



Anticorporate Bias in Employment Cases

By Persuasion Strategies

In evaluating the character and behavior of large corporations, the American public employs two primary filters:

1. their experience as a consumer, and
2. their experience as an employee.

For many potential jurors, this second employment filter is likely to be the most salient touchstone. Given the amount of time devoted to an individual's work life, it is predictable that jurors who work with or for a big company will form opinions about other large companies through the prism of their own experience on the clock. For that reason, anticorporate bias plays a particularly important role in employment cases.

This article will first consider the overall impact of anticorporate bias and then consider the ways counsel can address this bias before and during employment litigation.

Recognize that Anticorporate Bias Limits Trust in Large Employers

Anticorporate bias significantly impacts employment cases. Four years of Persuasion Strategies survey research reveals 87 percent of the jury eligible population believes big company executives often try to cover up the harm they do.¹ National statistics become personalized for jurors when contextualized

¹ Persuasion Strategies, a service of Holland & Hart LLP, has completed the fourth year of an ongoing National Juror Survey Project. Since 2003, we have conducted an annual scientific public opinion poll involving a minimum of 500 randomly selected and stratified households. The questions we tested grew from our mock trial research with thousands of mock jurors over the years. All 500 jury-eligible respondents were over the age of 18 and were either licensed drivers, registered voters, or both. Focusing on the nation's jury-eligible population, this research project examines attitudes relating to the status of corporations within America's legal system. Now with 2,000 total participants, results identify important trends in the public's attitudes toward corporate legal responsibility and misconduct. Any references to specific relationships between variables are based on statistical significance at a .05 level or less. For more information please visit us at www.persuasionstrategies.com.

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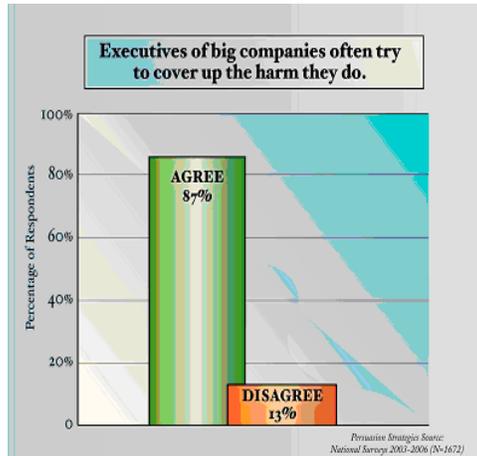
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by the fact that the employees change jobs frequently, particularly in the 18- to 34-year-old age bracket. A presumption that an employer is acting out of dishonesty or self-interest has become a common starting point for many jurors, and willingness to grant an employer the benefit of the doubt is a thing of the past.



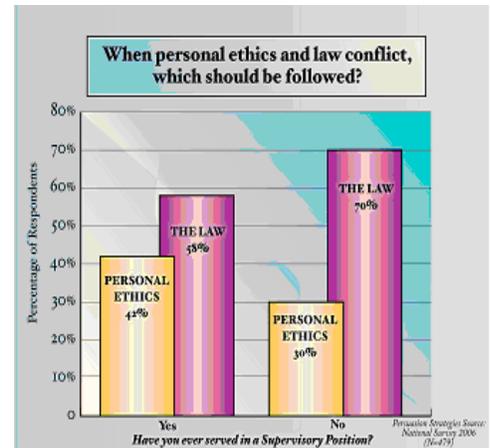
Jurors' individual experience will impact their interpretation of employment litigation issues and the degree of bias that they bring to the evaluation of those issues. Jurors with positive employment experience with large corporations (500 or more employees) are likely to apply that experience in developing expectations for a corporate party in litigation. Similarly, jurors with negative employment experiences with large corporations will often use that experience to reinforce a negative view of large companies, or conversely, to place greater responsibility on those who deal with large companies to expect the worst and to protect themselves accordingly.

Reactions differ, of course, because they are strongly tied to the quality of an individual employee's experience. However, employers must consider the strong potential influence of anticorporate bias both as a key to avoiding litigation when possible *and* to effectively handling unavoidable litigation.

