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Litigation in the Era of Fake News and Rampant Suspicion

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Much has been written about conspiracy theories in the American psyche, some of which are classic (e.g., assassination of JFK, Roswell), others comical (e.g., the Earth is flat), and others pernicious (e.g., Sandy Hook never happened). More people believe in conspiracy theories than you might think. Did you know that roughly one-third of jurors (34%) agree with the statement that "the 1969 moon landing was faked"? [1]

The Age of Trump has given conspiracy theories room to flourish, in part because of ubiquitous access to the internet, daily harangues about "fake news," and the viral nature of social media platforms (e.g., Twitter). As an increasing amount of substantive material is characterized as "fake," a decreasing amount of truly fringe material is dismissed as wholly outlandish and incredible. Thus, conspiracy theories take on a patina of legitimacy—or at minimum, *plausibility*. People are left wondering what information is reliable and trustworthy, and what is actually "fake." As a litigator, why should you care?

One consequence of the "What's-fake-what's-real?" conundrum is an erosion of public confidence in both corporations and institutions; many people today doubt the integrity of large companies, regulatory and law enforcement agencies (e.g., EPA, FDA, FBI, local police) and the legal system (e.g., attorneys, legislators, and judges alike).

The degradation of confidence in corporations has profound implications for corporate litigants for multiple reasons. For example, jurors are increasingly inclined to discount expert testimony (e.g., jurors conclude that "both sides just have their hired guns," and/or that "statistics can lie"). Jurors are also more likely to hold companies to idealistic standards of conduct, reasoning that they should do more than meet government standards (e.g., jurors cynically argue that "regulations are determined by company lobbyists").

In today's jury climate, jurors simultaneously feel power*ful* and power*less*.

In what way do jurors feel power*ful*? The internet provides infinite access to information, and information is empowering. "Google" is a verb in the American lexicon. Access to information leads people to confidently conclude, "*I can do this!*" regardless of what "this" is. People today believe they can renovate their homes, cook gourmet meals, evaluate the safety and efficacy of medications—and solve complex lawsuits. Jurors are confident that they can put information together and "figure it out."

In what way do jurors feel power*less*? Recent media coverage on the mood and psychology of "average Americans" says many feel embattled, abandoned and vulnerable. Pollsters report increased anxiety, disillusionment, unhappiness and distrust in the general population. Jurors' number one concern is government corruption and

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[1] Based on data collected by R&D Strategic Solutions in 18 venues across the nation (N= 681).

pollution and climate change rank among the top 10.[2] Jurors feel they are subject to the whims of powerful corporations perceived to be in control.

Why should corporate litigants be concerned about today's jury climate?

Increased anxiety and fear provide fertile ground for Ball and Keenan's reptile strategy to take root.[3] The reptile framework generally involves arguing that: (1) the defendant violated a fundamental "safety rule" of operating in society, one which is virtually impossible to controvert; (2) the defendant's conduct endangered the plaintiff and, left unchecked, endangers the community at large; (3) the plaintiffs need and deserve compensation; and (4) it is incumbent on jurors to render a large award and send a message to the defendant to safeguard the community. The reptile strategy activates jurors' fears. Plaintiffs advancing the reptile strategy essentially argue that the defendant company acted negligently (e.g., by rejecting industry norms, etc.) and endangered everyone in its ambit. The plaintiffs argue that the only way to get the company "back in line" is to hit it with a huge verdict, thereby negating the company's cost/benefit analysis. Jurors are implored to correct the errant behavior of the defendant rule-breaker through 8, 9 or 10-digit verdicts (or more).

What must corporate defendants do to prevail in court?

Defense attorneys must do more than merely "respond" to the plaintiffs' claims. They must provide an alternative explanation for the bad outcome that upends the plaintiff narrative.

Imagine a product liability suit arising from an accident involving an overturned golf cart, a teenage driver ("RJ") and severe leg injuries to a 10-year-old girl ("MJ"). RJ had been driving his sister around on his grandfather's farmland when he lost control of the cart, veered off the dirt road and tipped the vehicle into a shallow trough. MJ extended her leg to brace herself as she tumbled from the bench seat and ultimately found her ankle pinned under the cart. MJ's parents filed suit against the cart manufacturer, alleging design defect based on the absence of a foot guard (i.e., estimated production cost per unit: $2.50) and inadequate warnings (i.e., estimated cost per unit: pennies).

This plaintiff storyline has the thematic components necessary for a compelling case at trial: a sympathetic victim (MJ), a villainous company (the multibillion-dollar cart manufacturer) and customer betrayal (the company put profits over safety).

The defense might argue that the owner's manual clearly stated the importance of keeping arms and legs inside the vehicle at all times and the obvious risk of overturning when operating at excessive speeds and/or on uneven terrain. The company might also argue that the cart design met or exceeded all industry standards, had a solid safety record, etc. These are good defense arguments, and they are likely *necessary* to win the case, but they alone are probably *insufficient* to overcome the reptile framework.

