



The Voice of the  
Defense Bar™

# The Voice

February 5, 2020

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## This Week's Feature



## Can You Ever Know Too Much About Prospective Jurors? Cognitive Science Says “Yes”

By Dennis P. Stolle, Dennis J. Devine, and Amit Patel

Trial lawyers often must make inferences about prospective jurors based on precious little information. Courts' standard juror questionnaires typically include only a few questions. Courts seldom allow parties to use longer, supplemental juror questionnaires that can provide more useful information. Time allocated to questioning prospective jurors in court is limited, and many federal judges no longer allow attorney-conducted voir dire. Some prospective jurors may even skate through the voir dire process without ever saying a word.

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### Upcoming Seminars

- Toxic Torts and Environmental Law, February 19-21, 2020
- Litigation Skills Seminar, March 18-20, 2020
- Medical Liability and Health Care Law, March 26-27, 2020
- Insurance Coverage and Claims Institute, April 1-3, 2020
- Cannabis Law, May 6, 2020

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- Avoiding Hidden Catastrophes—The Healthcare Professional as a Witness, March 3, 2020, 12:00 pm-1:00 pm CST
- Predicting Jurors' Verdict Leanings in the Trump Era, March 26, 2020, 12:00 pm-1:30 pm CST

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### State Membership Chair/State Representative Spotlight

- Rhode Island  
Kristina Hultman, Partner, Higgins Cavanagh & Cooney LLP  
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May 6, 2020  
Boston

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### New Member Spotlight

Eugene Nassif III, Lederer Weston Craig PLC

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### Quote of the Week

“My motto was always to keep swinging.”

—[Hank Aaron](#) (b. Feb. 5, 1934).

## This Week's Feature

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Trial lawyers often must make inferences about prospective jurors based on precious little

information. Courts' standard juror questionnaires typically include only a few questions. Courts seldom allow parties to use longer, supplemental juror questionnaires that can provide more useful information. Time allocated to questioning prospective jurors in court is limited, and many federal judges no longer allow attorney-conducted voir dire. Some prospective jurors may even skate through the voir dire process without ever saying a word.

However, rapid developments in communication technology have greatly increased the ability of trial attorneys to gather “outside” information about prospective jurors. When a court makes the names of prospective jurors available before voir dire starts, productive internet searches are possible—sometimes even in real time in the courtroom. For prospective jurors with an extensive online presence, internet searches can yield copious amounts of information beyond what juror questionnaires and voir dire provide. But how useful is this additional information? And could having this additional information even impair good decision-making?

## The Dilution Effect

Consider the following situation. Amy Attorney represents a defendant in a case headed to a jury trial. She knows from a mock trial study of her case that potential jurors are more likely to be pro-plaintiff jurors if they (1) have been plaintiffs themselves and (2) were dissatisfied with the outcome of their case. The day of jury selection has arrived, and Amy must decide which jurors to strike. Imagine two scenarios regarding what Amy knows about prospective juror A:

Scenario 1: Prospective juror A was previously a plaintiff and was dissatisfied with the outcome of his case. Amy knows nothing else about A.

Scenario 2: Prospective juror A's favorite color is blue, he volunteers as a soccer coach, he can play the piano, he owns two Golden Retrievers, and he was previously a

plaintiff in a lawsuit and dissatisfied with the outcome of his case.

In both scenarios, Amy has some valid information about prospective juror A—his dissatisfaction as a plaintiff in a previous case—that would suggest that he might not be a good juror for her case. In either scenario, there is no other *diagnostic* information, meaning information that will lead to a valid conclusion that juror A should be stricken. So Amy should be equally confident in striking A in both scenarios, right? Yes, she *should be*. But cognitive science suggests that she probably won't be. Amy would likely be less confident about striking A in the second scenario than the first, and she might not even strike A at all in the second scenario. Why might that happen? The reason has been termed the “dilution effect.” H. David Smith & Mark F. Stasson, *Dilution in Legal Decision Making: Effect of Non-Diagnostic Information in Relation to Amount of Diagnostic Evidence*, 17 *Current Psychology* 333 (1998). The dilution effect is a cognitive quirk that affects everyone. When diagnostic information is diluted with nondiagnostic information, confidence associated with the correct inference is reduced. In Amy's case, the diagnostic information available in Scenario 1 is exactly the same as in Scenario 2. But her confidence striking prospective juror A would likely be diminished by the additional extraneous information. This could occur even when Amy *knows* that the additional information about A's dogs, hobbies, and favorite color is probably not useful for making the strike decision. Sometimes, it probably could. Think again about Amy Attorney. When additional extraneous information is available about juror A, the dilution effect suggests that Amy would be less confident about striking juror A, even though the truly diagnostic information about him is the same in both scenarios. Simply having more information reduces her confidence in the (valid) decision to strike him. The extraneous information essentially distracts her from the information that matters most.