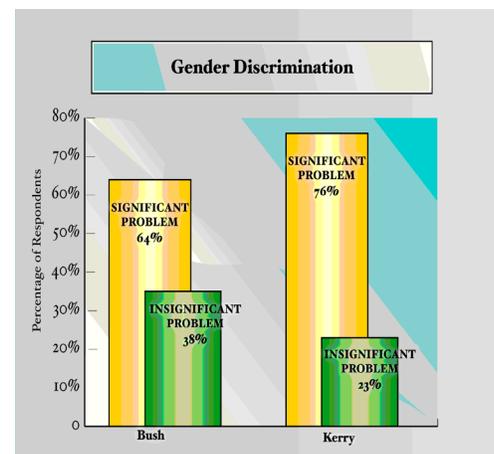
Several specific trends can be observed in the way potential jurors' experience bears upon their view of large corporations

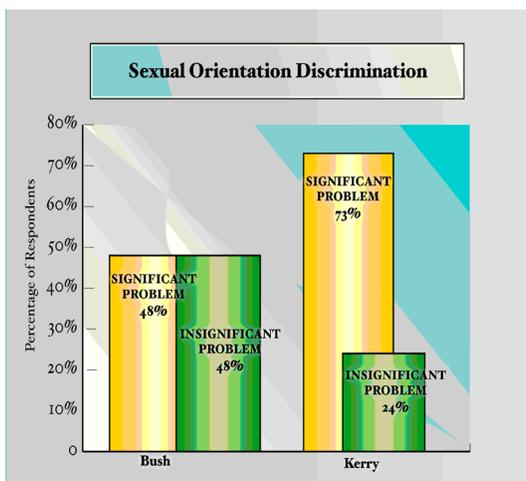
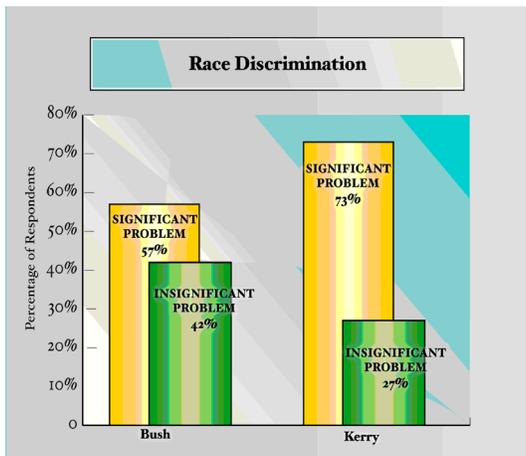
² Persuasion Strategies National Juror Surveys, 2006.
³ Persuasion Strategies National Juror Surveys, 2005.

in employment litigation. Specifically, jurors with experience working in large corporations *or* with supervisory experience are significantly more likely to believe that in evaluating company conduct, "whether a company acted ethically" should be given greater weight than "whether a company acted legally."² Jurors with supervisory experience are also significantly more likely to follow personal ethics when it conflicts with the law.



Beyond employment experiences, those who voted Republican in 2004 are significantly *less* likely to view race, gender and sexual discrimination as serious problems.³ Those who voted Democratic in 2004 are significantly less likely to identify with business executives. These are just a few examples of the ways jurors' individual experiences impact their perspectives of corporations and corporate behavior.





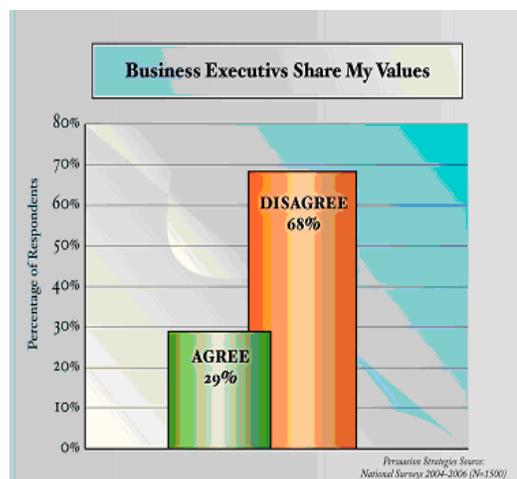
While jurors' employment experience can lead to a diminished view of corporate responsibility, jurors' political alignment can lead to a much greater perception of the prevalence of employment discrimination. The combination of an anticorporate attitude with the perception that discrimination is ever-present can prime a pro-plaintiff juror in many employment suits. While these results alone should encourage employment litigants to give very careful attention to an analysis of their specific venue, there are also important implications for reducing the effects of this bias before and during litigation.

