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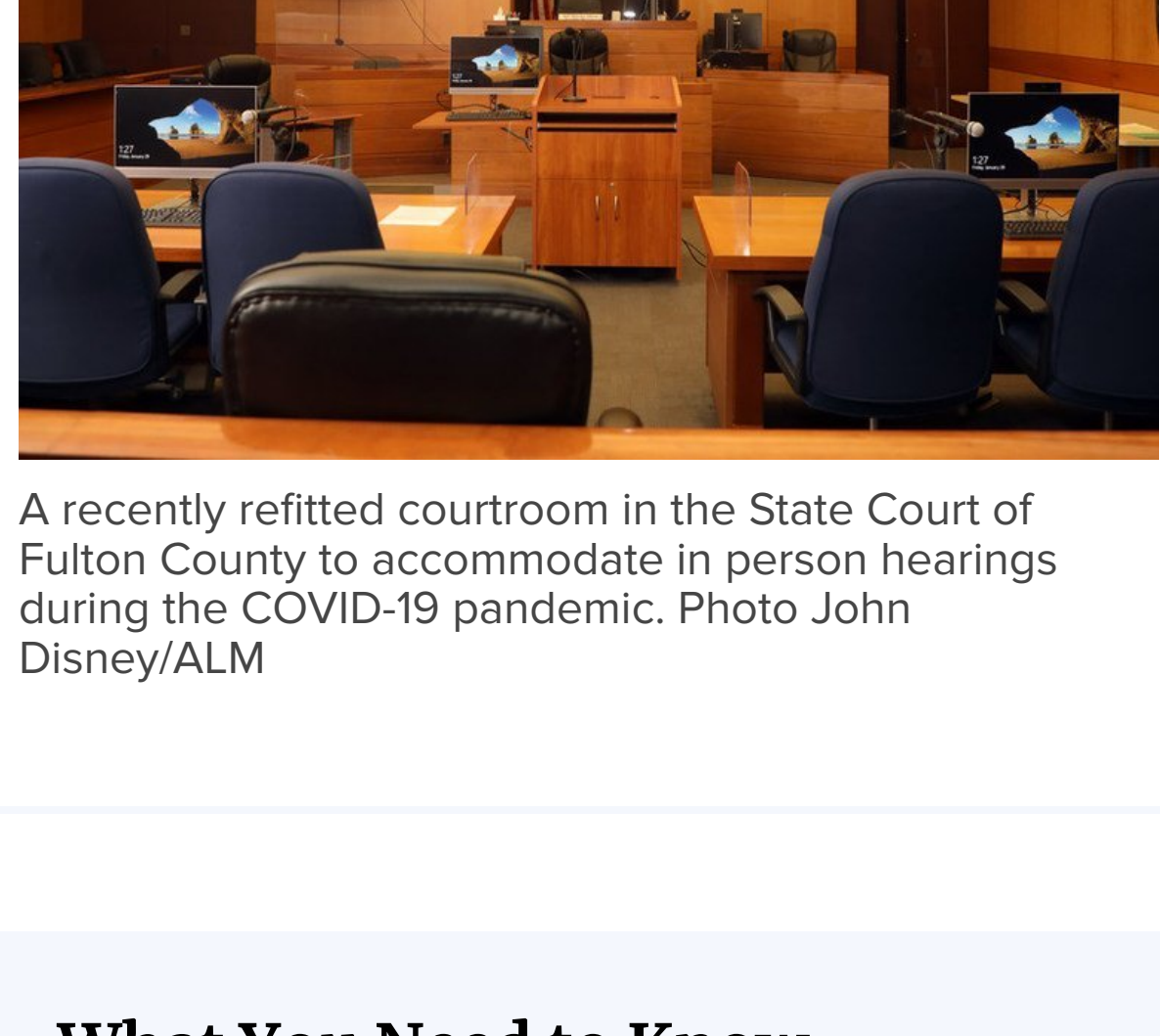
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A recently refitted courtroom in the State Court of Fulton County to accommodate in person hearings during the COVID-19 pandemic. Photo John Disney/ALM

NEWS A Shadow Over Science? How the Pandemic Changed—Or Didn't Change—Jurors

Some lawyers who have handled trials this year say the COVID-19 pandemic has clouded how jurors perceive scientific and medical testimony, but others aren't convinced that juries have changed that much. More apparent, lawyers say, is that the political polarization surrounding the pandemic has seeped into the jury pool.

