can help ensure that your survey efforts are proper, discreet, and effective.

**Understand local values.** Attorneys may conduct voir dire in a venue far from home. Although local counsel may assist with local legal issues, outside attorneys must educate themselves on the community’s core values—for the sake of jury selection and for trial strategy. Community ideals, morals, and values will vary from state to state and even from county to county within one state, so it is vital for attorneys to recognize and learn of their trial community’s positions in these sensitive areas.
Use a Written Juror Questionnaire

A written juror questionnaire greatly increases the information that you learn about prospective jurors. Because it acts as a form of individual, sequestered voir dire, jurors often answer more questions and provide more information in their answers on a written questionnaire than they do in panel-wide oral voir dire. We find that jurors often disclose opinions and information about themselves in a written questionnaire that they will not disclose orally in open court.

Guidelines. There are several key guidelines for preparing and using an effective written juror questionnaire.

Keep it simple and short. A simple question such as “Have you ever worked in the medical profession?” works much better than “Are you currently, or have you ever been in the past, employed, either paid or as a volunteer, in any of the following medical-related fields?”

Do not include the basic voir dire queries required by statute or always asked in oral voir dire. Do not use valuable written questionnaire space to probe prior jury duty or to determine if the jurors know any of the parties to the lawsuit.

Ask jurors to explain their answers. When you ask whether the juror has ever suffered from significant harassment, retaliation, or bullying, either at work or somewhere else, you should add, “If yes, please describe.” When you ask, “Have long have you lived in this community?,” also include the following question: “What are the most significant changes that have occurred in your community during this time?”

Ask jurors to make decisions. When you ask jurors to describe prior experiences or express their opinions about important issues, also ask jurors to describe how they would improve the experiences or better resolve or solve the issues. Following a question about prior jury service, you should ask, “What do you feel could have been done to improve your experience as a juror?” Following a question about opinions and beliefs concerning excessive lawsuit damage awards, you should ask, “What do you think should be done in response?” When you ask, “Have you ever been involved in a serious injury accident?,” you should add, “Please describe what or who you feel caused the accident.”

Provide minimal formatting for jurors’ answers. Do not use ruled lines within, or boxes around, an answer space. Observing how a juror fills a space can provide important clues about the juror.
Often, there are important differences revealed between a juror whose answer comprises several large words scrawled diagonally across an answer space and a juror who writes several complete sentences of text in neatly ruled lines.

Do not ask a concluding question about whether the prospective jurors feel that they can be fair and impartial. Too often, a prospective juror’s answer to this type of question simply will provide opposing counsel with a counterargument against considering and acting on the rest of the information provided by the juror when answering all of the other questions on the questionnaire. This type of “Can you be fair?” question always should be reserved for oral voir dire. Instead, conclude the questionnaire with a question asking for additional information, such as “Is there anything else you think it is important for the court and the parties to know about you and your potential service as a juror in this trial?”

Uncovering bias. A written juror questionnaire can serve as a discreet preview of the extent to which a panel holds highly sensitive, prejudicial, or inflammatory opinions. This information can help determine whether there is a need for sequestered oral voir dire. We often use the following simple, four-part questioning format to uncover and evaluate the extent of preexisting knowledge and bias:

1. How much, if anything, do you know, or have you seen or heard, about [party/event/issue]?
2. What do you know, or have you seen or heard, about [party/event/issue]?
3. What opinions or beliefs have you formed about [party/event/issue]?
4. How strongly do you hold your opinions or beliefs about [party/event/issue]?

Procuring court approval. Not all courts accept written juror questionnaires. The following approaches/arguments have proven effective in convincing courts to agree to allow written juror questionnaires:

- Cooperation with opposing counsel. The most effective starting point is the statement, “Your Honor, we both agree.” Implicit in seeking agreement with opposing counsel is offering to include opposing counsel’s questions on the questionnaire.

- Prior use. Determine what other courts and judges have used similar written questionnaires in similar, prior trials.
- **Judicial efficiency.** A juror questionnaire can reduce the time needed for voir dire.

- **Flexibility.** Come to court with both your desired questionnaire and a shorter version of the questionnaire. Courts also have accepted questionnaires at the last moment when we have offered to strike out offending questions and agreed to make all necessary copies and provide the pens and pencils.

- **Effective use of peremptory strikes.** It is often helpful to remind the court that although identifying and removing biased jurors is an important outcome of voir dire, there is an equally important benefit: learning more about the jurors via a written questionnaire allows the parties to use their peremptory strikes more effectively. Although answers to questions concerning a juror’s media viewing habits or current health concerns may not speak directly to bias, such characteristics may identify an unfavorable juror.

### Use Open-Ended Questions

Consider the way in which you ask questions of prospective jurors. Open-ended questions give jurors an opportunity to talk more. Closed-ended questions are more suited to reaching a group consensus or getting others to agree with a certain concept.

You can ask jurors the same question both ways for different results. In the open-ended form, the question would be, “How do you feel about government regulation of pharmaceutical companies?” Conversely, the closed-ended question would be, “Do you think there should be more government regulation of pharmaceutical companies?” Both questions get at jurors’ attitudes toward government regulation of pharmaceutical companies. However, the first question asks for their opinion, while the second one asks if they agree with a certain viewpoint. There are advantages to both ways of asking questions. You should choose the type of question that most effectively advances your voir dire goals.

There is also a difference between asking jurors for their opinion and asking jurors if they have an opinion. The difference is subtle. The first question—“What is your opinion?”—makes the assumption that jurors have thought about an issue and formed an opinion on it. It also forces a response by making jurors articulate a certain viewpoint. The second—“Do you have an opinion?”—takes it back a step. It gives jurors an out. You may want to ask the first question with jurors who are difficult to draw out. Requiring them to articulate a position, even if it is only to say that they do not know, gives you more information than asking if they have an opinion and getting no response.
Lawyers are often uncomfortable about using open-ended questions, given the old law school maxim “Never ask a question to which you do not know the answer.” Voir dire is the exception to the rule. In voir dire, asking questions to which you already know the answer is a waste of valuable time. Encouraging jurors to “get away from you” by allowing them to freely respond to open, no-holds-barred questions will reveal the personal experiences, attributes, and emotions necessary for an accurate portrait and a successful jury selection process. It is much better to “lose control” of a potential juror during voir dire than during deliberations.

Focus on Case Weaknesses

The most dangerous jurors are those attracted and receptive to the weakest parts of your case. The best way to identify and remove these jurors is to prompt them to talk about the issues most harmful to your case. Use voir dire to get jurors talking about feelings, attitudes, and beliefs that they have about the issues most detrimental to your case.

In many jurisdictions, successful plaintiffs attorneys have led the way in implementing this strategy. Often, during voir dire, they sound as if they were defense counsel. They ask, “Who here has become concerned about frivolous lawsuits and their effect on our society?” and “Who feels lawsuit damage awards are too large?” However, too often, counsel only query feelings and beliefs concerning favorable issues.

Themes. To best employ this tactic of addressing case weaknesses in voir dire, prepare a list of the five to 10 themes that go to the heart of issues likely to appeal to jurors predisposed against your client and case. These themes should be the starting point and centerpiece of your voir dire.