Positive Behavior to Preempt Bias Before Litigation

Clearly, today's corporate climate of perceived scandal and misconduct has caused jurors to be more skeptical of defendant companies' motives and more critical of corporate decisions. Companies that could once benefit from the

positive reputation that came from being a large employer and a successful enterprise, now are more likely to be in the position of needing to prove their responsibility through good works. As a result, it is more important than ever to communicate effectively with potential jurors *prior to* becoming involved in litigation—both as a way to preempt public resentment and minimize potential litigation risk. Our research confirms that companies can gain an advantage by differentiating their own image from more general anticorporate attitudes. This can be done by having your clients focus on their own internal and external communications.

A first step to taking some control over your client's public image is to recognize the degree to which average Americans are alienated from corporate culture. Our survey research reveals that more than two-thirds of the population does *not* believe that business executives share their values.



This means that the task of communicating externally requires *overturning* some ingrained assumptions and conveying that the company and its executives are cut from different cloth. We continue to recommend making key executives accessible to the public by taking advantage of the opportunity to explain that the company's conduct is not only legal, but moral and ethical as well. Defendant companies can gain an advantage by having potential jurors hear a positive message from company executives before litigation hits, portraying the large employer as, in effect, "a different kind of company."

Finally, we continue to recommend that

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companies communicate internally as if their image depends on it—because it does. Jurors perceive documents as stronger evidence than witness testimony and we continue to see “smoking gun” e-mails and memoranda playing a major role in employment litigation. Educate your clients’ employees on effective internal communication and fostering an organizational climate where employees are not only comfortable but mindful of communicating key organizational values in writing, and particularly in e-mail. This will serve you and your clients well down the road, when employment jurors expect a good company to have a clear paper trail, and value that record when they see it.

Maximize Your Effectiveness In Litigation

Our research confirms that despite a climate of anticorporate bias, there are also ways companies can gain an advantage *in* litigation.

Facing a jury panel of independent experts on employment law by virtue of jurors’ personal employment experiences, jury selection is often more critical in employment cases than in other types of litigation. Scrutinizing individual jurors and unearthing juror bias in voir dire is an important first step in effectively handling anticorporate bias in employment litigation. In most cases, the answer is not found in juror demographics (gender, age, education, etc.). Carefully profiling and deselection high-risk jurors requires clearly articulated, case-specific criteria to identify those with attitudes and experiences most likely to work against you and your client.

We also continue to find that jurors’ and judges’ evaluations of responsibility center around two key factors—the parties’ perceived power and the parties’ respective choices, including how those choices were

exercised. Thus, enhancing the plaintiff’s perceived power and available choices while also demonstrating how your company used its power and choices responsibly is an effective way to diffuse or even channel anticorporate bias in the courtroom.

For example, consistency is pivotal in defense employment cases. Jurors seek to learn if the defendant company treated the

plaintiff consistently over time and how other similarly situated employees were treated. Companies can effectively show jurors they used their power appropriately by *choosing* to implement policies and demand consistent supervisory behavior.

By showing jurors the pattern of choices leading to their consistently ethical behavior, defendant companies emphasize consistent and fair use of power and choices in situations where

Our survey research reveals that more than two-thirds of the population does not believe that business executives share their values.

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inconsistent often equates to illegal. By showing that the company's policies and practices exceed jurors' (possibly low) expectations, employment defendants can enhance their own credibility and foist the greater burden on the plaintiff to defend their own use of power and exercise of choices.