## But, Why Does More Information Feel Better?

If having more information about a potential juror is not always helpful—and even potentially harmful—why does it usually *feel* better to have more information when making a

decision? The answer is due to “information bias.” Jonathan Baron, Jane Beattie, & John C. Hershey, *Heuristics and Biases in Diagnostic Reasoning: Congruence, Information, and Certainty*, 42 *Organizational Behavior and Human Decision Processes* 88 (1988). Another quirk of human reasoning is that when an important decision must be made based on scarce facts, *any* new information can seem quite valuable and increase our confidence in the decision—even if the additional information is not actually useful. The “dilution effect” and the “information bias” can even work in tandem to lower confidence in the right decision while increasing subjective comfort with the wrong decision. This is the opposite of what trial lawyers want and need.

To make matters even more complex, yet another cognitive quirk can creep in that makes it *feel* good to have additional information, even when that information is not actually useful. “Confirmation bias” is a persistent human tendency to interpret new evidence as supporting a pre-existing conclusion. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *Review of General Psychology* 175 (1998).

People of course can and do sometimes change their mind based on new information. But all else being equal, we are much more likely to interpret new information as supporting an existing belief than contradicting it. We rarely like to revisit our thinking and change our minds. Doing so has cognitive and sometimes social costs. The confirmation bias is even worse under conditions of time pressure, uncertainty, and limited information—conditions that almost always describe jury selection. The result is that trial lawyers may interpret new information, especially if its utility is ambiguous, as confirming their first impression, regardless of whether their first impression was correct or not.

## So, What Do We Do?

Searching the internet for information on prospective jurors can often provide useful information. So, we generally advise doing so when practical and permitted by a court. The results must be handled carefully, though. Information from the internet should be screened carefully by a jury-selection expert who can separate the useful kernels from the unhelpful chaff.

Consider our initial scenarios again and a prospective juror who perfectly fits the profile of an unfavorable juror based on the empirical research. The data indicate that Amy Attorney should strike this person. Suppose, though, that Amy has a few minutes during a court break and conducts an internet search. The search reveals a Facebook

posting showing that the juror has donated to one of Amy’s favorite charities. This information, although interesting, is most likely completely unrelated to the potential juror’s feelings about the case. Even though Amy knows better, she might have a difficult time setting aside the interesting, but unhelpful, new discovery and fail to make the right call and strike the prospective juror.

In jury selection, important decisions must be made quickly. Those decisions should be informed only by truly useful information—meaning information likely to be predictive of a potential juror’s case-related opinions. Several quirks of human thinking, combined with the stress and time pressure of jury selection, can make it challenging for trial lawyers to stay focused on information that matters. Those quirks, which every human being is subject to, include the diluting effect of extraneous information, the comforting presence of additional information, and our strong desire to confirm our initial beliefs. Jury consultants with expertise in cognitive science and human decision-making can help trial teams avoid these pitfalls and help keep a trial team’s attention focused on information that matters.

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**Dennis P. Stolle**, JD, PhD, is the president of **ThemeVision LLC** in Indianapolis, a trial consulting firm affiliated with **Barnes & Thornburg LLP**, where he is a partner. As a member of multiple national defense teams, Dr. Stolle provides advice on judicial and jury decision-making, demonstrative evidence, theme development, jury selection, and trial strategies. Mr. Stolle is a member of the DRI Litigation Skills Committee.

Dennis J. Devine, PhD, MJ, is a litigation consultant with **ThemeVision**. He specializes in applying psychological principles, findings, and methods to assess and diagnose client needs, gathering and systematically analyzing relevant data, and then conveying critical findings in an easy-to-digest manner. Before joining ThemeVision, Dr. Devine was an associate professor in the Department of Psychology at Indiana University–Purdue University Indianapolis for 22 years.

Amit Patel, JD, MA, is a jury consultant with **ThemeVision**. Mr. Patel has experience facilitating focus groups, conducting mock trials, performing statistical analysis, and publishing venue reports. With a background as a practicing attorney, Mr. Patel applies his experience as a corporate attorney and civil litigator in his current role as a jury consultant; he also has practiced family, employment, and real estate law.

## And The Defense Wins

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### Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to [DefenseWins@dri.org](mailto:DefenseWins@dri.org). Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for *The Voice* to publish your win.

### Michael Phillips, Hagwood and Tipton



In a January 2020 decision, **Hagwood and Tipton** attorney and DRI member [Michael Phillips](#) won on appeal in the US Court of Appeals for the Fourth Circuit in Richmond, Virginia. The appeal related to an original case in the US District Court for the Middle District of North Carolina, which resulted in summary judgment. In the case, the plaintiff, John Walter Riggins, claimed negligent care by the defendant, the Brian Center, specifically that the failure to

provide his mother a thickened liquid diet resulted in his mother’s death from aspiration pneumonia. Summary judgment was granted by the district court when the plaintiff’s medical expert failed to testify to a reasonable degree of medical certainty that that the decedent’s death was related to the failure to provide thickened liquids.

