

TRIAL TECHNIQUES AND TACTICS

MARCH 2020

IN THIS ISSUE

As society grapples with the current wide array of social, cultural and political issues that have polarized this country, the trial lawyer must be able to face and understand how strong beliefs can sometimes be more important than facts when questioning today's jury pool. This article will explore some of the prevalent trends in jury behavior and help the trial lawyer successfully navigate through the "post-truth" era of jury selection.

Jury Trends in the Post-Truth Era and Strategies to Maximize Your Chances of Success

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Over the past four years, American culture has been inundated with news coverage on a wide array of social, cultural, and political issues, including the Me-Too Movement, allegations of political corruption (on both sides of the aisle), erosion of trust in governmental agencies and educational institutions, climate change, and the opioid crisis – just to name a few. Polarization on these types of issues has seemingly become more prevalent during the Trump presidency, in light of “alternative facts,” “fake news,” and spin from all sides. Some have called this period the “post-truth” era – a time when personal beliefs or opinions are considered more meaningful than facts. At the same time, we have seen an increasing level of activity on social media platforms, which curate content to reinforce people’s preexisting personal views. According to socialmediatoday.com, the average adult spends almost two hours a day on some form of social media. Indeed, The Nielsen Company reported that the amount of time spent on social media increased more than 35% between 2015 and 2017.

So why is this important? As trial lawyers, we must be aware of all the factors that influence jury pools. Jurors do not come to court with a clean slate. They process the evidence and facts presented through their personal filters, which – whether we like it or not – will always extend beyond the four walls of the courtroom. Thus, understanding the current trends in jury behavior will help you anticipate and develop strategies to best present your case. While it is impossible to predict how any particular jury will interpret the law and evidence in any given case, this article explores some of the prevalent trends and provides strategies to help successfully navigate these litigation landmines.

Are Today’s Jurors More Likely to Discount Objective Facts Based on Beliefs?

In the post-truth era, we sometimes have seen an increased tendency to discard objective facts in favor of beliefs. One of the most infamous recent examples of this involves pictures of the Washington Monument mall during the inauguration of President Trump. Objectively, the pictures do not support the President’s claim that the crowds at his inauguration exceeded the crowds at the inauguration of President Barack Obama; yet, instead of addressing the objective nature of what the photographs depicted, some questioned whether the photographs were altered or inaccurate.

In a trial setting, the general thesis may be that jurors today are more willing to discount evidence if it does not match their worldview. But the trends we are seeing are more complex and multifaceted than this. For example, a sample of 500 mock jurors from multiple mock trials across the nation were asked, “Which do you value more? Facts or opinions?” 96% of jurors said facts; 4% said opinions. Immediately following this question, jurors were asked, “Which best describes you? ‘Facts guide my life’ or ‘Beliefs guide my life’?” 50% of jurors said facts guide their lives and 50% of jurors said beliefs guide their lives. These results may seem inconsistent on the surface, but they are indicative of how jurors and the general population operates in the world.

To be sure, jurors view cases and evidence through filters, namely their personal experiences, attitudes, and beliefs. These filters can create cognitive bias, a subjective reality created from jurors’ own perception of the world. This phenomenon has become

more prevalent in light of our 24-hour news cycle and constant social media attention. Jurors' biases and subjective reality is often strengthened as media – particularly social media – acts as an echo chamber wherein jurors' beliefs are constantly reinforced while opposing views may be ignored. You can always find someone or some group on Facebook or Twitter that will agree with you and vice versa.

Despite these biases, jurors still value facts and “hard evidence,” such as documents, photographs, videos, and other tangible things. Many jurors need these forms of physical evidence to overcome cognitive biases. Jurors are looking for something “solid” that they feel they can rely on to some degree, and they are turning more to the law. In 2016, a sample of 380 mock jurors from several mock trials across the nation were asked, “If you were sitting on a jury and had to choose between following the law or following your conscience, which would you do?” 60% of jurors indicated they would follow the law; 40% indicated they would follow their conscience. In 2018, a sample of 412 jurors in mock trials across the nation were asked the same question. 75% indicated they would follow the law, while 25% indicated they would follow their conscience. In 2019 and 2020, the trend of turning toward the law has continued: A sample of 420 jurors across the nation were asked, “If you were sitting on a jury and had to choose between following the law or following your conscience, which would you do?” 72% of jurors indicated they would follow the law; 28% said they would follow their conscience. The trial setting helps limit the “echo chamber” effect that occurs on social media and minimizes the impact of the 24-hour news

cycle, which can often meld opinion and fact (“fake news”). At trial, all jurors see the same evidence and arguments firsthand and in real time (“what they see is what they get”). So, while jurors will interpret the evidence differently (as they always have done) and debate vigorously on which evidence is important and credible, you won't hear jurors referring to what they see and hear in the courtroom as “fake news.” Jurors will argue over what the evidence means based on their pre-existing attitudes and beliefs, and some will reject information that does not comport with their worldview, but the trial setting and deliberation process can act somewhat as a safeguard or gatekeeper to mitigate the impact of emotion-based decision-making and cognitive bias.

For example, defense-leaning jurors can sometimes successfully refocus wandering jurors when we arm them with the facts and law they need to combat plaintiff-leaning jurors and diplomatically shut down “in my experience” viewpoints. Arming defense-leaning jurors with the law allows them to push back on plaintiff-leaning jurors without being personal and, more importantly, permits jurors with contrary opinions to save face by ceding their position because “we have to follow the law.”

