The New Normal

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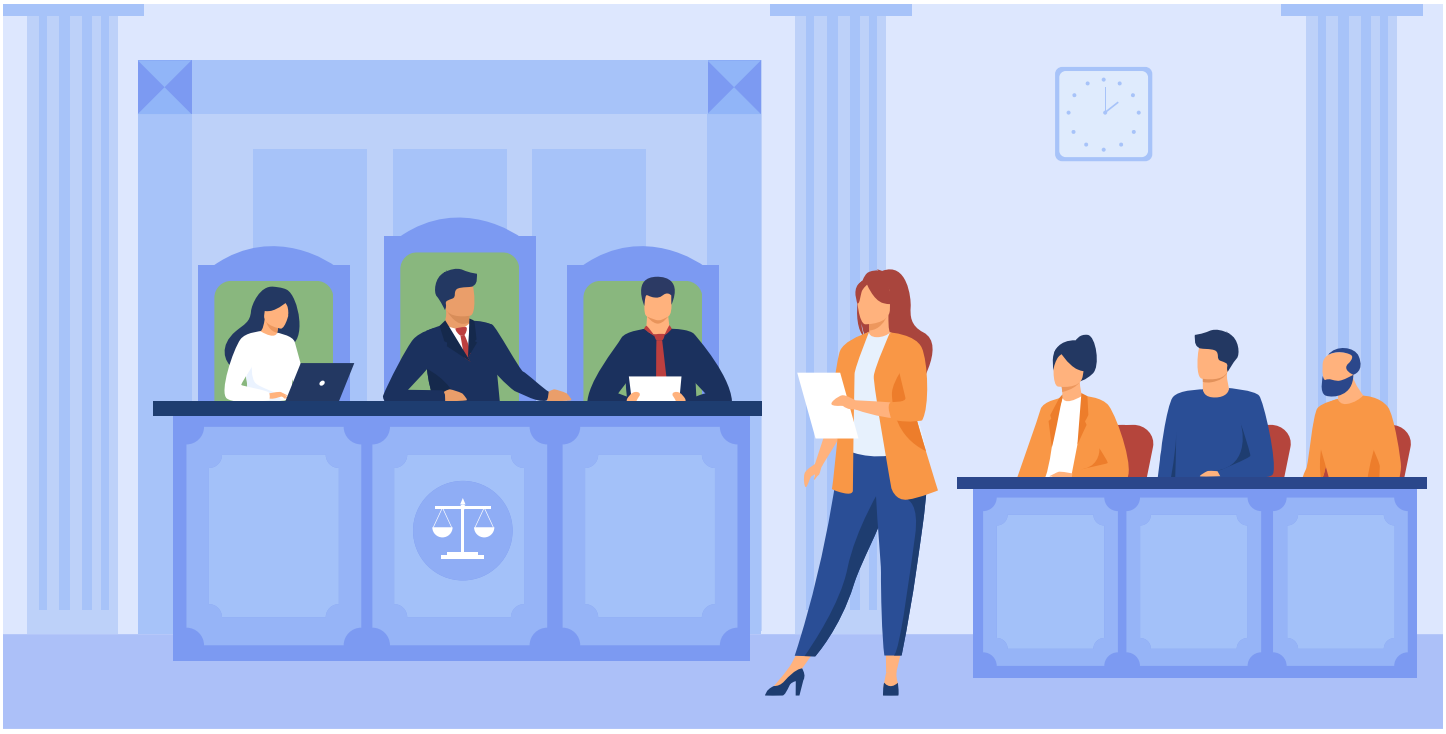
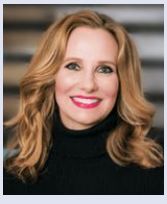
Safety-ism and Conspiracies Are Affecting Juries



$2.5 million. $13 million. $22.5 million. $50 million. $100 million. Recent years have seen a steady rise in the frequency and amounts awarded in so-called "nuclear verdicts." At the same time, the jury pool itself is evolving, forcing defense attorneys to reassess what types of jurors might favor their clients' interests.

Namely, the number of defense-friendly jurors is dwindling, and its cause appears two-fold. A simultaneous swell of both "conspiracy-minded" jurors and "safety-ism" jurors has created a troubling environment for defendants—one in which not only are some plaintiff-friendly jurors becoming more extreme in their views, but some traditionally defense-friendly jurors are now switching sides and fueling some of the largest recent verdicts.

