

It is late in the afternoon, on the fourth day of a five-day jury trial, and my soon-to-be-disbarred opposing counsel settles in for his mid-trial, afternoon, nap. I make my obligatory “do you see this guy?” eye contact with the judge. The judge sees. With a slight nod and a shrug, the decision is made to let the man sleep.

No one in the courtroom is at their best this afternoon. One juror’s head intermittently dips suggesting he might soon join opposing counsel in a nap. Others, literally, navel gaze. The most alert jurors appear decidedly more interested in my silent correspondence with the judge than the trial testimony. When my co-counsel whispers a question to an associate, the response is something to the effect of “I’m sorry, I didn’t catch what the witness said.” For longer than I care to admit, I ruminate on the absurdity of my client, a careful and erudite lawyer, being sued for legal malpractice by a man who is sleeping through trial testimony for the third afternoon in a row. It takes blunt, mental, force to get myself back in the game.

Why is everyone operating so poorly? If you were to ask Daniel Pink, the author of *When: The Scientific Secrets of Perfect Timing*,¹ he would tell you that it’s just a matter of time. The participants of this courtroom scene don’t know it, but they happen to be approaching the least productive time of day - the afternoon “trough” – and a minute in which, on balance, most of us are at our functional and emotional worst... 2:55 pm.¹

The dramatic effect of the time of day on many non-legal professions is well known. For example, any medical malpractice lawyer worth their salt will tell you to schedule surgeries early in the morning. Research supports this view. At 9:00 am, the risk of an adverse event involving anesthesia is about 1 percent. At 4:00 pm, the risk of an adverse event is over four times greater.² For each hour that passes in the day, endoscopists are 4.6 less likely to detect polyps during colonoscopies.³ If you see a medical professional in the afternoon, know that they are washing their hands 38 percent less than they are in the morning. The consequences of this circadian fatigue: skyrocketing probabilities of infection and injury.⁴

With these studies in mind, Pink posits that timing deserves greater consideration in our professional lives. For trial advocates and litigators, this would be a worthwhile goal. If the cognitive abilities of our judges and jurors don’t stay the same throughout the day, are advocates doing enough to cater to the deteriorating performance of our audience? A study, involving the effect of time of day on the performance of our legal factfinders, demonstrates why advocates should consider heeding Pink’s advice.

¹ Daniel H. Pink, *When: The Scientific Secrets of Perfect Timing* (2017); see also

<https://www.cnn.com/2013/06/07/tech/social-media/apparently-this-matters-255-workday/index.html> (Pink’s work establishes that the trough is a range of afternoon times. This unscientific poll of office workers puts the peak of the afternoon trough, near the midpoint of the range, at 2:55pm).

² Melanie C. Wright, et al., “Time of Day Effects on the Incidence of Anesthetic Adverse Events,” *Quality and Safety in Health Care* 15, no. 4, 2006 at 253-263.

³ Alexander Lee, et al., “Queue Position in the Endoscopic Schedule Impacts Effectiveness of Colonoscopy,” *American Journal of Gastroenterology* 106, no. 8, 2011 at 1457-1465.

⁴ Hengchen Dai, et al., “The Impact of Tim at Work and Time Off from Work on Rule Compliance: The Case of Hand Hygiene in Health Care,” *Journal of Applied Psychology* 100, no. 3, 2015 at 836-862.

While it is reasonably well-settled that people are less functional late in the afternoon, the more interesting question is: How do factfinders make decisions at these inopportune times of the day? According to a study conducted by Professor Galen Bodenhausen, they appear to rely on shortcuts to avoid doing the hard analytical work that they would normally do (at high-functioning times of day).⁵ Bodenhausen hypothesized that:

...if cognitive capabilities and motivation fluctuate as a function of time of day, it follows that reliance on stereotypes in the judgment process should also vary as a function of time of day, other things being equal.

In other words, when we are not sufficiently able and motivated to carefully consider relevant evidence, do we cheat in order to simplify our tasks? The answer appears to be “yes.”

To test his proposition, Bodenhausen asked his study participants to read fact patterns about the alleged misconduct of three individuals to assess the likelihood of their guilt. The fact patterns involved an individual accused of assault, an individual accused of selling drugs, and an individual accused of cheating on a final exam. Each study participant was given identical fact patterns with one exception. For half of the participants, the defendants were identified as Robert Garner, Mark Washburn, or a general student. But, for the other half, the defendants were identified as Roberto Garcia, Marcus Washington, or a star athlete. The idea was to interject racial and other stereotypes to see if the “jurors” were more likely to succumb to unfair stereotypes at nonoptimal times of day.

That is precisely what happened. When the “jurors” deliberated in the morning, they treated all of the defendants the same. The stereotyped defendants (Roberto Garcia, Marcus Washington, and the star athlete) were as likely to be innocent in the morning as the non-stereotyped defendants (Robert Garner, Mark Washburn, and the student). But, when the jurors deliberated in the afternoon, they were significantly more likely to find Roberto Garcia, Marcus Washington, and the star athlete guilty than the non-stereotyped defendants.⁶ Chillingly, it appears that (1) time of day was dispositive of guilt in identical fact patterns, and (2) factfinders seek to replace an analytical approach to their task with a psychologically easier/lazier framework at non-optimal times of day.

What implications does this have for trial advocates? I asked several colleagues how they might consider incorporating these considerations into their practice, and the answers might be useful to think about:

- One civil litigator wonders whether the natural call order of a jury trial should sometimes be set aside. If the jury is less able to process hard analytical information in the afternoons, is it worth trying to avoid calling an expert in some complex field at non-optimal times?

⁵ Galen V. Bodenhausen, “*Stereotypes as Judgment Heuristics: Evidence of Circadian Variations in Discrimination*,” *Psychological Science* 1, no. 5, 1990 at 319-22.

⁶ *Id.* Roughly 15% of people are scientifically/genetically night owls. In the study, the participants were categorized as morning people or night people to determine their individualized optimal time of day. For brevity’s sake, I’ve summarized the findings without making this distinction. The findings were the same across morning and evening types.

- A plaintiff's lawyer, who has habitually made his settlement negotiation calls to insurance adjusters in the afternoons, might shift to the morning calls. Maybe, the adjusters will be more charitable and amenable to his advocacy outside of the afternoon troughs.
- A criminal defense lawyer, who routinely represents minority clients in one-day trials, notes that many of her cases go to the jury in the late afternoons. She might consider trying to push certain cases into a second day so that the jury will start deliberations in the mornings (when they are less likely to fall back on racial stereotypes).
- A non-morning-person civil defense lawyer, in a jurisdiction where counsel can select the time of their motion hearings, contemplates scheduling his motion to dismiss or summary judgment hearings on the morning docket. His thinking? A cognitively alert judge might be more likely to do the hard thing – like dismissing a case – in the morning instead of falling back on the easier path of letting a case proceed to trial in the afternoons.

Of course, we need to be careful not to over-weight one factor (time of day) in a complex and multi-factorial endeavor like lawyering. But, as we strategize to gain every inch of advantage over our adversaries, considering the time of day is worth giving greater weight. In the oft repeated words of Dan Pink, “timing isn't everything, but it's a big thing.”⁷

⁷ <https://www.npr.org/2018/01/17/578666036/daniel-pinks-when-shows-the-importance-of-timing-throughout-life>