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What Hath COVID and Ongoing World Trauma Wrought on Jurors' Perspectives of Corporate America? Are We Better or Worse in Their Eyes?

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What Hath COVID and Ongoing World Trauma Wrought on Jurors' Perspectives of Corporate America? Are We Better or Worse in Their Eyes?

Plaintiff attorneys across the nation are brazenly making large demands, and then, if their demands are not met, going to trial and asking the jury for even more money than they originally demanded. One reason plaintiff attorneys feel comfortable requesting what some might consider outlandishly high damages is that they have been successful in receiving them. Often referred to as "nuclear verdicts," verdicts considered disproportionately high compared to what would be expected given the economic damages or the plaintiff's contributory/comparative fault for the outcome, are causing concern for defense counsel and insurers. In several areas of litigation, even if the *number* of "nuclear verdicts" has not increased, the amount of money that jurors have awarded *has* increased significantly[1]. According to TopVerdict.com, the top verdicts in the U.S. in 2012 and 2013 were just over $1 billion each year; while the top verdict in 2019 was $8 billion.

It is important for defense counsel and corporate clients to be aware of the factors that lead to "nuclear" verdicts and steps that can be taken to reduce their likelihood. The COVID pandemic has impacted, and continues to impact, jurors economically, emotionally, and attitudinally. Jurors' negative attitudes toward corporations create greater pressure on key witnesses such as corporate representatives. Additionally, the large verdicts that are publicized in a community affect jurors' perceptions of what is a typical verdict, driving damages upward. Below are recommendations for the defense in the wake of COVID.

COVID'S IMPACT ON JURORS

Courtroom Sciences' consultants have been aware for many years that jurors experiencing stress, anxiety, depression, or other mental health issues are more inclined to favor plaintiffs than those who are not. Research on information processing and decision-making explain this relationship.[2] Anxiety and stress sap cognitive resources, and thus increase the likelihood that sufferers will engage in what is known as the heuristic or experiential information processing mode. In this processing mode, individuals rely on heuristic cues or "rules of thumb" for reasoning (e.g., *this lawsuit made it all the way to court, so the defendant must have done something wrong; there are many more people at the defense table compared to the plaintiff's table…it is clear the plaintiff is out-numbered and this is unfair*). Heuristic or experiential information processors tend to make decisions quickly and rely on emotions and intuition; they are also particularly influenced by graphic or "gruesome" photograph evidence. People less affected by anxiety or stress, or who are better able to manage these conditions, are more likely to have the cognitive resources needed to engage in central or rational processing. In this processing mode, individuals more carefully and deliberately analyze information and are thus more likely to reach a logical conclusion, which is favorable for most defendants.

During the first twelve months of COVID, Courtroom Sciences' consultants tracked jurors' stressors such as concerns about paying bills and job security, as well as health concerns and stress due to social distancing. Data from more than 1,000 individuals who participated as jurors in Mock Trial research across multiple case types (e.g., premises liability, auto accident, product liability) were analyzed. Jurors who awarded higher compensatory and punitive damages expressed greater concerns about COVID. Currently, some of the individuals who were experiencing significant stress during the first year of the pandemic are now describing their ability to overcome obstacles and their success in fighting for a higher quality of life. These individuals can be risky for the defense. Counsel will need to listen to jurors describe how COVID has affected them to identify the jurors who pose the greatest risk. An

excellent question to ask during voir dire is "Has COVID fundamentally changed you?" The question then needs to be followed up with "How so?" Individuals who perceived that they were unfairly treated by employers or felt that the pandemic revealed an unfair system in America that favors large corporations and the wealthy elite are likely to side with the plaintiff and are motivated to help the plaintiff achieve "justice." On the other hand, individuals who do not feel that COVID had much of an effect on their lives are more likely to side with the defense.

The Financial Impact of COVID

One stressor that continues to plague many Americans since COVID is its financial impact. Since COVID, more Americans are reporting that their financial situation is getting worse as opposed to getting better.[3] When jurors are deliberating over the amount of money they believe is fair to award someone who was injured through no fault of their own, many plaintiff-favoring jurors are pointing to the increased cost of housing and typical living expenses and arguing that a higher damage number is necessary.

Prior to COVID, it was helpful for the defense to identify and keep jurors who have greater comfort with numeracy. This is even more important today. Jurors who work with numbers regularly in their occupation, who handle their own taxes, or who are generally mathematically inclined are more likely to seek solid numbers for calculating damages.

Anti-Corporate Attitudes in the Wake of COVID

Not only is COVID continuing to impact jurors' finances, it is also impacting their attitudes toward American industries. Early in the pandemic, survey research revealed an increase in favorable perceptions of several industries such as healthcare, trucking, railroad, large grocery stores, the retail industry and small businesses.[4] Unfortunately, jurors' views of most industries has either returned to pre-COVID levels of favorability, or has dropped.[5] Courtroom Sciences' researchers have found that post-COVID, 63% of jurors agree that taxes for large corporations should be increased, 57% agree that corporations take advantage of individuals, and 74% agree that corporations should be held to a higher standard than individuals.

