

# The *CSI* Effect

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In 2002, CBS launched a crime drama that featured a team of investigators who used the latest advances in forensic science to solve a seemingly never-ending series of homicides and complex crimes. The show, *CSI: Crime Scene Investigation*, blossomed into a mega-hit, running for 15 seasons, spawning three spin-offs, a book series, video games, and even museum exhibitions. The show's enduring popularity, however, has been credited, rightly or wrongly, with casting a dubious influence over real-life criminal trials. The phenomenon, known as the "CSI effect," is the idea that television shows like *CSI* have created in the minds of jurors the expectation that the only credible evidence is highly technical, science-based, forensic evidence. Thus, the *CSI* effect causes some jurors to expect, if not demand, DNA tests, fingerprint analysis, computer forensics, and other specialized "scientific" evidence. When such evidence is presented, these jurors are almost certain to believe it. When it is absent, however, more traditional nonscientific evidence, such as witness testimony and documents, may be disregarded.

It is difficult to measure the influence that the *CSI* effect actually has on verdicts. Nevertheless, the *CSI* effect has been an enduring concern for defense attorneys and prosecutors alike. Because of the prevalence of high-tech forensic tests in fictionalized depictions of the criminal justice system, and society's increasing comfort with, and reliance on, technology in general, in our experience, the *CSI* effect is something a trial practitioner should be cognizant of in all phases of trial. But, like all juror expectations, the *CSI* effect can be managed effectively with

sufficient preparation and focus. In this article, we explore how the *CSI* effect can influence all phases of the trial, and we share specific steps criminal law practitioners can use to either mitigate or exploit this pop culture phenomenon.

## Jury Selection

Whether or not attorneys want jurors who are heavily influenced by crime-show depictions of scientific evidence obviously depends on the type of case they have or are defending against. Attorneys who intend to admit significant pieces of forensic evidence would likely want to impanel such tech-expectant jurors, while attorneys relying heavily on witness testimony may not. Similarly, attorneys defending cases involving a significant amount of testimonial evidence may also want jurors who have a high expectation of technical evidence.

Regardless, attorneys need to focus on learning as much as possible about potential jurors' expectations. Thus, it is important to make jury selection a priority. When preparing for trial, it is easy to spend the inevitably limited time one has on preparing jury addresses, exhibits, and witness examinations, without developing a plan for jury selection. Jury selection, however, is the only opportunity to learn about the individuals who will ultimately render the verdict and to strike potential jurors who may not be able to fairly evaluate the evidence. Thus, well before trial, it is important for attorneys to learn the details

Illustration by Fian Arroyo





PRODUCTION CSI  
DIRECTOR Flan Arango  
CAMERA 1  
SCENE 1 TAKE 1 ROLL 1  
DATE 10/29/20

Evidence Director





of the trial judge's jury selection procedures and deadlines for submitting any proposed voir dire.

When suggesting voir dire questions, beyond trying to tease out obvious biases, it is important to suggest questions from which attorneys can learn about jurors' day-to-day lives. What is the nature of their employment; what television shows and movies do they watch; what newspapers, magazines, and books do they read; what websites do they visit; what technology do they regularly use; and what are their hobbies and interests. Learning about jurors' day-to-day lives is the best way to learn about any unreasonable expectations they may harbor. Potential jurors, like all people, are not monolithic and not all who enjoy watching *CSI* are unduly influenced by doing so. Learning about all of their interests and media exposure will paint a broader picture of the type of jurors they will be.

When jurors answer voir dire questions in a manner indicating that they may be unduly influenced by fictionalized trials, it is important to try to ascertain, through follow-up questions, as much additional information as possible. Judges' practices on follow-up questions vary, but most allow attorneys, at the very least, to suggest to the court follow-up questions. When possible, attorneys can ask potential jurors whether their television preferences would influence their ability to follow the court's instructions on how they should evaluate evidence, even if the instructions are different than on TV. The manner in which a prospective juror answers that question can give some insight into how potential jurors will react to a lack of forensic evidence. Some courts will allow lawyers to strike potential jurors based on television viewing habits or if they express an expectation about being presented with scientific evidence.

Some prosecutors may try to ask explicit questions regarding the *CSI* effect, such as whether a potential juror is more likely to believe forensic evidence versus other types of evidence. Defense attorneys, however, should object to these types of questions because they can have a tendency to improperly influence the entire jury pool by giving the impression that reliable forensic evidence is not necessary to prove the defendant's guilt, when it is the sole province of the jury to make that determination.

In addition to direct answers, potential jurors' demeanor and the manner in which they react to the judge can provide valuable information about whether they will be unduly influenced by the *CSI* effect. Potential jurors may have certain expectations coming into trial, but many of them are willing to put those aside if the judge instructs them accordingly. Thus, it is important to identify which jurors are likely to follow the judge's instructions. Potential jurors are continually receiving instructions through jury selection. They are told what to do, where to sit, what questions to answer, what to listen to, and how to act. By paying attention to how seriously and intently potential jurors absorb and follow instructions, attorneys can learn a fair amount about how likely they are to follow the court's instructions on how to evaluate evidence.

