

Georgia Society for Healthcare Risk Management Article

How the Information Revolution Has Impacted Juror Decision-Making

By James L. McGarity, MS and Aref Jabbour, PhD

When evaluating the strengths and weaknesses of a medical malpractice claim/case, risk managers and claims staff often assess a variety of variables: What is the extent of the injuries/damages? What is the quality of our expert support? How favorable or unfavorable is the trial venue? Who is plaintiff's counsel? As jury consultants, our experience with medical malpractice cases has taught us a few things about what variables are important to *jurors* with respect to the way *they* evaluate the strengths and weaknesses of medical malpractice cases. Of course, jurors care about issues like damages, injuries, expert testimony, and the relative skill of the attorneys, but the most important part of jurors' decision-making is the impression they have of the defendant care provider(s). Does he/she come across as caring *and* competent? Does the logic behind their care decisions (as they explain it) make sense *to jurors*? Jurors also take great interest in the manner in which a case is presented: Do they get the gist of the story right away? Is the defense providing a clear, straightforward response to the plaintiff's claims? Do the graphics/illustrations used by the lawyers help jurors understand the medicine *and* the case themes? Jurors also give a great deal of consideration to the conduct of the plaintiff: How compliant as a patient was the plaintiff? Did they seek treatment in a timely manner?

We raise these questions because our culture is changing. The "information revolution" we have experienced over the past few years (i.e., increased access to information through smartphones, increasing number of internet-based information platforms/outlets like Google, Wikipedia, Facebook, etc.) has changed both how jurors process information in general, as well as their expectations of how information should be presented to them. These cultural changes affect jurors' expectations about the way in which medical malpractice cases are presented to them at trial. Jurors feel more important today, their attention spans are shorter, and they demand direct, impactful presentations. To put it succinctly, it has become more show than tell. Jurors are more knowledgeable about the legal system, lawsuits, and how the legal process works.

What are the implications of these changes in jurors' expectations of how information is presented to them?

- Jurors expect, and are better able to process, case information presented to them in short, impactful case themes or "chunks" of information, that are easy for them to understand, remember, and then repeat during deliberations. As a result it becomes imperative for trial attorneys in medical malpractice cases to distill their cases down to about 3 or 4 major themes to argue to jurors. Experience is always a great guide for developing case themes, but jury research (e.g., mock trials, focus groups, online surveys, etc.) is the best way to assess the strengths and weaknesses of the case themes.
- The goal of assessing case themes via jury research, whether using a focus group, mock trial, or online jury research format, is to determine whether or not jurors understand the case, how quickly they can grasp the defense's case themes, and

whether or not they can repeat those themes in deliberations to help them find for the defense

- In addition to developing meaningful and easy to follow case themes, it is imperative to generate graphics that integrate teaching aids with case themes. Jurors simply want to see “how stuff works,” and they expect to be shown sophisticated, animated and specific graphic representations that help explain complex medical issues and procedures to them. Call it the “CSI effect” but the bottom line is that jurors expect and appreciate being shown the medical/scientific evidence supporting the case themes they hear. Presenting sophisticated and informative graphics not only helps communicate case themes to jurors, but they often also help educate them about complicated medical issues. Jurors not only appreciate being properly informed about a case, but they also take into consideration that a party who invests in these graphics/teaching aids truly believes in their case.
- Finally, jurors also expect witnesses they will hear from to provide direct, honest and informative testimony. However, in order to achieve this it is often necessary to help witnesses determine what the crux of their testimony is, by developing 3 to 4 core themes, or “home bases” to help them communicate what they want jurors to know *quickly* and *unequivocally*. The best way to achieve this is to have witnesses practice what they will communicate and how they will do so in practice direct and cross examination sessions. This preparation should focus on helping witnesses provide direct and easy-to-decipher answers—especially when under pressure. Given the rising popularity of videotaped depositions, witnesses’ preparation for deposition these days needs to anticipate that some excerpts of the deposition testimony will be played at trial. This means witnesses still need to follow the basic guidelines of giving “deposition” answers (i.e., don’t volunteer information), but they need to have their “trial answers” ready at deposition if key case issues are discussed at length.

Because attention spans are shorter and so many different forms of media are incorporated into our culture, today’s jurors are more likely to “tune out” a presentation that does not meet their expectations. With the right amount of preparation in developing case themes, effective graphics, and clear witness messages, trial teams and witnesses can meet jurors’ changing expectations for understanding new information.