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# 2021 LITIGATION TRENDS

# INCREASES IN SETTLEMENTS

With courts shut down or operating at reduced capacity across the country, the backlog of civil litigation only continues to increase, while plaintiff attorneys continue to file suits at a breakneck pace. The conflating of these two circumstances creates both the necessity and opportunity for more settlements and mediations. Clients will look to their counsel to help them navigate their cases and make informed decisions about how to manage each one.

One way in which litigators can help their clients is by ensuring that any witnesses are psychologically trained prior to mediation or settlement discussions. A poor performance at deposition will significantly hinder your client's options when engaging in mediation or settlement negotiations. Your witnesses need to be trained to combat plaintiff reptile attacks, to manage their emotions, and be taught not to use their "workplace brain" but instead develop a "litigation brain" before their deposition. The concept of the "litigation brain", taught by a trained litigation psychologist, gives your witnesses the tools to handle the tricks, traps, and combative approach taken by opposing counsel.

Another way that litigators can benefit their clients prior to settlement negotiations is by investing in early jury research via a virtual focus group to gather data on what a mock jury believes the case is worth. Opposing counsel is likely doing research on the case too, so you do not want to give them the upper hand. Early jury research helps you understand the 'blind spots' in your litigation and arms you with research data – both quantitative and qualitative - that you and your client can use to make strategic decisions about how to manage the case and feel confident that you aren't overpaying during settlement.

# JUROR PERCEPTIONS

The researchers at Courtroom Sciences, Inc. have surveyed mock jurors since the beginning of the Coronavirus pandemic. These survey results indicate changes in juror sensitivities, perspectives, and their decision-making approach. Juror perceptions are changing, and this will require a more thoughtful and scientific approach to *voir dire*. The "standard" questions that litigators have grown accustomed to asking potential jurors for the past several years will not be enough in the age of Covid-19. A more thorough and precise questioning strategy (and questionnaire) is imperative to ensure that the psychological changes experienced by potential jurors due to the pandemic and the impacts it has had on their lives, health, income, and loved ones is taken into account. If *voir dire* is not approached in a more deliberate manner, and a deeper level of analysis of the results is not conducted, there is a risk that you may select a jury that surprises you, in a very negative way.

# EMOTIONAL WITNESSES

**It would not be overstating things to say that more people are on edge now than they were before the onset of the Coronavirus. The strain on everyone's mental health has increased significantly since early 2020 and though there are reasons to be optimistic about the future, pressures remain. Our research reveals that people are more anxious since the start of the pandemic and are more concerned about the plight of others. These increases in anxiousness and empathy can play into how witnesses (and jurors) respond during the litigation process. Witness performance at deposition is critical to case outcomes and witnesses may require more work with a psychology professional to be fully prepared for the stress and challenge of testifying. Opposing counsel can, and will, take advantage of the anxiety, fear, and worry that your witnesses are experiencing if they are not properly trained by someone who understands how to manage the mental health of a witness.**

**Learn more about witness effectiveness training.**

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# FRONT-LINE WORKERS

It's safe to say that our perception of front-line workers has changed since the start of the pandemic. Collectively we have begun to recognize and appreciate the role that these essential workers have played in our daily lives. Nurses, doctors, other healthcare professionals, grocery store workers, truck and delivery drivers, and more have been critical in allowing all of us to manage our health and have access to necessary supplies while doing our best to stay safe.

There are two important considerations when thinking about front-line workers. The first is the perspective that the average juror may now have for people in these positions and how that perspective may have changed from before the pandemic. Assumptions that were made about how jurors perceive truck drivers, for example, will be tested when jurors are reminded how truck drivers risked their personal health to deliver the food, toilet paper, and other crucial household supplies that we took for granted in the past. And the impact that healthcare professionals have had on our lives, and the risks they assumed to help the most sick and vulnerable during the pandemic, is obvious. Juror perception of these front-line workers must be taken into consideration when selecting a jury panel.

The second consideration is thinking of the psychological state of these front-line workers when they are called to testify. Unlike many others, "essential" personnel were not given a choice about whether they would do their jobs or not during the pandemic and did not have the option to convert their role to a virtual one. Their physical presence was required, and they had scant time to consider the dangers and implications of being deemed "essential". They simply had to do their job. The mental strain associated with both the job itself, combined with the pressure of not knowing whether they or their loved ones were going to be safe, is something that must be addressed prior to sitting for testimony. A trained professional should be leveraged to conduct a full psychological evaluation of a front-line worker witness to ensure that they are capable and prepared for the adversarial experience of testifying.