Personal responsibility remains a strong theme in employment litigation. Jurors are willing to scrutinize plaintiffs, including their use of power and choices, and will look for evidence that the plaintiff did everything possible to mitigate any damage. However, defendant companies should use an understanding of jurors' scrutiny wisely. The perception that the defense is trashing the plaintiff can result in a backlash effect, with jurors sympathizing with the plaintiff. Jurors are particularly skeptical when they perceive corporate defendants as turning their back on an employee the company previously endorsed via promotions or the assignment of an upper level position. Thus, defendant companies are often best served by first offering jurors their own affirmative story demonstrating their responsible behavior before even subtly attacking the plaintiff. This approach effectively arms defense-oriented jurors with the persuasive power to influence plaintiff-jurors in deliberations—a critical piece of jury persuasion in employment cases, where defense jurors often emerge as jury leaders due to their employment in higher status occupations and leadership experience.

A presumption that an employer is acting out of dishonesty or self-interest has become a common starting point for many jurors.

Ultimately, large employers in the current anticorporate climate face several challenges, but also enjoy several strategic advantages. In that context, the best formula for success involves first, acknowledging the full extent of doubt in corporate motives that inheres in many

jurors; second, seizing every opportunity to communicate responsibility inside and outside of the company walls; and third, framing the dispute in terms of the responsible exercise of *both* the company's and the individual's power and choices.

Persuasion Strategies, based in Denver, CO, is a service of Holland & Hart LLP. Information about Persuasion Strategies' litigation consulting services is available at www.persuasionstrategies.com. The authors may be reached at (303) 295-8182 or by e-mail at kbrodabahn@persuasionstrategies.com.

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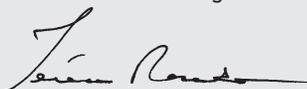
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Biblical Beliefs and Juror Attitudes

by Philip F. Monte, Ph.D., J.D.

Understanding how a potential juror might lean in a criminal or civil trial, whether towards the prosecution or the defense, or employee plaintiff or corporation, is, of course, the goal of much pretrial research and voir dire. It has become increasingly clear over the past two decades that religious belief and practice, often referred to broadly as “religiosity,” plays a significant role in how the public views various issues regarding the criminal and civil justice systems.¹ It therefore stands to reason that a person’s religious beliefs and practices can influence the perceptions that he or she brings to jury deliberations.

Consider, for instance, the following types of religious variables: church attendance, religious denomination, strength of commitment to one’s religious denomination, church fundamentalism, and the belief that the Bible is the literal word of God (Biblical inerrancy). Prior research has found that each is associated with specific attitudes towards certain social issues. For example, members of fundamentalist churches, which tend to be very traditional in their practices and beliefs, tend to hold more conservative political beliefs than members of liberal or “mainline” denominations on issues

“Religiosity” plays a significant role in how the public views various issues regarding the justice system.

such as crime, abortion, and homosexuality.² However, some research also indicates that they tend to be relatively liberal on economic issues, such as attitudes towards corporations.³

Collecting data from the venire about more than a handful of these religious variables, at best, can be extremely difficult in many instances due to restricted voir dire in some courts and other practical considerations. Hence, the question arises: Do any of these variables stand out as being especially helpful in understanding how a person might view the issues to be covered at trial? Data drawn from the General Social Survey (GSS) was examined to shed light on how different types of religiosity might influence whether a juror has a propensity to convict at trial (conviction bias).⁴

GSS survey respondents were asked the following question: *All systems of justice make mistakes, but which do you think is worse?*

Respondents were given the following response choices:

- a. *To convict an innocent person, or*
- b. *To let a guilty person go free.*

The religious variables mentioned were statistically analyzed with the following control variables: race, sex, family income, political orientation, political party affiliation, marital status, and age. Of the religious variables examined, only a survey respondent’s beliefs regarding the doctrine of Biblical inerrancy was statistically useful in predicting whether he or

¹ See, e.g., Grasmick, Harold G., Elizabeth Davenport, Mitchell B. Chamblin, Robert J. Bursik, Jr. “Protestant Fundamentalism and the Retributive Doctrine of Punishment.” 1992. *Criminology*, 30:21-45; Curry, Theodore R., “Conservative Protestantism and the Perceived Wrongfulness of Crimes: A Research Note.” 1996. *Criminology*, 34:(3) 453-464; Young, Robert L., and Carol Y. Thompson, “Religious Fundamentalism, Punitiveness, and Firearm Ownership.” 1995. *Journal of Crime and Justice*, 18:81-98.

