

The Pool of Defense Jurors is Drying Up

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Agenda

The Problem

- Current verdict atmosphere
- What is Safety-ism?
- What is Conspiracy-ism?

Goals

- Discuss long and short-term solutions to juror “Safety-ism” and “Conspiracy-ism” ideologies
- Learn practical trial strategies to handle safetyist and conspiracy-minded jurors

The Problem(s)

The Problem

- Stronger anti-corporate attitudes
 - Distrust of government regarding safety
 - Damages as justice and power over corporations
- Reversing the burden of proof
 - Possibilities over probabilities
 - Decreased reliance on science/evidence
- Rise of nuclear verdicts and inflation
 - The total gross jury verdicts, nationwide, has risen by **66%** in the last decade.
(Sangmin, 2021)

← DEMOCRAT

REPUBLICAN →

Jury Profile

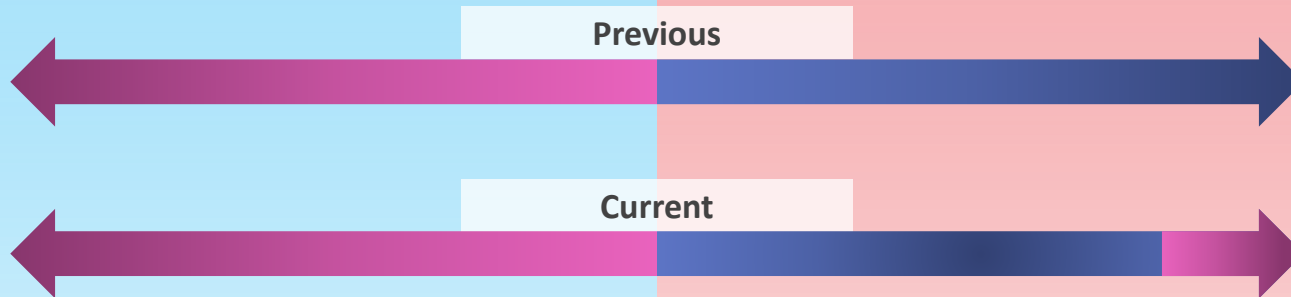
← Previous →

■ Plaintiff
■ Defense

← DEMOCRAT

REPUBLICAN →

Jury Profile



■ Plaintiff
■ Defense

The Rise of Safety-ism

What is Safety-ism?

- Safety-ism = “***A moral culture in which people are unwilling to make trade-offs demanded by other practical and moral concerns. Rather than seeing safety as one concern among many, it becomes a sacred value.***”
(APS, 2020)
- Safety-ism directly impacts juror decision-making
 - Increased emotional emphasis
 - Impossible/unsupported standards of care
 - Key focus for Plaintiff’s trial strategy

Today's Safety-ism: An Entitlement That Has Evolved Over 40 Years



Three Thought Fallacies of Safety-ism

(1) “What doesn’t kill you, makes you weaker.”

Fragility: total avoidance of harm, discomfort

(2) “Always trust your feelings.”

Emotional thinking as legitimate, before reason or science

(3) “Life is a battle between good and evil people.”

Tribalism: no discourse, no compromise



Source: *The Coddling of the American Mind* by Greg Lukianoff & Jonathan Haidt

Emotional Reasoning: Avoiding All Conflict, Discomfort

- Avoidance of alternative views, any difficulty, negative emotion, or physical discomfort, can lead to:
 - Fallacy that discomfort = danger
 - Feelings guide interpretations of reality (e.g., “words are violence,” etc.) = interpret danger everywhere
 - Emotional decision-making
 - Quick, judgmental feelings toward witnesses
- Emotional injuries = higher damages



The Fallacy of Emotional Reasoning



Emotional reasoning

Feelings guide interpretation of reality

Catastrophizing

Focus on worst possibility and make it most likely

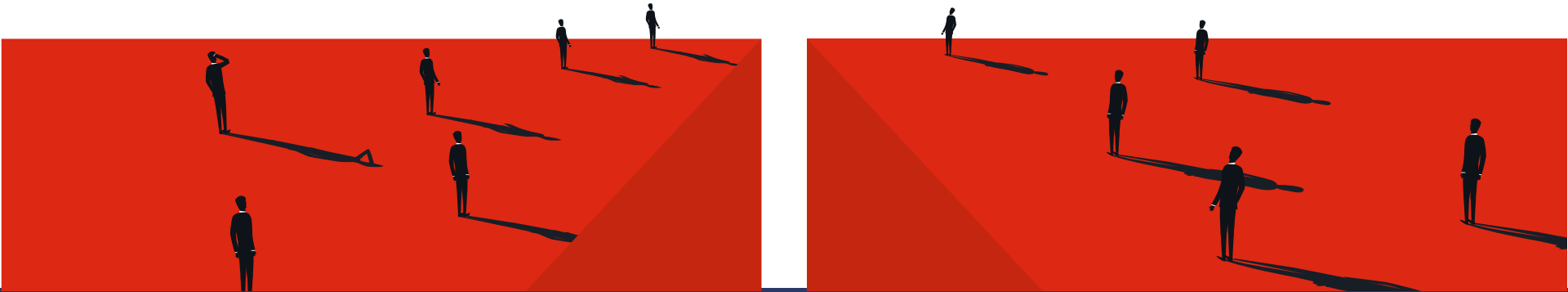
Overgeneralizing

Base global negatives on single incident

- All-or-nothing thinking
- Labeling, categorizing everyone/everything
- Focus on negatives
- Outward blame (external locus of control)

Tribalism

- Us vs. them
- Pandemic effects
- Anti-government
- Anti-corporation
- Plaintiff jurors are angry, want to punish, see more danger, use damages to reduce danger
- Easy to accept/adopt conspiracies



Is Safety-ism Real?

Safety-ism: 2022 Survey Data

- Companies should take every possible measure, no matter the cost, to ensure their products are always safe
- Companies need to ensure their products are 100% safe 100% of the time
- Pharmaceutical companies should warn about every possible side effect, no matter how small
- A manufacturer has the responsibility to research and prevent every possible misuse of its product
- If someone misuses a product, it shouldn't be the manufacturer's fault if they are harmed as a result (RC)



Safety-ism: 2022 Survey Data

- **Higher education** correlates to higher safety-ism
- **Urban residents** have higher levels of safety-ism
- **Social media, podcasts, and internet viewers** have higher safety-ism (traditional news sources such as TV and radio lead to less safety-ism)
- **Democrats** have higher levels of safety-ism
- **Strongly believe in scientific conclusions** related to higher safety-ism
- Safety-ism jurors had **COVID vax**
- Safety-ism jurors **plan to get a booster**



- Risk Avoidance

- If you are undergoing a procedure and there is a 1% chance of severe complications, how worried would you be that something could go wrong?
- The NHTSA says the average American driver has a 1 in 103 chance of being involved in a fatal car accident in their lifetime. Knowing this, how safe do you believe driving a car is?