The Fourth Circuit affirmed the district court on all issues, holding that the district court did not err in granting the summary judgment, nor did it abuse its discretion in pointing out the conflicting portions of the plaintiff’s medical expert’s after-the-fact affidavit. The Fourth Circuit reaffirmed that the plaintiff’s medical expert’s testimony was insufficient to reach a jury (therefore leading to summary judgment), and the medical expert’s affidavit was only presented when faced with summary judgment and introduced a “vague, competing standard.”

## DRI Cares

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### FDLA Helps Local Families During Winter Meeting

During the recent **Florida Defense Lawyers Association's** Winter Meeting in Lake Tahoe, attendees were asked to make a monetary donation to the [South Lake Tahoe Family Resource Center](#). The mission of the Center is to enable individuals and families to achieve self-sufficiency and economic stability, to develop resilience in both parents and children, and to allow families to become a contributing part of the community. They work with the community to support learning, foster parent engagement, and promote wellness for all ethnicities and backgrounds. The Center is a school-based, public benefit, not for profit corporation,

with support from Lake Tahoe Unified School District, Lake Tahoe Community College, and El Dorado County Mental Health Dept.

Getting attendees to open their wallets proved easy. They were simply told that FDLA was supporting a local charity, asked to take a look at the view from the meeting room, and reminded that they are blessed. The Center was extremely excited when informed that a check was on the way.

\$370 was collected, which was matched by the FDLA for a total donation of \$740.



Upcoming Seminars

**Toxic Torts and Environmental Law, February 19–21, 2020**



dri Toxic Torts and Environmental Law Seminar

February 19–21, 2020  
Phoenix

REGISTER TODAY

Head to Phoenix February 19–21 for DRI’s Toxic Torts and Environmental Law Seminar—the premier gathering for the defense bar. Earn up to 9.75 hours of CLE by attending sessions focused on litigation strategies and regulatory updates. Learn how to be more effective counselors and advocates in toxic tort litigation and environmental compliance. Explore the role and effect of media and PR in toxic tort and environmental law litigation. Find out how toxic tort and environmental law will play a role in plastics, cannabis, and consumer products in 2020. [Click here](#) to view the brochure and to register for the program.

**Litigation Skills Seminar, March 18–20, 2020**



dri Litigation Skills Seminar

March 18–20, 2020  
Las Vegas

REGISTER TODAY

Attend the DRI Litigation Skills Seminar, March 18–20, in Las Vegas, for skill-building workshops on the four phases of litigation: how to prepare corporate witnesses for deposition, how to depose sympathetic fact witnesses, how to cross-examine expert witnesses, and how to handle evidentiary hearings. Each phase contains mock exercises and presentations on best practices. Register by February 25 to save \$100. [Book your hotel](#) room by then as well to ensure availability. [Click here](#) to view the brochure and to register for the program.

**Medical Liability and Health Care Law, March 26–27, 2020**



dri Medical Liability and Health Care Law Seminar

March 26–27, 2020  
Austin, TX

REGISTER TODAY

DRI’s annual Medical Liability and Health Care Law Seminar, March 26–27, in Austin, features the latest topics in medical liability and health care law. Participate in interactive sessions about evaluating complex medical malpractice cases, jury selection trends, how to handle conflicts related to coverage issues, and more. Register by February 24 to save \$100 and ensure your place at this cutting-edge event. [Click here](#) to view the brochure and to register for the program.

Upcoming Seminars

**Insurance Coverage and Claims Institute, April 1-3, 2020**



From dozens of bridges to Marina City and Cloud Gate, Chicago’s art and architecture are diverse, mixing buildings and structures that have made Chicago one of the great cities of the world for sightseeing. Like its host city, the 2020 DRI Insurance Coverage and Claims Institute promises to provide an incredible array of presentations, topics, and networking opportunities, making this program a mandatory event for every insurance law practitioner and claims professional. [Click here](#) to view the brochure and to register for the program.

**Cannabis Law, May 6, 2020**



Thirty-three states have legalized medicinal marijuana and 10 states have legalized the adult use of marijuana. However, the Controlled Substances Act (Schedule One) and ongoing regulatory uncertainty presents a barrier to full realization of the potential of this \$50-plus billion business. This quickly developing sector affects virtually every area of the law and provides opportunities to those with the knowledge base to guide clients and companies deftly through a shifting regulatory and legal landscape. The DRI Cannabis Law Seminar provides you with subject-matter experts who will share with you the knowledge and strategies needed by professionals, businesses, and insurers to traverse the complex pitfalls and prospects of cannabis legalization successfully. [Click here](#) to view the brochure and to register for the program.