² Id., see also, e.g., Greeley, Andrew. “Evidence that a Maternal Image of God Correlates with Liberal Politics.” 1988. *Sociology and Social Research*, 72:150-154; Evans, John H., “Polarization in Abortion Attitudes in U.S. Religious Traditions, 1972-1998.” 2002. *Sociological Forum*, 17:(3) 397-422. There are numerous sources of scholarly research on this topic. It should be noted the relationship between religiosity and social or political beliefs tends to be complex and defies easy generalization.

³ See generally, Woodberry, Robert D., and Christian S. Smith. “Fundamentalism et al: Conservative Protestants in America.” 1998. *Annual Review of Sociology*, 24: 25-26.

⁴ The General Social Survey is conducted by the National Opinion Research Center (NORC), and is one of the highest quality sources of public opinion data in the United States. Those who are interested may contact the author for coding schemes and details regarding the logistic regression and chi-square statistical analyses that were used to test for predictive significance. Both types of analysis are appropriate where a dependent/categorical dependent variable is under examination.

she thought it worse that an innocent person might be convicted as opposed to a guilty person being set free. Belief regarding Biblical inerrancy was measured by asking respondents which of the following statements came closest to their own beliefs:

- a. *The Bible is the actual word of God and is to be taken literally, word for word.*
- b. *The Bible is the inspired word of God but not everything in it should be taken literally, word for word.*
- c. *The Bible is an ancient book of fables, legends, history, and moral precepts recorded by men.*

Thirty-five percent of those who believe that the Bible is the actual word of God thought it worse that a guilty person go free, compared to only 24 percent of those who believe that the Bible is the inspired word of God, and 21 percent of those who believe that the Bible is a book of fables felt similarly. This suggests a definite conviction bias, albeit moderate, among persons who believe in Biblical inerrancy.

Statistical analysis was also conducted to examine what religious variables might help to predict how people think about corporations, which is relevant to many types of civil, as well as criminal, cases. GSS survey respondents were asked whether they agreed with the following statement:

Corporations should pay more of their profits to workers and less to shareholders.

Here, again, a person's belief regarding Biblical literalism was statistically significant in predicting how he or she answered the question. Eighty-nine percent of those who believe that the Bible is the actual word of God agreed that workers should receive a greater share of profits, compared to only 77 percent of those who believe that the Bible is the inspired word of God and 68 percent of those who believe that the Bible is a book of fables.⁵ In other words, respondents who believe that the Bible is the literal word of God and inerrant demonstrate a clear bias in favor of workers, relative to those who hold other beliefs.

The research demonstrates that how jurors understand the Bible may influence how they may view certain issues that arise regularly at trial. This is not to say that the types of religious belief and practice mentioned above, as well as other forms of religiosity, are not helpful in determining how a person might filter information. And obviously, many other variables (e.g., political orientation, education, income, etc.) may come into play, depending on the issues under consideration. But, it suggests that beliefs about the Bible seem especially helpful as a predictor, relative to the other religious variables examined, in examining whether potential jurors might possess a conviction bias in a criminal trial or hold favorable attitudes towards workers.

While it is sometimes more acceptable to talk about religion during voir dire in certain regions of the country, attorneys who follow this line of inquiry should expect potential objections on the grounds of relevancy. However, many panelists will have likely stated that they belong

⁵Note that all percentages are rounded up.