- Emotional Thinking

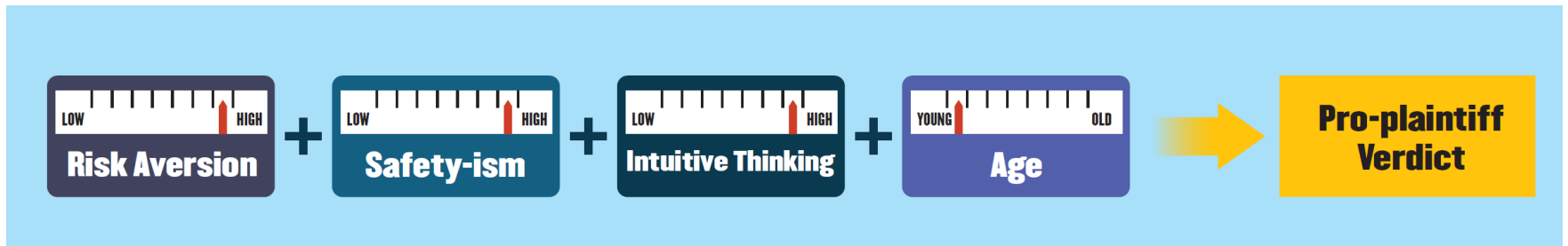
- I trust my gut to tell me what's true and what's not.
- My initial impressions are almost always right.
- I can usually feel when a claim is true or false even if I can't explain how I know.

Safety-ism: 2023 Case Scenario

- Woman with cancer vs. chemical company



Safety-ism: 2023 Survey Data



- Expectations of Companies
- Risk Aversion
- Emotional Thinking
- Age

Conspiracy-ism

What is Conspiracy-ism?

- Conspiracy-ism = **A person's belief that is not supported by evidence and involves an improper motive.**
 - Post-pandemic world has caused an increase in the belief of conspiracy theories. (Kuzelewska, et al. 2022)
 - Conspiracy minded people also remain open to additional beliefs. (Granado, et al., 2022)



Conspiracies: 2022 Survey Data

Respondents read a brief fictional lawsuit summary

- Plaintiff alleged migraine medication caused cancer
- Sample: N = 258
- Tested 10 conspiracy theories

Top Predictors of Plaintiff Verdict:

1) Belief in Conspiracies

2) Emotion over Cognition

3) Sympathy

Conspiracies: 2022 Survey Data

Conspiracy Beliefs

- Conspiracy with strongest support: 33.3%
- Respondents who agreed with *at least* one conspiracy: 62%

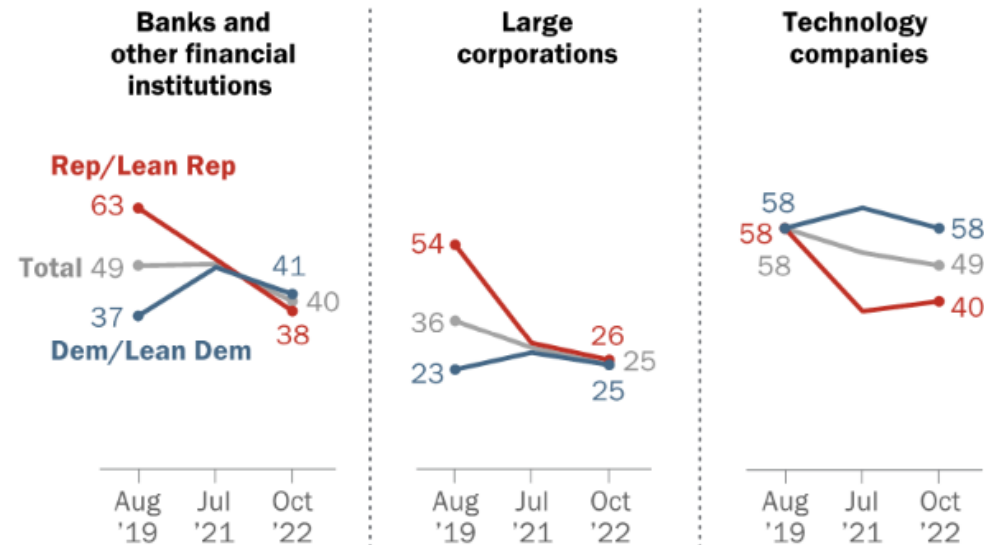
People who believe in conspiracies...

- Have unique opinions regarding politicians
- Have a faith in intuition for facts
- Show loyalty to their ingroups
- Don't trust government/regulators
- Don't trust corporations

Opinions of Corporations

Republicans' views of banks, large corporations have become much less positive since 2019

*% who say ____ have a **positive effect** on the way things are going in the country these days*



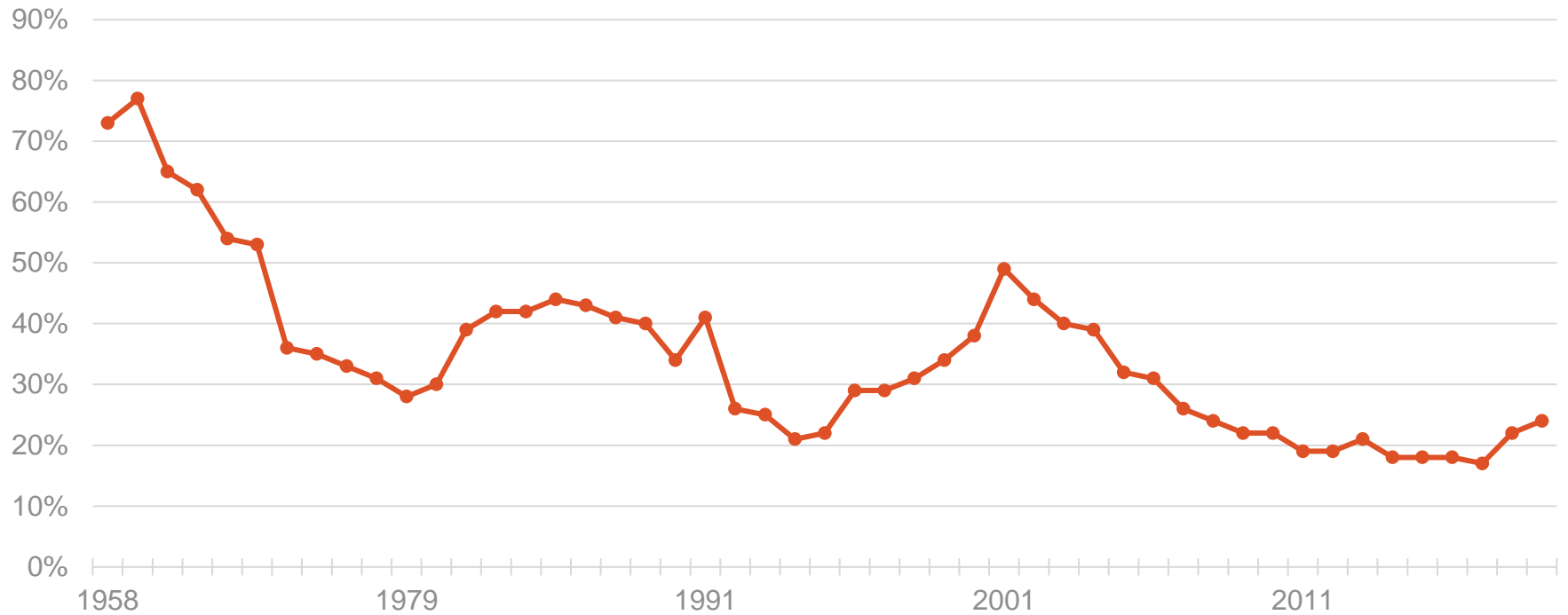
Source: Survey of U.S. adults conducted Oct. 10-16, 2022.