Often, these themes are general rather than case-specific. Regarding large corporate defendants, a top issue might concern corporate profits. For personal injury plaintiffs, a top issue might be excessive lawsuit awards and the McDonald’s coffee lawsuit.

Sometimes, the top issues have no direct, factual link to the instant case. Juror preconceptions concerning large corporations, their power and influence, and their effect on our society can strongly influence juror decisions about cases as diverse as a small-company employment dispute or trademark-infringement dispute.

These themes may be posed as questions, phrased either to the jury as a group or to individual jurors. Often, these themes are more effective if posed as a statement to which jurors are asked to
express the extent of their agreement or disagreement. One example of a general theme expressed as a statement that addresses anticorporation bias is “Big companies put profits before people.”

The statements should be phrased in a manner that encourages jurors to express their unfavorable opinions. Rather than ask, “What do you think about the McDonald’s coffee lawsuit?,” plaintiffs counsel should ask, “Who here agrees, ‘The McDonald’s coffee lawsuit is a good example of lawsuit abuse’?” In a similar manner, defense counsel should ask, “Who here agrees, ‘Companies that manufacture products have a duty to make their products 100 percent safe for consumers’?”

**Strikes for cause.** This tactic is most helpful in those jurisdictions in which the number of unfavorable jurors greatly exceeds the number of peremptory strikes. Even adding a few strikes for cause can make a dramatic difference in the jury’s final composition. We have watched a high-profile attorney start voir dire by asking, “I have been a controversial figure; who here would have to say, right from the start, they really do not like what they have heard about me?” Nearly a third of the pool responded and was struck for cause.

**Detoxification of weaknesses.** Some counsel express concern that focusing on case weaknesses during voir dire may act to poison the jury pool. This concern is unfounded for several reasons. First, if the bias exists in a juror, it exists whether or not it is expressed during voir dire. Second, jurors are not likely to have important, strongly held opinions changed simply because a stranger sitting next to them expresses a strong contrary opinion. Any juror so easily swayed would be unlikely to be a dangerous, influential juror.

In fact, not only does the tactic of addressing case weaknesses in voir dire not poison the jury pool, but it, in fact, provides the added benefit of helping to inure jurors to those weaknesses. These case weaknesses often appear less sinister and dramatic when they are openly and freely raised in voir dire rather than when introduced later during the opposition’s opening statements or dragged from a reluctant witness during cross-examination.

**Need for a jury consultant.** It is often difficult to correctly identify the most significant areas of weakness in a case. The demands of advocacy, long familiarity with a case, and plain old wishful thinking often act to block identification of important vulnerabilities. Counsel often are shocked to hear what jurors consider important and probative. Use of a jury consultant to objectively identify and assess case strengths and weaknesses is valuable in improving voir dire efforts.
Go Beyond Demographics and Experiences

The old saw says that we are hurt not as much by what we do not know as by what we think we know that is not true. The practice of basing important jury selection decisions on demographic and experiential information is a potential poster child for this old truism. Not only is this practice ineffective in identifying dangerous jurors, it often causes harm due to the misuse of strikes that remove favorable jurors.

Demographic and experiential information such as gender, age, income, ethnicity, educational achievement, employment status, media consumption, accident experience, and medical history is the information about jurors that is most abundant and easiest to acquire in voir dire. However, research shows that basic demographic and experiential information is not predictive of juror verdict decisions. Often, it is not even predictive of the presence of initial bias for or against parties in litigation. Nonetheless, counsel often attempt to make important jury selection decisions based on basic demographic and experiential information.

Some counsel, for example, will make jury selection decisions based on a juror’s status as a current smoker, a former smoker, or a nonsmoker. Jury research consistently shows, however, that this information alone is not predictive of verdict opinion—even in cases involving lung disease and cancer. Some smokers sympathize with a fellow smoker plaintiff; some smokers find against a fellow smoker to psychologically distance themselves from the harm done to the plaintiff. By itself, smoking history is not useful information for jury selection.

Instead, counsel should use demographic and experiential information solely as a starting point for learning more about a juror. This information should be the means to learn about jurors’ feelings, values, concerns, and beliefs. To use a baseball analogy, demographic and experiential facts about a juror are like base runners that only count if the follow-up questions drive them home. Effective voir dire thus requires going beyond demographics and experiences. Some examples follow:

- Jurors often are required to disclose previous lawsuit experience. By itself, this experiential information has little value for evaluating a potential juror. However, uncovering a juror’s feelings and opinions about that lawsuit experience often provides important insights into how the juror will perceive and resolve a case. Was the juror satisfied with the outcome? Did she feel that the process was fair? What important life lessons did she take away from the experience?
Jurors often are required to discuss previous jury experience. By itself, this experiential information has little value for evaluating a potential juror. Thus, in addition, ask about how the jury service went for the juror. Did the juror enjoy the experience? Did he feel that he could play an important role? What opinions did he form about the lawyers involved? What suggestions would he make to improve the experience?

Jurors often are asked about family experience with major health problems such as cancer or heart disease. By itself, this experiential information has little value for evaluating a potential juror. However, adding a follow-up question often unlocks a world of relevant meaning. As a follow-up, you might ask, “What do you believe caused your father’s lung cancer?” A juror might reply, “He just chose to keep on smoking.” Another might answer, “The factory work destroyed him. He always came home dirty, sore, and exhausted.”

A little knowledge can be a dangerous thing. Demographic and experiential information is “a little knowledge.” To become useful and safe, this knowledge must be expanded to reveal what jurors feel, value, worry about, and believe.

Observe Behaviors

When prospective jurors are asked to do their civic duty by showing up for jury duty, they are removed from their daily routines and subjected to a novel and ambiguous environment in the courtroom. Most prospective jurors want to serve and do their duty for society. However, they often are required to make decisions that are more difficult than typically required and expected to articulate opinions in a public forum in which they have little experience. Most of the time, jurors find ways to express these opinions and decisions verbally. However, with limited communication skills and experience, and compunctions about revealing their thoughts and beliefs in public, jurors may communicate largely through nonverbal cues and communications. Thus, it is imperative to pay attention not only to what jurors are saying but also to how they are saying it and how they are relating to counsel during the voir dire process.

For example, evaluate the extent to which prospective jurors make appropriate eye contact and show open body language and facial expressions. Look for mismatches between what potential jurors say and how they behave. Prospective jurors who display exaggerated behavior should be avoided because such behavior often signals deceit.

Traditionally, all verbal information is transcribed and available for review by an appellate court; however, very little nonverbal information is ever made part of the record. Given the variability in
scrutiny that appellate courts use regarding voir dire issues on appeal, in combination with
deferece to the trial court judge, it is important for trial counsel to establish as part of the record
as much information as possible surrounding their observations of prospective jurors who have
been subject to controversy during jury selection. Thus, when there is a potential issue regarding
the decision to keep or reject a particular juror, attempt to explicitly document nonverbal
behaviors of the jurors so that the appellate court has a much more robust and richer context in
which to evaluate the propriety of the decisions made by the trial court judge regarding particular
jurors. For example, you could say, “Your Honor, I would like the record to reflect that when Juror
No. 10 answered my questions, he made very little to no eye contact with me; he was squirming in
his chair; he grimaced and smirked when I asked him questions; and then when he did answer my
questions, he did so in an angry and flippant manner.”