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to a religious organization or church if asked previously during the voir dire whether they belong to any volunteer groups or associations. And asking, for instance, whether a panelist spends time in Bible study should be viewed as simply following up on an earlier response to prior questioning that “opened the door” to further exploration. Additionally, attorneys should try to set up the questions and somehow relate them to the case at hand (e.g., the literal meaning of case documents, or a biblical analogy related to the case). Regardless, any questioning about religion during voir dire must be conducted with the utmost sensitivity and respect for the privacy of the potential jurors who are willing to expose their beliefs to public examination. Where possible, jurors should be questioned about their religiosity in camera or via a supplemental juror questionnaire.

Sample Questions:

At trial, an attorney might simply borrow from the GSS question referenced above by asking jurors which of the statements concerning Biblical inerrancy comes closest to their own beliefs, and then reading each until agreement is reached. Of course, one should also include the original question “All systems of justice make mistakes, but which do you think is worse? (1) to convict an innocent person or (2) to let a guilty person go free.” In addition, the following questions should be helpful in revealing potential jurors’ opinions regarding Biblical inerrancy:

- Has anyone ever participated in Bible study or formally studied the Bible, or Theology? Did you form any opinions regarding the accuracy or word for word believability of the Bible? Please explain. Why do you feel that way?
- Some religions teach that the Bible is the actual and literal Word of God. How do you feel about the Bible as the actual and literal Word of God?
- Some people hold the belief that the Bible is the literal word of God, and that everything in it is true. Others feel that the Bible is a book of fables or moral stories. Which position do you most agree with? Why?

- Who here has read the Bible? Who here has formed opinions about it? Can you share with me what some of those opinions are? How do you feel about the Bible as the actual word of God? What are your thoughts on that?

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Quick Courtroom Tips

By
Bob Gerchen

In Voir Dire, We Don't Want to Know if Jurors Think They Can Be Fair and Impartial!

If you have asked this question of jurors in the past, I encourage you to stop – now.

The purpose of voir dire is to ferret out the jurors who would be pre-disposed to being hostile to your case. Thus, what we really want to know is when they will be unfair and partial. And if that happens to be when a client such as yours has come before them to be heard, then it's time to send them home.

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For more information about Bob Gerchen's book, 101 Quick Courtroom Tips for Busy Trial Lawyers, visit www.CourtroomPresentationTips.com.

Jury Reform Proposals to Enhance Juror Experience

by **Kevin Stirling, M.B.A.**

The American jury is the cornerstone, if not the very lifeblood, of our nation's legal system. Its importance to our democracy cannot be overstated. Yet how many Americans (and attorneys in particular) are entirely unfamiliar with the recently approved ABA American Jury Initiative? You remember, right? In 2005, the "Year of the Jury," American Bar Association President Robert Grey spearheaded the wide-ranging set of jury reforms and initiatives developed to preserve the right to a jury trial, and to enhance juror participation. Sound familiar?

Perhaps you would remember if the reforms were packaged as a new hit TV show with a catchy name? It would be complete with comedic host Howie Mandell and lovely models opening up briefcases filled with cards labeled for each of the major reforms. Or maybe you would remember if celebrities, paired in dancing teams, each represented a particular jury initiative? That might jog the old memory.

Regardless, this is a good time (and place) for an update on the Jury Reform Initiative. In this month's issue, we introduce a new column: "What You Should Know About Jury Reform." This column will explore recent efforts to improve jurors' abilities to do their jobs, the theory and research behind the reforms, the impact of those changes in the courts, and ways that you can enhance your advocacy by using these methods. In this month's column, we examine a jury reform that is on the brink of becoming mainstream: juror note-taking. In later issues, we will be examining a number of other suggested (and tested) reforms including voir dire openings, juror notebooks, jurors asking questions during the trial, interim jury discussions, improved judge's instructions, and juror access to trial transcripts.

Enjoy!

What You Should Know About Jury Reform

Part I: Examining Juror Note-taking

by **Debra L. Worthington, Ph.D. and Julie E. Howe, Ph.D.**

Theory and Research

Juror note-taking was initially introduced as a reform measure in response to increasingly complex civil litigation. Juror note-taking is now approved in all federal circuit courts, has become routine in most federal courts, and is permitted in all states.¹ However, the rules vary by state and it's usually at the judge's discretion.