PEW RESEARCH CENTER

Trust in Government

Public trust in government in the United States

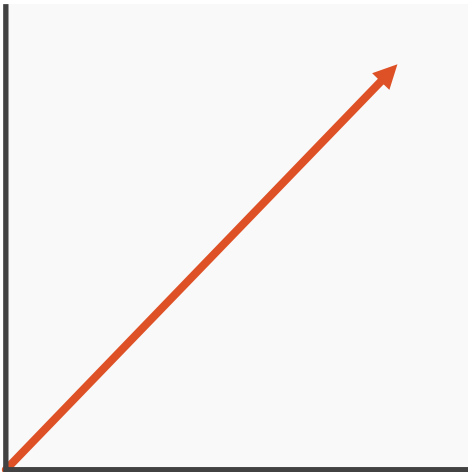
Share who trust the United States Government always or most of the time.



Sources: Pew Research Center (2022); <https://ourworldindata.org/trust>

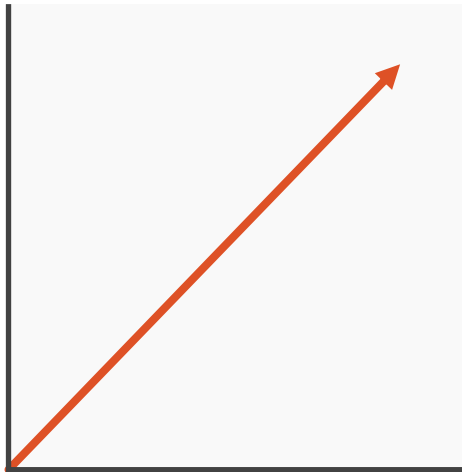
Safety-ism: 2022 Survey Data

STRONGER
government distrust



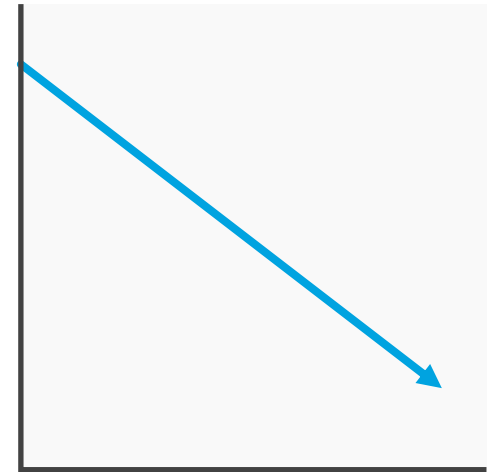
STRONGER
conspiracy

STRONGER
safety-ism



STRONGER
anxiety over
“what if/possibilities”

STRONGER
safety-ism



LOWER
belief in conspiracies

Search for “Justice”



Solutions

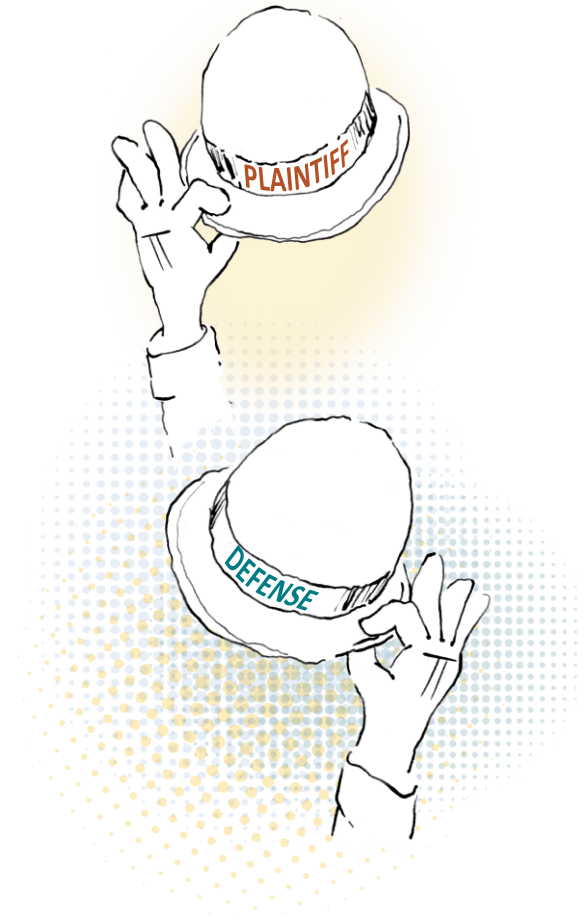
Generalized Juror Profiles

Plaintiff-leaning jurors tend to be:

- Liberal (though Democrats can go either way)
- Education – Liberal Arts, Humanities, Performing Arts
- Helping professions
- Idealistic – challenge the status quo
- External locus of control (Environment Determines Outcomes)
- Health/wellness conscious
- Fearful/worrisome/cautious
- Believe people need to help one another (Seller Be Fair)
- Fearful of COVID/believe in government mandates

Defense-leaning jurors tend to be:

- Republican/fiscally-conservative
- Education – Hard Sciences, Business, Finance
- Analyzing professions
- Practical, rule-followers, trust in government/regulations
- Internal locus of control (The Individual Determines Outcomes)
- Cynical of most people
- Believe people need to look out for themselves (Buyer Beware)
- Not afraid of COVID/believe government is overstepping with mandates



How Do We Combat Safety-ism and Conspiracy-ism?

