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THE JURY HAS RETURNED

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Jury Selection and Deliberations.
Here's How to Take Back Control*

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COVID-19 Will Affect Jury Selection and Deliberations. Here's How to Take Back Control

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Jury trials are gradually resuming even as the COVID-19 threat lingers and safety measures are enacted and evolve. In this unprecedented context, jury verdict risks have changed. While particulars are fact and venue dependent, here is some broad guidance as to likely changes in the dynamics of jury selection and jury deliberations, highlighting areas of greatest risk and recommended steps to address them.

Jury pools will likely skew noticeably younger and whiter than before, with somewhat more males and conservatives. Several recent national surveys converge in this direction, with views on the seriousness of COVID-19 a strong underlying factor.

Venires will mostly be comprised of Generation X (ages 40-55), millennials (ages 24-39), and a smaller but ever-increasing proportion of Generation Z jurors (ages 18-23). Data show that, relative to older generations, Generation Z and millennials are accustomed to learning in shorter bursts and through multimedia formats. On average, they:

- Are more educated, liberal, and ethnically diverse.
- Are less nationalistic, authoritarian, and hierarchical.
- Tend to assume email keeps executives in the internal loop.
- Look for corporations to be good citizens.
- Believe that government should play a greater role in solving society's problems.

However, though near-term jury pools are expected to skew noticeably younger, they are also likely to be markedly whiter and moderately more male and conservative, undercutting some of the broad trends a younger jury pool might otherwise suggest.

Cumulatively, these overall demographic shifts will more likely benefit civil and white-collar defendants, though the overall risk profile of a case and the most compelling case narrative for a particular venue and jury pool is highly fact- and context-dependent—but it can be gauged in advance of trial.

THE JURY HAS RETURNED

Voir dire is likely to be curtailed for the foreseeable future. Lower turnout for jury duty and prioritization of criminal cases will cause courts in civil cases to conserve juror availability through measures such as limiting extra peremptory challenges (or even reducing the standard number), rejecting “gray area” cause challenges, and extensive rehabilitative questioning. There also will be pressures to conduct live voir dire quickly, limiting opportunities for effective questioning.

Courts in some states are already experimenting with non-traditional voir dire formats, such as online (Florida, Texas, and Washington) and in auditoriums or arenas (Michigan, Mississippi, and Texas). These pressures increase the importance of having a sharper understanding of the profiles of riskiest adverse jurors to enable highly prioritized usage of peremptory challenges, and the value (where permitted) of a thorough written juror questionnaire.

Certain juror attitudes will be starker where shaped by personal experience during the pandemic. The experience of the pandemic will lead to some strong attitudes among prospective jurors, based on their perspectives as employees, customers, business partners, patients, federal aid recipients, taxpayers, members of particular communities, and, more broadly, as physical, psychological, or financial victims of the pandemic. The pandemic is likely to be especially fertile ground for jurors’ personal anecdotes in employment, health care, insurance, and business disputes involving claims of force majeure, and will bear on their views of what is acceptable behavior in meeting legal versus moral duties, and what they view as “common sense.” Where such anecdotes are perceived as case-relevant, jurors will tend to deploy them as a yardstick for gauging a defendant’s liability and blameworthiness, and a plaintiff’s deservedness of compensation.

In cases where COVID-19 itself is at issue, jurors are likely to have particularly strong reactions. Jurors may expect both businesses and individuals to react to circumstances—whether created by

the pandemic or otherwise—with more flexibility, mirroring the ways in which certain industries and entities have been more forgiving during the pandemic.

For example, in cases involving business interruption claims, we anticipate that jurors, especially those negatively impacted by the pandemic, will be inclined find coverage for struggling small businesses, entities with an essential worker “halo,” and beloved companies that support the local community. Equally, jurors are likely to be inclined against plaintiffs who appear to be gaming the system at a time when average persons are independently managing their own losses.

Certain jurors will be more skeptical of expert evidence. Jurors may have less trust in experts’ opinions in light of conflicting and evolving views among scientists, medical experts, and policymakers as knowledge of COVID-19 continues to rapidly evolve.

This may also galvanize skeptical jurors to dismiss expert evidence opposing the side they favor as a kind of false narrative, especially if the juror is unclear on how the experts reached their conclusions. Polling in recent years shows a higher likelihood among conservatives than liberals to resist the import of scientific evidence, which has most visibly emerged in public discourse over climate change and now the seriousness of the COVID-19 threat. The increasingly partisan divide could also lead to more hung juries in cases where fact patterns trip partisan wires.

Anxiety due to COVID-19 will have complex impacts on both real-time case information processing and group deliberations. Jury service entails sustained forced interaction with multiple strangers in an environment over which jurors have little control. Heightened anxiety due to fear of contracting COVID-19 during jury service—reinforced in court through constant visual and sensory cues of personal protection equipment and potentially compounded by physical, psychological, and financial stressors in jurors’ daily lives due to the pandemic—will likely impinge in complex ways

upon jurors’ abilities to absorb case information during trial and engage properly in deliberations.

Broadly, psychological studies show that a state of anxiety tends to lead to more thoughtful, broader-based causal attributions and to less confidence in the final decision (which would generally benefit defendants more than plaintiffs), but makes it more difficult to focus one’s attention in a sustained manner on case presentations, especially for more complex and drier evidence and arguments (which would generally benefit plaintiffs, who often have a simpler story to tell).