There is no quick and easy solution to this problem, but here are a few ideas. First, anticipate the questions and criticisms the jury may formulate and proactively address them. Frame your case from the start to highlight key issues that matter, including during voir dire. Next, from opening to closing, arm jurors with the facts and law needed to redirect jurors who refuse to consider objective evidence. Ensure that jury

instructions clearly identify the applicable law and appropriate evidence to consider in light of the law. Finally, appeal to the jurors' sense of reason and remind them of their duty to refrain from reaching a decision until the conclusion of all evidence.

Exhaustion with "Spin" Exhaustion

Juries are becoming increasingly wary of attorneys who "spin" or twist damaging evidence to favor their clients. In the post-truth era, many jurors already have some level of distrust of institutions that were formerly considered reputable and neutral. Jurors are highly sensitive to – and fed up with – being manipulated by the media, social media, the government, and so on. As a result, we are now seeing some jurors who are exhausted by the "spin" and are increasingly relying on facts and law. They are more perceptive and critical of strategies and tactics intended to play on their fears and emotions. Quite simply, jurors' BS detectors are set higher than ever.

One way to combat this problem proactively is to acknowledge damaging evidence directly. Instead of trying to excuse or defend bad facts, explain why they are not relevant to the case and/or not important to the ultimate issues the jury must decide. And at all times, be real, honest, transparent, and trustworthy. Do not stretch or "do too much explaining."

Trends in Juror Selection and Service

Following the 2016 election, it initially appeared that some jurors might have been emboldened to express unconventional or seemingly insensitive statements in the trial setting. In the mock jury setting, potential jurors appeared to be more willing than

before to admit to personal biases – regardless of any stigma attached to them. Generally, though, this level of candor does not seem to have translated into the actual voir dire process during trial. Most jurors are less willing to admit biases in front of a judge in a public courtroom setting, even in the post-truth era (unless they are trying very hard to get out of jury service). Moreover, some judges may take it upon themselves to rehabilitate jurors who have admitted bias, or permit the attorneys to do so. Of course, it remains important to ask questions that attempt to uncover potential biases in the jurors, but there should not be an expectation that jurors are more likely in the "Trump era" to admit their biases.

It also may seem as if people have forgotten how to debate and discuss issues in a cordial manner. More than ever, people simply "unfriend" or "unfollow" people on social media who express facts or points of view that are inconsistent with their own. Similarly, there are reported instances where, rather than debate and discuss the evidence and law, jurors have disengaged from the process and refused to deliberate. For example, in June 2017, a judge presiding over a case in Vista Superior Court in California dismissed Juror No. 12 for refusing to deliberate. Members of the jury panel reported that Juror No. 12 refused to speak to other jurors or explain her positions, but rather stated, "I feel the way I feel."

<https://www.sandiegouniontribune.com/news/courts/sd-me-barton-jury-20170602-story.html>. Other similar stories have been reported in recent years.

To address this trend, it is worth considering whether to teach jurors how to deliberate as

a protection against the “obstinate” juror who may refuse to deliberate or consider other jurors’ views. The ultimate goal is to empower your jury leader with ways to use actual evidence and law to defend against alternative facts. Sometimes the jury instructions themselves are help with this, such as, “Discuss your differences with an open mind. Do not hesitate to reexamine your own view and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of your fellow jurors.” During your closing argument, it is worth reminding jurors of their basic and fundamental responsibility to engage actively in deliberations.

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While the post-truth era certainly causes concern, there are reasons to remain hopeful. In a November 2017 editorial in the *Los Angeles Times*, “Relishing jury duty in the age

of Trump,” the author likened the realm of fact, evidence, and due process under the law to a “welcome retreat into a purer realm” where the jurors were observers with no stake who could call it like they saw it. To best defend our clients at trial, it is imperative that we find ways to use this cultural mood to our advantage.

TRIAL TIP:

NEVER FORGET THAT YOU CAN USE AN OPPOSING PARTY'S DEPOSITION "FOR ANY PURPOSE"

BY L. PEYTON CHAPMAN, III

We are all familiar with the provision in Rule 32 that “[a]n adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).” As defense lawyers, this rule is most often used against us, specifically by plaintiff’s attorneys who play “gotcha” portions of video depositions of 30(b)(6) representatives during their case and, if the court allows, again during closing arguments. Some lawyers even seek to play selective video deposition clips during opening statements (which presents a topic for another day). Notwithstanding our generally negative experience with this rule, defense lawyers should remain mindful of the fact that it can sometimes be invoked to our benefit.

In a recent trial, for example, we effectively presented portions of the plaintiff’s deposition testimony in lieu of cross-examining the plaintiff on the stand. The case involved a portion of a guide wire which broke off in the plaintiff’s urinary tract during an ureteroscopy procedure to remove a kidney stone. The retained fragment caused hematuria and pain, and was discovered and removed several months later by way of a follow up procedure. The plaintiff’s deposition testimony generally minimized the damages and tended to contradict some of the more aggressive claims by plaintiff’s counsel about how the occurrence had harmed him.

At trial, when the plaintiff testified on direct during his case, he was led into some “stretching” of the impact of the occurrence, beyond what he had described in deposition. The difficulty for the defense was that the plaintiff was an extremely nice and sympathetic young man who had a diagnosis of Asperger’s Syndrome. While we needed for the jury to hear the favorable deposition testimony, we were of course very concerned about coming across as unsympathetic or boorish on cross. Thus, we decided to waive live cross and instead to read the helpful portions of the plaintiff’s deposition testimony. We initially sought to read those portions “on cross,” during the plaintiff’s case. The court did not allow us to do this, but did permit us to read the deposition portions at issue during the defense case.

Ultimately, we felt that this tactic was a success, as we were able to present the testimony we needed the jury to hear while coming across as being respectful and sympathetic toward the plaintiff. The situation we faced in this case was particularly well suited to this approach. Nonetheless, I certainly anticipate utilizing this strategy again in the future, in the appropriate case.

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