

What COVID-19, Social Issues Mean For Pharma Case Juries

By **Buffy Mims, Rachel Horton and Rick Fuentes** (June 29, 2021)

Since the World Health Organization declared that we were in the midst of a global pandemic on March 11, 2020, Americans have faced health challenges that have not been seen in a century. What's more, Americans have experienced myriad other challenges, from isolation to economic hardship.

2020 was such an unprecedented year that Oxford Dictionary threw up its hands when faced with its annual self-imposed task of selecting the Word of the Year. Rather than choosing a single word, the lexicographers chose words and phrases that overwhelmingly related to important topics like the pandemic ("social distancing") and social justice ("Black Lives Matter").

The COVID-19 pandemic led to an abrupt closure of offices, workspaces and the courts — which, in turn, led to increased telework, virtual hearings and even virtual trials. Once state and federal court systems emerge fully from the pandemic, the turbulence of this time will undoubtedly impact jurors — and, in turn, verdicts.

We wanted to track juror attitudes in these unprecedented times to explain and predict how our jury pools have changed over the past year. To do so, our firms teamed up to review surveys of actual and potential jurors across the country.

This article is based on survey responses from more than 1,000 actual and potential jurors across the U.S. Unless otherwise noted, the data presented here is collected from these survey responses. These surveys were conducted between April 2020 and February 2021.

Here's the bad news: We have observed a spike in skepticism toward large institutions among potential jurors in recent focus groups. A cross-section of Americans has soured on almost everything big: large institutions, the federal government, the media and even nongovernmental organizations.

But there is a bright spot among the data. Trust in pharmaceutical companies has increased during the pandemic. Although our surveys cannot explain why that is occurring, common sense tells us that the herculean efforts by pharmaceutical companies, academic scientists, distributors and pharmacies across the country have helped shape perception.

The historic speed with which pandemic-ending vaccines have been rolled out by pharmaceutical companies has buoyed attitudes while these companies have been in the spotlight.



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Skepticism toward large institutions has continued to intensify.

Overall, potential jurors' perceptions of large institutions have become more negative. In a series of nationwide polls, approximately a quarter of respondents have indicated that their opinions of corporations and corporate executives have become more negative since the start of the pandemic.

The percentage of respondents whose distrust for corporations has increased is as high as 40% or more in certain venues, such as the Northern District of California; Maricopa County, Arizona; the Southern District of Nevada – Las Vegas Division; and Brooke County, West Virginia.

Distrust of the government is also increasing. Nearly half of respondents stated that they now have a more negative opinion of the government since the pandemic began. Now, more than half of respondents generally distrust the federal government to some degree.

According to the 2021 Edelman Trust Barometer, trust in the federal government dropped six points between May 2020 and January 2021.[1] And other reports and anecdotal information suggest that trust in the Centers for Disease Control and Prevention has decreased significantly over the past year.[2]

Jurors' views of health care providers and life sciences companies have improved.

Health care professionals are definitely enjoying a halo effect because of their heroic efforts during the pandemic. Since the start of the pandemic, 38% of respondents agreed that their opinion of doctors and other health care providers is more positive. That result dwarfs the 8% of potential jurors who have a more negative opinion of health care providers.

Not as robust, but still significant, is that 20% indicated a more positive opinion of pharmaceutical manufacturers. And pharmaceutical manufacturers' unfavorable ratings have decreased significantly — resulting in unprecedented favorability ratings.

Potential jurors in 20 cities viewed doctors and health care providers more favorably, with between 16% and 54% indicating their opinions have become more positive. Similarly, respondents view other front-line workers and companies more favorably.

For example, nearly 40% indicate their opinions of trucking companies that ship goods and supplies, and of truck drivers, have become more positive during the pandemic. Such positive biases may benefit the defense in product liability cases.

One survey focusing on residents of Camden, New Jersey, and Chicago and its environs found that 18% and 25% of participants, respectively, held more positive opinions of pharmaceutical manufacturers than they did before the pandemic began. Almost no one in either jurisdiction said that their views of pharmaceutical manufacturers were more negative.

Interestingly, views of medical device manufacturers have changed little, and remain overwhelmingly positive or neutral among potential jurors in those two jurisdictions. Only a minuscule number of potential jurors harbor negative feelings toward medical device companies.

Positive attitudes toward science and experts have significantly improved.

Data show that jurors are relying on science more today than in the past. Science, after all, has become key to our survival. Many Americans have been impacted by the Fauci effect — a newfound appreciation for science and medicine.

Approximately three-quarters of potential jurors believe that science is very important in making important decisions and deciding legal cases. When deciding a difficult case, 89% of potential jurors said they would rely more on the scientific and medical testimony of experts than their own conscience and instincts.

As expected, geographic differences exist within the data. A whopping 96% of potential jurors in Palm Beach, Florida, believe that scientific evidence is very important in making important decisions, but only 59% of potential jurors in Orange County, California, agree.

Thus, it is of paramount importance for litigators to leverage the strengths and credibility of their expert witness — she should be the Anthony Fauci of the courtroom — and show the jury that the opponent's expert is merely a hired gun who lacks objectivity.

