

THE PSYCHOLOGY OF TODAY'S JURIES: WHAT MAKES THEM TICK? ARE THEY REALLY YOUR PEERS

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I. Introduction

Everyone has a story. The inexplicable "nuclear" verdict in a matter reliant upon junk science. The unexpected "no-cause" in the case you would have settled before the close of fact discovery. The jury panel from Mars that simply does not or, perhaps worse, cannot relate to or understand the case before it. Each of these scenarios raises a multitude of questions: How has our jury pool changed? What does a "jury of your peers" really mean to the parties who are forced to entrust the system? What makes them act in a particular way? And most important, what do we need to know before our next jury trial to identify the right jurors (and perhaps more importantly, eliminate the bad), capture their attention, and drive home our message?

This panel will offer lessons learned from leading trial consultants, trial lawyers and corporate counsel who share their thoughts and analysis of critical societal changes, data trends and psychological factors that will help us better understand today's jury pools, how they learn and digest key evidence, and what makes them act in a certain way – all of which increases the odds of securing a "jury of your client's peers," enhances your ability to prepare and present evidence/witnesses more effectively, and hammer home your trial themes and messaging in a manner that sticks.

II. The rise of extreme opinions—the psychology behind and the possible role of alternative facts

The veracity of a fact is no longer enough for people to accept it. Instead, the accessibility of information and the plethora of possible facts available are allowing people to pick and choose which “facts” they want to accept.

The growing opinion is that the more facts out there the better, because this gives people the opportunity to be more informed. If people are empowered to believe what they choose to believe because they can find facts to support their beliefs, then they are much less likely to change their opinion. This also means the more extreme their opinions could become.

Instantaneous access to information has not made people more fact-focused than before. It has made people more fact-selective than before. It is easier than ever before to avoid disagreement and find evidence to support almost any opinions. Hence, extreme opinions can be perpetuated, rather than properly challenged, and potentially altered.

III. The general impact of extreme opinions—polarization

The public is now both a consumer and source of news. If the public consumes as well as generates news, then people feel more empowered to believe what they want to believe. This makes it more difficult for people to evaluate new information, especially if it does not fit within their belief system. As a result, strongly held opinions become more so, and eventually they can become extreme.

The idea that people filter information through their attitudes, values and beliefs and seek out narratives that confirm how they view their world is not new. What is different today is the accessibility to widely-differing information that is purported to be true.

According to a 2016 Pew Research Poll, only 39 percent of American adults are confident they can differentiate between fake and real news. This means that about two-thirds of adults do not feel confident making the distinction. It is easier than ever for people to access evidence that confirms what they want to believe, regardless of how unreasonable that belief may be. This leads to people holding and keeping extreme opinions without the motivation to change them.

IV. What do extreme opinions do to lawsuits?

The increasing ease of confirming whatever beliefs people want to hold has led to people living in ideological bubbles. People are less accepting of being able to hold different opinions and debate them. Indeed, some believe they are entitled to have and consider separate facts, which may support extreme opinions that people are more and more comfortable expressing.

This is especially dangerous in lawsuits when jurors are tasked with evaluating evidence and rendering evidence-based verdicts. We know that people filter information through their world views to confirm beliefs. But if they draw on facts that are not true, but they believe they are, this problem highlights the challenge of convincing jurors who may hold extreme opinions.

In product liability cases, how will jurors react to evidence that does not comport with beliefs they hold, and are regularly confirmed? Will they evaluate the evidence, the scientific evidence with an open mind, or will they dismiss scientific principles and hold on to their beliefs?

V. Examples of how extreme opinions may affect processing of information in a lawsuit

People often latch on to facts that have been confirmed for them because they do not want to feel manipulated by new information. Deep down, we all want to feel empowered to focus on whatever information we choose to focus on. But what do we do when extreme opinions that jurors hold ultimately lead to diametrically opposed conclusions?

For example, in an automotive product liability case, one steadfast plaintiff-oriented juror dismisses the impact of clear defense-friendly evidence and statistics in favor of her expectation that the defendant should just fix any problems with the product. The statements of this juror demonstrate the potential impact of a juror's rejection of scientific evidence. This highlights the importance of identifying such jurors during voir dire. To that end, it is integral to ask such questions as "how many of you have a general distrust of scientific evidence", "who here believes that scientific data is often manipulated to fit a party's conclusions".

In another example, a premises liability case, one juror wants to make the defendant pay, and was motivated to carve a path to doing so regardless of how the evidence leaned. This juror's comments highlights the importance of identifying jurors who are highly motivated to send a corporate defendant a "message" by making them pay high damages. To identify such jurors, attorneys can consider asking such questions during voir dire as "does anyone here believe damages in lawsuits have been too low?", "who here believes that the best way to send corporate defendants

a message is to make them pay a lot of money”, “how many of you believe that regardless of the evidence, corporate defendants should pay some money to someone who is hurt on their property/by their product?”.

