



courtroomsciences.com

Impacts of the COVID-19 Crisis on Jurors' Attitudes and Decisions

By Dr. Lorie Sicafuse

Critical Communications

Records & Depositions

Litigation Psychology

Trial Consulting

4950 North O'Connor Road, Suite 100, Irving, TX 75062-2778

Phone 972.717.1773

Toll Free 800.514.5879

courtroomsciences.com

Introduction

The COVID-19 crisis has significantly impacted all our lives, and there is no telling if we will ever fully return to “normal.” Though some individuals have been less affected than others, most Americans have experienced increased stress, with many others experiencing decreased well-being and other symptoms of psychological distress. Recent survey data indicate that 71% of a nationally representative adult sample are concerned about the Coronavirus' implications for their personal health. Nearly half (49%) say that the stress and anxiety caused by COVID-19 has been challenging for them. About 40% say that the COVID-19 crisis has caused financial stress, and 28% say that it has negatively impacted their relationships.¹ These are likely underestimates, as participants may be unwilling to admit that the COVID-19 crisis has impacted their psychological health and well-being or are not consciously aware of the extent of these impacts.

The medium to long term impacts of the COVID-19 crisis on individuals' psychological health and well-being remain unknown; however, prior research suggests that such impacts will be significant and persistent for many. A recent review of studies examining the effects of quarantine reveals that those who have been quarantined are about four times

more likely to experience post-traumatic stress disorder symptoms and depressive disorder symptoms compared to their counterparts. Longitudinal data indicate that such symptoms were observed in subjects up to three years following the quarantine event. It should be noted that many of these subjects were quarantined for about two weeks.²

Increased stress and uncertainty, fear of illness and death, and other changes in psychological health and well-being can dramatically affect how individuals process information and make decisions. The COVID-19 crisis will not be “behind us” when civil trials resume across the U.S. Fear of infection and other associated stressors will likely persist until a vaccine becomes widely available; even then, many individuals will continue to experience stress due to financial hardships and other COVID-19-related issues. Thus, it is critical for civil trial lawyers, in-house counsel and insurance claims specialists to understand the effects the COVID-19 crisis will likely have on civil jurors' attitudes and decision-making in the following months, and perhaps years. Read on for the top four changes to expect in civil jurors' attitudes and decision making as a result of the COVID-19 crisis.

1. Polarization

When individuals are reminded of death and the reality that they too one day will die, they tend to cling to and strongly defend their pre-existing ideologies, attitudes, and beliefs. Typically, there is a shift in their ideological framework such that they become more extreme. Social psychology's Terror Management Theory posits that when confronted with “mortality salience” or subconscious death-related anxiety, people react by bolstering their own worldview (thus the strengthening of pre-existing attitudes and beliefs) in an attempt to feel more meaningful and in control. Whether or not you believe in this interpretation, there is no doubt that this effect occurs. Hundreds of studies have demonstrated that death reminders lead to ideological polarization and more vigorous defense of pre-existing beliefs; it is one of the most well-documented effects in the history of social psychology.³ “Death reminders” cause religious individuals to become more religious. Political liberals become more liberal, and conservatives become more strongly conservative. Sports fans become more adamant supporters of their favorite teams, and more likely

to derogate or reject fans of different teams.

Mortality salience and death reminders are everywhere in the era of COVID-19, and likely still will be when civil jury trials resume. Even if jurors are not affected by mortality salience, however, it is likely that they will be experiencing stress, uncertainty, and perhaps fear. What does the research say about individuals who are stressed, uncertain, and fearful? One key finding is that these individuals will adhere to and defend their pre-existing attitudes and beliefs, and often become more polarized. Again, doing so helps them feel more in control and ease the psychological distress caused by uncertainty. Stress and fear catalyze the fight or flight response mode. These individuals are not in a position to consider multiple response options. Instead, they tend to choose familiar options when making a decision that cohere with their pre-existing experiences and beliefs. This is why stressed or fearful individuals often keep deploying the same ineffective tactic in the face of a threat rather than to consider a different, more effective solution.⁴