The social justice movements of 2020, and the events that spurred them, remain fresh in many jurors' minds, and continue to impact their thinking.

2020 ushered in not only a global pandemic, but also a movement for social justice that swept the country, with Americans marching with, and protesting against, the Black Lives Matter movement. Whether or not respondents participated directly, many say their attitudes have changed over the past year.

Jurors have become more polarized in their political and ideological beliefs. Seventy-three percent of potential jurors agreed that they are stronger in their political beliefs now than they were before the pandemic.

This suggests that jurors who were previously pro-corporation and pro-defense will remain firm in their beliefs, and those who were previously pro-plaintiff will remain firm in theirs. Properly screening prospective jurors during voir dire will be even more important as trials resume with more regularity.

Given the recent sociopolitical turmoil and the era of fake news, conspiracy theories are also on the rise. For instance, 20% to 30% of the jury pool in most venues believes that the 1969 moon landing was faked.

But buy-in to conspiracy theories is radically divergent in different jurisdictions. For example, the proportion of focus group respondents who believe that it is probable that the first moon landing was faked is 27% in St. Lucie, Florida, and 48% in Philadelphia, Pennsylvania.

The penchant for believing conspiracy theories can have real-world consequences at trial. For example, the anti-vaccination movement, which has been simmering for more than a decade, has reached a boil.

Potential jurors who hold such beliefs may harbor ill will toward the pharmaceutical industry based on what they have read online or heard from acquaintances. When quarantine ends, and more people emerge from their homes, their belief systems may be changed for years to come.

Jurors' views of injuries and damages remain complex and evolving.

The results of our survey are a mixed bag for defense attorneys — meaning that the identity of the defendant may have the power to tip the scales in any given case.

Jurors have more favorable attitudes about essential workers and some corporations and entities, but they have less favorable views of others. For example, some respondents — usually less than 20% — feel that medical malpractice lawsuits, personal injury lawsuits, the opioid epidemic and opioid-related litigation are all more important now than a year ago.

Interestingly, views about litigation have some significant geographic variations. A mere 12% of respondents in Pulaski County, Arkansas, and Baldwin County, Alabama, agreed that medical malpractice cases were more important since the start of the pandemic, whereas 41% of respondents in Phoenix, Arizona, agreed.

We have observed jurors expressing increased cynicism about large requests for noneconomic damages, particularly mental anguish, claims of inability to return to work and post-traumatic stress disorder. But large verdicts in the personal injury and product liability space persist.

In commercial cases, plaintiffs are having more difficulty getting jurors motivated to award significant damages. Jurors have also become desensitized to emotional appeals, placing less trust in hyperbole and aggressive narrative.

This may be due, in part, to the fact that many potential jurors have been facing significant financial hardship during the pandemic. It is likely that half or more than half of individuals in many jury pools across the country are somewhat or very concerned about their personal finances.

But jurors who report that they have been more impacted by COVID-19 than the average individual tend to be more pro-plaintiff, even in business and intellectual property cases. More than 42% of people surveyed by the U.S. Census Bureau in December 2020 reported symptoms of anxiety and depression, compared to only 11% during the January to June 2019 time frame.[3]

When jurors are highly emotional, anxious and concerned with the well-being of others, it might be a recipe for large verdicts in personal injury cases. The silver lining for defense lawyers, though, is that jurors have experienced so many debates over the past year — such as whether to wear a face mask, and whether students should be learning in person or virtually — that they have become frustrated by spin and theatrics.

Jurors are tired of hearing plaintiffs lawyers telling them how they should feel, and they are cynical about emotional manipulation. They want evidence so they can sort through it and reach their own conclusions. Defense lawyers who can leverage this independence will be better able to serve their clients in the courtroom.

Conclusion

The data demonstrate that 2020, with its unprecedented challenges, led to significant changes in juror attitudes. Pharmaceutical companies and health care providers may benefit when juries deliberate, because their pandemic-related efforts have engendered goodwill.

But the results of the numerous surveys we have conducted have nuances that will be

concerning for many in the defense bar: Juror attitudes toward large corporations are becoming less favorable and, of course, many families are struggling financially.

These societal and economic changes underscore the need for careful jury selection and attorney questioning that is tailored to the moment. Once life goes back to normal, many jurors will enter the jury box with a new perspective.

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[1] Edelman Trust Barometer 2021, at 5, available at <https://www.edelman.com/sites/g/files/aatuss191/files/2021-01/2021-edelman-trust-barometer.pdf>.

[2] Michael S. Pollard and Lois M. Davis, Decline in Trust in the Centers for Disease Control and Prevention During the COVID-19 Pandemic, Rand Corp. (2021), available at https://www.rand.org/pubs/research_reports/RRA308-12.html.

[3] Alison Abbott, COVID's Mental-Health Toll: How Scientists Are Tracking a Surge in Depression (Feb. 3, 2021), available at <https://www.nature.com/articles/d41586-021-00175-z>.