Look for Leadership

Every jury verdict arises, in large part, because of the efforts of one or two leaders on the jury. In
addition to discerning whether prospective jurors are favorable or unfavorable to your case, it is
important to consider their relative influence on the other jurors—in other words, their potency.

Some jurors are persuaders. These jurors wield considerable influence in the jury room, even if
they are not the foreperson, and will be strong allies or foes of your case. Other jurors are
participants. They will have opinions about the case and will vocalize them in the jury room but
will be less influential than persuaders. And then there will be those jurors who are mere passive
followers. To evaluate leadership qualities and determine which category applies to each juror,
observant various traits of the potential jurors.

Watch how jurors interact. Watch how jurors interact with members of the court and with fellow
jurors. Note the extent to which prospective jurors appear at ease with the voir dire process and
express a level of confidence that imputes authority. Note how other jurors respond to a possible
juror leader, including nonverbal cues (such as nodding in agreement) and verbal cues (giving
similar answers or using similar logic in reaching conclusions).

Be observant of the entire surroundings during voir dire. Do some jurors speak out of turn? Do
some jurors seem reluctant to speak at all? If so, are they shy or merely trying to keep a low
profile? What do they bring with them to the courtroom, such as books, magazines, etc.? Which
jurors are socializing and seem to be bonding with each other? At the first break in voir dire,
which jurors start the conversations between jurors?
Watch for likability. Look for the attractive qualities of possible juror leaders. These qualities can range from favorable physical characteristics to the use of humor in a traditionally nonhumorous setting. Such qualities, in whichever form they may emerge, appear to embody confidence, intelligence, and authority.

Look beyond expressiveness. A confounding factor is that those individuals who are particularly verbose may be mistaken as opinion leaders, but this is not necessarily so. Even more difficult is determining whether individuals who rarely if ever say anything during voir dire (i.e., the wallflowers) are going to be opinion leaders.

Look for extroversion, conscientiousness, and emotional stability. Studies have demonstrated that the most influential jurors tend to be extroverted, conscientious, and emotionally stable.

Look for followers. Equally important to know is which jurors will be receptive to persuasion and influence. In other words, who will be the leaders, and who will be the followers? The research also indicates that conscientious people (those willing to consider all opinions before deciding) and people generally less open are the ones who are most likely to be influenced by others.

Eliminate Stealth Jurors

In addition to the subset of prospective jurors with strong preexisting opinions, attitudes, and beliefs adverse to your case—who often are unaware or unable to recognize the extent of their bias—there are also some, albeit rare, prospective jurors who are well aware of their bias, willing to hide their opinions, and motivated to sit on the jury to attempt to advance their own agenda.

These “stealth jurors” purposely try to fly under the radar; and akin to the most sophisticated aircraft radar-detection equipment not being able to detect an enemy stealth bomber, these dangerous prospective jurors are difficult to detect. As popular culture increasingly has highlighted and dramatized jury trials, and as the stakes involved have increased, these prospective stealth jurors have become more common.

Steps to detection. Increased awareness of the problem is a good first step. Going forward, as part of every voir dire, commit to allocate some time and effort to doing more to consider and look for stealth jurors.
Next, identify important aspects of the case that may motivate a stealth juror. Cases involving claims of sexual harassment or assault, claims of employment discrimination, claims regarding police misconduct, or simply large damage claims may attract stealth jurors. High levels of media attention also may attract stealth jurors. Following a highly publicized mass tort case, a juror started his posttrial interview with the statement, “I wanted the verdict to send a message.”

Look for experiential connections that prospective jurors may share with one of the parties. Recently, we uncovered a stealth juror who failed to disclose several years of participation in a memorial 5K race for the deceased plaintiff.

**Characteristics.** There are several characteristics associated with being a stealth juror:

- **Obsequious behavior.** Prospective jurors who are overly deferential to authority figures, such as the lawyers and the judge, may be particularly dangerous. Behaviors associated with this include repeated “Yes, sir” and “Yes, ma’am” responses; standing quickly when the judge enters the courtroom; and overly polite mannerisms.

- **Just-world orientation.** Prospective jurors who exhibit a tendency to want to “right the wrongs of the world” often may end up being stealth jurors. These types of jurors may have a heightened sense of vulnerability in their own lives and often believe that they cannot prevent bad things from happening to them. Identifiable characteristics include being extremely active in charitable activities; having a degree in the social sciences or humanities; and describing themselves as people who, for example, work really hard to be fair to all involved.

- **Excessive eagerness to serve.** Prospective jurors who repeatedly and overenthusiastically express a strong desire to be on the jury, particularly those who may have served on a jury previously, could be stealth jurors.

- **Extremely inconsistent or incompatible profile characteristics.** Prospective jurors who exhibit starkly contrasting or incompatible profiles or characteristics are likely candidates to be stealth jurors. An example of this is someone who is underemployed or whose occupation is incongruent with his education level, such as a taxi driver who has a Ph.D. in biochemistry. Another example is the prospective juror who lives 90 miles from the courthouse and is working 60 hours a week at two jobs but denies any hardship concerns.

**Conclusion**
You will have two opportunities to hear from the jurors: during voir dire and when they announce their verdict. Minimize your chances of hearing something that you do not want to hear at verdict by maximizing your opportunities during voir dire to hear from, and to learn about, the prospective jurors.

Voir dire offers a unique and fleeting opportunity to reveal the minds and hearts of the jurors. Prepare to use voir dire effectively to probe for deeply held beliefs and feelings. Promoting and conducting these voir dire practices can help trial counsel improve their jury trial results.

Notes

Background

Last year, I authored an article for Business Law Today discussing the ethical obligations of lawyers in connection with potential searches of confidential information on their portable electronic devices by the U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE)—both agencies within the Department of Homeland Security (DHS). This companion article briefly considers the ethical obligations in this scenario of judges—including business court judges and bankruptcy judges—under the canons of judicial conduct. Like lawyers, judges should consider whether consenting to a device search by a CBP or ICE agent is compatible with their professional responsibilities.

Rather than reiterate information about current CBP and ICE policies as background, the reader should refer to that earlier article.

Sources of Rules and Principles of Judicial Ethics

Judges of the States and U.S. Territories

The responsibilities of a state judge are set forth in the applicable code of judicial conduct (CJC) for the state in which he or she is a judicial officer; guidance and interpretations on the meaning of...
individual provisions are periodically issued by the appropriate authorities, whether judicial advisory committees or similar bodies, or judicial conduct commissions in connection with disciplinary proceedings, which, if appealed, may also lead to interpretations by the jurisdiction's court of last resort. In addition, interpretations of the MCJC are periodically issued by the ABA Standing Committee on Ethics and Professional Responsibility. These interpretations, although not binding on judges in any jurisdiction, can be influential for interpretation of identical or substantially identical provisions in the relevant jurisdiction’s CJC.³

Part-time judges are also bound by the CJC. To the extent that they are also practicing lawyers, however, they should be aware of pertinent obligations under applicable rules of professional conduct as well. (Although full-time judges are usually members of the bar, they may not practice law (MCJC Rule 3.10), so the latter set of rules are largely inapplicable to them).

**Federal Judges**

Federal judges are subject to statutory rules of judicial conduct and to the Code of Conduct for United States Judges.⁴ Interpretive guidance is also available in the form of advisory opinions issued by the Codes of Conduct Committee of the Judicial Conference of the United States.