Juror surveys and legal commentary suggest at least three primary advantages:

- increased juror satisfaction, motivation and participation

- greater comprehension and understanding, and
- more accurate memory, ideally leading to improved deliberations/decision making.

These advantages are weighed against several criticisms:

- note-taking is often time consuming, distracting from listening
- jurors may overemphasize the evidence in notes
- notes may favor one side because jurors have more energy early in the trial.

¹ Elissa Krauss. Jury Trial Innovations in New York State: Improving Jury Trials by Improving Jurors' Comprehension and Participation. *New York State Bar Association Journal*, May 2005. The American Judicature Society maintains a list of federal decisions and all state court statutes and rules concerning note-taking. http://www.ajs.org/jc/juries/jc_improvements_notetaking_statutes.asp

Social scientific research supports the advantages of taking notes during trial.² For example, Lynne Forster Lee and several colleagues were interested in how note-taking could affect juror recall and comprehension. Their primary findings suggest that permitting mock jurors to take notes during a complex tort trial with multiple plaintiffs leads to improved overall performance (when compared to those that were not allowed to take notes). In addition to overall greater comprehension of trial evidence, jurors were better able to distinguish between multiple plaintiffs with differing types of injuries (i.e., they assigned damages that were more in keeping with the plaintiff's injuries). A more recent study, by Irwin Horowitz and Kenneth Bordens, found that note-taking groups deliberated longer than non-note-taking groups. The researchers believe that the longer deliberations may be due to the fact that note-taking jurors had more evidence to discuss or that more jurors felt that they had something to add to the discussion. Finally, Steven Penrod and Larry Heuer have addressed the impact of note-taking on deliberations and found that the note-takers had no more influence over the deliberations than the non-note-takers and

Juror note-taking is now approved in all federal circuit courts, has become routine in most federal courts, and is permitted in all states.

jurors do not pay more attention to evidence noted than evidence not noted.

The Practical Impact

Additionally, the New York State Court System has studied jury trial innovations (The Jury Trial Project) in 91 civil and criminal trials. Their findings on juror note-taking discounted many of the criticisms of juror note-taking and specifically found that clear majorities of jurors given the opportunity to take notes found the note-taking assisted them in recalling the evidence, the law, and reaching a decision.³ Moreover, judges also reported

specific positive experiences. Several observed that notes were used as tools during deliberations as more specific requests were made for testimony to be read back. Judge Michael F. McKeon believes "we are short changing all litigants if we are not providing jurors with all the necessary aids and tools to enable them to perform the critical tasks we ask them to undertake."⁴

New York is not alone. Juror note-taking pilot programs have been conducted in states such as Massachusetts, Ohio, and Tennessee. Results of these and similar programs show that judges and jurors overwhelmingly support note-taking during trial.

Jurors, however, should not be taking notes "willy-nilly." For example, the Jury Trial Project

² Studies examining the effects of juror note-taking and utilized in writing this column include: Lynne Forster Lee & Irwin Horowitz, The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials, iv, *Judicature* 184 (2003); Lynne Forster Lee, Irwin A. Horowitz, and Martin Bourgeois, Effects of Note-taking on Verdicts and Evidence Process in Civil Trial, *18 L. & Hum. Behav.* 567 (1994); David L. Rosenhan, Sara L. Eisner, & Robert J. Robinson, Note-taking Can Aid Juror Recall, *18 L. & Hum. Behav.* 53 (1994); B. Michael Dann, Valerie P. Hans, Recent Evaluative Research on Jury Trial Innovations, *41 Court Rev* 12 (2004) B. Michael Dann, Valerie P. Hans, and David H. Kaye, Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested mtDNA Evidence (Final Technical Report to National Institute of Justice, Washington, D.C. 2004), Available: (<http://www.ncjrs.gov/App/Publications/Abstract.aspx?ID=211000>); Irwin A. Horowitz & Kenneth S. Bordens, The Effects of Jury Size, Evidence Complexity, and Note-taking on Jury Process and Performance in a Civil Trial, *87 J App Psych* 121 (2002); Larry Heuer & Steven Penrod, Juror Note-taking and Question Asking During Trials: A National Field Experiment, *18 L. & Hum. Behav.* 121 (1994); Larry Heuer & Steven Penrod, Increasing Juror Participation Through Note-taking and Questions Asking, *79 Judicature* 257 (1996); Steven Penrod & Larry Heuer, Tweaking Commonsense: Assessing Aids to Jury Decision Making, *3 Psych, Pub Pol & Law* 159 (1997).

