



**ALFA International**  
THE GLOBAL LEGAL NETWORK

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### CONSIDERING JURY TRIALS THROUGH A POST-PANDEMIC LENS

Christopher A. Page  
Moderator  
YOUNG MOORE AND HENDERSON P.A.  
Raleigh, North Carolina  
[Chris.page@youngmoorelaw.com](mailto:Chris.page@youngmoorelaw.com)

## Considering Jury Trials Through a Post-Pandemic Lens

### The Impact of the Covid-19 Pandemic on Jurors' Decision-making

There is no question that the pandemic will impact the perspectives of individual citizens in each state –citizens who will be selected for jury trials. Employers and trial counsel need to prepare for new attitudes and biases that jurors may develop due to the pandemic. In this roundtable, we will discuss the current research on jury decision-making in employment cases, generally, and compare that with current research on the pandemic impact on jurors. In addition to sharing personal “war stories,” we will explore options for clients and their counsel with strategic decision-making as it relates to whether to go to trial, whether to pass on a juror in *voir dire*, and whether to pursue certain defense tactics during trial.

#### Juror Decision-Making in Employment Cases Generally

One national jury consultant concluded in a 2016 article that jurors in employment cases don't care about evidence.<sup>1</sup>

Possibly more than in any other type of litigation, people feel uniquely qualified to sit as jurors on employment cases. “More than 50% of jurors' time in deliberation is spent... talking about their jobs and related experiences.” In evaluating the strength of an employment case, one key factor to consider is the degree to which the specific issues are likely to support or challenge jurors' perceptions of themselves and their environment . . . Most people derive their self-concept from their jobs... Even for those people who don't derive intrinsic satisfaction from their work, the job defines the way they spend a great deal of their waking hours, sustains them, and brings routine and stability to their lives.

. . .

At some level, most people fear losing their jobs. Many have a close friend or relative who has experienced a serious problem at work. As a consequence, people who sit on juries find it rather easy to identify with the fear, anguish and humiliation plaintiffs report due to unfair treatment at work, no matter how exaggerated or baseless they appear to defense attorneys.

Effective trial attorneys recognize and exploit the link between self-concept and job-related issues. During *voir dire*, they spend more time listening than talking to jurors about their negative and positive experiences in the workplace, feelings about the stability and fairness of their current job situation, and fundamental attitudes and values toward employer-employee relations...

Effective opening statements, witness testimony and closing arguments also take advantage of the importance of self-concept in employment disputes...

Jurors hold employers to very high, sometimes unattainable standards when it comes to disciplining, demoting, firing and protecting employees. Jurors expect clear, written policy on anything that affects employees... Jurors expect clear, fair, consistent performance evaluations. They expect clear and consistent written communication... In short, in employment litigation, jurors expect just about everything that almost never happens. Before demoting or firing, jurors expect an employee to receive a series of warnings, counseling/coaching sessions, training sessions, job adjustments, more warnings, more coaching, and when, and only when, everything else has failed, at least one more warning.

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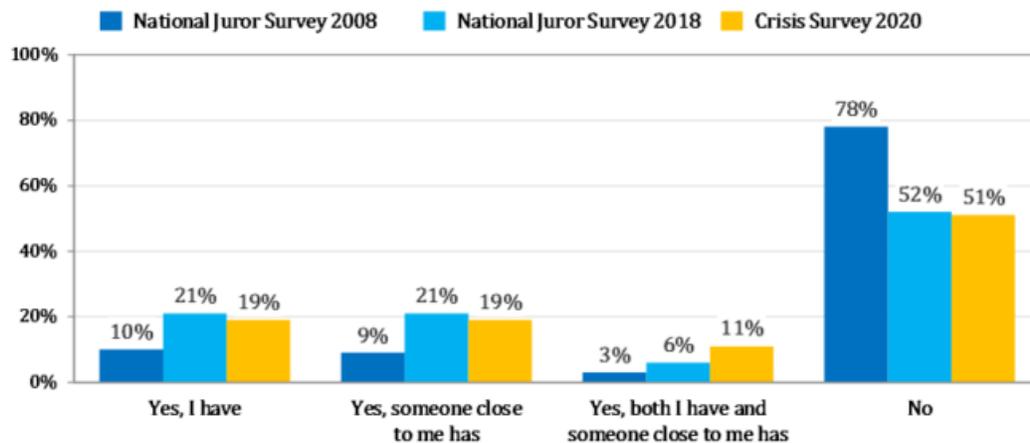
<sup>1</sup> <https://www.decisionquest.com/why-jurors-in-employment-cases-dont-care-about-evidence/>