There are several steps corporations can take during this time to improve jurors' perceptions of corporations and corporate defendants; our next featured COVID-19 publication will focus on this topic. Generally, prior research findings as well as some current data regarding public perceptions of corporations suggest that jurors will become more polarized as a result of the COVID-19 pandemic and that this polarization will persist even when the threat subsides. Jurors who were previously anti-corporate will likely at the very least retain that position, and many will likely become more anti-corporate. Many readers will likely recognize such ideological shifts in their own social network, especially if they are active on social media. Those who were previously publicly anti-corporate are posting about unfair and unsafe

working conditions in the midst of the COVID-19 crisis, whereas those who were previously publicly pro-corporate are posting about CEOs taking pay cuts, paying full salaries and benefits for furloughed employees, and using their manufacturing facilities to produce medical equipment.

Ultimately, when civil jury trials resume, counsel and clients should expect that jurors will be more extreme in their beliefs and more adamant defenders of their beliefs. Some jurors may also be more willing to express those beliefs via a juror questionnaire and during *voir dire*. It will be critical for counsel to develop and execute evidence-based, highly strategic inquiries and detailed plans for *voir dire* in order to increase support for challenges for cause and to retain (and if necessary, rehabilitate) the most advantageous jurors.

2. Ingroup Favoritism and Outgroup Bias

Though it is challenging to precisely measure the extent of bias against Asian-Americans and Asian-based entities as a result of the COVID-19 crisis, there are plenty of case studies and anecdotal reports highlighting increased instances of prejudice and discrimination against those of Asian descent. This bias will likely persist throughout at least the next several months, and perhaps for years. This can inappropriately influence jurors' perceptions of any individual or party of Asian descent (including witnesses and attorneys) as well as their perceptions of Asian corporations.

The trend towards increased prejudice and discrimination against individuals of Asian descent is highly disturbing in and of itself. Unfortunately, prior research indicates that the COVID-19 crisis may lead to increased prejudice and discrimination against a variety of minority groups and other "outgroups." As previously discussed, individuals are motivated to protect and defend their worldview during times of fear, uncertainty, and distress. This leads to stronger identification with one's "ingroup" and increased distrust of outgroup members. As a basic example, psychological theory and research results predict that European-Americans will place a greater importance on their heritage and background during this

time and increasingly bond and identify with others who share that heritage, while becoming more judgmental of those with different backgrounds. Similarly, African-Americans may feel a stronger bond with other African-Americans during this time, and become more distrustful of

others with different backgrounds and experiences. It is important to note that these are not guaranteed effects and each person is different. In addition, most individuals do not consciously decide to discriminate against others in times of crisis. Yet, there is a vast well-executed body of research on this topic which should be considered by those interested in how the COVID-19 crisis may impact jurors' judgments and decision-making.

Ethnic background provides an easy example of how tendencies towards ingroup favoritism and outgroup bias may operate among jurors, but this is not the only identity that jurors use to categorize themselves. Due to the psychological impacts of the COVID-19 crisis, "blue collar" jurors may increasingly identify with other blue collar jurors and be more suspect of traditional "white collar" jurors, and vice versa. Christian jurors may be more judgmental of a Jewish or Muslim witness. Essentially, psychological theory and research predicts that many jurors may be increasingly judgmental of individuals who do not

Individuals are motivated
to protect and defend
their worldview during
times of fear, uncertainty,
and distress.

share their ethnicity, background, or beliefs; jurors also may have more positive perceptions of individuals who appear similar to them.