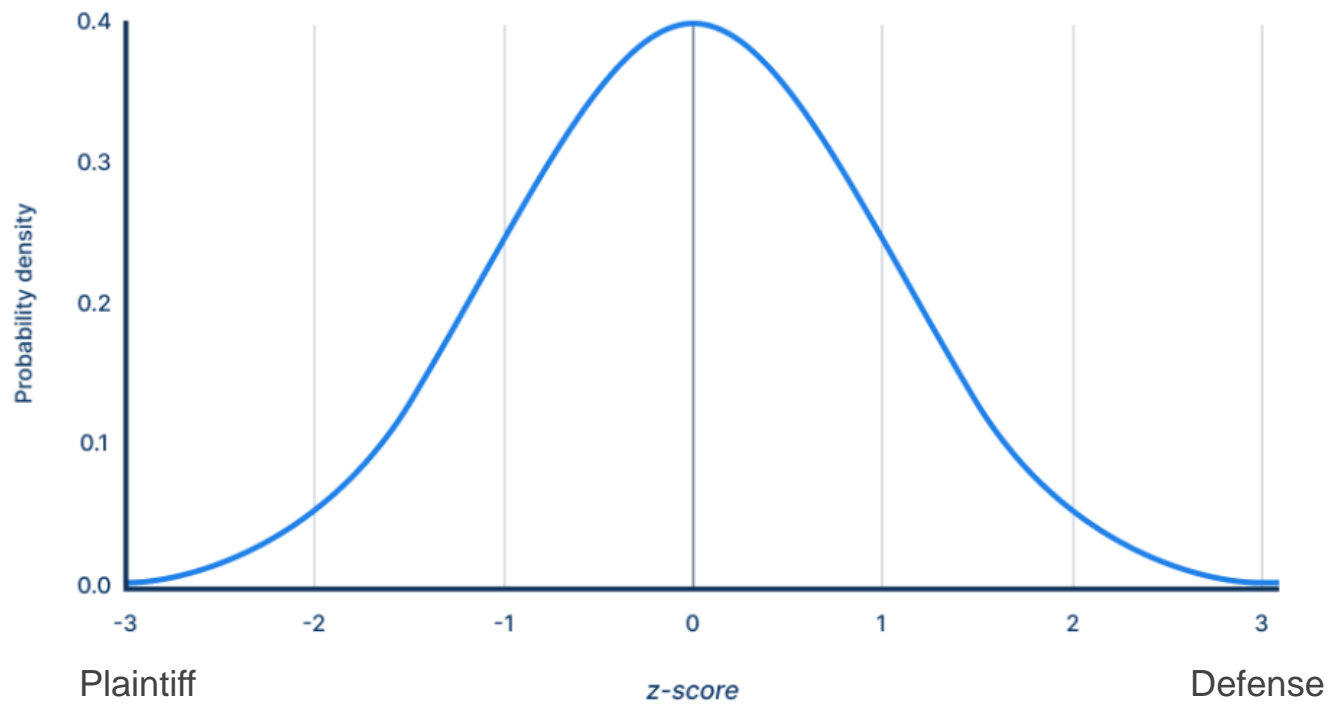
(1) Voir Dire: Key Principles

- 1. Be a good representative**
- 2. Preview weaknesses/plaintiff themes**
- 3. Choose your questions wisely**