This article examines "conspiracy-mindedness" and "safety-ism," and how these two juror paradigms correlate with the surge of nuclear verdicts. By leveraging contemporary insights from trial attorneys





Dr. Jill Leibold, a jury consulting advisor at IMS Consulting & Expert Services, has 19 years of experience preparing witnesses, conducting jury research, developing case themes, and assisting counsel with jury selection across all genres of civil litigation. Dr. Leibold has spoken at DRI's Litigation Skills Seminar and several DRI Toxic Tort & Environmental Law Seminars. **Dr. Nick Polavin**, a senior jury consultant with IMS Consulting & Expert Services, assists clients with a variety of jury research services, including focus group and mock trial facilitation, crafting themes and in court with jury selection. Dr. Polavin is also a past speaker for DRI's Litigation Skills Seminar (2022) and Young Lawyer's Seminar (2022). **Christopher Burrichter** is counsel in the Chicago office of Dechert LLP, where he is a member of the Products Liability and Mass Torts group, and he has extensive experience in product liability, MDL, and securities litigation. He has represented clients in all stages of federal and state courts litigation, including overseeing all aspects of fact and expert discovery, drafting and arguing motions, and preparing for trial and mediation. **Mary Kim** is an associate in the San Francisco office of Dechert LLP, where she is a member of the Products Liability and Mass Torts group and focuses on state and federal complex commercial litigation matters, including multidistrict litigation on behalf of major pharmaceutical companies. She is a past speaker at DRI's Drug and Medical Device Seminar (2023) and former Vice-Chair of the Young Lawyers Committee's Online Community (2020-2021). **Allie Ozurovich** is an associate in the Los Angeles office of Dechert LLP, where she is a member of the Products Liability and Mass Torts group and routinely represents clients in the pharmaceutical and consumer products industries in all aspects of litigation, including fact and expert discovery, depositions, dispositive motions, trial, and appellate issues.

and jury consultants alike, it addresses the following questions:

(1) What exactly are conspiracy-minded jurors and safety-ism jurors?
(2) What has jury consultant research shown for these juror types?
(3) What experiences have trial teams had with each type of juror at trial?
(4) What are some practical tips for how to be best prepared to handle each type of juror?

What Are Conspiracy-Minded Jurors and How Do They Impact Jury Selection?

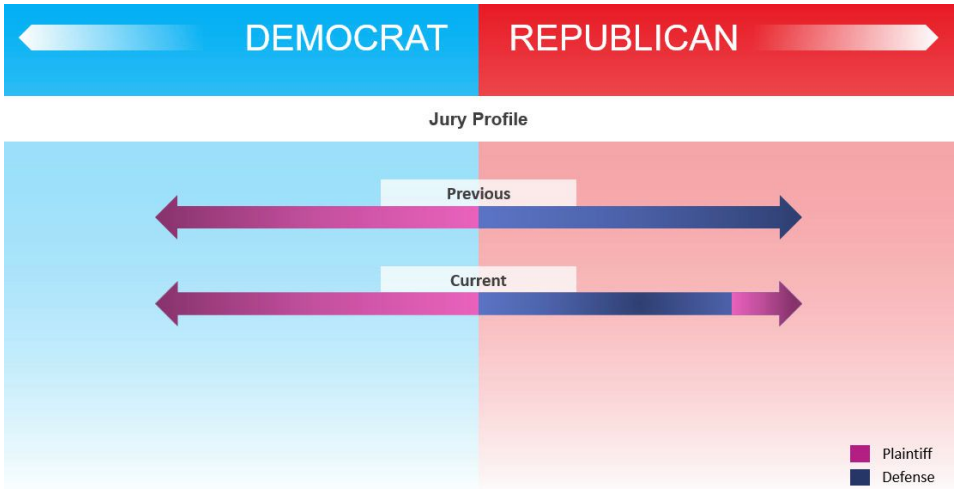
"I tend to distrust big corporations since it is easy for them to use money to further their agenda."

In the past three years, conspiracy theories have flourished across a broad range of topics—whether about the origins of the COVID-19 pandemic or the legitimacy of the results of the 2020 United States Presidential Election. Jurors' views on the credibility of such theories have proven to be an indicator as to how these jurors view common themes at trial. A new group of what can be termed "conspiracy-minded" jurors has emerged.