The literature examining people's reactions to death anxiety, fear, stress, uncertainty, etc. already illustrates increased tendencies towards ingroup favoritism and outgroup bias. Research examining fear of contagion adds to our understanding of the motivations for these behaviors. Such studies have shown that when individuals fear contagion, they become less tolerant of outgroup members and more accepting of ingroup members. This likely occurs because outgroup members are perceived as more likely to be carrying the disease and to infect others. Conversely, close ingroup members are largely perceived as "safe."⁵

It is rare for jurors to acknowledge politically incorrect biases during either open or closed *voir dire*; if they do, it is usually a strategic attempt to avoid serving. Further, it is extremely challenging for counsel to detect "implicit biases" – which jurors are often unaware of and operate at the unconscious or subconscious level – during *voir dire*. There

are highly specialized and case-specific inquiries that CSI's Litigation Consultants can craft to reveal which jurors will likely be biased against your side. However, discussing the potential for bias during *voir dire* can be helpful in minimizing the effects of juror prejudices and stereotypes. For example, defense counsel may acknowledge that "I represent a company that is based in (Asian country). Is there anyone here who is uncomfortable with that fact, or just has negative feelings towards Asian companies or individuals of Asian descent?" Even if this inquiry is met with silence, jurors are now more cognizant of the potential for bias. Many may make increased efforts to view the defense case more objectively and to appear unbiased and "politically correct" during deliberations. Counsel may then follow up with a directive such as "I asked that question because I strongly believe in the right to a fair trial, and I'm sure you all do too. Can I get a commitment from each one of you that my clients' ethnicity will have absolutely no effect on how you interpret the evidence and on your decision-making in this matter?"

3. Increased Reliance on Intuition, Emotion, and Heuristics

Psychological research and literature identifies two main information processing modes, or ways in which individuals attend to and process information to make decisions.⁶ The first is the logical processing mode, which is sometimes referred to as the systematic or rational processing mode. Individuals in the logical processing mode are motivated to carefully analyze evidence and case facts to arrive at a rational conclusion. Logical processing takes time and patience, with the decision-maker more focused on details and facts rather than on their emotional responses or automatic judgments of others. The second information processing mechanism is the intuitive mode, which is sometimes referred to as the experiential or heuristic mode. Individuals in the intuitive processing mode are not able to carefully consider all evidence, testimony, and case facts; rather, they rely on their initial reactions, "gut instincts" and mental shortcuts to quickly reach a decision.

Many individuals are inherently inclined to favor one processing mode over the other; some jurors are by nature logical processors, and others are intuitive processors. CSI Litigation Consultants always assess prospective jurors' natural information processing mode during jury selection.

However, there are many other situational and individual factors that determine whether a juror is likely to engage in a more logical or intuitive processing mode. These factors can shift a typical "intuitive" pro-plaintiff juror into the logical mode and a typical "logical" pro-defense juror into the intuitive mode.

Logical processing is most likely to occur when an individual is motivated to process information carefully; is not experiencing stress, uncertainty, or fear; and has the cognitive resources available for careful and systematic analysis. In the absence of such conditions, people are likely to engage in intuitive processing which is indeed the default processing mode. During and after the COVID-19 crisis, it is highly likely that most jurors will still be experiencing stress, uncertainty, and/or fear. In addition, their cognitive resources will likely be limited as they have been increasingly devoted to managing personal finances, home-schooling, concern for loved ones, etc. During this time, many individuals have reported difficulty concentrating in their work. This is undoubtedly due to stress and limitations on individuals' cognitive resources due to the COVID-19 crisis.

Ultimately, both psychological research and common sense point to an increased likelihood that jurors will follow the intuitive processing mode in the wake of the COVID-19 crisis. This, of course, can make jurors more susceptible to typical pro-plaintiff narratives. Jurors also may increasingly rely on heuristics, cognitive shortcuts, or “rules of thumb for reasoning” in their decision-making. For example, they may be more influenced by superficial, extra-legal factors such as witness attractiveness⁷ and more prone to sympathy bias. Imagery and disturbing or highly emotional evidence and testimony is particularly influential when jurors are engaged in intuitive processing. Jurors also may be more likely to rely on heuristics such as the anchoring and adjustment heuristic when determining damages.

Jurors engaged in intuitive processing will make decisions more rapidly and be more inclined to “make up their minds” early in the trial despite instructions to the contrary. They also will be more motivated to reach a case conclusion. This motivation partly stems from the shift in processing mode, but also from a desire to reduce feelings of discomfort and uncertainty linked to the COVID-19 crisis. Jurors are not aware that their feelings related to the COVID-19 crisis are affecting their perceptions and decisions as jurors; they are simply motivated by minimizing feelings of discomfort and uncertainty regardless of their origins.