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COVID-19

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What You Need to Know

- Beasley Allen's Andy Birchfield, whose firm lost three talcum powder trials this year, said there is a 'growing lack of trust in science' among jurors.
Not all lawyers who have handled trials are convinced, so far, that jurors have changed their approach to scientific or medical testimony.
Lawyers have noticed the pandemic's political polarization among jurors, particularly as it relates to COVID-19 precautions in the courtroom.

In the first talcum powder trial to take place since the COVID-19 pandemic shuttered courthouses, an Illinois jury came back July 30 with a defense verdict. Three talc trials followed, in Pennsylvania, Missouri and Georgia, and all the juries sided with Johnson & Johnson.

The string of losses is a marked departure for attorneys representing ovarian cancer victims, who, although they haven't won every time, have collected awards of tens of millions, even \$4.7 billion, prior to the pandemic.

Andy Birchfield, whose firm lost three of the four talc trials, believes that jurors have changed their approach to science after a year and a half of living through a pandemic.

"One of the things that has emerged is there's confusion over the science, and there seems to be a growing lack of trust in science," said Birchfield, head of the mass tort section at Beasley Allen in Montgomery, Alabama. "And I think that's the result of what we're seeing in our country over the pandemic and the vaccines. Is it real? Is it fake? It has cast some suspicion, and we've got to be able to effectively communicate the true science here because the true science is on our side."

Not everyone believes jurors have changed all that much. Many lawyers who have handled trials this year insisted that jurors fairly assessed the scientific evidence before them and, for the most part, appeared unremarkably different from pre-pandemic times—save for the concern among some about possible COVID-19 cases in the courtroom. Other lawyers said the pandemic had changed jurors in another way: They're polarized in their views before even heading to the deliberations room.

Yet many agree there are signs of growing skepticism, particularly in focus groups and mock trials.

"People are just in a place where they're saying, 'Show me. That's your opinion, but show me. Where are the facts to back that up? Do you have facts?'" said Katherine Otto, a partner at Messner Reeves in Denver. While that trend began prior to COVID-19, she said, "people in the pandemic have made this an exclamation point."

'Cast a Shadow Over Science'

Some lawyers say they've already witnessed the effects of scientific skepticism in actual trials.

"I do think that the pandemic has kind of cast a shadow over science," Birchfield said. "We're going to have to figure out what's going on with jurors' mindsets after this prolonged battle with this pandemic. It has clearly affected mindsets, and we're going to have to sort through it."

He insisted that Johnson & Johnson's attorneys, in the recent talc trials, used scientific ambiguity to their advantage, which confused jurors. That particularly hurts plaintiffs, he said, who have the greater burden to prove the science to jurors.

"The corporate defense tactics have found a way to tap into the political aspect of science," Birchfield said. "It's maddening to see this level of confusion they're bringing into the courtroom over the science."

He acknowledged, however, that, at least in his trials, defense attorneys used other strategies that also could have convinced jurors, such as poking holes in the narratives of the individual plaintiffs.

Allison Brown, a partner at New York's Skadden, Arps, Slate, Meagher & Flom, who handled two of the trials for Johnson & Johnson, disputed any change in jurors. Instead, she credited evolving science that shows cosmetic talc does not cause ovarian cancer.

"I wouldn't necessarily say it was about the pandemic," Brown said. "When presented with the science and the facts and the evidence, these juries are coming to the right decision, which is that this is not a risk factor for ovarian cancer."

But exactly how lawyers present that scientific evidence might make a difference in the minds of pandemic jurors. Otto, who represents health care professionals, won three medical malpractice trials in August and September. In all three trials, which took place in different parts of Colorado, Otto said the juries had accepted the scientific evidence, as long as it was presented clearly.

"It seemed to me there was very much a trust in scientific evidence and appropriately qualified witnesses, particularly expert witnesses," Otto said, "and not suspicious or distrustful of it, which was something I had a concern about going into a trial post-pandemic: whether jurors' trust and confidence in medical experts had been impacted at all by the last year and a half."