**Pertinent Principles of Judicial Ethics**

*Compliance with Law.* MCJC Rule 1.1 requires judges to comply with the “law”; the comparable provision in the Federal CJC is Canon 2A. The purpose of these provisions is central to judicial ethics—avoiding both the appearance of impropriety and diminishing public confidence in the judiciary. Assuming, arguendo, that border searches of personal electronic devices are authorized by existing federal statutes,⁵ there can be no civil disobedience by a judge of CBP and ICE policies.

*Avoiding Abuse of the Prestige of Judicial Office.* MCJC Rule 1.3 prohibits judges from using or attempting to use the prestige of judicial office to gain personal advantage of deferential treatment of any kind; the comparable provision of the Federal CJC is Canon 2B.⁶ Thus, a judge should avoid any conduct that might be, or be construed as, an attempt to use the cachet of judicial authority to intimidate or cajole a border official wishing to search any of the judge’s electronic devices.⁷

*Nonpublic Information.* Perhaps the most pertinent provision of the MCJC is Rule 3.5,⁸ although its language creates some ambiguity. Like its predecessor, Canon 3(B)12, the rule prohibits intentional disclosure of use of “nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge’s judicial duties.” “Nonpublic information” is a term of art specific to this rule.
initially it is defined, somewhat circularly, as “information unavailable to the public,” but the
definition goes on to provide a nonexclusive list of examples: “information that is sealed by statute
or court order or impounded or communicated in camera, and information offered in grand jury
proceedings, presentencing reports, dependency cases, or psychiatric reports.” As electronic filing
becomes more ubiquitous, judges are increasingly likely to have these sorts of pleadings or
documents on their portable electronic devices.

One might well ask whether a border search of an electronic device qualifies as an “intentional”
disclosure of nonpublic information acquired in a judicial capacity. That is certainly an open
interpretive question. Given the breadth accorded the concept of “intent” in tort law and criminal
law, however, it would be dicey in a disciplinary proceeding to hang one’s hat on such an argument,
especially where the expected retort would be that the judge knew or reasonably should have
known that his or her electronic devices would potentially be subject to search when traveling
abroad, and that such a search would unduly risk the proscribed disclosure.

Some Concluding Observations

The following are worthy considerations by any judge anticipating cross-border travel:

- Consider whether it is necessary to bring with you any electronic device containing
  confidential or privileged information. (If you’re going on vacation, the foolproof solution is to
  enjoy yourself and leave the device behind!)

- If you absolutely must bring one or more portable electronic devices along, make sure each
  one is thoroughly scrubbed of all privileged or confidential information. Note that merely
  deleting files may not be adequate to remove them completely. Alternatively, consider
  acquiring an electronic device exclusively for use during foreign travel and avoid, to the
  maximum extent possible, placing confidential or privileged information thereon.

- Merely encrypting privileged or confidential information on a device is no guarantee of its
  remaining confidential. Remember that border agents may demand that you provide
  password or other decrypting information, and failure to do so can lead to your device being
  seized and detained for a period of time.

- Advise the border agent of the existence of any privileged material on the device in question.

- Finally, be cognizant of the location and content of all privileged and confidential information
  on each device you bring across the border, and be prepared when advising a federal officer of
the existence of privileged or confidential information to identify for the officer specific files or categories of files, and any other information that will help the officer segregate such information.

Notes

1. Also noteworthy are some 2017 reports that the Transportation Security Administration (TSA) is implementing heightened screening procedures with respect to electronic devices for purely domestic flights. See, e.g., Russ Thomas, TSA Implements new screening procedures in Montana, KPAX.com, Dec. 14, 2017; Joel Hruska, TSA Will Now Screen All Electronics 'Larger Than a Cell Phone', Extreme Tech, July 26, 2017.

2. Specific references in this article will be to the ABA Model Code of Judicial Conduct (MCJC). Judges should consult the version adopted in their respective states.


4. See Admin. Office of the U.S. Courts, Code of Conduct for United States Judges [hereinafter Federal CJC]. The Federal CJC is applicable to U.S. circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges, and has been adopted by the U.S. Tax Court, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Armed Forces.

5. Interestingly, the MCJC defines “law” somewhat broadly to include statutes, although not broadly enough expressly to include regulations or agency policy statements. The Federal CJC contains no definition of “law.” The commentary to Canon 2A, which also does not expressly include regulations or agency policy statements, seems more inclusive: “Because it is not practicable to list all prohibited acts, the prohibition [against impropriety and the appearance of impropriety] is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.” (Emphasis added).
6. Canon 2B provides in pertinent part: “A judge should [not] lend the prestige of the judicial office to advance the private interests of the judge or others . . . .”


8. The closest analogue in the Federal CJC is found in Canon 4, which relates to extrajudicial activities. Canon 4D(5) provides, “A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge’s official duties.” This language, in contrast to MCJC Rule 3.5, is not modified by the adjective “intentional.” It is uncertain, however, whether this language, although unambiguous, applies to general disclosures, as it is part of Canon 4D, which is headed “Financial Activities.”
Ten Tips for How Judges Can More Effectively Communicate with Children in Court

By Judge Samuel A. Thumma and Chloe Braddock

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Courtrooms are not particularly comfortable places for most people. This is especially true for children. When children are involved in court proceedings, it is important that they understand the questions they are asked and that what they say is understood. Adults often do not understand children because children’s language and processing skills are different and are still in the early stages of development given their limited experience with language. If a child is not understood, the truth-seeking process gets distorted, and the purpose of the judicial process is undercut.

Even very young children are capable of accurately recalling events. Despite this, several experts have noted that communication errors with children in court are widespread. This communication gap is often attributed to the failure to question children appropriately and the fact that some questions asked of children use confusing language. It is important that judges do their best to ensure questions are tailored specifically for children to bridge this gap and allow children to understand and be understood.

To address this issue, some countries have attempted various alternative means for children to testify unknown in the United States. For example, in 1993, South Africa began using an intermediary when child witnesses were involved. The intermediary is an impartial professional trained to work with children who would rephrase questions to children in a separate room in order to, among other things, facilitate effective communication.
proven helpful to aid the child’s understanding of questions being asked, and therefore facilitates more accurate and responsive answers. In addition, it helps make the child more comfortable during the process. As another example, in Canada, children often are interviewed outside of court at a “Child Advocacy Center,” and then have video assist testimony, so the child can answer questions in a way where they will be comfortable.

Particularly where such alternative means are not used—as is the case generally in the United States—judges must be vigilant to ensure that child witnesses are understanding questions and being understood. There is a wealth of literature on the unique aspects of children as witnesses. The American Bar Association Center on Children and the Law, established in 1978, published a *Handbook on Questioning Children*. Written by Anne G. Walker, first published in 1994 and now in its third edition, this *Handbook* provides helpful guidance in questioning child witnesses and things to look out for in answers by child witnesses, includes references to nearly 200 articles on the topics, and discusses other important principles of questioning children in court. Focusing on selected portions of the *Handbook* and highlighting a small portion of that significant research, this article suggests 10 ways in which judges can speak with children so that they will understand and be understood, and what to do when judges suspect a child may not understand a question that is being asked. Although the focus here is on judges, these same tips may apply, in varying degrees, to attorneys asking children questions in court.