Dr. Nick Polavin, a senior jury consultant with IMS Consulting and Expert Services, is engaged in extensive research evaluating this trend in conspiracy-minded jurors. As described in detail in a recent issue of *DRI For The Defense* (Polavin; *Who Needs Evidence? The Rise of Conspiracy-Minded Jurors*; DRI For The Defense, 2023 [DRI: ADD LINK]), his research identified a new phenomenon: the number-one indicator of a plaintiff-leaning juror was a current belief in conspiracy theories. For example, the same jurors who subscribe to conspiracy theories are also more likely to believe that private industry has co-opted governmental agencies like the U.S. Food and Drug Administration ("FDA") or the U.S. Environmental Protection Agency ("EPA"), thereby rendering any approval or endorsements by these governmental agencies as effectively meaningless.

Perhaps even more illuminating than the existence of conspiracy-jurors was the sheer volume of study participants who subscribed to conspiracy theories: of the 11 conspiracy theories tested, 33.4% of the 258 respondents believed that at least one of these conspiracies was "probably" or "definitely" true, with an average of 19.4% believing that a given conspiracy was "probably" or "definitely" true.

Dr. Polavin's research does not exist on an island—as defense lawyers, we have seen this problem bear out in the last few years at trial. Though not always the case, past research and experience suggested that a juror who identifies as a Republican typically exhibits attitudes predictive of a defense-leaning juror, whereas a juror who identifies as a Democrat typically exhibits attitudes predictive of a plaintiff-leaning juror. But recent experience demonstrates that some of the most sizable plaintiff verdicts are occurring where the seated jury consisted primarily of traditionally defense-leaning Republican jurors—including upwards of $50 million of punitive damages in multiple instances.



Therefore, the natural question on every defense lawyer's mind is: how does this trend impact jury selection? As explained by Dr. Polavin, while it makes jury selection more complicated, a nuanced approach to understanding jurors' political ideology can help separate the traditional defense jurors from the growing number of conspiracy-minded jurors. For example, the data shows that jurors who favor far-right Republicans more likely favor the plaintiff, while jurors who favor more moderate Republicans more likely lean defense. Moreover, as jurors leaned further left on the Democratic spectrum, they also leaned further toward plaintiffs. In simplified terms, the key change in the current jury-pool profile can be depicted as follows:

Implications for Jury Selection and Trial Strategy

This data shows that understanding broad political ideologies alone is not enough; rather, the contours of those ideologies should inform *voir dire* decisions.

Moreover, *voir dire* should consist of questioning that targets themes that lend themselves to associated conspiracy theories. For example, take the COVID-19 pandemic. It would be imprudent to ask a juror if he or she thinks the COVID-19 pandemic is overblown or is a hoax, but lawyers may ask less direct questions to develop a better understanding of a juror's attitude toward the pandemic (and propensity to engage in conspiracy theories related thereto). This could include: (1) questions about a juror's trust of the Centers for Disease Control and Prevention ("CDC"), the FDA, and the EPA; (2) questions about the reliability of scientific data more generally (such as the propriety of mask mandates or vaccination requirements); and (3) questions aimed at eliciting how a moderate Republican handled the pandemic versus a far-right Republican or a government public health specialist (as conspiracists tend to distrust government in most ways). And even if attorneys cannot get this information in *voir dire*, it is important whenever possible to discern between different types of Republicans and Democrats by using social

media/internet searches. For example, a background record showing "Registered Republican" is not nearly as informative as seeing if the potential juror follows Donald Trump versus Liz Cheney or Mitt Romney on social media.

If, however, defense counsel find themselves in a jurisdiction where it is impossible to remove all or most jurors who hold strong conspiracy beliefs, they may need to consider what trial strategy can be leveraged given the likelihood that some conspiracist jurors will be empaneled. Research has shown that buying into one conspiracy belief predicts a tendency to believe in additional conspiracy theories in the future (Granado Amayoa, et al.; *A Gateway Conspiracy? Belief in COVID-19 Conspiracy Theories Prospectively Predicts Greater Conspiracist Ideation*; PLoS ONE, 2022). Therefore, it can be important to think through and test what sort of conspiracies jurors may attribute to the *plaintiff* and *plaintiff attorneys*—and craft a case strategy to draw out those themes. For instance, these jurors may be particularly persuaded by evidence showing that the plaintiff is malingering or that the plaintiff brought his or her lawsuit only after seeing multiple attorney advertisements. Alternatively, they may be particularly willing to believe that plaintiff's counsel is concocting litigation claims to receive a big payday, an avenue that has seen success in some mass tort cases.