Even though jurors will have to wait to hear the

defense case, counsel can tailor their approaches and tactics to appeal to intuitive information processors. Thorough and systematic refutations of the plaintiff's allegations will not be effective in persuading jurors during and after the COVID-19 crisis. Instead, the defense must advance a simple, linear, and relatable pro-defense narrative that preferably highlights the conduct of the key parties and no more than 2-3 key defense themes. Primacy will be critical. If possible, the defense should advance their narrative and key themes during *voir dire* and should begin opening statements with their core message. The defense cannot afford to waste time during opening statements talking about themselves or their client in an attempt to build rapport, or in discussing complex evidence that 1) jurors are not cognitively or psychologically equipped to digest; and 2) may cause jurors to “tune out” and subsequently reject the defense's entire case. Capitalizing on primacy effects will be more critical in reaching jurors impacted by the COVID-19 crisis compared to capitalizing on recency effects.

There are methods for priming logical processing among jurors. Although such a discussion is beyond the scope of this article, CSI Litigation Consultants work closely with trial teams in determining how to most effectively prime jurors and shift jurors' processing modes in a way that is most comfortable for counsel given their unique styles and approaches.

4. Increased Focus on Rules and Rule-Breaking

Evidence indicates that rules and conventions become more important among individuals who fear contagion.⁸ This likely occurs for two main reasons. First, strict adherence to rules and tradition help individuals to feel more in control during an unpredictable and chaotic time. Second, following rules and conforming to social norms may be an inherent reaction intended to safeguard individuals and their families against disease. People are less likely to become ill if they adhere to high standards of cleanliness and follow other protocol designed to prevent infection. From an evolutionary perspective, people also may be motivated to punish those who engage in immoral acts and otherwise distance themselves from what they perceive as “impure” or “unclean.”⁹ As previously mentioned, those who fear contagion place an increased importance on ingroup loyalty. They also tend to show a greater deference to authority figures and a

decreased tolerance for those who defy authority.

The implications of this likely effect of the COVID-19 pandemic for civil juror decision-making are varied and highly complex. This is partly because jurors will have different moral frameworks and different ideas about what constitutes a legitimate authority figure. For instance, some do not view President Trump as a legitimate authority figure; others do not view the CDC or other government agencies as legitimate authority figures. Some jurors will view corporate CEOs as legitimate authority figures; others will not. Some jurors may perceive a company's decision to remain open during the COVID-19 crisis as highly immoral given that doing so increases both employees' and consumers' risk for becoming ill, whereas others may view the same decision as moral as the company can keep workers employed and provide the public with needed goods and services.

Despite these complexities, counsel should anticipate some basic overall changes in jurors' perceptions and decision-making resulting from increased adherence to rules and minimized tolerance for rule-breaking. The most obvious change is an increased susceptibility to plaintiff reptile tactics. Most corporations had publicly advertised unattainable rules for safety and conduct prior to the COVID-19 crisis. In reacting to the crisis, many have repeatedly reinforced their public commitment to these unattainable rules. Even worse, many corporate communications to the public (in the form of emails, other advertisements, etc.) not only establish their commitment to maintaining impossible safety standards and preventing all negative outcomes, but then follow this commitment with a sales pitch. In the midst and aftermath of the COVID-19 crisis, jurors should be even more inclined to punish a corporate defendant for breaking their own highly publicized rules. The punishments will be more severe if plaintiffs show that public pledges to ensure employee and consumer safety are followed by sales pitches;

Evidence indicates that
rules and conventions
become more important
among individuals who
fear contagion.

clearly this company values profits over safety.