The most important thing to understand about speaking with children is that children are not just small adults—the language they speak is completely different from the language of adults. Children often do not understand the intricacies of language, and although they may use the same words as adults, these words often have different meanings, causing confusion. Children learn language by observation, including looking at the context in which words are used; it takes time and experience to pick up on the intricacies of language. For example, a child could learn that “Are you okay?” is asking about how they are feeling, not if they are “okay” at what they are doing, or more generally that they are an “okay” person. Understanding these intricacies is hard for children, and it may be especially difficult for children who have been abused or neglected. To help account for, and narrow, this communication gap, what follows are 10 practical tips on adapting to the child’s language to help make sure all are understood in court.

### Use Simple Words
Using simple words seems obvious. Children will not understand complicated, long, or unfamiliar words. But language used in court often fails to be language that children understand. Studies have shown that one in four (or more) questions posed to children is too complex. Yet one study indicates children only ask for clarification or mention that they do not understand for just 1 percent of the questions they are asked.

In everyday life, when speaking with children, most adults “modify their language so that children can understand what they say.” Although this same approach should be used in the courtroom, often that does not occur. One linguist analyzed a transcript of a five-year-old witness in a murder trial and noted that “there were a lot of big words like ‘opportunity,’ ‘subsequent,’ ‘amplified,’ and ‘included’; one question asked her about “other people’s opinions” and another asked, “did you get the impression that . . .”. At one point, the five-year-old witness was handed some images and asked, “Can you look at these photos and tell me the color of the skin of the people depicted?” What are the odds that any five-year-old witness to a murder could understand, with any precision, what “depicted,” “impression,” “amplified,” “subsequent,” and “opportunity” meant, let alone that the witness understood all of those terms without any need for clarification?

That children typically do not seek clarification is particularly significant. There are several reasons why children do not say that they do not understand a question: They may not realize that they do not understand; they may not realize that they are allowed to ask for clarification; they may not want to admit that they do not understand; and they may feel pressured to not say that they do not understand given the perceived power difference between the child witness and the person asking the question (something that happens with adult witnesses).

For all these reasons, as a judge, it is both important to use only simple language and to make sure that others who are asking children questions do the same. It also is important to be alert to when a child may not understand questions, recognizing children typically will not seek clarification. This is particularly true for acronyms and legal jargon. In juvenile court, for example, legal terms (adjudication, disposition, restitution, termination), acronyms (ICWA, UCCJEA, JIPS, and DOJC), and jargon (“What, if anything . . .” “I don’t disagree with that statement,” or “Would you disagree with . . .”) may roll off the tongue of judges and lawyers like a second language. But there is no reason that most children would know that second language or have any idea what the terms mean. A judge taking the time to explain the concepts, briefly, to children involved in a court proceeding will further help bridge that communication gap.

Use Simple Syntax
Along with using simple words, using simple syntax, or the arrangement of words, may be even more important for children to understand what happens in court. The suggestion here is to make sentences as simple as possible. What makes sentences simple (or complex) is not necessarily their length, but how long it takes the listener to process the sentence. A key to using simple sentences is to use one subject and one verb and to keep the subject and the verb next to each other.

In practice this would sound like “Where was your dad at the time?” instead of “After this happened, did you know where your dad was?” The first question is much easier to process because it avoids clutter. It keeps the main idea (where was dad) at the beginning of the sentence. This helps a child know what he or she is supposed to answer, resulting in less processing time. Minimizing processing time by keeping sentences simple and starting with the main idea will help a child understand the question and answer properly.

Use Positive, Active Language

To illustrate this suggestion, consider two questions: “How did it feel when he hit you?” and “Did it not hurt when you were hit by him?” The first is easier to understand, even for adults, and it is especially easier for children to understand. These sentences illustrate how using positive, active language adds clarity and ease of understanding.

One reason is that the negative language of “did it not hurt” is difficult for children to understand. One study found that children’s answers are correct only 50 percent of the time when answering a question that used either single or double negatives, but are correct between 70 and 100 percent of the time when the question used positive language. The more negative words or phrases there are, the longer the question takes to process, meaning positive language is the clearer (and better) alternative.

Another reason why the first question is easier to process is that it avoids passive language; “he hit you” is easier to process than “you were hit by him.” Studies suggest that young children often ignore passive words and just process a sentence by the order of the words. As applied, if a child ignored passive words in the second alternative, “you were hit by him” would become “you hit him.” The odds of getting an accurate answer significantly decrease when viewed this way. Moreover, even when children do not ignore passive words, using passive words makes it harder for children to process the question. Simply put, to further clarity, use positive, active language and avoid negative and passive language.
Limit Questions to One Main Idea

When there are too many parts to a question, it can be difficult to keep track of and process all the parts. Especially for children in an unfamiliar environment, keeping track of multipart questions can be nearly impossible. One study found that, when multiple questions are combined, children give a relevant answer just 60 percent of the time. This is especially problematic given research showing the child will likely not ask for clarification, meaning an irrelevant (or incorrect) answer will follow.

Consider how the following examples might confound a child witness and how they might be improved: “But do you recall going to the hospital and will you tell us why you went to the hospital?” “Did somebody ever tell you that you were, when, this is a person that would babysit you and that you were afraid of Ettie Sue that Ettie Sue had a stick and she was going to get you?” Both questions, and many others like it, were used in court. Their compliance with the rules of evidence is dubious, and they are a challenge to process. But what if there is no objection and a child answers “yes” (or “no” for that matter)? What does that mean and what does that prove? And what is the likelihood that the child answered the entirety of the question, or just latched on to one part of the question? Limiting a question to one main idea can avoid these conundrums.

Another thing to avoid is embedding a question or statement into another question. One of the more common examples of what should be avoided is the use of clauses beginning with “who,” “where,” “which,” and “that.” Examples include things like “Do you recall whether the girl who was wearing the dress was awake or asleep?” or “Was the movie that you liked playing that night?” Sometimes embedding these descriptive statements into a question may be necessary, but most times it is not. Typically, two questions dealing with the issues separately adds clarity.

Another way to add clarity is to use one tense throughout. Consider the question “did anything happen to your pet cat on this day?” This shifts the tense from past (did happen) to the present (this day), which can be confusing. If the witness answered “no,” it could mean either that nothing happened to the pet cat on some day in the past (which could be a relevant answer) or that nothing happened to the pet cat on the day the question was asked (i.e., the day the witness testified), which almost always would be a useless answer.

Think Literally
Children are very literal in their use of language. To them, each word has a very specific meaning, and they may have a hard time thinking more broadly. Examples abound. A house may have a meaning that excludes an apartment; a car may have a meaning that excludes a truck; and touch may have a specific meaning that excludes a punch. What a word means to a child may depend on the child, but one thing that is consistent is that children often think quite literally. Consider this exchange involving two attorneys and a five-year-old witness:

DEFENSE COUNSEL: Do you remember them [Don and Martha] having you build this kind of block place to supposedly be—excuse me. You had to build some blocks together, didn’t you?

ANSWER: It wasn’t blocks

Q: They weren’t blocks?

A: They were … They were little pieces of triangle wood.

Q: I’m sorry, I didn’t—I didn’t understand. Did you say “try wood”?

