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Embracing the Uncertainty of the Post-COVID Jury Trial

In the past several months, COVID-19 has moved our cheese.
What will our response be?

BY MELISSA M. GOMEZ

*“Be patient toward all that is unsolved in your heart and try to love the questions themselves.” —
Rainer Maria Rilke*

Who Moved Our Cheese?

Change and uncertainty are two very unpopular concepts in American life. In his bestselling book, “Who Moved My Cheese,” Spencer Johnson addresses the issue through a story about mice, Sniff and Scurry, and little people, Hem and Haw, who employ different philosophies in their response to displaced cheese in a maze. While Hem and Haw continually went back to where the cheese used to be, only to be met with frustration and disappointment, Sniff and Scurry went in search of “new cheese,” and ended up finding more and better cheese.

In the past several months, COVID-19 has moved our cheese. What will our response be?

Given the perceived state of modern technology and medicine, the extent to which a molecule, so small that it is invisible to the human eye, could bring

the entire world to a grinding halt has been unsettling, to say the least. It has disrupted both daily life and likely has challenged some of our core beliefs in a profound way. For example, there is the startling realization that maybe we are not as technologically or medically advanced as we believed.

When core beliefs are challenged, perceptions may be altered, and decisions affected.

What makes the COVID crisis more interesting and unique is that this experience has been traumatic, profound and shared, not unlike the Sept. 11 terrorist attacks, except that the traumatic nature of the event was not so sudden. Instead, people experienced this as a slow burn.

While all people are experiencing the crisis together, individual experiences vary vastly, depending on one’s vantage point. Some will know the terror of breathing difficulties associated with the illness, lose loved ones, work among the sick and dying in an ICU, restock the toilet paper for anxious buyers, lose a job, deliver personal protective equipment to hospitals, live in crowded communities where social



Melissa M. Gomez president of **MMG Jury Consulting**.

distancing is almost impossible, or manage a screaming 3-year-old without the benefit of an open playground or a break.

Most Americans have been living in challenging situations and relative isolation for weeks on end. Without the ability to venture into the world, the primary source of information and intellectual stimulation has been an inundation of internet and television media. As a result, media themes of this crisis will likely take a seat in the forefront of our minds and those of our potential jurors.

The question is: How will they be impacted?

Competing Biases

There are two well-researched concepts in psychology that address how people make decisions. The first, confirmation bias, is one in which people hold tightly to their beliefs by focusing attention on information that confirms those beliefs, ignoring information that disprove them. For example, if you are Philadelphia Eagles fan and supportive of the city, you are more likely to focus on information about the endearing brotherhood between the members of the underdog 2018 Superbowl Champion Team, and ignore the stories about Philly fans who booed Santa or threw beer cans at opposing fans.

The second concept, the availability heuristic, asserts that people tend to heavily weigh their judgments toward more recent information, developing opinions biased toward that latest news. For example, if you were a child of the '70s and '80 and watched movies such as "The Princess Bride," "The NeverEnding Story," "Blazing Saddles" or the television show "Batman," which depicted our heroes and heroines battling quicksand, you may have believed that quicksand would be a much bigger problem in your life than it turned out to be. Quicksand was readily available in your head, and so it became real. As Jonah Berger says in his marketing book, "Contagious: Why Things Catch On," "Top of mind leads to tip of tongue."

The conundrum for litigators considering their future jury trials is are confirmation bias and the availability heuristic in conflict for post-COVID jurors? And if so, which one will take precedence? In other words, will the

experience with this pandemic further entrench jurors in their previously held opinions or will it change their preconceptions.

Consider a hair salon owner who ran a thriving small business for many years but had to close her business for good after a shutdown order prevented her from operating. Before the shutdown, she was skeptical of companies perceived to prioritize money over safety.

The question is: how will the experience of losing her livelihood to slow the virus's spread affect her? Will she consider the information in a way that comports with her previous belief about profits and safety or will her experience caused her to reconsider that belief?

How about the diabetic who, before quarantine, was appalled by the costs of his life-sustaining medicine? He is worried because he is vulnerable to the virus given his medical condition. Every day, he reads news about the money and time spent in the frantic search for a vaccine. He believes he needs the vaccine to feel safe going back into the world.

The question is: Will he consider the cost of medication differently based on his daily focus on the long and expensive process of research and development? Will his perception of pharmaceutical companies be altered, or will he continue to be skeptical of the idea that companies may profit from the vaccine once developed?

