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The Fear Factor Feeds the Reptile

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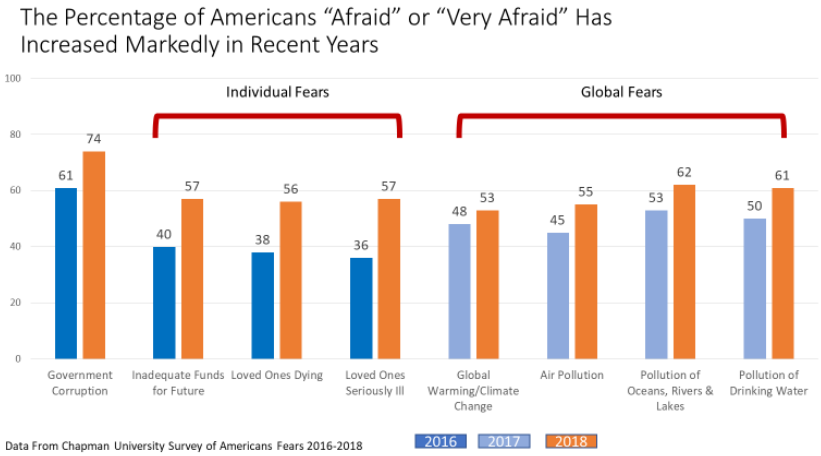
What are jurors afraid of and what percentage of the populous is afraid?

Generally, Americans' fears can be classified as individual vulnerabilities (e.g., loved ones getting sick or dying) and global concerns (e.g., climate change and pollution). In other words, jurors in 2018 are afraid for themselves and loved ones, *and* for the planet and humankind.[1]

Government corruption and running out of money have ranked as top fears among Americans for many years, and the percentage of people expressing these fears and others has grown steadily over time. The percentage of Americans reporting each fear has increased markedly over the last two years (see blue bars below). Whereas government corruption was the *only* fear expressed by the majority of respondents in 2016, the majority of respondents expressed fear of *all of the top 10 categories* (see orange bars below) in 2018.



[1] Chapman University conducts an annual survey of a random sample of adults in the U.S. (aka prospective jurors) about their level of fear of 94 phenomena across many domains (e.g., crime, government, environment, personal anxieties, etc.). Each year, the Top 10 Fears are rank ordered according to the percentage of people reporting they felt "afraid" or "very afraid" of x, y, or z phenomenon. Government corruption has been the #1 fear for many years. Jurors' global fears were not among the Top 10 list in 2016, but are among the Top 10 Fears in 2017 and 2018.

What does rising anxiety mean for corporate litigants?

Rising anxiety provides fertile ground to plaintiffs relying on Ball and Keenan's infamous "reptile strategy" to argue their case.[2] The reptile strategy capitalizes on jurors' fears to drive up damage awards.

Lawsuits using the reptile approach are typically framed around the following concepts: (1) the defendant company violated a "safety rule" fundamental to a well-ordered society; (2) the defendant's conduct endangered the plaintiff, and potentially the entire community; (3) the plaintiffs need and deserve compensation; and (4) jurors must compensate plaintiffs and deter similar conduct in the future with their verdict.

Staunch plaintiff jurors in deliberations can often use fear plus the common preconception that corporations put profits over safety to justify a multi-million-dollar award to make the defendant company "straighten up and fly right." Examples of exorbitant jury verdicts in recent years include: $4.6B to plaintiffs alleging talcum powder caused ovarian cancer; $500M to patient alleging metal hip implant caused metallosis; $289M to patients alleging popular weed killer caused lymphoma; $50M to patient alleging pelvic mesh caused severe complications.

Rising anxiety coupled with daily chants of "fake news" makes the courtroom a snake pit.

Seemingly wacky conspiracy theories are flourishing in today's internet environment where the questionable is freely intermingled with the legitimate.[3] In this environment, it is tempting to give air time to "both sides" type of arguments.[4] The trap for corporate defendants in trial is responding in "brick by brick" fashion to each and every plaintiff claim and thereby failing to provide an alternative explanation for the bad outcome.

What can companies do in self-defense?

Corporate litigants can bolster their position in court by: (1) using psychology to craft a persuasive narrative and retain jurors' attention; (2) teaching witnesses active listening and effective communication skills; (3) using demonstratives to illustrate your story, (4) providing jury instructions which to give jurors a roadmap to solve the case; and (5) get to the point quickly and make jurors feel smart.

Use confirmation bias to craft an alternative storyline explaining the bad outcome absent negligence.