To address such strong anti-corporate sentiments, defense counsel must prioritize preparing the corporate representative. At times, the ideal corporate representative is not necessarily the most knowledgeable person at the company. The skill that one must have to be able to answer questions in an adversarial arena in a way that is well-perceived by the jury is not a skill that is easily identified. It is recommended that, when possible, corporations select a few potential corporate representatives, expose them to cognitive-emotional training, and then test each candidate with a simulated examination. At the end of the simulations, the ideal candidate is more easily spotted and can be specifically trained to handle the opposing counsel's questioning tactics.

The corporate representative is often the witness whose testimony is used to tell the "good company story." This story, which humanizes the corporation and persuades jurors to view the company as a group of individuals and not a large, greedy machine, is critical to the defense. Thus, it is important to start working with the corporate representative early. Waiting until the day before deposition or trial to start working with such a key witness is risky. Even witnesses who have testified multiple times will need time with the trial team to understand the issues in the specific case and the defense themes.

Defense Strategies for Jury Selection

There is at least one silver lining for the defense post-COVID. Currently, many judges previously hesitant to allow supplemental juror questionnaires (SJQs) have been more likely to approve them, as doing so can limit the time needed for in-person *voir dire.* Research has shown that many jurors are uncomfortable sharing their true

perspectives during *voir dire* with other jurors present and are more forthcoming when provided with the psychological cover of a questionnaire.[6] SJQs may be especially valuable in revealing negative attitudes, beliefs, and experiences with regarding a corporation or industry. Carefully and sensitively crafted SJQ items can also provide insights into jurors' emotional stability, cognitive ability, and propensity for gut-level, rapid processing versus analytical processing.

Analysis of prospective jurors' social media activity and online presence is critical in jury selection decisions and is typically more rewarding for defendants compared to plaintiffs. This is because jurors who generally profile as more "pro-plaintiff" are more likely than their counterparts to post frequently on social media platforms and to allow public access to these posts. In addition, studies show that most Americans report more frequent social media use since the pandemic, with about half of those surveyed reporting that they post more frequently now than before the COVID-19 crisis.[7] By researching jurors' social media and digital footprint, the defense can, at times, identify jurors who are social justice warriors or jurors who express a lot of grievances. While jurors may not be forthcoming in *voir dire* to specific questions on these issues, their social media may be particularly revealing.

MEDIA AND PLAINTIFF ATTORNEY ADVERTISING: THE IMPORTANCE OF THE DEFENSE COUNTER-ANCHOR

When the average juror walks into a courtroom, the juror's concept of the value of a case is based on the extreme verdicts described in the media, the cherry-picked largest verdicts touted by plaintiff attorneys in their advertisements, and the often hefty amount of money requested by the plaintiff attorney at the trial. None of these numbers are helpful to the defense. Defense counsel must use every strategy available to reduce the impact of these multiple biased sources of information. Providing a counter-damage number is a strategy that often benefits the defense.

The media tends to report outliers, in other words, extremely high civil verdicts; and it is rare for anyone in the media to report civil defense verdicts[8]. Thus, the media attention to the few particularly large verdicts in a venue can cause community members to perceive large awards to be more common than they are. This effect occurs due to what psychologists refer to as "availability bias"[9]. When determining the probability of an outcome, such as a multi-million-dollar verdict, individuals rely on information that is readily available in their minds, such as recent verdicts they have read or heard about. Large verdicts can then drive more large verdicts. Previous research has shown that the more common jurors believe large verdicts to be, the more likely they are to award large verdicts themselves[10].

While members of the media are likely unintentionally creating a false perception of the prevalence of high verdicts, plaintiff attorneys often do so intentionally through advertising. The verdicts that plaintiff attorneys tout on their websites, blogs, billboards, and commercials are also likely to increase community members' perceptions of the prevalence of larger verdicts. Imagine a community member who has no involvement in litigation, having recently heard or read about a $5 million verdict in an automobile suit, who shows up to jury selection and finds that the plaintiff in an auto accident is requesting $5 million. While $5 million is well above the average verdict for an auto accident, the number is consistent with the most salient information the juror has for valuing such cases and the juror may not bat an eye.

Plaintiff attorneys are well aware that many jurors have no knowledge of what an average verdict is, or any idea of how to determine monetary amounts for noneconomic loss or punitive damages. Therefore, before going to trial, plaintiff attorneys are conducting focus groups or mock trials to determine the ideal ad damnum; in other words, the attorney identifies how much money he or she can request before losing credibility with the jury. Once the plaintiff attorney determines the highest damage number he or she can request, the ad damnum is mentioned early and often in trial so that jurors become desensitized to the large number and it serves as a psychological

"anchor." An anchor is a number that affects the judgments made by the jurors, solely due to the number being presented[11]. Higher anchors provided by plaintiff attorneys can increase both jurors' judgments of the defendants' liability and the jurors' determinations of damages[12].

The defense must be ready to combat media effects, plaintiff advertising of verdicts, and the excessive plaintiff's ad damnum, which are all part of the formula for "nuclear" verdicts. One tactic the defense may employ is providing jurors with suggested damage numbers to counter the plaintiff's ad damnum.