In sum, lawyers engaging in *voir dire* should not rest on traditional notions of what constitutes a defense-leaning juror. Defense counsel should spend more time taking a targeted, nuanced approach to understanding which jurors on the panel, if any, are likely to endorse conspiracy theories. And in the event conspiracy-minded jurors cannot be avoided, defense counsel may need to adapt their case strategy to achieve a defense verdict.

What Are Safety-ism Jurors and How Do They Impact Jury Selection and Trial Strategy?

"If we don't get the plaintiff compensatory damages, then we can't give punitive damages. If it is ruled for the defendants now, it will be harder for [plaintiffs] to re-open this in the future."

"The company withheld information regarding how safe the medicine is. I think they acted in selfish capacities and truly were out to get their money rather than serve the people."

These recent mock juror statements highlight some of the issues facing corporate defendants, as several problematic juror expectations and attitudes have come to the forefront. Like the jurors quoted above, some view the act of awarding damages as social justice, a way to wield power over corporations' actions. They believe that corporations should protect people, but do not trust them to do so. Furthermore, many jurors exhibit what psychologists call an external locus of control—essentially, the belief that they are not in control of their own fate but rather subject to external influences and/or luck. This mindset can lead to an over-reliance on feelings and, at times, less effortful thinking.

Additionally, some jurors expect all products to be 100% safe, 100% of the time; as we have seen many mock jurors exclaim, "If it's going to be on the market, it needs to be 100% safe." By such jurors' logic, if a product is not meeting that standard, then it is defective.

This mindset has been growing for decades. Think about the expansion of nonstop, sensational media about disasters, safety mishaps, criminal activity, and culture wars. While the number of these stories increased exponentially with the advent of the 24/7 news cycle, it grew from seeds planted perhaps even as early 1979, as Americans were drawn to uninterrupted coverage of the looming Three Mile Island disaster. Compounded exposure has led more of society to believe that danger (including corporate misconduct) is all around us.

Psychological literature has tracked such a trend, too: humans' very concept of "risk" has changed. Where risk used to reflect a calculation of benefits in comparison to potential harm, over time, it changed to a more abstract "feeling," and how much of that feeling one was willing to tolerate. In the 2000s, feelings became legitimized as a valid decision-making tool by the name of "emotional reasoning"—if you feel it, it is probably true. Because risk is not only a *feeling*, but one perceived increasingly as a threat that will lead to harm, humans now feel it is *probably true* that they stand to be harmed when they *feel* risk.

In their book, *The Coddling of the American Mind*, authors Greg Lukianoff and Jonathan Haidt address many of the issues seen in jury decisions and trends these days, coining the movement as "safety-ism." In defining the characteristics of safety-ism, Lukianoff and Haidt describe three fallacies of thinking:

- Desiring a total avoidance of risk, harm, or verbal/social discomfort;
- Always trusting feelings first, such that emotional reasoning is more legitimate than logic or science; and
- Perceiving the world as a battle between good and evil, such that the resulting tribalism allows for little to no good-faith discourse or compromise.

Although they discuss the movement in an educational setting, the parallels to litigation are clear. In their recent article (Leibold & Polavin, *The Rise of Safety-ism Has Entered the Courtroom*; Law360, May 3, 2023), Dr. Jill Leibold, a Jury Consulting Advisor with IMS Consulting and Expert Services, together with Dr. Polavin, describe how these thought fallacies apply in a legal setting. First, safety-ism jurors, who want to avoid all risks, will be doubtful of various defense arguments in product liability cases. With a safety-ism mindset, a defendant arguing that "dose makes a difference," or that a product "is safe when used as directed," is no match for the simple fact that someone has claimed to have been injured by it. When safety-ists hear evidence that animals given a high dose of a substance got cancer or showed other negative effects, they assume that, despite a lack of confirming human evidence, the substance/chemical likely poses some risk to humans and therefore is defective. And if a product can be misused in a way that causes harm, they assume that it poses an unreasonable risk and that the manufacturer did not do enough to prevent the misuse (regardless of cost or foreseeability). Even in transportation cases, safety-ism jurors believe that any company that has not equipped its tractor trailers with the latest accident-avoidance technology is negligent for not minimizing the risks to others.