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[2] David Ball and Don Keenan, "Reptile: The 2009 Manual of the Plaintiff's Revolution"

[3] For example, roughly one-third of jurors (34%) believe the 1969 moon landing was faked. Based on R&D Strategic Solutions data collected from almost 2000 respondents across the country.

[4] A candidate for a U.S. ambassadorship recently said she would give equal consideration to "both sides" of the science on global warming. This is one area in which there is scientific consensus with 97% of studies and scientists concluding that the earth's temperature is warming. J. Cook, et al, "Consensus on consensus: a synthesis of consensus estimates on human-caused global warming," *Environmental Research Letters* Vol. 11 No. 4, (13 April 2016); DOI:10.1088/1748-9326/11/4/048002—Quotation from page 6: "The number of papers rejecting AGW [Anthropogenic, or human-caused, Global Warming] is a miniscule proportion of the published research, with the percentage slightly decreasing over time. Among papers expressing a position on AGW, an overwhelming percentage (97.2% based on self-ratings, 97.1% based on abstract ratings) endorses the scientific consensus on AGW."

Confirmation bias is a psychological tendency to give credence to material consistent with predispositions and prior experiences. Attorneys must identify favorable experiences, attitudes, and values that jurors bring to the courtroom, and use these to frame the defense strategy.

The good news is that jurors hold countervailing perceptions about most complex issues which means that *some* jurors are likely to harbor *some* attitudes and predispositions that favor the defense even in seemingly hostile venues. For example, while most people would agree that killing someone is wrong, most would also agree that landing a fatal blow in self-defense may be justified.

For product liability cases, defendants benefit from the almost universal perception that accidents are more likely due to human error rather than defective products. Research shows that jurors apportion fault by weighing the level of knowledge and control each party had over the circumstances precipitating the bad outcome. Therefore, in a tire defect case, amplifying factors that were within the knowledge and control of the driver will be central to convincing jurors the accident was a function of *human error* not a *defective tire*. Detailing the history of the tire (i.e., age, use, and maintenance history), the road conditions at time of blow out (e.g., slick roads, speed), and/or identifying driver distractions (e.g., kids in car, cell phones) will bolster the defense. The key question at trial is "Who was in the best position to prevent the accident? The company that made the tire 10 years earlier, or the people who owned, used and maintained the tire in the interim?"

Don't let witnesses give "reptile friendly" sound-bites, especially during deposition. Instead, prepare witnesses using non-traditional witness preparation techniques so they can tell the story effectively at trial.

Plaintiff counsel employing the reptile strategy in deposition can often get concessions from defense witnesses by making very broad assertions that seem incontestable. This may include for example, *"Wouldn't you agree that a design engineer has a responsibility to avoid needlessly endangering the public?"* or *"Wouldn't you agree it is always better to be safe than sorry? Or "Wouldn't you agree a manufacturer should use the safest design option, especially if the cost increase would be nominal?"* An unprepared design engineer might unwittingly agree with these overly broad seemingly incontrovertible concepts, and thereby hamstring the defense by reinforcing idealistic expectations of the company.

Traditional witness preparation methods often include a list of "do's" and "don'ts," but do not teach witnesses the listening and communication skills necessary to "hold their ground" in deposition when faced with questions like *"Wouldn't you agree it is incumbent upon design engineers to avoid needlessly endangering the public?*"

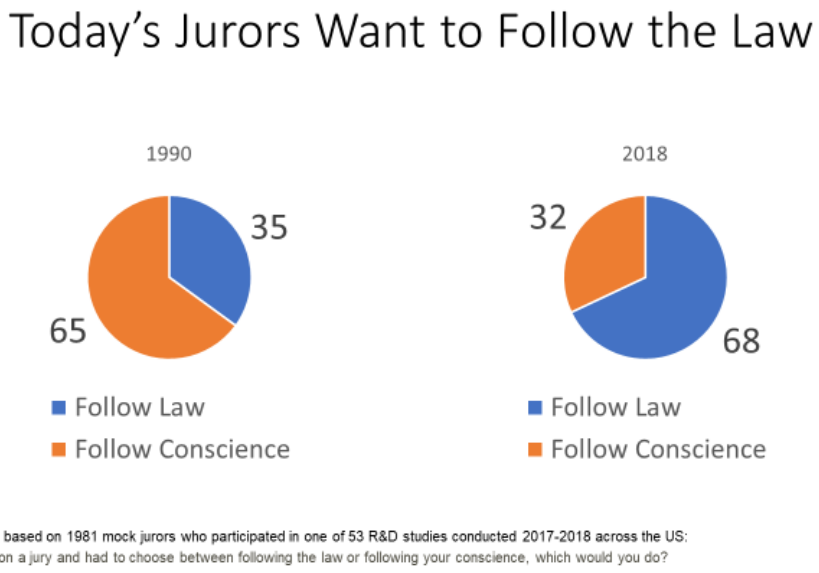
Use demonstratives and multi-media presentations to make the defense story more persuasive and memorable. Jurors today have short attention spans. If jurors can't remember and repeat your arguments, they can't fight for you in deliberations.