³ Elissa Krauss. Jury Trial Innovations in New York State: Improving Jury Trials by Improving Jurors' Comprehension and Participation. *New York State Bar Association Journal* May 2005. The Jury Trial Project's full report is available at www.nyjuryinnovations.org. The recommendations made are also in line with the ABA's Principles for Juries and Jury Trials which are available at: <http://www.abanet.org/jury/principles.html>.

⁴ Michael F. McKeon. How Experience Changed My Practice on Juror Note-taking, *The Daily Record*, (April 29, 2005).

in New York recommends to judges that all jurors be provided with note-taking materials and that jurors be instructed that the notes are for their own use and should not be shared with others. The notes taken are confidential, collected at the end of each day, and then destroyed at the end of the trial.

Judges are also encouraged to present jurors with a number of additional guidelines, including:

- note-taking should not distract from the proceeding,
- notes are an aid to memory and should not take precedence over one's independent recollection,
- jurors must not be influenced by any notes that another juror may take, and
- notes are for personal use in refreshing recollection.

Jurors are further instructed that notes are not a substitute for the recorded transcript of the testimony, for any exhibit received in evidence, or for the principles of law explained by the judge, and that if there are any discrepancies, the juror should ask to have the relevant testimony be read back, exhibit produced, or the principles of law re-explained.⁵

Mock jurors are routinely permitted to take notes during focus groups and trial simulations. As with actual trials, some choose to take notes and others do not; some take a lot of notes and others take only a few. The mock jurors then use their notes in their structured discussions and mock deliberations. Anecdotally, it does not appear note-takers gain an unfair advantage in deliberations or that the jurors who take the most notes have any more or less influence than any other juror in the room. Mock jurors often do refer to their own notes to make their points; however, their notes have not replaced the recollections of others in the room. Indeed, where there are discrepancies, the mock jurors generally come to a group consensus about the evidence or they ask for clarification.

There is a tendency for those involved in the legal system to think of juries as opposed to individual jurors. As all good teachers know, people learn differently. Attorneys and judges must recognize jurors learn, process, and retain information differently. If a juror feels that note-taking will help her to process, understand, and retain information, and if the goal is to enhance her comprehension of the case, then allowing her to process the information in a way that is most helpful to her (i.e., taking notes) makes sense.

Improving Your Advocacy

Although judges are authorized to allow jurors to take notes and note-taking appears to be more the norm than not, there are still judges (and attorneys) who are skeptical. Attorneys who desire their jurors to fully understand their case issues should:

- request the judge allow jurors to take notes,
- provide the judge with a detailed procedure of how it would work,
- draft instructions on note-taking for the judge to read, and
- support their request with research conducted by social scientists, ABA principles, and other research conducted by the courts in states like New York, Ohio and Tennessee.

In a nutshell, there are few, if any, downsides to allowing jurors to take notes. The above research and anecdotal evidence support claims that note-taking enhances juror memory, leads to greater understanding of evidence, increases juror attention and motivation during trial, enhances deliberations, and leads to increased juror satisfaction with the trial process.

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⁵ New York State has created a pamphlet as a Practical Guide for Judges summarizing the Jury Trial Project's recommendations that includes New York State law, suggested procedures for implementation, and suggested instructions to the jury. The recommended instructions on note-taking can be found in CJI 2D [NY] note-taking (revised Oct. 25, 2001).

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