PROSECUTOR: “Triangle”

Q: Oh, I’m sorry. They were triangles?

A: Yeah.

Q: So, they were kind of triangles, is that what they were?

A: Yeah.

Absent the disclosure about “little pieces of triangle wood,” and the resulting follow-up, the testimony would have appeared to be that the child did not play with blocks (but only because, in the child’s mind, a block is not a triangle). As another example, a child was asked, “Did you ever put your mouth on Daddy’s penis?” The answer was no “because it did not reflect the literal truth. It wasn’t the child who did the putting, it was Daddy.” Or if a child was asked, “Are you in school?”
and the answer is “no,” it may be because the child was in court (not in school) when asked the question. The answer, however, could be viewed as indicating the child was not enrolled in school, necessitating follow-up questioning to clarify the testimony and avoid ambiguity.\textsuperscript{25}

When asking questions of a child, thought should be given about how the child will think, just in case the child might translate words to mean something else. If a judge suspects that there could be a misinterpretation by the child, asking a follow-up to clarify can help make sure that the child understands correctly.

Be Specific and Avoid Pronouns

Day-to-day language is often ambiguous. That is normally acceptable as we have similar experiences to those around us that help us understand what we mean.\textsuperscript{26} Children, however, are different. They lack this experience and knowledge, and they may need specific information or they will not understand a question. Even phrases that seem very easy to understand, such as “it's cold in here,” can be interpreted in more than one way (most people understand that phrase to mean that the temperature of the room is cold, but someone could interpret it as people's demeanor being cold, or perhaps in other ways).

Similarly, while pronouns frequently are used in day-to-day conversation, when used in questioning in court, pronouns can be very difficult for a child to track.\textsuperscript{27} One study suggests anything like a full mastery of pronoun use may not come until middle-school years or beyond.\textsuperscript{28} Because of this, pronouns should be avoided when questioning children. Using, instead, the name of the person or object can avoid confusion and add clarity.

Frame Questions

Framing questions is like giving a set of questions a title: It makes clear the focus of the question. In practice, it might be as simple as something like “Okay, we just talked about Topic One; now we're going to talk about Topic Two.” One of the reasons why framing is necessary is that sudden shifts between topics can be jarring and result in confusion. Absent proper framing, consecutive questions addressing unrelated topics can confuse a child and should be avoided.

Framing a question also helps the child witness focus on the individual topic. Once properly framed, the child can begin to think about that topic specifically. This may help recall during questioning, which allows for more reliable answers.\textsuperscript{29}
Be Direct

Children may not have the practical language skills necessary to discern what a questioner is trying to address in a broad question. Recognizing that leading questions are improper in some contexts, some unbounded words that may cause confusion or be overwhelming include “any,” “anything,” or “anyone” or unbounded phrases like “what happened” because they are too broad in scope. When, for example, a question is based on “any,” the child may think she is being asked about everything that could have possibly happened, not just what the questioner was seeking to address. Often this leads to the child’s not being able to answer. Here is an example of a broad question asked to a seven-year-old victim in an abuse case:

Q: Can you tell me what he did the other time?

A: He pulled me inside the house, and then, and then I fell asleep on the couch.

Q: What happened?

A: [silence]

Q: Did something happen?

A: No.

The questioner was expecting the child to detail the abuse that happened in between when she was pulled inside the house and she fell asleep, but the child did not understand that, so she said nothing. At this point, the questioner would need to specify that she was asking about what happened between when he pulled the witness in the house and she fell asleep. If that did not happen, incomplete (or no) information would be provided in the answers.

This does not mean that questions need to be leading or otherwise suggest answers. It does, however, mean that any expectations applicable to most adult witnesses do not apply with equal force to most child witnesses. More specificity through being direct likely will be beneficial in questioning a child witness.
Avoid Suggestive Questions

A limit, of course, on being direct is the problematic nature of questions suggesting answers. This is particularly true with child witnesses. Children often trust that the adult is telling the truth, making it difficult for a child to tell an adult, who has clear power over him or her, that what the adult is suggesting is not true. Researchers have found that children are twice as likely to acquiesce to a suggestive question than to resist. Other research described suggestive questions to children as “disastrous,” while more open-ended questions have become the “gold standard.” Suggestive questions also tell a child how to answer, meaning the answers provided are less useful.

As a judge, it is critical to not use suggestive questions when speaking with a child and to be a check on suggestive questioning of a child by others. Judicial vigilance of cross-examination of a child witness also should be significant. Suggestive questions can be inherently manipulative, and children often do not have the tools to address them when responding, undercutting the truth-seeking process.

Although absent an objection, judges rightly are reluctant to be too involved in an attorney’s questioning of an adult witness. For a child witness, however, the proper approach may be quite different. Evidentiary rules of all types are designed to ascertain the truth to help facilitate better decision making. As an example, the Federal Rules of Evidence are to be construed, among other things, “so as to administer every proceeding fairly . . . , to the end of ascertaining the truth and securing a just determination.” The court also is directed to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth . . . [and] protect witnesses from harassment or undue embarrassment.” Keeping these directives in mind properly may embolden judges to be more involved when presiding over suggestive questioning of a child witness.

Ask Follow-Up Questions

While these suggestions are designed to help obtain more full, complete, truthful, and reliable testimony from child witnesses, some misunderstandings are inevitable. Remember that every child understands language differently based on his or her experience and upbringing. The best way to account for this is to ask follow-up questions to clarify about any potential misunderstandings. If in doubt, a follow-up question may help confirm, clarify, and correct an erroneous view of what prior testimony appeared to provide.
Conclusion

Courtrooms are not particularly comfortable places for most people, both adults and children alike. And children are not simply short adults. When children are asked to provide testimony, it is important that they understand the questions they are asked and that what they say is correctly understood. To further the truth-seeking process, judges presiding over proceedings involving child witnesses should be attentive to ensure that children understand questions they are being asked. These 10 common-sense tips can help judges in that process and can help all to more effectively communicate with children in court.

The views expressed are solely those of the authors and do not represent those of the Arizona Court of Appeals.

Notes


8. Walker, supra note 1, at 12 (“Children and adults do not speak the same language.”).


10. Walker, supra note 1, at 47 (citing Cathleen A. Carter, Bette L. Bottoms & Murray Levine, Linguistic and Socioemotional Influences on the Accuracy of Children’s Reports, 20 LAW & HUM. BEHAV. 335 (1996)).

11. Id. at 47.

12. This sentence and the prior sentence come from Anne G. Walker, Questioning Young Children in Court: A Linguistic Case Study, 17 LAW, PSYCHOL. & CHILDREN 59 (Feb. 1993).

13. Walker, supra note 1, at 18, 70.

14. The acronyms, in order, stand for the Indian Child Welfare Act; the Uniform Child Custody Jurisdiction Enforcement Act; juvenile intensive probation, and the department of juvenile corrections.

15. Walker, supra note 1, at 47 (“What makes a complex sentence complex? Most people would probably answer ‘length’ to that question, and length can certainly be a factor, but the correct answer is anything that increases processing time.”).


17. Id. at 52 (citing Peter A. Reich, Language Development (1986); Colin Fraser, Ursula Bellugi & Roger Brown, Control of Grammar in Imitation, Comprehension, and Production, 2 J. VERBAL LEARNING & VERBAL BEHAV. 121 (1963)).