## Upcoming Webinars

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### Avoiding Hidden Catastrophes—The Healthcare Professional as a Witness, March 3, 2020, 12:00 pm–1:00 pm CST



Despite significant differences in personalities and emotional expression among healthcare professionals, physician and nursing witnesses are repeatedly dealt with in a universal manner when preparing for depositions in medical malpractice cases, resulting in ineffective, and often damaging, testimony. Among physicians, two primary personalities can be identified, while nursing staff can similarly be broken down into distinct personalities. Individual healthcare personalities must be identified and uniquely addressed early on from both a cognitive and emotional perspective to avoid destructive testimony that will unnecessarily increase both the value and exposure of the case. [Click here](#) to register.

### Predicting Jurors' Verdict Leanings in the Trump Era, March 26, 2020, 12:00 pm–1:30 pm CST



Increasing polarization in American politics has led to a substantial shift in civil juror decision-making and jury verdicts. This webinar examines the effects of political beliefs on trial outcomes. Research results indicating the extent to which individual jurors' political orientation affects verdict preference will be presented, followed by discussion of how case characteristics and juror political orientation can interact to produce unexpected outcomes. Attendees will learn how socio-political changes can affect deliberation dynamics and how to evaluate the composition of a jury. Finally, presenters will review evidenced-based strategies for identifying favorable and unfavorable jurors. [Click here](#) to register.

## DRI Membership—Did You Know...

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### DRI's Defense Library Series—It's Free, It's Online, and It's Knowledge that You Can Use

If you are not taking advantage of DRI's free online [Defense Library Series](#), you are leaving money on the table. Did you know that DRI tapped the experience and expertise of national defense leaders in their practice area to author and publish more than 18 publications that are free and online to all DRI members?

Go to [dri.org](http://dri.org) and log in to your membership account. Click on "Legal Resources," scroll down to "Access DLS Titles" and select it, and then select a **practice area**. Among others, in the **Drug and Medical Device** category,

you will find *FDA Basics for the Drug and Medical Device Lawyer*; in the **Insurance Law** category, you will find *Duty to Defend Compendium* and *Insurance Bad Faith—A Compendium of State Law*; in the **Intellectual Property Litigation** category, you will find *Remedies in Intellectual Property Cases*; and in the **Product Liability** category, you will find *Products Liability Defenses: A State-by-State Compendium*.

## State Membership Chair/State Representative Spotlight

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### Rhode Island

#### State Membership Chair



**Kristina Hultman**, Partner, Higgins Cavanagh & Cooney LLP

Areas of practice: Premises liability, transportation, and professional liability.

DRI member since 2015.

Kristina's experience with DRI: "I was introduced to DRI through my SLDO, Defense Counsel of Rhode Island, where I served as a member of the board of directors and Young Lawyers Division co-chair. Since joining DRI, I have become a member of the DRI Women in the Law Committee, the Young Lawyers Committee, and the Retail and Hospitality Committee."

Fun Fact: "I was a championship-level Irish Step dancer."

#### State Representative



**John F. Kelleher**, Shareholder, LaSalle & Kelleher PC

Areas of Practice: Corporate litigation, product liability defense, and insurance defense.

DRI member since 2005.

John's experience with DRI: "I've been a member of DRI for decades and have benefited tremendously from attending its seminars, meeting its extraordinary members, and more recently, the trove of helpful material available through DRI's new online library, LegalPoint."

Fun Fact: "Every year I set a bicycling goal of 1,000 miles, and every year I fail to reach it. I blame it on a short season."

## New Member Spotlight

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### Eugene Nassif III, Lederer Weston Craig PLC



**Eugene Nassif III** is an associate with **Lederer Weston Craig PLC** in West Des Moines, Iowa. His practice focus is civil litigation, tort litigation, insurance defense, personal injury litigation, and municipal law.

Mr. Nassif was admitted to the Iowa Bar in 2018 after earning his J.D. from Drake University Law School. He is also a member of the Polk County Bar. He has served on several boards and committees, including as philanthropy

chair of Delta Theta Phi International Law Fraternity and treasurer of the Drake Law Federalist Society.

Mr. Nassif earned his bachelor's degree from Luther College in 2016, with a major in political science. Before joining Lederer Weston Craig PLC, he worked as a clerk and associate attorney at LaMarca Law Group in Des Moines, with a personal injury practice. In addition, he clerked with former state Representative Ken Rizer and former Iowa Governor Terry Branstad.

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### Quote of the Week

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"My motto was always to keep swinging."

—[Hank Aaron](#) (b. Feb. 5, 1934).