The Determination of Whether to Provide a Counter-Anchor

Just as plaintiff attorneys are performing pre-trial research to identify the highest ad damnum they can suggest, the defense is wise to perform similar pre-trial research to test the effects of a potential counter-anchor. Importantly, determining whether to provide a counter-anchor cannot be done by asking mock jurors to self-report what they would have done if they had heard a different presentation. In other words, a moderator cannot ask jurors at the end of a mock trial, "If, instead of saying nothing about the damages in the case, the defense had suggested that the damages should be no more than $1 million, what would you have determined in your damages?" Jurors often do not want to admit, or may not even consciously realize that they have been influenced by the plaintiff ad damnum or by a defense counter-damage number (or lack of one). To determine whether a counter-anchor would influence the damages, an experimental research design is required. This means that one group of mock jurors should be exposed to a mock trial in which the defense provides no counter-damage number and a separate group of mock jurors, who are matched to the first group, should be exposed to the same mock trial except that the defense provides a counter-damage number.

Of course, testing different conditions experimentally, if that requires running several mock trials, can be expensive. To efficiently and cost-effectively test different conditions, an online mock trial is ideal. Online mock trials save on expenses such as travel, catering and facility costs. Additionally, rather than having to perform a mock trial repeatedly over two or more days, with different jurors each time, as is necessary with an in-person project if you would like to test different conditions, an online project can be much more efficiently prepared with different conditions for testing. In an online project, attorneys create video-taped plaintiff and defense presentations. The videos can then easily be edited to create different counter-damages conditions. Additionally, online jury research more easily and cheaply incorporates larger samples of mock jurors. For example, 50 mock jurors can be recruited to watch videos of plaintiff and defense presentations, with half the sample viewing a video in which the defense suggests a counter-damage number and the other half of the sample viewing a video in which the defense suggests no number. Then, deliberation groups are formed from each condition and the damage determinations are compared.

The table below is an example of the type of data obtained from a test of whether or not to provide a counter-damage number. In most cases, the type of matter that would go to trial would benefit from the defense providing a counter-damage number. However, if the defense team is considering not providing a number at all, that tactic should definitely be tested prior to trial. The numbers in Table 1 were collected during a mock trial in which the plaintiff attorney requested $30 million in compensatory damages in a personal injury matter. As shown in the table, the jury panels who heard the defense provide a counter-anchor of $3 million arrived at lower group verdicts than the two panels who heard no defense counter-anchor.

Table 1. *Example of Mock Trial Data Comparing Group Verdicts across Anchoring Conditions.*

	Plaintiff Ad Damnum of $30 million			
	No Counter-Anchor		Counter-Anchor ($3 million)	
	Jury 1	Jury 2	Jury 3	Jury 4
Group Compensatory Determinations	$24,500,000	$54,114,000	$14,431,000	$18,000,000

By performing an online experiment, the defense can determine whether providing a counter-anchor will affect many aspects of the case, including compensatory damages, jurors' determinations of liability or apportionment of fault, or the likelihood of a punitive award. All of the findings, once analyzed, will aid the defense in strategy for trial, not based on the intuition of the trial team, but on scientific findings.

Commonly Held Concerns Regarding Counter-Anchors

A common concern of defense counsel and insurers is that if a counter-anchor is provided, then jurors will simply split the difference and award an amount that is half-way between the plaintiff ad damnum and the defense counter-anchor. At times, it is true that jurors will use this method of determining damages. Importantly, though, this method may result in a better outcome for the defense when compared to not offering a counter-damage number at all. The only way to know for sure is to test the case using mock trial methodology.

Another common concern is that if the defense provides a counter-damage number then jurors will assume the defense acknowledges fault and will perceive the counter-anchor to be an "offer." If the defense has a very strong case and a good chance of a defense verdict, it may be possible that providing a counter-anchor could work against the defense. However, in our experience most cases that are headed to trial are not so imbalanced in favor of the defense. We have seen attorneys uncomfortably provide a counter-anchor in a mock trial, seeming to doubt themselves as they speak, and still reach the outcome of lower damage numbers compared to the test in which they provide no counter-anchor. With practice, an attorney can deliver this message confidently and clearly, which is even more likely to have the intended effect of reducing the damages.

At the same time, we recognize that there are often jurors who do misunderstand the rationale for the defense providing a counter-damage number. It is common to hear at least one juror state, "Well, if the defense did not believe they had any fault, they would not have offered the $500,000." Importantly, though, even when jurors misunderstand the defense's rationale for countering the damages, the number *still* works to reduce the damages. Thus, it is often ideal to provide a counter-anchor, though it is best to test each case to determine scientifically what is the ideal strategy to employ.

CONCLUSION

COVID continues to impact juror finances, attitudes toward corporations, and perceptions of fairness in American systems and institutions. At the same time, Plaintiff attorneys are sharing winning strategies and teaching the less experienced in their field how to aim high in their demand and how to advertise large wins. The defense has an uphill battle by the time they reach the courtroom. Rather than wait for trial and try to determine how to combat the plaintiff's tactics, defense teams need to be proactive with witness training, testing their case, honing defense themes and planning for jury selection well ahead of the trial date.

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