Second, the emotional reasoning fallacy appears to be critical to jurors' decision-making regarding liability and damage awards. Specifically, jurors' feelings often guide interpretation of the evidence, arguments, and witness testimony. Thus, because safety-ism jurors put undue focus on the worst, most remote possibilities in a case, their conclusions can become more extreme due to the heightened perception of danger; their anxiety takes control of their reasoning. And even a single incident (e.g., one plaintiff) becomes enough to overgeneralize negative outcomes.

Last, safety-ism jurors can be strengthened by "tribalism"—i.e., persons who have an "us versus them" way of thinking—thereby emerging with strong, emotional opinions of each party to the case, more often than not positioning the plaintiff as the "good" individual against the "evil" defendant corporation. Tribalism accentuates safety-ism jurors' anger and anxiety by providing a righteous framing, which, taken together, can lead them to want to use damages to reduce their sense of danger and fight for "good" by punishing the defendant. In deliberations, this may also contribute to greater emotional pushback by plaintiff jurors against their defense counterparts, with less willingness to compromise or find areas of common ground. With a more combative deliberation, jurors on one side—especially if they are in the minority—may even hang the jury, being unwilling to meet their fellow jurors part-way.

Is There a Link Between Conspiracy Jurors and Safety-ism Jurors?

Given the intriguing safety-ism theory and prior findings on conspiracy-mindedness, in 2022 Drs. Leibold and Polavin undertook an initial juror research survey to assess safety-ism views and how they might be related (or not) to conspiracist views and whether these are two distinct groups of plaintiff-leaning jurors or whether they overlap. This national survey was administered to 200 jury-eligible respondents, assessing attitudes and behaviors regarding safety and adherence to various conspiracy theories.

Upon analysis, factors correlated with higher levels of safety-ism included:

- Higher education
- Urban residents
- Strong Democrats
- Get news primarily through social media, podcasts, and the internet
- *Strongly believe* in scientific conclusions that are not sponsored by a corporation
- Received a COVID vaccine
- Plan to get or have received a COVID booster

A strong belief in scientific conclusions from noncorporate sources may appear to run counter to the theory about safety-ists' tendency toward emotional reasoning. However, on the other side of the coin, this finding reasonably may be interpreted as jurors having a negative, emotional, gut reaction to corporate-funded studies, undercutting their belief in those scientific studies and bolstering studies far removed from corporate influence.

Jurors perceive evidence and testimony through the lens of their experiences, anxieties, and attitudes. Safety-ism jurors will view mass tort, product liability, or personal injury matters through their safety-ism glasses.

Significantly, safety-ism appears to be becoming more of a "norm" than an exception. Most respondents agreed that companies should take every possible measure to ensure their products are 100% safe, and that any products that companies put out to consumers should warn about every possible risk or drug side effect, no matter how small. Similarly, the majority of respondents agreed they would stop using a product if they heard there was a possibility it could cause cancer—indeed, some indicated they had already stopped using a product due to health and safety concerns.

As for comparing safety-ists and conspiracy theorists, data revealed that these two juror groups are completely distinct. In fact, despite both leaning toward the plaintiff side, the two groups demonstrated an *inverse* relationship: higher safety-ism was associated with lower conspiracy-mindedness. Findings show that safety-ism jurors do not believe in conspiracies but are overly-relying on their feelings, particularly their anxieties about harmful possibilities. The conspiracy theorists focus on their distrust of corporations and especially the government. Their outsized skepticism leads them to believe plaintiff claims about corporate "cover-ups" and the like. In other words, while both sets of jurors arrive at a similar destination, they travel on very different trains.

How Should Defense Counsel Modify Case Preparation and Strategies?