That said, Otto did something different this time around: She used more graphics and visual aids in her presentation to the jury that helped explain the testimony of the doctors. Jurors, she said, now want to see for themselves what an expert is saying.

Katherine Otto, a partner with Messner Reeves. Courtesy photo

"As a result of the pandemic, all of us, but in this context jurors, are more critically thinking and they want to see the facts and the data," she said. "They want to go behind the curtain and understand and make sure for themselves that this person testifying has the facts and data to back up their opinions."

Still, whether jurors are more skeptical about science appears to be largely anecdotal at this point. It also depends on which part of the country a trial is taking place, said Kenneth Suggs, a principal at Janet, Janet & Suggs in Columbia, South Carolina.

As head of the American Association for Justice's Presidential Task Force on Civil Jury Trials in the Era of COVID-19, from July 2020 to July 2021, Suggs tracked cases throughout the country and, based on conversations he had with lawyers, there appeared to be more distrust of science in the U.S. South.

Much of the concern about rising scientific skepticism among jurors is originating not from actual trials but from focus groups, mock trials and studies by consulting firms. Geri Satin Fischman, a senior trial consultant at Focus Litigation Consulting in Miami, said anti-science sentiment has resulted in skepticism of scientific data and related expert testimony, particularly given that litigation experts are hired to testify at trials.

"COVID has amplified a preexisting problem in the deliberation room in terms of juror receptivity to scientific and medical testimony," Fischman said. "The rapidly evolving science surrounding COVID has resulted in mixed messages and, in some cases, misinformation that has eroded public trust in science."

Several studies on juror perceptions during COVID-19 have found verdicts to be less friendly to plaintiffs. But Fischman said those studies can be misleading and shouldn't be extrapolated to include the entire nation.

"In my view, there is a general misconception in the legal community about just how much COVID has impacted current juror decision-making," she said. "Cases we have worked on amid COVID have been statistically similar to pre-COVID plaintiff vs. defense verdict rates."

Michael Smith, a partner in charge of Scheef & Stone's office in Marshall, Texas, said it's not unreasonable to be concerned about anti-science views on juries, but he hasn't seen that play out. He handled trials this spring in two intellectual property matters and one medical malpractice case. The jury in the medical malpractice case chose a medical student as its foreperson.

He said he's more concerned about the possibility that jurors might be swayed by arguments that played to online conspiracy theories. "I didn't see evidence that it actually shakes out that way" in his trials, Smith said.

That's probably because conspiracy theories thrive on quick sound bites on social media, whereas sitting in a jury box for a week or more "forces you to focus on all of the facts."

Michael C. Smith, Siebman, Burg, Phillips & Smith, Texas. Courtesy photo

A challenge for litigators is that conspiracy theory themes might play well in pretrial focus groups, which are typically limited to a single day. "We may see that more in focus groups, and we may have to discount that" when factoring in the dynamics of a full trial, Smith said.

'Extremely Attentive to Both Sides'

Some lawyers have found little change over jurors.

Bryan Aylstock, of Aylstock, Witkin, Kreis & Overholtz, who is co-lead counsel in the multidistrict litigation over 3M's dual-ended combat earplugs, has won four out of five bellwether trials in Pensacola, Florida, some of which have awarded punitive damages.

"These are Pensacola-area jurors from the Northern District of Florida," said Aylstock, who is based in Pensacola. "We are certainly a conservative, and some would consider a very conservative, jury venire. We've elected Republican congressman in our district for many years. All that said, the juries who have listened to the evidence have been receptive to the evidence we've provided, carefully considered this evidence and been extremely attentive to both sides."

Stuart Ratzan, a partner at Ratzan, Weissman & Boldt in Coconut Grove, Florida, said jurors' views on science didn't impact a wrongful death trial he handled in June. He is chairman of the American Board of Trial Advocates Miami COVID-19 Jury Trial Task Force, which was created to get jury trials back into courtrooms amid the pandemic.

"I think people are more conscious of safety and following safety rules for sure, but, bottom line, I think the jurors are given a power that the democratic institution jury trial gives them, and that they exercise it responsibly," Ratzan said. "There's nothing to trust or not trust because the power and decision they make is theirs, so they trust themselves, and I think they do that now just as they did before."