Subject to the reptile tactics in depositions, witnesses would likely be asked questions like, "Wouldn't you agree that a design engineer has a responsibility to avoid needlessly endangering the public?" and "Wouldn't you agree that it is always better to be safe than sorry?" An unprepared design engineer would likely feel compelled to concede both points,

[2] America's Top Fears 2017, Chapman University Survey of American Fears, October 11, 2017
[3] David Ball and Don Keenan, "Reptile: The 2009 Manual of the Plaintiff's Revolution"

creating a suboptimal pre-trial record and reinforcing idealistic expectations of the company.

Defense counsel must provide an affirmative story that advances the defense case and motivates jurors to argue it in deliberations. The concepts of knowledge and control are key to doing this.

Jurors apportion blame in all cases by assessing each party's level of knowledge and control over the circumstances precipitating the lawsuit. The greater the level of knowledge and control ascribed to your client, the more likely you are to lose.

As compared to the injured girl, the golf cart manufacturer will surely be perceived as having superior knowledge and control. After all, the company had engineers trained to improve cart stability, account for human reflexes, etc., and the company certainly had 100% control over its profit margins. But, all product manufacturers are not doomed in every case. Why? Jurors are complicated and generally sensible.

Jurors invariably bring to the courtroom the attitudes and experiences that influence the way they hear, process, remember and recall information. People can hold two seemingly countervailing perceptions at the same time. For example, a person may think it is wrong to kill, but killing in self-defense may be justified. Similarly, a person may harbor some anti-corporate views, but also espouse personal responsibility and accountability. So, even in the face of jury venires that appear rabidly anti-corporate, litigators should assume that jurors harbor *some* predispositions that are defense-friendly.

Litigators must identify predispositions favoring the defense and leverage them at trial. Jurors must be armed with specific evidence to argue your case and, importantly, be motivated to do so in deliberations.

Many common juror predispositions favor product manufacturers. For example, the vast majority of jurors believe that most *accidents are due to human error, not defective products*, regardless of the product at issue.[4] The majority of jurors also believe that *student drivers should be trained and supervised*, and statistics consistently show that *teens are high-risk drivers*. Furthermore, most jurors believe product owners should not modify or disable safety systems on equipment (e.g., remove restraints, rails or seatbelts).

The golf cart manufacturer can prevail at trial by elevating the knowledge and control that the jurors ascribe to other parties closer to the incident. This might include bringing out the following case facts in the opening:

- RJ liked racing ATVs with his cousins whenever he visited his grandfather's farm.
- This golf cart was very different from the ATVs RJ was accustomed to riding—i.e., it did not have big, fat tires designed for rough terrain, it did not have a low-center of gravity, etc.
- RJ had had never driven this golf cart, or any other cart like it.

[4] R&D research has consistently found 80-90% of mock jurors agree that accidents are more likely due to human error than product defect in cases involving tires, vehicles, appliances and more.

- RJ had not taken any safety courses related to operating golf carts.
- RJ had also not completed driver training and did not have a driver's license.
- Grandpa had declined to participate in the dealer's free introductory class on maintaining and operating the cart, including risks associated with speeding, uneven terrain, etc.
- Grandpa had removed a safety net that snapped into place on either side of the vehicle to facilitate passengers getting in and out.
- Mom and Dad had allowed RJ to operate the cart without adult supervision, and they allowed MJ to accompany him.
- Mom and Dad had told RJ that they would follow them home about 15 minutes later.

After all, the accident may not have happened if any one of these factors had been reversed. To be clear, the manufacturer cannot win by merely attacking 15-year-old RJ for having maimed his little sister. But, by asking "Who was in the best position to have averted this crash?" the company can reframe the case from "innocent child victimized by greedy corporation" to "tragic accident involving a safe product used improperly."

Jurors will reconsider the merits of the plaintiffs' overly simplistic victim/villain storyline if the company can: (1) elevate the knowledge and control of the people closest to the incident; and (2) assuage jurors' fears that the company is operating "off the rails," without regard for the safety of customers and the community. This is true even in today's jury climate which is rife with fear, anxiety and idealistic expectations. Granted, jurors often grumble about getting seated on a jury—after all, it can be inconvenient, disruptive, stressful, expensive, etc. But, once seated and sworn, jurors become emotionally invested in "figuring it out"—in reaching the *right* conclusion. Play your cards right, and jurors will reach *your* conclusion.

Maithilee Pathak Phd., JD, is a partner at R&D Strategic Solutions. She has devoted her professional career to understanding jury-decision-making in complex risky cases. She develops compelling conceptual and visual strategies for trial to help her clients win. Dr. Pathak obtained her doctorate from the University of California, Irvine, and her law degree from the University of Nebraska, Lincoln.