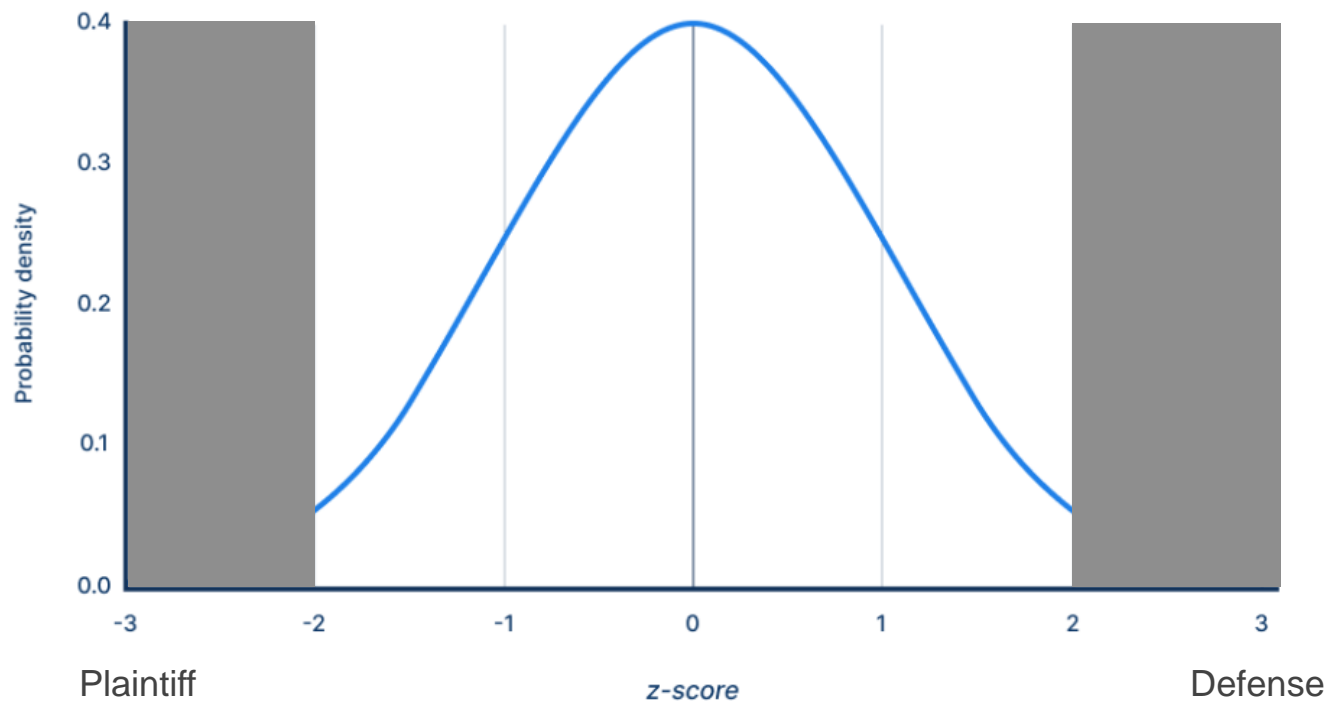
Focus on Cause Challenges

Standard normal distribution



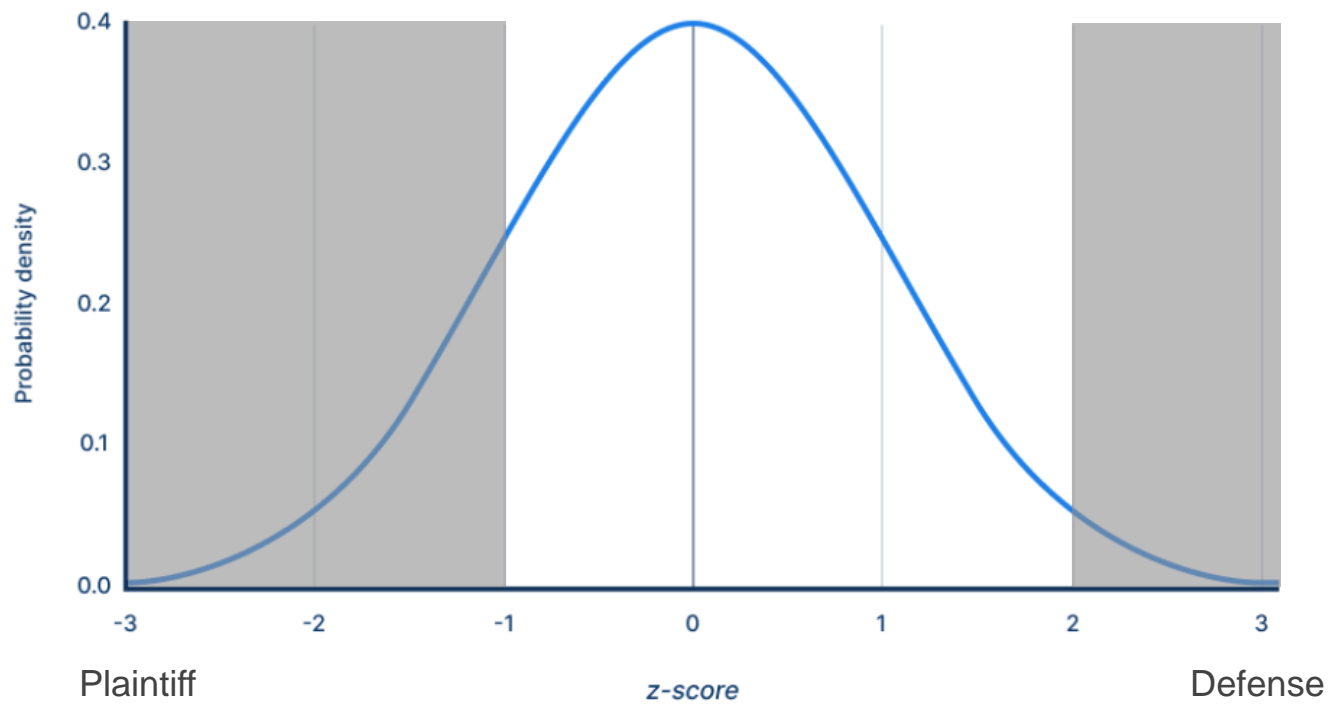
Focus on Cause Challenges

Standard normal distribution



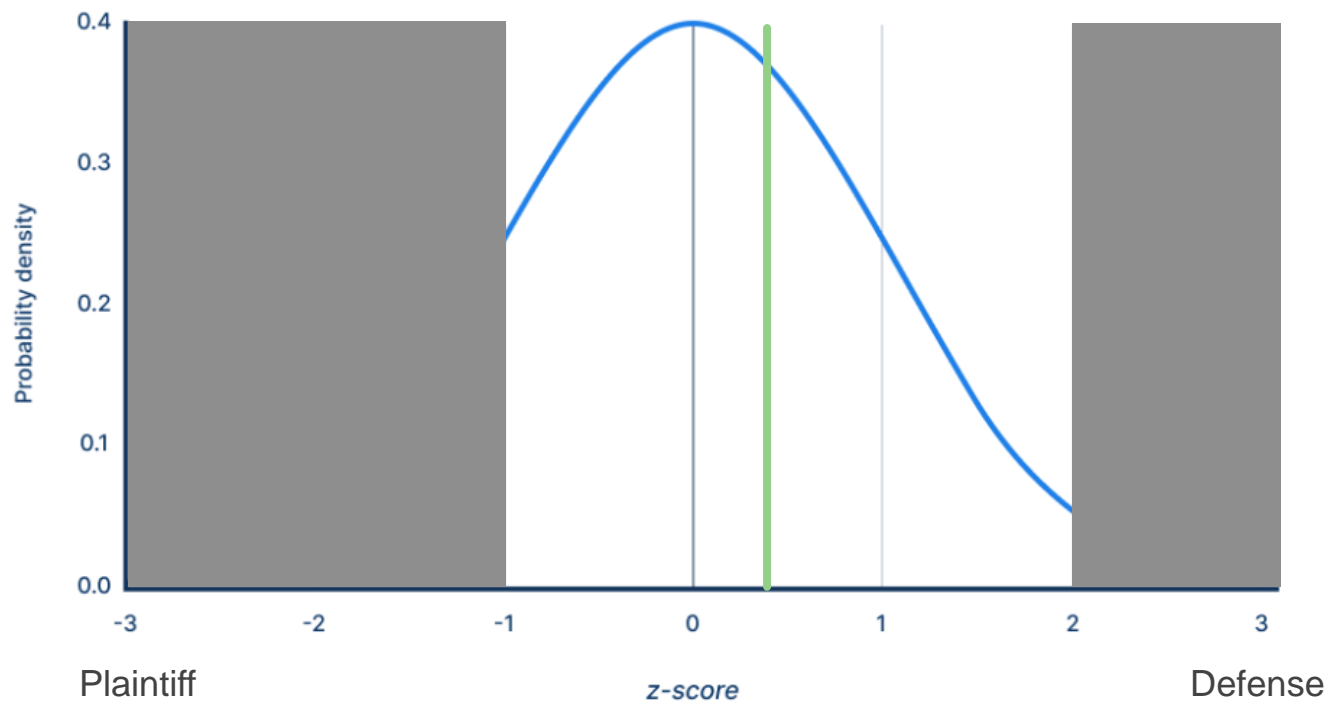
Focus on Cause Challenges

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Focus on Cause Challenges

Standard normal distribution



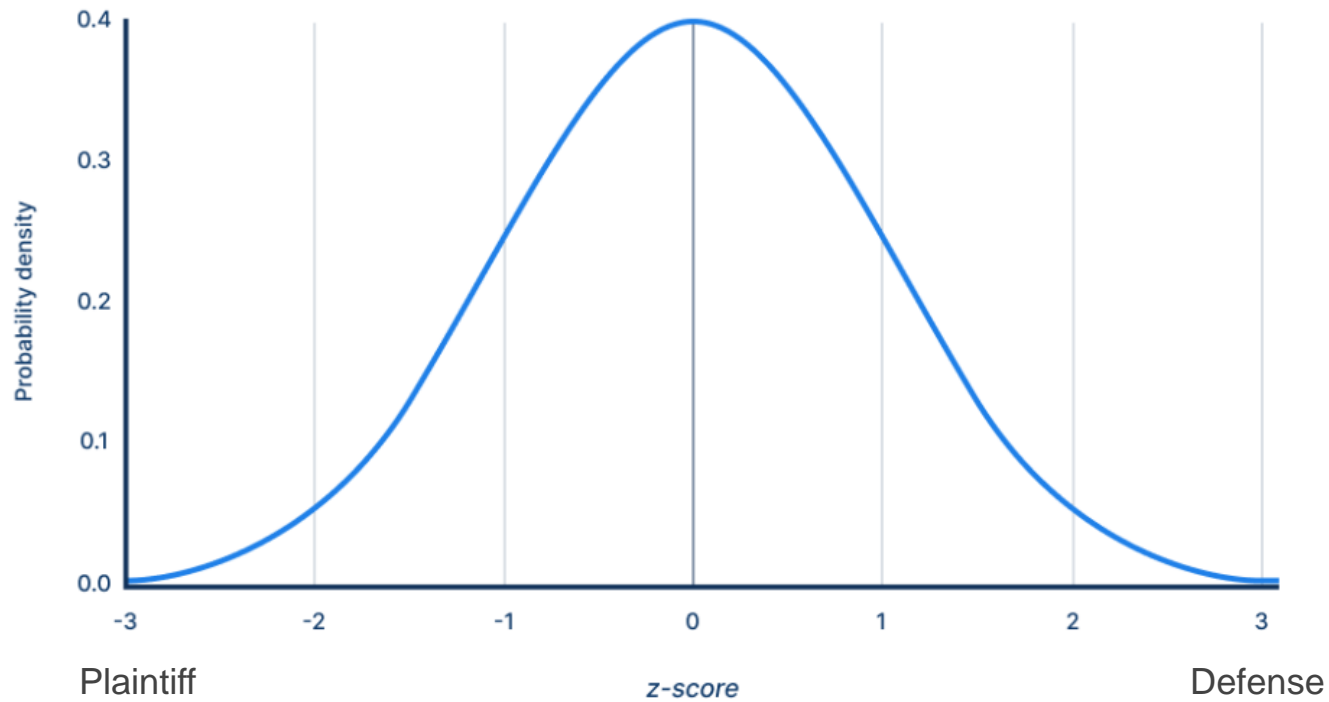
(1) Voir Dire: Key Principles