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That same jury consultant company conducted a national jury survey in 2008, 2016, 2018, and 2020 on employment cases generally, and found that, combined with their case studies since 2000, several attitudes about discrimination and harassment in the workplace have remained relatively consistent.<sup>2</sup>

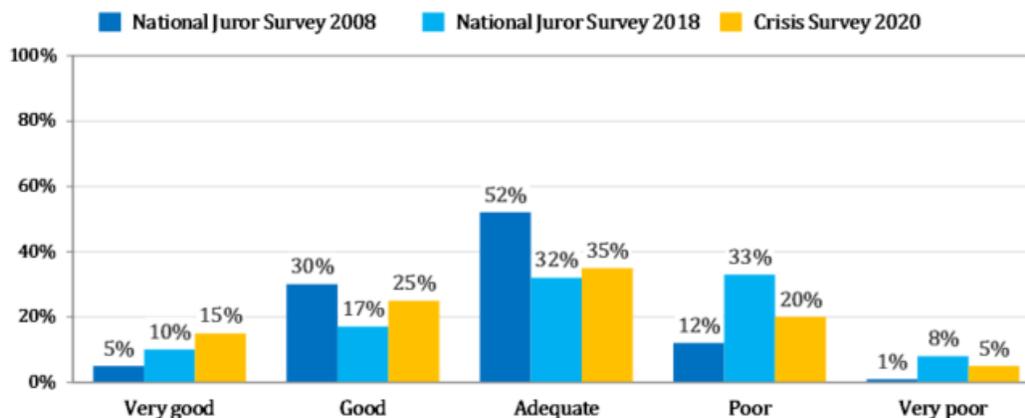
- 60% agree that that racial discrimination is common in the workplace
- 66% believe most discrimination lawsuits are justified
- 75% believe most harassment lawsuits are justified
- 70% believe that retaliation is common after an employee complains of harassment

In that company’s 2008 National Juror Survey, 22% of the respondents reported that they, or someone close to them, had experienced sexual harassment in the workplace. Ten years later, in the 2018 National Juror Survey, more than double that percentage of respondents (48%) indicated that they, or someone close to them, have experienced sexual harassment in the workplace. This increase could be a result of the “me too” movement, but could also be attributable to other trends.



Another notable survey finding was the impression that corporate America is or isn’t doing a good job in fighting sexual harassment in the workplace.

How good of a job has corporate America done in fighting sexual harassment in the workplace?



<sup>2</sup> These statistics and the following 3 charts can be found at <https://www.decisionquest.com/juror-attitudes-in-the-age-of-the-coronavirus-discrimination-and-harassment-lawsuits/>

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### Current Research on the Impact of Covid on Juror Decision-Making

We will discuss in the roundtable the findings in the excellent article by Dr. Lorie Sifacuse of ALFA International Gold Sponsor **Courtroom Sciences, Inc.** entitled “Impacts of the COVID-19 Crisis on Jurors’ Attitudes and Decisions”.<sup>3</sup> Dr. Sifacuse states that a 2020 survey indicated that 71% of a nationally representative adult sample were concerned about the Coronavirus’ implications for their personal health. Nearly half (49%) said that the stress and anxiety caused by COVID-19 has been challenging for them. About 40% said that the COVID-19 crisis has caused financial stress, and 28% said that it has negatively impacted their relationships. Increased stress and uncertainty, fear of illness and death, and other changes in psychological health and well-being can dramatically affect how individuals process information and make decisions.

Dr. Sifacuse posits that there are four primary changes to expect in civil jurors’ attitudes and decision making because of the COVID-19 crisis:

1. Polarization
  - a. What does the research say about individuals who are stressed, uncertain, and fearful? One key finding is that these individuals will adhere to and defend their pre-existing attitudes and beliefs, and often become more polarized.
  - b. Jurors who were previously anti-corporate will likely at the very least retain that position, and many will likely become more anti-corporate.
2. Ingroup Favoritism and Outgroup Bias
  - a. Psychological theory and research predict that many jurors may be increasingly judgmental of individuals who do not share their ethnicity, background, or beliefs; jurors also may have more positive perceptions of individuals who appear similar to them.
3. Increased Reliance on Intuition, Emotion and Heuristics
  - a. Psychological research identifies two main information processing modes, or ways in which individuals attend to and process information to make decisions: logical processing mode and intuitive mode.
  - b. Ultimately, both psychological research and common-sense point to an increased likelihood that jurors will follow the intuitive processing mode in the wake of the COVID-19 crisis. This, of course, can make jurors more susceptible to typical pro-plaintiff narratives. Jurors also may increasingly rely on heuristics, cognitive shortcuts, or “rules of thumb for reasoning” in their decision-making.
  - c. Even though jurors will have to wait to hear the defense case, counsel can tailor their approaches and tactics to appeal to intuitive information processors. Thorough and systematic refutations of the plaintiff’s allegations will not be effective in persuading jurors during and after the COVID-19 crisis. Instead, the defense must advance a simple, linear, and relatable pro-defense narrative that preferably highlights the conduct of the key parties and no more than 2-3 key defense themes.
4. Increased Focus on Rules and Rule-Breaking
  - a. Evidence indicates that rules and conventions become more important among individuals who fear contagion.

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<sup>3</sup> <https://www.courtroomsciences.com/blog/litigation-consulting-1/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-132>; <https://www.courtroomsciences.com/blog/litigation-consulting-1/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-133>; <https://www.courtroomsciences.com/blog/litigation-consulting-1/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-134>; <https://www.courtroomsciences.com/blog/litigation-consulting-1/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-135>

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- b. Those who fear contagion place an increased importance on ingroup loyalty. They also tend to show a greater deference to authority figures and a decreased tolerance for those who defy authority.
- c. Counsel should anticipate some basic overall changes in jurors' perceptions and decision-making resulting from increased adherence to rules and minimized tolerance for rule-breaking. The most obvious change is an increased susceptibility to plaintiff reptile tactics.
- d. To defeat a well-executed plaintiff reptile approach, the defense must swiftly and assertively advance a counter-narrative identifying the responsible party or parties.

During the pandemic, DecisionQuest's national jury survey included a brief case summary of a discrimination and harassment lawsuit scenario and asked respondents to render decisions on liability and damages.<sup>4</sup>

The case scenario presented to respondents involved a female plaintiff with claims of harassing behavior of a sexual nature, retaliation, and lack of action by management. The allegations described inappropriate comments and actions by a manager that gradually escalated in severity, culminating in a negative rating by the manager following the plaintiff's rejection of the manager's request to begin a sexual affair. She alleged that this resulted in the loss of a raise received by comparable employees and that, after she brought a complaint to HR, management retaliated by putting her on probation and firing her a month later.

Her case was contrasted with defense arguments of a poor performing employee (with documented warnings in her file) and falsifications on her employment application. Witnesses testified that the plaintiff's attitude and performance changed after a different coworker had broken off an affair she had been having (in violation of company policy). The company also argued that appropriate affirmative actions were taken against the alleged harasser, including forcing him to take early retirement. Since she did not report the harassment for several months, the company says it is not liable for the inappropriate behavior of her manager, so her employer should not have to pay any damages and should not be punished. Respondents were asked which party they favored, what amount of claimed damages (\$10 million) they would award, and the extent to which the corporate defendant should be punished.

- The majority (73%) of respondents favored the plaintiff and the remaining 27% favored the defense.
- In terms of damages:
  - 17% said they would award nothing
  - 32% said they would give one fourth of what was requested
  - 25% said they would give half of what was requested
  - 15% said they would give three fourths of what the plaintiff requested
  - 5% said they would award all the damages claimed
  - 6% of respondents said they would give everything the plaintiff asked for plus more
- More respondents than not said that the employer deserved to be punished in the case: 10% said "not at all," 23% said "a little," 38% said "some," and 29% said that the employer "very much" deserved to be punished.

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<sup>4</sup> <https://www.decisionquest.com/juror-attitudes-in-the-age-of-the-coronavirus-discrimination-and-harassment-lawsuits/>

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DecisionQuest noted that several factors were reliably associated with verdict decisions:

- Respondents endorsing beliefs that women are often denied opportunities for advancement because of their gender were statistically more likely to find in favor of the plaintiff and to award her higher damages;
- Respondents holding a strong opinion that women who raise harassment complaints are retaliated against were statistically more likely to find in favor of the plaintiff and to award her higher damages;
- Respondents with greater anger against corporate America were statistically more likely to find in favor of the plaintiff and to award her higher damages;
- Respondents who believe sexual harassment lawsuits are usually justified were statistically more likely to find in favor of the plaintiff and to award her higher damages; and
- Respondents who indicated higher levels of concern that they or someone they know will become infected with the novel Coronavirus were statistically more likely to find in favor of the plaintiff and to award higher damages.