Given the increased risks for corporate defendants facing these two categories of risky plaintiff jurors, defense attorneys may consider a variety of short-term and longer-term strategies:

- Practice, practice, practice. There is less room for error than ever before in *voir dire*. Even trial attorneys who are frequently in court only conduct *voir dire* a few times a year. Practicing with a group of people whom you do not know—mock jurors or staff with whom you have not worked—can help attorneys get comfortable with efficiently eliciting information from a group of people. Record your mock *voir dire* and have a consultant or objective colleague observe to provide feedback on the phrasing of questions to the panel and follow-up questions with individual jurors. Remember, every cause challenge you earn is essentially an extra peremptory strike for your client.
- During *voir dire* and trial, explain to jurors that they should use evidence and law instead of feelings, even if the evidence or law runs counter to those feelings. And, as permitted, do this by referring to jury instructions and by framing those instructions as the court's and legal system's expectations of the jury. The literature on the psychology of persuasion tells us that when people know they will be held accountable, and a leader sets high performance or outcome standards for the group, it can improve their performance.
- Counsel may find common defense trial themes proving less and less persuasive. For example, the growing numbers of conspiracy-minded jurors are not necessarily impressed by a company's compliance with the FDA's regulations. However, those same jurors may be drawn to other themes, including

where a learned intermediary (such as a doctor) failed to tell the plaintiff about known risks, a malingering plaintiff, or perhaps that defendant was fully transparent and operated in a state-of-the art manner. Similarly, safety-ism jurors may discredit themes focused on assumption of risk or comparative negligence. However, those same jurors may be very skeptical if a plaintiff's expert is shown to have received corporate funding for his or her past research. With either type of juror, defense counsel must be willing to adapt their themes to the jurors' frame of reference.

- Counsel should evaluate if there are ways to use the mindset of conspiracy or safety-ism jurors to advance their own themes. For example, if there is evidence from which a juror could conclude that a plaintiff, his or her lawyer, and plaintiff's experts are in the litigation primarily to make money rather than in righteous pursuit of safety or truth, counsel should consider ways to present such evidence at trial to allow certain jurors to conclude as much.
- Relaying several themes to jurors throughout trial—repeatedly, verbally, and on relevant presentation slides—can help to reduce jurors' reliance on feelings as well as increasing trust in the defense's science and the burden of proving probabilities over possibilities. For example:
  - **"Facts, Not Feelings"** to focus jurors on their responsibility to apply the law and listen to the evidence, over their feelings, regardless of what those feelings may be.
  - **"Probabilities, Not Possibilities"** to emphasize that the law doesn't permit verdicts based on possibilities—only when evidence meets the "more probable than not" standard.
  - **"Only the Credible Evidence"** to encourage jurors to critically examine issues being presented by the plaintiff without full context—why aren't they showing you the whole story?
- A key anti-tribalism strategy may be to arm defense jurors with thematic "olive branches" to plaintiff-leaning jurors. Now, more than ever, jurors need to find reasons to create a bridge to the other side, so framing important points in digestible ways can reduce the temperature of the deliberation room. These themes might include reiterating that:
  - **"Correlation Does Not Imply Causation"**
  - **"Follow the Science"**
  - **"Justice Looks Different Here"**: The *defendant* is here to seek justice because it was wrongly accused.
- Finally, prepare witnesses, particularly corporate representatives and experts, to understand that some jurors will be listening to their responses through a safety-ism lens or looking for conspiracy fodder. Corporate representatives must be able to address the timeline of research and development for the product at issue, including how the company addressed any safety concerns or warnings. They also will be expected to have adequate historical knowledge—a series of "I don't know" responses won't cut it. And they should be direct in answering questions while staying on message with the themes of the case. Meanwhile, expert witnesses better able to relay their findings and opinions may help break down barriers to jurors' distrust and create openness to a company's story and science. The more relatable an expert or corporate representative can be, explaining the science and company story in jurors' own vernacular, the more credible and trustworthy the witness will be. As post-trial interviews reveal, trust in the witness begets trust in the message.

Recent jury verdicts have sent a resounding message: the "new normal" of safety-ism and conspiracy-minded jurors is here to stay.

Conclusion

Recent jury verdicts have sent a resounding message: the "new normal" of safety-ism and conspiracy-minded jurors is here to stay. Though recent political and pandemic events have triggered more extreme ideologies, the persistence of these ideologies has revealed that they have been building for decades. Over time, more and more jurors are bringing to the jury box distrust of the government and corporations, anxiety, risk-aversion, and the predominance of feelings as reasoning. While this effect has generated eye-popping verdicts, this does not mean that corporate defendants are defenseless. With enough cooperation across companies and defense firms to enact counteractive themes and strategies across the board, companies can be armed with tools to present a compelling case to the new frontier of jurors.