We may also consider the warehouse worker who, until three months ago, had a stable job and believed he was in control of his own safety at work. Now, his company has not provided adequate personal protective equipment,

and quality masks have been hard to find. Five of his colleagues have gone into the hospital, and one is fighting for his life. He puts on the same mask he has been wearing for a week to fulfill orders. He is scared to complain because he needs the job.

The question is: Will his perception of corporate control over safety be altered or does he still hold tight to his belief that he is in complete control of his health and safety?

What Does It All Mean for Trial Lawyers?

Much of the work of trial lawyers is to take what is known about a case, coupled with juror decisions from the past, to make predictions and associated decisions about case resolutions and strategies. But what happens when there was an event that makes the future so potentially different from the past that we cannot rely on what happened before?

Uncertainty. That is what happens. Our cheese has been moved.

In times of uncertainty, research indicates that two common phenomena tend to occur:

- **We avoid making any decisions at all.**

Amos Tversky and Eldar Shafir conducted research on the of impact uncertainty on decision making, even when the uncertainty had nothing to do with the actual decision at hand. In their experiment, when deciding whether to take a vacation while on break, college students deferred making that decision when they were uncertain if they had passed or failed a course, despite the fact that the trip was unrelated to the grade. In the conclusion to their findings, Tversky and Shafir asserted that "in the presence of uncertainty, people

are often reluctant to think through the implications of each outcome,” and therefore avoid making those choices.

- **We guess based on what we have seen before.**

In “Made to Stick,” authors Chip and Dan Heath refer to The Curse of Knowledge. This means that once we have knowledge, stepping outside of this knowledge is difficult. This is by far one of the greatest barriers to both effective communication and to learning new information.

Neuroscience research indicates that when we are anxious, our minds prevent us from seeing information that disconfirms our beliefs. In essence, we engage in unconscious avoidance, a process furthering our own confirmation biases. By avoiding disconfirming information, we avoid the anxiety associated with uncertainty—especially in a situation where we once felt confident.

So, the issue for litigators is that, because of our focus on predicting how jurors are thinking differently, we avoid understanding how we may be thinking differently or how we need to think differently. Our own confirmation and availability biases may lead us to make decisions based on our assumptions.

Time and time again, though, we have learned the danger of making assumptions about what will happen instead of realizing that we simply must embrace the questions we need to answer.

In his book, “Mindwise,” Nicholas Epley provides a profound example, learned from a military officer stationed in Afghanistan, of the importance of seeking rather than assuming

how a person is affected by a traumatic circumstance. The story related to a program called “Guardians of Peace” in which the U.S. military was trying to prevent violence by asking citizens to report Taliban activities. Despite spending millions of dollars on advertising for the effort, few reports were made. Assuming this was a result of people either not wanting to call or not knowing how to call, the military tried various approaches to further motivate and inform the Afghan citizens.

One approach the military did not take initially was to speak to the people of the community and ask why they were not calling. As it turns out, the assumptions the military made were wrong. The citizens did try to call, but the Taliban had shut down the cell phone towers when they came to town. The people did not need more motivation or information, they simply needed a secure cell phone tower.

In a time of chaos, we seek certainty. Just as jurors are prey to their own cognitive biases, so too are we. We must consider our assumptions and the information feeding those assumptions. Is this information valid and reliable?

One thing is clear: While assumptions can be dangerous at any time, holding on to our old assumptions about juror perspectives from before this life-altering time is likely a mistake, and trying to read the tea leaves about who will be affected and how before we are able to make the appropriate inquiries is a mistake as well.

Therefore, instead of avoiding moving our cases forward, or trying to read the tea leaves to guess how and if

perceptions will be altered, it is time to start considering what questions we want to ask and how we may need to reconsider our own way of thinking. Jury research will be as important as ever, not only to understand juror beliefs and assumptions, but to challenge our own.

Just as Rilke’s quote at the beginning of this article suggests, it is time to embrace the unsolved questions and seek the information we need to answer them instead of avoiding uncertainty and going back to the same old places where we used to find our cheese. We may just find there is new and better cheese out there.

Melissa M. Gomez is a senior jury consultant and the president of MMG Jury Consulting. She holds a Ph.D. in psychology and a M.S.Ed. from the University of Pennsylvania. She has appeared as an expert jury consultant on CNN, CBC News, NPR, MSNBC, NBC, and FOX29 and has consulted on over 800 jury trials across the United States. Gomez is the author of two books, “Jury Trials Outside-In: Leveraging Psychology from Discovery to Decision,” and “The Witness Preparation Partner: A Guide to Becoming the Ready Messenger.” Contact her at mgomez@mmgjury.com.

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