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## Opening Statements

Opening statements present an opportunity to set expectations and account for jurors' views on forensic evidence. Attorneys relying on nonscientific evidence, such as witness testimony or documents, can address why such evidence is just as trustworthy as forensic evidence. Thus, attorneys can acknowledge that the case does not involve DNA testing or fingerprint analysis but that the evidence will nonetheless be very reliable. For example, witness testimony will be corroborated by documents or by the testimony of other witnesses. By addressing the issue head-on, advocates will not leave jurors to wonder why highly technical evidence is not being presented to them.

Alternatively, opening statements also present an opportunity for defense attorneys to frame their presentations in a manner that plays to juror expectations. Thus, attorneys can emphasize the lack of forensic or scientific evidence to cast doubt on the strength of the case against their client. However, far more compelling is demonstrating that scientific or technical evidence was available but the prosecutors failed to obtain it. Jurors may be willing to overlook the lack of forensic evidence, but jurors who are anecdotally aware of such evidence are less likely to overlook the lack of forensic or technical evidence when it was readily available.

Defense attorneys should continuously look for such instances of missing evidence. In the highly technical world in which we live, there may be multiple missed opportunities to obtain forensic or technical evidence. For example, if the government is contending through witness testimony that the defendant was at a particular location at a particular time, there are many opportunities to corroborate such testimony. It is worth exploring whether there was any nearby video footage, cell phone location data, GPS data, E-ZPass records, or credit card transaction data that was not obtained to corroborate testimony about location.

Similarly, when appropriate, defense counsel can emphasize that unrecorded communications between government sources and other individuals could have been recorded but were not, emails or text messages that likely exist were not collected, computer forensic analysis that could have been conducted was not, or calendars, contact lists, and address books that could have been analyzed were not. Referring to missing evidence not only raises doubt about the prosecution's case but also appeals to jurors who have certain expectations pursuant to the *CSI* effect.

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## Direct Examinations

When conducting direct examinations, attorneys concerned about the *CSI* effect should point out all the ways in which their nonscientific evidence is corroborated. Thus, if multiple witnesses tell the same story, corroborating each other, attorneys should consider calling those witnesses back-to-back, emphasizing for

the jury that the stories line up exactly. This can be done through consistencies in the most relevant portions of testimony, as well as through small details that are the same. For example, two witnesses recalling a joint conversation with a third individual who both notice that individual's particular mannerisms or behavioral ties can corroborate each other. In addition, through careful questioning, direct examinations can establish that there was no opportunity for witnesses with similar accounts to get their stories straight. For example, witnesses can be questioned on whether they had recently communicated with another witness or had any opportunity to do so. Independent evidence, like phone records and location data, can be used to corroborate the lack of interaction between two witnesses.

Attorneys also should attempt to use documents to substantiate testimony. While it is not possible to corroborate every relevant portion of testimony, it is important to use documents as much as possible to backstop the witness's testimony. For example, if a witness testifies he made a phone call, the attorney can show the witness and the jury the telephone record demonstrating the call was made. If a witness states that she went to a particular location at a particular time, the attorney can admit into evidence the Outlook calendar entry reflecting the meeting time and location. If a witness indicates he entered a particular office building, the attorney can show security records indicating he checked in or signed an entry log. Every bit of corroborative evidence, regardless of how small, can demonstrate to the jury that independent, unimpeachable evidence supports the witness's testimony, thereby bolstering the witness's believability and mitigating the *CSI* effect.

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## Cross-Examinations

For defense attorneys, cross-examining cooperating witnesses can present a compelling opportunity to play to a jury's expectation for *CSI*-type evidence. Many criminal cases rely heavily on testimony from cooperating witnesses that is not backed up by scientific or technological evidence. Under such circumstances, defense attorneys can make significant headway by emphasizing the lack of such evidence.

Cross-examinations should certainly focus on the cooperating witness's compromised credibility, the witness's incentive to give inculpatory evidence, and any cooperation agreement reached with the government. However, cross-examination also can be used to demonstrate to the jury the lack of forensic, technical, or other uncontroverted evidence that would corroborate a cooperating witness's testimony. Thus, if a witness is being cross-examined on an alleged statement made by the defendant, it is important to follow up that there is no email or recording made of the statement. If the cooperating witness states that he met the defendant at a particular location, it is important to note

that there is no video of that encounter or no GPS or cell phone location data demonstrating the defendant was present. If the prosecution had the opportunity to obtain such evidence and did not do so, that also can be brought out through cross-examination. Defense counsel could ask the witness whether investigators sought access to his cell phone to corroborate his whereabouts at a particular time or forensically examined his computer to obtain all relevant records and communications.