18. Id. (“Putting two or more questions into one.”).

20. WALKER, supra note 1, at 49.

21. Id. at 14.

22. The questions and ambiguity in this paragraph come from Walker, supra note 12.

23. Id.

24. WALKER, supra note 1, at 15 (citing Lucy Berliner & Mary K. Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. SOC. ISSUES 125 (1984)).

25. Id. at 78–79, 95–96.

26. Id. at 48.

27. Id. at 32–34.

28. Id. at 27.

29. Id. at 19–20.

30. The questions and ambiguity in this paragraph come from id. at 64.


32. WALKER, supra note 1, at 57.

33. Andrews & Lamb, supra note 4, at 184.

34. See Marchant, supra note 2, at 432.
35. See generally Zajac, O’Neill & Hayne, supra note 3, at 181 (discussing research regarding cross-examination of child witnesses, include its impact on children as well as witness testimony and credibility).


37. Fed. R. Evid. 611(a).

ENTITY:
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CHILDREN’S RIGHTS
Between July 2017 and June 2018, the U.S. government separated thousands of children from their families as part of a “zero-tolerance policy” of immigration enforcement.

The practice stirred vigorous public debate over the extent to which arriving parents and children enjoy due process rights. In particular, reports of young children appearing unrepresented in immigration court focused attention on the availability of legal representation for respondents in removal proceedings. Unlike criminal defendants, who have a right to an attorney even when they cannot afford one, respondents in immigration court do not. Indigent respondents must instead rely on scarce pro bono lawyers. Many find themselves without representation. ABA leaders have renewed calls for enhancements to due process in immigration proceedings, including the appointment of federally funded counsel for all indigent persons and unaccompanied minors in removal proceedings.

Removal Proceedings in a (Highly Summarized) Nutshell

Individuals suspected of entering the United States illegally typically face removal proceedings. Most removal proceedings begin with an arrest, either by a local police department that coordinates with U.S. Immigration and Customs Enforcement (ICE) (an agency within the Department of Homeland Security (DHS)), or U.S. Customs and Border Protection (CPB) (a separate DHS agency). Once in ICE custody, ICE determines whether to detain and institute removal proceedings against the individual.
Removal proceedings usually occur in immigration courts, which are part of the Executive Office for Immigration Review (EOIR), an office within the Department of Justice. In every immigration case, DHS is represented by an attorney from ICE’s Office of the Principal Legal Advisor, a division of DHS’s Office of the General Counsel. EOIR’s immigration judges preside over formal, quasi-judicial hearings, rendering decisions on deportation, exclusion, removal, rescission, and bond. Because the EOIR is part of the Department of Justice—not an Article I court—immigration judges serve at the pleasure of the attorney general.

One defense to removal may be qualification for asylum based on a credible fear of persecution in the respondent’s home country because of race, religion, nationality, political opinion, or membership in a particular social group. During removal proceedings, a respondent may be detained in DHS custody, released with conditions, or released without conditions. If the court determines removal is appropriate, the individual will return to his or her country of origin via voluntary departure or involuntary deportation by ICE.

**Right to Government-Funded Counsel for Indigent Respondents**

Section 292 of the *Immigration and Nationality Act* (INA) has long afforded respondents in removal proceedings the “privilege” of representation by counsel at their own expense. However, debate over the right to counsel has more frequently centered on a different question: whether indigent respondents in removal proceedings have the right to government-funded representation.

Data suggest this debate has broad implications, particularly for children. Unaccompanied minors were unrepresented by an attorney in approximately three out of four cases originating in 2017, according to a University of Syracuse report. As of September 30, 2018, approximately 66 percent of the total 537,152 juveniles in removal proceedings were unrepresented, according to the same data.

The Sixth Amendment guarantees “the assistance of counsel” to defendants in federal criminal proceedings, which case law has interpreted to include the appointment of counsel for defendants who cannot afford to hire their own. This right applies to defendants facing any charge resulting in a sentence of actual or suspended imprisonment. However, removal proceedings are classified as civil rather than criminal matters. Accordingly, although the right has been held to apply in some civil contexts, courts have held that immigrants in removal proceedings do not have a right to government-funded counsel under the Sixth Amendment.
Less settled, however, is the question of whether the Fifth Amendment’s general guarantee of due process provides a basis for the appointment of counsel during removal proceedings. Some circuit courts have stated that due process may require the appointment of counsel on a case-by-case basis for aliens who are incapable of representing themselves due to age, ignorance, or mental capacity.

With regard to children in particular, courts have been sympathetic but have thus far declined to determine that immigrant children, as a class, have a due process right to appointed counsel. In *J.E.F.M. v. Holder* (2015), a district court denied a motion to dismiss in a class action seeking a ruling that juveniles in removal proceedings have a constitutional right to counsel at government expense. In 2016, the U.S. Court of Appeals for the Ninth Circuit reversed the district court on jurisdictional grounds. The appellate court declined to opine on the merits of the plaintiffs’ claims, but two circuit judges specially concurred, stating in part that whether or not appointed counsel would someday be found to be a constitutional right, the other branches of government should act: “To give meaning to ‘Equal Justice Under Law,’ the tag line engraved on the U.S. Supreme Court building, to ensure the fair and effective administration of our immigration system, and to protect the interests of children who must struggle through that system, the problem demands action now.”

Greater clarity may soon arrive, at least for respondents in the Ninth Circuit. In September, the appellate court ordered a rehearing en banc in *C.J.L.G. v. Sessions*, an appeal from an order of the Board of Immigration Appeals affirming an immigration judge’s denial of an unrepresented minor’s claims for asylum and withholding of removal. In the original panel opinion, the court admitted that the minor, who had fled violence in Honduras at the age of 13, was “a sympathetic petitioner.” But, “proceed[ing] cautiously” given “the peculiar and restricted role of the judiciary in reviewing matters of immigration policy,” the court declined to find that the Due Process Clause implied a right to court-appointed counsel at government expense. Oral argument is set for December 2018.

To date, the Supreme Court has not weighed in on whether due process requires the appointment of government-funded counsel for any class of respondents in removal proceedings. Nor has Congress acted to provide a legislative solution. In the meantime, respondents who cannot afford attorneys continue to rely primarily on pro bono representation, and the debate over whether to provide counsel to indigent respondents in immigration proceedings—regardless of whether the Constitution requires it—continues.
The Impact of Counsel in Immigration Proceedings

Whether a respondent is represented by counsel can have a significant impact on the outcome of immigration proceedings. In 2016, the American Immigration Council published a report on access to representation that analyzed data from over 1.2 million removal cases decided between 2007 and 2012. The report concluded that only 37 percent of respondents secured legal representation, with significant variances in representation rates depending on the geographic location of the court and the immigrant's nationality.

Represented immigrants were more likely to apply for relief from detention and deportation. Respondents with counsel were also more likely to obtain the immigration relief they sought. Detained immigrants with representation were more than twice as likely as unrepresented immigrants to obtain relief if they sought it. Non-detained immigrants with representation were nearly five times more likely than their unrepresented counterparts to obtain relief if they sought it.