The defense must be aware of such susceptibilities and prepare to defeat plaintiff reptile strategies, and to give reptile plaintiff attorneys a "taste of their own medicine." In order to defeat a well-executed plaintiff reptile approach, the defense **must** swiftly and assertively advance a counter-narrative identifying the responsible party or parties; again, traditional systematic refutation of plaintiff allegations (even if very logical and scientific) will not be effective. The defense also must establish its own rules and ask prospective jurors to publicly endorse these rules during *voir dire* (e.g., an employee must always follow their employer's safety guidelines and rules; a parent must always ensure that their children are properly supervised; a patient is responsible for following the physician's instructions to minimize surgical complications). Reverse reptile approaches may be warranted in many cases; however, we recommend consultation with CSI Litigation Consultants to determine the most appropriate tactics for your particular matter in the context of the COVID-19 crisis.

Future Directions

We are living in an unprecedented time full of uncertainty. It is unclear when civil jury trials will resume in different venues across the U.S., and what these trials will look like. Will social distancing protocol apply? Will jurors be afraid to report? Will jury selection processes continue as usual, or will each juror be questioned individually? How will social distancing protocols such as directives to wear masks affect witness performance, and jurors' perceptions of witness demeanor and character? These questions remain unanswered currently, but CSI will provide timely updates on procedures, protocol, and psychological implications for jurors as courts begin the reopening process throughout the next few months.

The anticipated effects of the COVID-19 pandemic on civil jurors' attitudes and decision-making as discussed in this article are largely based on prior research results, though current data were incorporated as available. CSI Litigation Consultants are actively collecting data from

nationally representative samples to further inform our practice during this time and our recommendations for clients and counsel. Specifically, our PhD-level consultants specifically trained in survey and research methodology are collecting and analyzing data to better understand jurors' perceptions of a variety of corporate entities during this time; attitude and belief changes resulting from the COVID-19 crisis; and behavioral changes resulting from the COVID-19 pandemic. We are conducting further analyses to assess geographic and venue-related differences in jurors' post-COVID-19 attitudes and decision making processes, with a focus on comparisons between rural and urban venues and between notable "Judicial Hellholes" such as Cook County, Los Angeles, Philadelphia, New York, and various Georgia and Texas counties. We will continue to share our findings with counsel, clients, and insurance claims professionals to help achieve positive case outcomes during this unprecedented time.

References

- 1 See Morning Consult's *Coronavirus Trend Tracker: How the Coronavirus Outbreak is Impacting Public Opinion*. Available at <https://morningconsult.com/form/coronavirus-outbreak-tracker/>
- 2 Brooks, S. K., Webster, R. K., Smith, L. E., Woodland, L., Wessley, S., & Greenberg, S. et al. (2020). The psychological impact of quarantine and how to reduce it: Rapid Review. *The Lancet*, 395, 912-920.
- 3 Pyszczynski, T., Solomon, S., & Greenberg, J. (2015). Thirty years of terror management theory: From genesis to revelation. *Advances in Experimental Social Psychology*, 52, 1-70.
- 4 Anderson, E. C., Carleton, R. N., Diefenbach, M., & Han, P. K. J. (2019). The relationship between uncertainty and affect. *Frontiers in Psychology*, 10, 1-17.
- 5 Aaroe, L., Peterson, M. B., & Arceneaux, K. (2017). The behavioral immune system shapes political intuitions: Why and how individual differences in disgust sensitivity underlie opposition to immigration. *American Political Science Review*, 111, 277-294.
- 6 Evans, J. S. B. T. (2008). Dual processing accounts of reasoning, judgment, and social cognition. *Annual Review of Psychology*, 59, 255-278.
- 7 Park, J. H., van Leeuwen, F., & Stephan, I. D. (2012). Homeliness is in the disgust sensitivity of the beholder: Relatively unattractive faces appear especially unattractive to individuals higher in pathogen disgust. *Evolution and Human Behavior*, 33, 569-577.
- 8 Murray, D. R., & Schaller, M. (2011). Threat(s) and conformity deconstructed: Perceived threat of infectious disease and its implications for conformist attitudes and behavior. *European Journal of Social Psychology*, 42, 180-188.
- 9 Murray, D. R., Kerry, N., & Gervais, W. M. (2017). On disease and deontology: Multiple tests of the influence of disease threat on moral vigilance. *Social Psychological and Personality Science*, 10, 44-52.