1. Be a good representative
2. Preview weaknesses/plaintiff themes
3. Choose your questions wisely
4. Rehab your best jurors
5. Hide your “keeps”



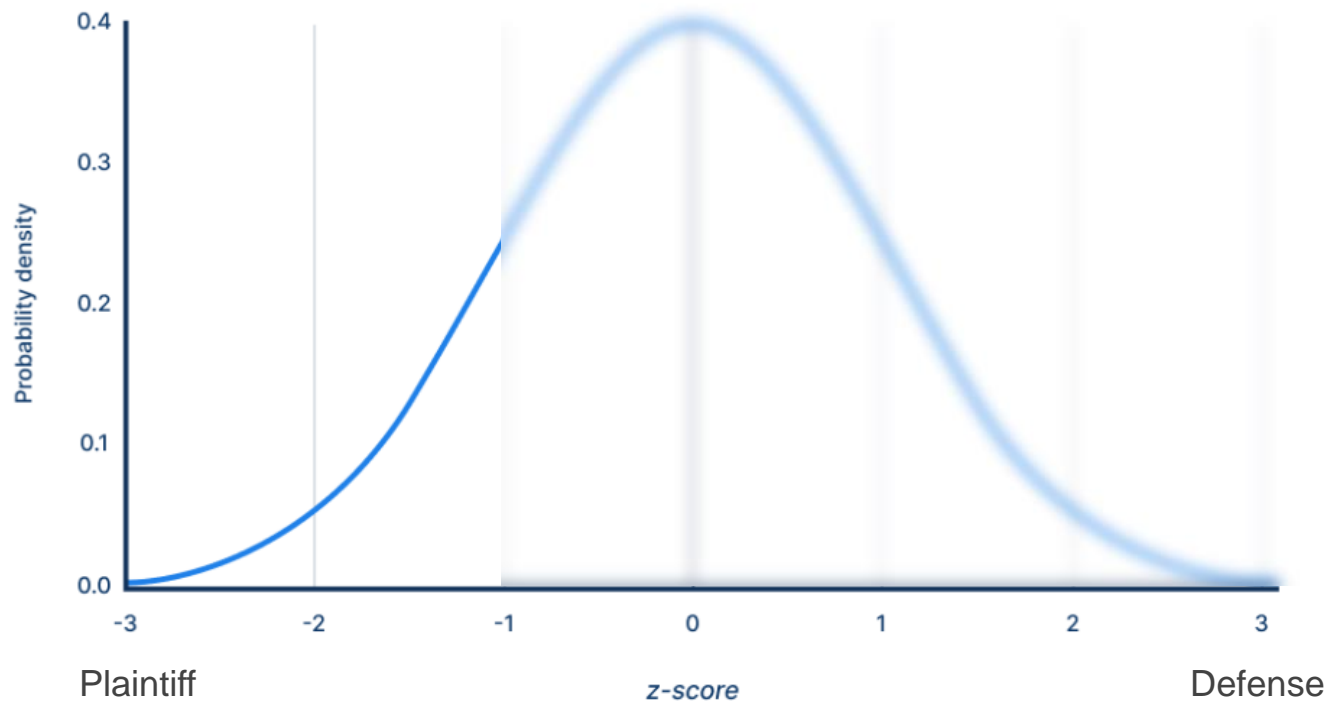
Hide Your “Keeps”

Standard normal distribution



Hide Your “Keeps”

Standard normal distribution



Hide Your “Keeps” – Question Construction

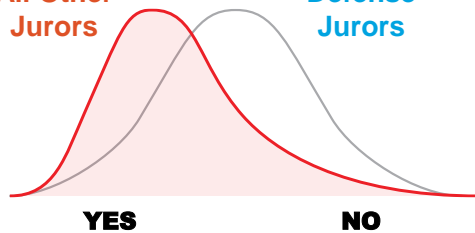


Question Construction--

“Do you believe commercial drivers should be more careful while driving?”