There is no such thing as being "too slick" in court as jurors have very high expectations of presenters. Today's jurors fully expect to see, hear, and sometimes even touch evidence in court. The vast majority of jurors are tech savvy and use the internet every day to gather and assimilate information. Indeed, today's younger jurors were surfing the internet, and *doing research* on-line *by age 5* (i.e., "Google" is a verb).

Jurors today often grow bored and inattentive when counsel rely solely or primarily on one way of presenting information (e.g., simply talking at jurors). This means counsel must develop a visual strategy to convey important concepts during openings and closings, and expert witness testimony to ensure that jurors will be able to remember and repeat arguments in deliberations. To be clear, "multi-media" does not mandate expensive computer animations, but it should definitely include charts and diagrams that simplify and organize information.

Craft jury instructions carefully because jurors want to "get it right" on the verdict form—right according to the law and facts.

Today's jurors want to follow the law, whereas jurors in the past were more inclined to follow their conscience. Indeed, two-thirds of mock jurors (68%) said they would follow the law over their conscience if there was a conflict between the two. This is in sharp contrast to 25-30 years ago when jurors were more likely to say they would follow their conscience over the law, if the two were in conflict.



Source: 2018 data based on 1981 mock jurors who participated in one of 53 R&D studies conducted 2017-2018 across the US:
If you were sitting on a jury and had to choose between following the law or following your conscience, which would you do?

What explains jurors' greater deference to the law today?

One possible explanation for the shift in juror attitudes about instructions is rooted in the increased anxiety jurors bring to the courtroom. Jurors may be yearning for some external authoritative source that can help navigate through the uncertainty and/or emotion driving lawsuits.

Jurors today feel empowered to get the verdict "right," meaning correct according to the law and the facts. The ubiquity of the internet, DIY programs, and flat-pack furniture have taught jurors they can get the right result by following X, Y, Z instructions. Jurors today find very appealing the idea that there is a common set of rules which provide structure, definition, and emotional security. There is an answer, and they can use instructions to find it.

Jurors today may also be more willing to adhere to jury instructions given the prevalent discussions about the law in everyday society. The current climate of special counsel investigations, allegations of malfeasance among politicians, concerns about illegal immigration, reports of voter fraud and so forth have made the phrase “rule of law” part of the lexicon. Jurors seem to be spending more time in deliberations in civil cases, and that appears to be to the benefit of defendants. In two recent jury trials, jurors spent three full days deliberating.

A third possible explanation for jurors’ adherence to the law may be a growing skepticism of plaintiff claims of physical and emotional injuries. Jurors resent plaintiffs trying to get ahead through the “litigation lottery” and resent plaintiff counsel using sympathy to win a case.

The structure of the law allows jurors to feel good about reaching difficult decisions (e.g., denying recovery to a sympathetic plaintiff) in a time when empathy for those less fortunate is valued. Increased respect for the law means litigants can potentially use jury instructions to help defense-minded jurors advocate difficult positions in the deliberation room (e.g., set aside sympathy when deciding damages, etc.).

Get to the important and powerful evidence quickly and make jurors feel smart and empowered to conclude that yours is the “right side” of the dispute.

Jurors *expect* counsel to provide them the tools and information they need to “solve the case” and to do so in a clear and efficient manner. Jurors want to be: (1) educated about the issues they must decide; (2) engaged by interesting, clear, and efficient presentations; and (3) given room to reach their own conclusions about the evidence.

In addition to being teachers, jurors expect attorneys to make the material interesting and comprehensible. Failure to do either will surely spark juror anger at counsel/company for “wasting their time,” and/or “being patronizing.”

In sum, counsel must develop defense themes that resonate with jurors’ expectations, experiences, and attitudes—don’t advance weak arguments and “swim with the current.” Counsel must also state an affirmative alternate narrative to explain the facts of the case, and equip witnesses to be good story tellers at trial. Finally, counsel must link the evidence to the jury instructions and the verdict questions to provide defense jurors “toe-holds” to shift deliberations in your direction. Without such toe-holds, the defense will likely slip and fall.

Maithilee Pathak PhD., JD, is a partner at R&D Strategic Solutions. Dr. Pathak has devoted her professional career to understanding jury-decision-making in complex risky cases. She develops compelling conceptual and visual trial strategies 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.