# NUCLEAR VERDICTS AND SETTLEMENTS

There is much debate about the definition of a nuclear verdict or nuclear settlement. Ultimately, it's in the eye of the beholder. If you have been hit by a verdict that hurts more than expected, that's a nuclear verdict. If you have had to settle for more than you had anticipated - or your client had planned for - that's a nuclear settlement. The one thing that everyone can agree on is that no defendant wants to be the victim of a nuclear verdict or settlement. But they aren't going away.

The plaintiff's bar continues to ratchet up their demands and the defense is consistently on their heels in fighting against these massive dollar amounts. Ridiculous figures are thrown out to the jury in opening statements and become anchored in the juror's minds, making it difficult, if not impossible, to purge those amounts from the jury's decision-making process. So damage awards by juries are based on the original, outrageous figure, leaving the defense at the mercy of the jury.

The transportation industry, healthcare industry, and insurance industry are all being bludgeoned by nuclear verdicts and settlements, but they don't have to simply accept it. Suppression and control of nuclear verdicts and settlements is possible by investing in scientific research. The accuracy of scientifically derived estimates far exceeds that of the hunches and intuition typically used to value and settle cases. The cost of guessing in settling cases is not only more expensive than the research, but it is in fact *far more* expensive than the research when it is based on scientific method and theory. There is a way to combat nuclear verdicts and settlements via research if the defense avails itself to it.

Listen to our nuclear verdict podcasts and read our blog posts for more.

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# THE “REPTILE” CONTINUES ITS ATTACK

The “Reptile” attack has been a huge boon to the plaintiff’s bar with over $8 billion and counting in verdicts and settlements. There’s no denying it – the “Reptile” method has been widely successful. And what should keep defense counsel up at night is that, up until this point in time, the “Reptile” method has focused almost exclusively on cases involving personal safety and care (healthcare, transportation, medical malpractice, trucking, etc.), but there is a trend developing where the “Reptile” approach is being deployed in areas broader than personal injury and death: product liability, patent infringement, and even family law. With just a slight adjustment, the safety and danger rules that are core to the “Reptile” method can be applied to questions of reasonableness, rationality, sensibility and fairness. Once this shift becomes commonplace, the “Reptile” will be fully unleashed.

Just like in nature, the only proven defense to a “Reptile” attack is preparation. In The Art of War by Sun Tzu, he writes, “If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.” Defense attorneys must prepare themselves for potential “Reptile” attacks by researching their adversary and must prepare their clients to combat a “Reptile” attack when it is unleashed. A comprehensive, neuro-cognitive witness effectiveness training with an experienced psychologist – prior to deposition - is the most effective way to prepare vulnerable witnesses for a “Reptile” attack. Without training focused on combatting the emotional, behavioral, and cognitive triggers that a “Reptile” plaintiff attorney will exploit, all witnesses – regardless of their level of fortitude or testimony experience – are susceptible to a “Reptile” attack, which will inevitably lead to a negative outcome.

Watch our videos about “Reptile” attacks, read our “Anti-Reptile” articles and learn about the CSI “Anti-Reptile” solution.

# REPUTATIONAL RISKS

Covid-19 has created more disruption than any other event in modern history. Every organization has had to adapt their business model in minor or major ways to the pandemic, leading to opportunities, but also risks and exposure. Massive amounts of litigation are expected to come out of the Coronavirus pandemic and each lawsuit is not only a potential financial hit for companies, but also could cause significant reputational damage as well. How the image of the business is managed can factor directly into how a potential jury perceives the company and how they decide in a potential case involving said company.

Litigation related to worker's safety issues, in particular, could be devastating for a company's reputation and public perception. Businesses with essential workers who are sued for cases of negligence or other lapses or inequities in their operations will struggle with receiving empathy from a jury that, as we established earlier, has increased their compassion for those workers. And businesses that profited during the pandemic will be judged through a very different lens than ones that struggled due to the virus. Businesses need to take public perception into account in the management of their litigation and ensure that they are managing their communications, both internal and external, in a way that considers potential future litigation and the media coverage that would be associated with those lawsuits.

Learn more about how to prepare for a crisis.