Separate lines of research on the cognitive effects of anxiety highlight other trends to watch for, particularly in cases involving the scienter of a large corporation or group of corporations, for example, in antitrust, products liability, environmental, employment, and fraud cases, and in cases involving perceived “outsiders.”

Anxiety tends to trigger sense-making and control-restoring mechanisms that make people more prone to conspiratorial thinking, which typically benefits plaintiffs in cases involving the scienter of large corporations.

Additionally, anxiety in the courtroom about COVID-19 may inherently amplify the emotional effects of a plaintiff’s “reptile strategy,” while media coverage of governmental and corporate responses to the pandemic may give defense counsel a ready analogy to combat such an approach. For example, corporate defendants may be able to reference best efforts at multifaceted decision-making by government entities and businesses in light of evolving scientific evidence to cope with the pandemic as a backdrop to tell their own story in a more directly relatable manner. Any explicit comparison would need careful, case- and venue-specific testing to be framed appropriately and hedge against risks of backfire.

Lastly, as self-protective psychological mechanisms trigger, individuals tend to experience greater negative feelings and display bias against members of communities perceived as “not my tribe.”

THE JURY HAS RETURNED

For the foreseeable future, this could lead to greater risks for litigants construed as outsiders by the local community, such as a socially progressive Silicon Valley tech company defending itself in a socially conservative venue.

Against the backdrop of these trends, anxiety may lead to curtailed deliberations, mere compliance rather than genuine attitude change, and more roughly hewn compromise verdicts if jurors seek to end jury service as quickly as practicable. Any resentment at jury service relative to perceived case merits may be reflected in the verdict, on one side or the other.

RECOMMENDATIONS FOR COUNSEL

In light of the foregoing factors, counsel should consider the following steps to help minimize the risk of an adverse jury verdict.

Consider conducting pretrial research in the venue. Pretrial research, such as mock juries, can be used to gauge risks, frame the client and case narrative in a relatable way, and develop an empirically based juror profile. Online methodologies may suit simpler cases. Local counsel can be an invaluable resource as to trends in the jury pool mindset.

Anticipate curtailed voir dire. Develop a focused and efficient set of (proposed) voir dire questions in order to identify the most dangerous jurors and help you develop cause challenges resistant to judicial rehabilitation efforts. Petition for a comprehensive, written juror questionnaire addressing both hardship and bias to supplement and streamline the live voir dire.

Tailor voir dire to meet likely shifts in juror thinking. Consider broadening a typical generic voir dire question about physical or mental health concerns to encompass the impact of COVID-19 and the experience of self-quarantining on the ability of a juror to serve. Further, voir dire questions about likely origins of the coronavirus and best strategies for managing it would provide a useful litmus test for identifying potential conspiracy theorists and scientific skeptics.

Engage the judge in process planning. Encourage comforting messaging to

jurors, such as emphasizing the civic importance of jury duty, expressing gratitude for jurors' time, and explaining court practices that maximize jurors' safety. Be sure to mention when masks or clear face shields will be required, with an eye towards clear verbal and non-verbal communication at key junctures.

Model the mindset desired from jurors. After a strong thematic introduction to the opening statement, counsel should engage jurors with heartfelt thanks for their service; counsel's conviction to ensure a fair and just result for the client (an intimation that despite the client's reasonableness, the case ultimately requires resolution by jury trial); and counsel's calm reassurance that the team will adopt best practices to keep everyone safe. Follow through on these affirmations.

Tailor case-presentation modes to meet expectations. Take advantage of trial technology and multimedia modalities to engage a relatively younger jury; be extremely organized with exhibits; and keep the case-in-chief lean and focused.

Be aware of ways to draw express parallels to the pandemic. For example, where applicable, point to sound evidence-based tradeoffs made during the pandemic between reducing transmission of COVID-19 and saving small businesses as a touchstone for explaining multifaceted corporate decision-making that involved well-intentioned, risk-benefit tradeoffs based on what was known at the time.

Be aware of ways in which jurors may draw express parallels to the pandemic. For example, to militate against adverse jurors who may cite "common sense" as a reason to inject into deliberations extraneous information from media coverage or internet searches, counsel should remind the jury during closing arguments that the admitted evidence had to pass courtroom tests in order to be worthy of consideration by the jury. Suggest to the jury that these facts should be placed in a mental safety deposit box dedicated to this case, and are the only facts to consider while deliberating.

Pay particular attention to expert evidence. Especially for cases in highly partisan venues or where applicable science is likely to clash with local community values, counsel should utilize an expert pre-tested to be relatable, trustworthy, and able to teach local jurors in a clear, engaging, and memorable manner. Pre-test these expert theories with mock jurors to identify potential pedagogical and ideological stumbling blocks to persuasion, then identify how to surmount them.

FINAL TAKEAWAYS

In light of the coronavirus pandemic, we expect prospective jurors to enter the courtroom harboring starker attitudes, palpable personal experiences, and anecdotal observations about a wide range of people, entities, conduct, and claims. Jury-selection strategy grounded in case- and venue-specific juror research will be critical in order to navigate the potential for such amplified biases, especially given the greater procedural constraints that are anticipated.

Likewise, it will be critical for the case narrative and presentation of witness testimony to be responsive to shifts in attitudes as to certain litigants, norms, and the credibility of certain types of evidence, while also anticipating the cognitive impacts of anxiety on the matrix of juror decision-making. ■

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