Plaintiff/
All Other
Jurors

Strong
Defense
Jurors

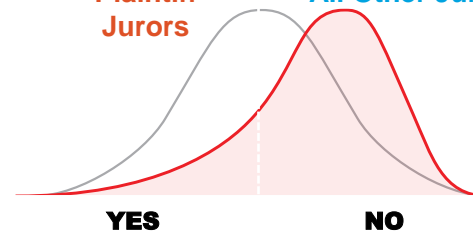


Question Construction--

“Do you believe commercial drivers often drive recklessly?”

Strong
Plaintiff
Jurors

Defense/
All Other Jurors



SUPPLEMENTAL JUROR QUESTIONNAIRE

Initials: _____

Thank you for taking the time to fill out this questionnaire. These questions could be asked in open court. You are given more privacy by answering them in this questionnaire. You are under oath and required to answer truthfully. The information that you give in response to this questionnaire will be used only by the court and the lawyers to select a qualified jury. The attorneys are under orders to maintain the confidentiality of any information they learn in the course of reviewing the questionnaires. Please put your initials in the top right corner of each page.

JUROR NAME: _____ AGE: _____ JUROR # _____

- What is the highest level of education you have completed:
 - ☐ Less than high school
 - ☐ High school diploma/GED
 - ☐ Technical training/vocational school/trade school/associates degree
 - ☐ Some college (Area of study: _____)
 - ☐ College graduate (Area of study: _____)
 - ☐ Graduate degree (Area of study: _____)
- Where do you work and what is your job title? _____
- Have you ever held a management or supervisory positions? ☐ Yes ☐ No
- Current marital status: ☐ Single, never married ☐ Married ☐ Divorced ☐ Separated ☐ Widowed
- Where does your spouse work and what is their job title? _____

6. Have you or anyone close to you ever had any experience with any of the following: **(Check all that apply)**

	YES, SELF	YES, SOMEONE CLOSE	NO
Medical Negligence / Medical Malpractice			
Amputation			
Emergency Medicine Physicians			
Emergency Medicine Nurse Practitioners			
Law/Legal Field			

If yes to any of the above, please state and explain your (their) experience: _____

- Have you ever filed any sort of lawsuit or any other claim (e.g., workers' compensation, disability)?
 - ☐ Yes ☐ No If yes, please explain: _____

- Have you ever been the defendant in a lawsuit? ☐ Yes ☐ No If yes, please explain: _____

- Have you ever served as a juror in a civil case? _____
If YES, what type of case was it? _____

- Circle any of the following in which you have received training or education:
Law/Legal Field Health/Medicine Psychology Education Law Enforcement

If yes to any of the above, please state the corresponding experience and explain your training or education: _____

Initials: _____

- Do you have a negative opinion of doctors, hospital systems, or other healthcare providers?
 - ☐ Yes definitely ☐ Yes somewhat ☐ No
 - Please explain: _____
- How frequently do you go to a doctor / hospital?
 - ☐ Once a year or less ☐ 2-5 times a year ☐ 5-10 times a year ☐ More than 10 times a year
- Have you or anyone close to you ever had a negative experience with a medical provider or hospital?
 - ☐ Yes, self ☐ Yes, someone close ☐ Yes, both ☐ No
 - If yes, please explain: _____
- Have you or anyone you know ever experienced any type of delay in diagnosis, delay in treatment, or any other type of delay that you/they believed was medical malpractice or negligence on behalf of the healthcare provider?
 - ☐ Yes ☐ No If yes, please explain: _____
- Are you or anyone you know currently under medical care or treatment for a serious illness or medical condition that has been difficult to diagnose, treat, or manage?
 - ☐ Yes, self ☐ Yes, someone close ☐ Yes, both ☐ No
 - If yes, please explain: _____
- Have you or anyone you know been injured or died as a result of medical treatment? ☐ Yes ☐ No
If yes, please explain: _____
- Have you or anyone you know ever been injured or died because of the wrongdoing of someone else or a company?
 - ☐ Yes ☐ No If yes, please explain: _____
- Please explain if this questionnaire failed to ask about something that you think we should know about you and your ability to be a fair and impartial juror. _____

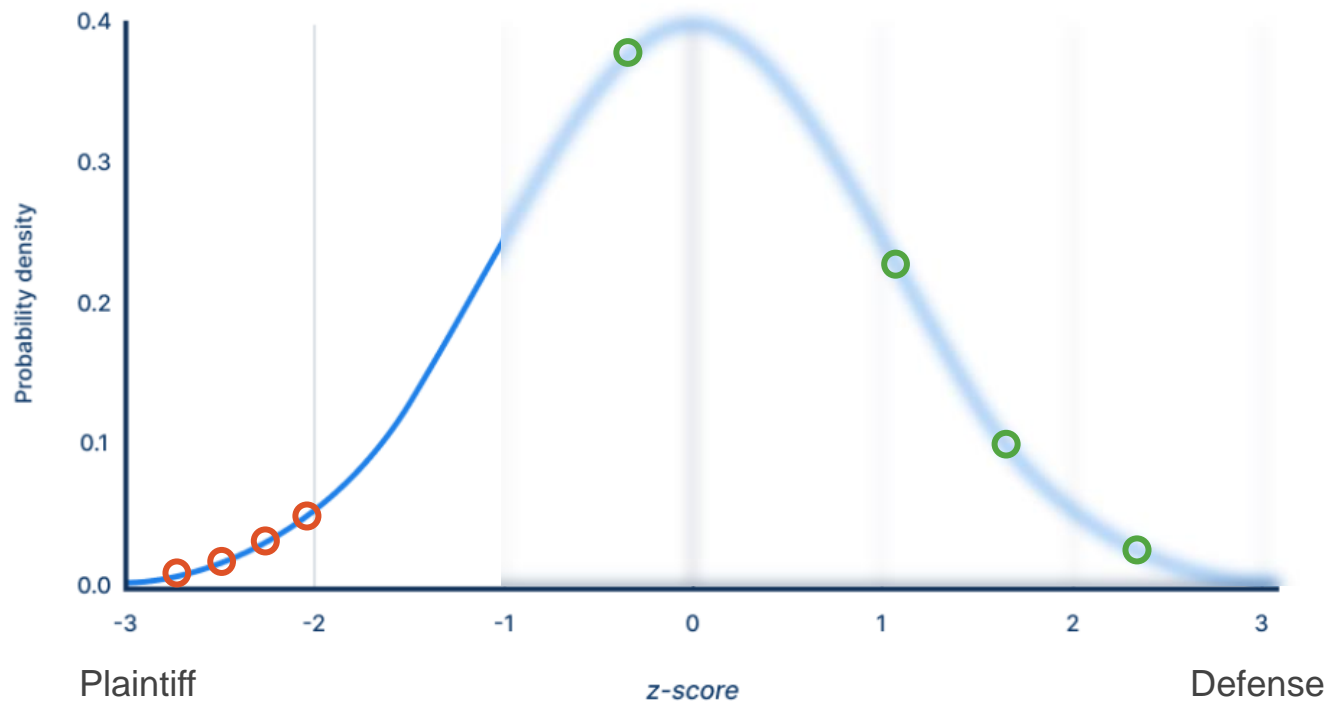
I hereby swear or affirm that all the answers contained in this juror questionnaire are true and correct.