Stuart Ratzan, founding partner of Ratzan Weissman & Boldt in Miami. Courtesy photo

Plaintiffs attorney Fletch Trammell, who lost an Oct. 5 verdict in Los Angeles over Monsanto's Roundup herbicide, said his case differed from trials before the pandemic in which juries awarded \$80 million, \$289 million and \$2 billion to plaintiffs. His case, which was bifurcated so that the first phase focused solely on causation, involved a young child diagnosed with an aggressive form of cancer called Burkitt's lymphoma. Trammell, of Trammell PC in Houston, said jurors understood the scientific evidence but weren't convinced that the plaintiff, at 4 years old, was exposed long enough to Roundup.

"I don't know if the pandemic has changed the way jurors see any aspect of these cases because they seemed pretty dialed in and honed right in on the difficult part of my case, and the strong part of the defense case," he said of jurors in his trial. "Their attitude, at least the ones who talked about it, was that there are studies saying everything. The studies, they thought, canceled each other out. They weren't interested in the nuances of the science."

Are Jurors More Liberal or Conservative?

More apparent to lawyers is the political polarization seeping into the jury pool, exacerbated by the COVID-19 pandemic. Trials have occurred across the country with a myriad assortment of COVID-19 precautions, such as masks, vaccines and social distancing, while others have carried on as normal, with masks optional and judges barring lawyers from asking jurors about COVID-19 or their vaccination status.

As a result, many lawyers say the jury pool looks different than before the pandemic—and not just because some are wearing masks.

Jerry Hamilton, of Hamilton, Miller & Birthisel, which is a defense firm in Florida, said jurors are more predictable now based on whether they are vaccinated or wear masks.

"Unfortunately, we see this has become such an issue," he said. "Jurors are easier to identify whether or not certain people are more conservative or more liberal depending on what side of the beat you're on. They've been saying more anecdotally that more conservative jurors are for the defense and more liberal jurors are for the plaintiff."

Jerry D. Hamilton, a partner with Hamilton, Miller & Birthisel.

"I hope the pandemic winds down, and more people get vaccinated, and then I believe we'll have a more represented jury pool of jurors who are liberal and conservative," he said.

Yet Fischman, the jury consultant, said juries, at the beginning of the pandemic, were overrepresented by individuals with "more relaxed views on the dangers of COVID, on masks, and on vaccinations." That led to more politically conservative jurors, which influenced verdicts, she said.

Much of that has changed in recent months, however, as jurors are more comfortable returning to the courtroom, in part due to increased access to vaccines, quarantine fatigue and more safety efforts on the part of the court, she said.

Moreover, Fischman said. Judges have hesitated to grant hardship excuses based on fears relating to COVID-19. In one Florida trial, she said, two nurses asked to be excused because they worked in short-staffed hospitals and could be exposed to patients with COVID-19, but the judge refused their request. Both were vaccinated and had not tested positive for COVID-19 within the past two weeks.

A judge in another Florida case refused to dismiss a juror who was concerned about serving for two weeks but allowed him to keep two empty chairs between him and fellow jurors, she said. The judge also required everyone to wear masks throughout the trial.

In the first two of her three trials, Otto said the judges did not allow lawyers to ask about vaccines, COVID-19 or anything related to the pandemic during voir dire. But, in the third trial, the judge allowed the lawyers to explore those topics, she said. That gave them knowledge about how jurors would analyze the opinions of doctors, particularly if they differed from one another.

"We had a very robust discussion with the jury panel, as we were selecting the jury, about their thoughts and feelings and views on what has happened over the last year and a half," she said. "I was surprised to hear that, in Jefferson County, which is a fairly traditionally conservative-leaning jurisdiction with a lot of older people toward the end of their careers, or retirement age, in the jury pool, it was overwhelmingly pro-science, overwhelmingly pro-mask, and overwhelmingly pro-vaccine."

In the end, most jurors appear to have one thing in common from pre-pandemic times: Their decision remains a bit of a mystery. They still come out with the same "mixed bag" of verdicts that they did before the pandemic, Suggs said.

"As this thing washes through, I don't think there will be a permanent change in juries because of the COVID pandemic," he said. "Long term, it's not going to make any difference. It's going to depend on the quality of the case, and the quality of the lawyering more than the external factors like COVID."

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