VI. How do we tackle the impact of extreme opinions during jury selection?

Personal biases have always been a part of how people process information and its relevance in their lives. It is a good idea to remind jurors that it is ok to have strongly held personal beliefs. In the courtroom, however, they have to test whether the beliefs of the parties are supported by evidence.

In areas with known bias, the task of correcting the bias starts with the Answer. Pay attention to the details of the Complaint and respond to them. Know the product and its history. Make sure that you address the bias in discovery. Ask detailed questions of the witnesses. Usually, details expose extreme opinions. You should know how the equipment works – the injured party generally does not.

Try to avoid “groupthink” by selecting a diverse jury. Groupthink is a psychological phenomenon where members of a group seek concurrence for the sake of promoting harmony and reducing conflict within the group – but to the extent that they end up making poor or irrational decisions. The tendency for members of the group to actively suppress dissenting minority viewpoints leads to a lack of critical evaluation of group decisions as well as thoughtful consideration of alternatives. As you might imagine, groupthink is more common in homogenous (non-diverse) groups. The more a group consists of those with shared experiences and opinions, the easier it becomes to suppress other voices.

Greater diversity among group members is therefore one of the most effective antidotes to groupthink. When a group has constituents with differing life experiences, points of view, and bases of knowledge, members are encouraged to consider a more comprehensive set of solutions and debate one another’s viewpoints more vigorously, leading to higher quality decisions. We can look to existing research on group interactions – and, in fact, on jury deliberations – to support this psychology.

A jury is a group of individuals tasked with poring over the case facts, examining strengths and weaknesses, resolving ambiguities, deciding on a narrative, and determining how to best argue for their side. The effect of jury diversity has been examined repeatedly, so what does the science have to say about it?

- Diverse juries are more likely to thoroughly discuss each element of the claim and were less likely to find the defendant liable or award punitive damages.
 - *A Study of Juror and Jury Judgements in Civil Cases* (Hastie, Schkade & Payne, 1998)
- Racially diverse juries deliberated longer, discussed more trial evidence, and made fewer factually inaccurate statements when discussing the evidence than did all-White juries. Diverse juries displayed greater openness to considering alternative theories of the case.

- *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations* (Sommers, 2006)
- Diverse juries promote vigorous debate, which encourages all jurors to examine the facts and evidence of the case more carefully.
 - *The Verdict on Juries* (Hans & Vidmar, 2008)

Whether a jury or a trial team, it is clear that a diverse group keeps groupthink at bay, instead encouraging its members to examine the support for their own beliefs in preparation to defend their positions and convince others whose views differ. In the face of challenges to one's point of view, members are more likely to abandon positions that cannot be supported by the evidence. That is, diverse groups more closely examine what's before them, and more often "get it right."

If you know you have too many of those people to strike, work hard to get them off for cause. Absent that, pick those who seem to be "the best of the worst." Then, develop tactics as to how to get commitments from them if you get to conduct voir dire. Also, begin to construct ways in which you can discuss the evidence that might be more appealing to a person with those extreme opinions. Hopefully, you have done focus groups and/or mock exercises to figure out how best to discuss the issues and evidence.

If possible in voir dire, it is essential to identify people who have a general distrust of scientific evidence, as they may believe that scientific findings can and are manipulated to fit a particular party's narrative. Questions might possibly be designed to get to this issue.

Do mock trials or focus groups. Test the biases and extreme opinions of local jurors. Use questionnaires that go specifically to the concerns, so you can find out what characteristics you may want to look for in designing questionnaires, preparing voir dire questions, and exercising preemptory strikes.

It is also important to recognize that all people want to feel empowered to make informed decisions. However, we can no longer expect people to follow, much less even accept the evidence, in this "alternative facts" world. It is essential to remind, and empower, jurors that they have to determine whether the beliefs and conclusions of the parties are supported by the evidence presented to them in court.

Use demonstrative evidence to defeat the bias. Use models, videos, or other visual aids, to show the operation of the machine, or difficult scientific or engineering concepts. Force the plaintiffs' expert to do the same. If the bias is demonstrably untrue, show them.

Your personal style at trial will be important as to how jurors view the facts and their willingness to adhere to or embrace extreme opinions. Your style of questioning in confronting plaintiffs, their experts and other witnesses and your style of argument in openings and closings will shape the jury's view of the facts and their opinions about those facts.

VII. What are some other ways to tackle the impact of extreme opinions?

If possible, look for prior expert reports of your opponents' experts, as they may reuse them. If likely, then this will provide a basis for understanding how the other side is approaching the case.

Try to address what you think the extreme opinions will be in preparing your own witnesses for deposition. Remember to do direct exams addressing these issues if the deposition is videotaped and you do not want the witness at trial, or you do not want them deposed more than once.

Another approach with witnesses might be to just get them to acknowledge there may be other ways to view certain issues and they understand that.

Use social media to understand witnesses and jurors before you address them at deposition or in voir dire. Newspaper articles and television news may give you a sense of how the incident was perceived.