Juror's signature _____

Date _____

Hide Your “Keeps”

Standard normal distribution



(1) Voir Dire Key Principles: Put Jurors at Ease

- Jurors hate public speaking
- Make it personal
 - The impartial parent referee
- Make it normal
 - Doesn't mean you're not a fair person
 - Get jurors to give their own examples
- Make it nonjudgmental
 - We have thick skin
 - Keep the client out of the courtroom



Practice Tip:

Revisit your example during individual follow-up:

- “Think it’d be a struggle to be a fair umpire in this case?”
- “Tempted to call balls and strikes in favor of the plaintiff?”

Reveal Bias: Words Matter

- Normalize the response:
 - “How many of you believe...” vs. “Does anyone believe...”
 - “Some people believe...”
- Assume the response: “How difficult would it be for you to...”
- Ask open-ended questions or get the juror to rephrase in their own words
- Phrases to avoid: “cannot,” “unable to,” “have a problem with”
- The answer should be “Yes”



Practice Tip:

Use “Anyone believe....” when preconditioning to emphasize that the belief is unacceptable

Practice Tip:

Pair this with “other people believe” to preview your themes without exposing your good jurors

Practice Tip:

Use “difficulty with” or “struggle with” instead

Reveal Bias: Words Matter

- Monkey see, monkey do
 - Raise hands
 - Nod along
- Normalizes the response
- Empathize with the juror



Practice Tip:

Asking for a raise of hands will get more responses than asking jurors to speak up



Practice Tip:

Show empathy by mirroring the juror's facial expressions

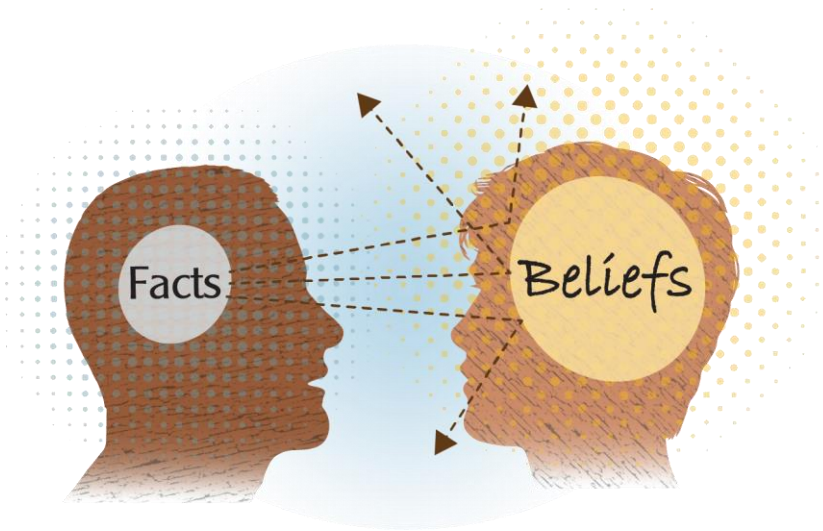
Reveal Bias: Don't Fear the Response

- Priming effects fade with time
- Beliefs are resistant to change
- An expression of unsupported belief will not change or influence others in any substantial way



Practice Tip:

If concerned about a juror revealing specific knowledge or inadmissible facts, preface questions with, "Without explaining why or what you've heard..."



(2) Effective and Compelling Trial Theme



Why Are Themes Effective?

- Jurors need to feel they are “getting it right”
- Jurors need emotionally compelling arguments
- Interesting, comprehensible, meets jurors’ expectations
- A legal argument is not necessarily an emotionally compelling one
(sometimes *the law is not a good enough reason* to find for your client)

What Makes a Good Theme?

Something Jurors Will **REPEAT**

Simple – think phrases, not sentences

- Newspaper headlines
- Short, clear messages

Memorable

- Alliteration
- Common phrases
- Idioms
- The rule of 3's

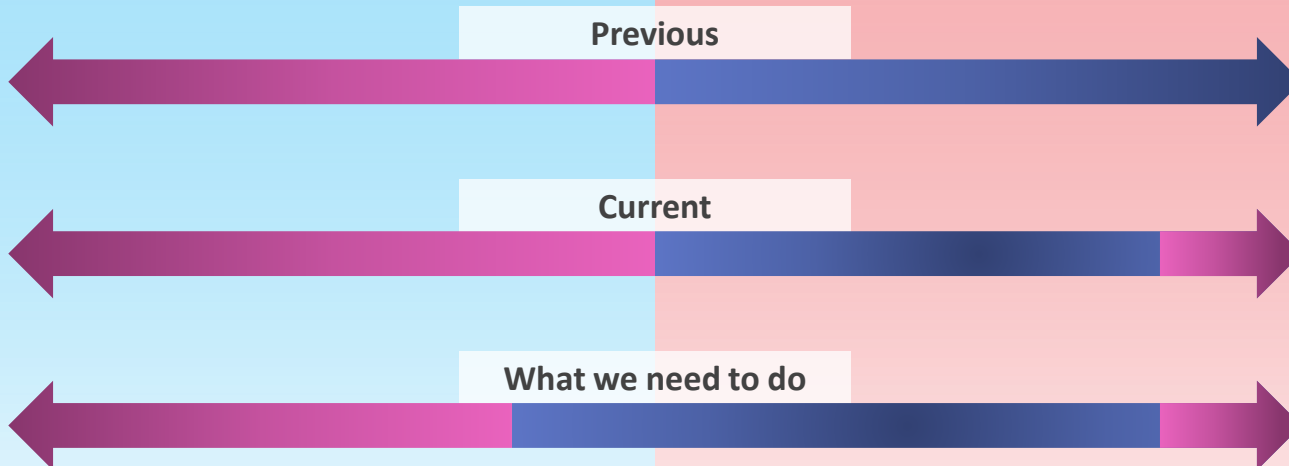
Simple + Memorable = REPEATABLE



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REPUBLICAN →

Jury Profile



■ Plaintiff
■ Defense