Even if there is some corroborating evidence, defense attorneys can point out its limitations. For example, if a cooperating witness created an audio recording of a conversation with the defendant, the cross-examiner can probe the circumstances of such a recording. Was the cooperator trusted to turn on the recording device himself? If so, the defense attorney can likely have the witness identify communications that were not audio-recorded. The attorney can emphasize, through questioning, that those communications could have contained exculpatory evidence that could have been captured but was not. Similarly, if the government trusted a cooperating witness with limited credibility to decide what to capture on a recording, that evidence may not be trustworthy at all. By poking holes in the manner in which seemingly uncontroverted evidence was collected, cross-examiners can introduce doubt concerning the reliability of the evidence.

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## Expert Witnesses

Expert witnesses are often a means for admitting scientific and technical evidence. Defense attorneys often find it challenging to confront experts on matters of scientific evidence. Thus, defense counsel risk losing their influence on jurors who are especially impressed with such *CSI*-type testimony. Well in advance of trial, it is essential for lawyers to try to master the scientific evidence and the details of how it was collected, including whether it was collected in accordance with industry-best scientific and technical procedures. To do so, attorneys need to understand the technology and science behind the evidence and, if possible, consult multiple independent experts. Careful preparation and thorough analysis of the evidence allow attorneys to speak the same language as the expert witness and challenge the expert on technical or scientific grounds. A well-planned and well-prepared cross-examination of an expert may score critical points with a juror biased by the *CSI* effect and reveal that even highly technical evidence may not be ironclad.

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## Jury Instructions

Charge conferences finalizing jury instructions usually take place toward the end of a trial. But planning for the conference and proposing instructions is vitally important. Jurors generally respect the judge and become accustomed to taking cues and

instructions from the judge. Thus, jury instructions present the best opportunity to account for juror expectations and biases, including the *CSI* effect.

Attorneys who are relying on nonscientific evidence should ensure there is a strong instruction on the appropriate use of circumstantial evidence, including that the law makes no distinction at all between direct and circumstantial evidence. This instruction can then be used to emphasize to jurors that all types of evidence can be given equal weight, including non-forensic evidence.

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Further, prosecutors can seek instructions that they are not required to present all possible evidence related to the case or produce all possible witnesses who might have some knowledge. Such instructions can be used to argue to the jury that defense critiques of the failure to produce certain types of forensic evidence are misguided. Some prosecutors may seek even more explicit instructions confronting the *CSI* effect, asking the judge to tell the jury that they were not required to employ any specific investigative technique or scientific test to prove their case. These kinds of instructions run the risk of lowering the government's burden of proof by instructing the jury that certain types of reliable scientific evidence are not necessary to prove the defendant's guilt. Defense attorneys should therefore vigorously oppose explicit instructions regarding the merits of forensic evidence and addressing the *CSI* effect.

Conversely, to emphasize the lack of forensic evidence, defense attorneys can seek a jury instruction that it is appropriate for the jury to consider the lack of evidence in determining guilt, and jurors can therefore consider the lack of specific investigative techniques used in their deliberations. Defense attorneys should be sure to seek this instruction, especially if the judge is inclined to instruct the jury that there is no legal requirement

that the government use any specific investigative technique or all possible techniques to prove its case.

Regarding expert testimony, defense attorneys can seek instructions to make clear to the jury that the existence of expert testimony does not automatically mean that forensic evidence is reliable and trustworthy. In cases in which the prosecution is relying heavily on forensic evidence, it is important to seek an instruction that the jury can disregard expert opinion if it determines that the opinion is not based on sufficient knowledge, skill, experience, or training; if the reasons given to support the opinion are not sound; or if the jury concludes that the expert opinion is not supported by the evidence or is outweighed by other evidence.

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### Closing Arguments

With regard to the *CSI* effect, closing arguments present an opportunity to reemphasize all of the strategies that were pursued during the course of the trial. Thus, an attorney can explain to the jury in detail how direct examination testimony was corroborated via documents, telephone records, audio records, computer evidence, or other non-testimonial evidence. Defense attorneys can methodically go through all the potential technical and scientific evidence that is not present, raising doubt as to the proofs in the case.

Emphasizing key jury instructions is vitally important during closing arguments. Jurors' respect for the judge makes the instructions one of the most important tools in overcoming jurors' biases and preconceived notions. In closing arguments, attorneys can focus on the jury instructions that are helpful to them and remind the jury that these instructions come from the judge, not from the lawyers. Attorneys may even want to enlarge and display the most helpful jury instructions. By methodically focusing on particular instructions that can be used to address the *CSI* effect, attorneys can appeal to or nullify certain juror expectations that are based on fictionalized accounts of trials.

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### Conclusion

Criminal law practitioners should always be cognizant of how popular culture and advances in technology influence the expectations of jurors. *CSI*, the television series, has now been relegated to reruns, but its legacy continues to affect how criminal trials are prepared and tried. At the end of the day, however, attorneys employing tried-and-true methods of trial practice will be in the best position to advantageously exploit or mitigate these *CSI*-influenced expectations and put their clients in the best possible position to prevail at trial. ■