The report noted that ability to pay was one obstacle to obtaining representation and that the availability of pro bono representation was insufficient to meet the needs of the respondent population. Although nonprofit organizations, law firm pro bono programs, and law school clinics are known for providing pro bono representation to immigrant populations, the report found that only 2 percent of immigrants facing removal secured such representation.

An Especially Pronounced Problem for Minors

Representation in immigration proceedings is a particularly critical issue when the respondent is a minor, says Martín Gauto, Los Angeles, CA, member of the Section of Litigation's Children's Rights Litigation Committee. When children are separated from parents, "they are very quickly on their own legal track where they may be expected to go to immigration court, come up with a claim for potential relief from deportation, all while separated from their parents and potentially without access to counsel, raising very serious due process and human rights concerns," notes Gauto.

The issue of legal representation for children has come into sharp focus in the last two years. In March 2017, then-secretary of the Department of Homeland Security (DHS) John Kelly stated that the department was considering separating children from their parents at the border as a means of deterring families from migrating to the country.
Because entry into the United States without inspection is a federal misdemeanor—in addition to a civil violation of the INA—the government has the discretion, but is not mandated, to charge unauthorized immigrants with a crime and to place them into custody to await trial. When a parent is criminally charged, the government’s policy is to transfer accompanying children to the custody of the Office of Refugee Resettlement, which then places the children with relatives, in juvenile detention centers, or in foster care. In contrast, when a parent is charged only with a civil violation, children typically remain with their parents. Prior to mid-2017, the government did not have a blanket policy to prosecute parents and, accordingly, separate them from their children.

From July 2017 to October 2017, the Trump administration implemented a zero-tolerance “pilot program.” During that period, federal prosecutors began to criminally charge any adult who crossed the border unlawfully between New Mexico and West Texas. On April 8, 2018, the attorney general announced the expansion of the “zero-tolerance policy” nationwide. In total, the government separated thousands of children from family members between July 2017 and June 2018, when, after public pressure, President Trump signed an executive order ending the policy of separating children from their parents.

**Separated Families File Suit Over Zero-Tolerance Policy**

Several parents separated from their children filed suit. In one of those cases, Ms. L. v. ICE, the U.S. District Court for the Southern District of California preliminarily enjoined the zero-tolerance policy and mandated the reunification of a class of separated families. The court found the plaintiffs were likely to establish a violation of the right to family integrity implicit in due process. Specifically, the court determined that the government’s policy, as implemented, was likely to be a highly destabilizing, traumatic experience with long-term consequences on child well-being, safety, and development.

On October 9, 2018, the Ms. L. court preliminarily approved a settlement. The settlement, if finally approved, would require the government to reassess the asylum claims of families included in the lawsuits. Such a reassessment would allow parents “the chance to present their claim objectively without all the stress and trauma of having their children ripped away from them, and now perhaps with legal representation,” observes Gauto.

**The ABA Expresses Concern Over Separated Families’ Access to Justice**
The ABA weighed in on the issue of legal representation for children following the nationwide expansion of the zero-tolerance policy. On June 12, 2018, then-President Hilarie Bass, Miami, FL, sent a letter to the Attorney General and the secretary of the DHS expressing opposition on behalf of the ABA. The letter noted that “[c]hildren proceeding in court alone often will not be competent to present their claims for relief or have access to vital evidence held by their parents.” The letter also acknowledged “that the number of families arriving at the southern border in recent years has created challenges for the government” and “recognize[d] that these are challenging issues and that immigration involving children is, in general, a complicated matter with no easy solutions.”

“The ABA Board of Governors has been involved in issues relating to immigration for quite some time,” notes Bass, explaining why the ABA opposed the policy. In April 2018, Bass testified before the U.S. Senate Committee on the Judiciary regarding the ABA’s recommendation to create an Article I court to replace the current immigration adjudication system (among other reasons, to solidify the impartiality of immigration judges) and to discuss the critical importance of access to counsel and legal information for respondents in immigration proceedings.

Supporting access to legal representation remains a key issue for Bass. “How can we have five-year-old children walking into immigration court being asked to articulate asylum claims? How can anybody suggest that that is reflective of the concept of due process that we afford to people in our country, whether they are U.S. citizens or people seeking asylum?” she stresses.

“I cannot tell you how many times I have seen a little kid sitting by himself or herself at the respondent's table in immigration court without an attorney sitting next to them. It is the saddest thing that you will ever witness. I saw a baby one time as a respondent in an immigration court. Someone just walked up and held the baby and the judge went through a hearing with the baby in someone's arms,” Gauto adds. “It is almost unbelievable that our country does this.”

**Supporting Access to Justice**

The ABA continues to support the appointment of counsel at federal government expense to represent all indigent persons and unaccompanied minors in removal proceedings. “Providing legal representation for children at government expense is something that we should advocate for, is the right thing to do, and is something I have been urging as an immigration lawyer for about 12 years,” says Gauto. In addition to supporting the appointment of counsel at the federal
government’s expense, the ABA has urged state, local, territorial, and tribal governments to provide legal counsel to all indigent persons in removal proceedings in their jurisdictions.

At least one local government has acted in accordance with the recommendation. In 2014, the New York City Council funded a program that provides free legal counsel to almost all detained indigent immigrants facing removal at one immigration court in Manhattan. Prior to the program, only 4 percent of unrepresented, detained cases in that court resulted in successful outcomes for the respondent. With counsel, approximately 48 percent of respondents will resolve their proceedings successfully, according to a 2017 evaluation of the program.

Opponents of paid legal representation for respondents in immigration proceedings believe that taxpayers should not fund initiatives that make it harder to deport those who are removable. On the other hand, a 2014 study by NERA Economic Consulting found that the fiscal savings expected from such a program could exceed its costs.

Unless and until Congress follows through on suggestions like the ABA’s policy proposal, indigent immigrants and children will continue to rely on the generosity of attorneys providing legal services pro bono. Attorneys who are interested in this issue, or who wish to learn more about serving in a pro bono capacity, can find information and resources on the ABA’s Immigration & Family Separation Resources pages.

Authors

Resources

- ABA’s Family Separation Resources.
- ABA’s Immigration Resources.
- Litigation Documents & Resources Related to Trump Policy on Family Separations.
- ABA Working Group on Unaccompanied Minor Immigrants.
ABA Letter Regarding Family Separation.

Statement of Hilarie Bass President of the American Bar Association for the Subcommittee on Border Security and Immigration Committee on the Judiciary United States Senate on “Strengthening and Reforming America’s Immigration Court System” (Apr. 18, 2018).


I.N.A. § 240(b)(4)(A).

6 C.F.R. § 15.30 (prohibiting discrimination by DHS).

28 C.F.R. § 39.130 (prohibiting discrimination by the Department of Justice).


*C.J.L.G. v. Sessions*, 880 F.3d 1122, 1136 (9th Cir.), *reh'g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

*Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).

*Escobar Ruiz v. INS*, 787 F.2d 1294, 1297 (9th Cir. 1986), *opinion withdrawn sub nom. Rolando Escobar Ruiz v. INS*, 818 F.2d 712 (9th Cir. 1987), *and on reh'g*, 838 F.2d 1020 (9th Cir. 1988).


- *Romero v. INS*, 399 F.3d 109 (2d Cir. 2005).


- ABA Resolution 115.

- ABA Resolution 301.

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