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DOAR has opened an office in New Orleans, expanding its trial consulting practice in the southern region.

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Playing to the Hyper-Local Juror: Successfully Defending Toxic Tort Trials in the Gulf Region

Our 15 years' experience working on both sides of large, high profile, toxic tort and mass exposure cases has shown us that jurors have a few very predictable ways of responding in these highly complex, lengthy trials. Most prominently, we have seen that jurors in complex toxic tort cases become so overwhelmed by the volume of highly technical expert testimony that the information becomes unusable to them. More so than in other types of cases, jurors in toxic tort cases identify themselves as the front line of defense in a community and respond to narrative themes that require them to use local common sense and local valuation amounts.

We have gleaned this information and tracked these trends based upon feedback from the deliberations of mock jurors, shadow jurors, and the post-trial interviews of actual jurors in numerous trials throughout the country. We have debriefed, profiled, and analyzed the feedback from scores of jurors. Based upon these in depth conversations and analyses, the following recommendations have proven successful for attorneys competing in the world of high-stakes toxic tort litigation.

Control the Common Sense

“Clean-Up - - \$86 Million Dollars? For one acre of bad soil? This whole pathetic town isn't worth \$86M! Yeah, somebody's cleaning up something alright, and it ain't gonna be that patch of bad dirt. It's that slick dude in the Armani suit.” – Jury Foreperson, NORM trial, post-verdict interview

Toxic Tort actions can assume a very personal nature for a juror. They often feel that they have become part of something larger than themselves, deciding an issue that may perhaps affect future generations for years to come. As such, they take their service quite seriously - although most days after lunch it may not appear that way. Nonetheless, jurors in toxic tort trials often feel vested and compelled to “do the right thing”, as through their verdict they believe they are an integral part of something important, either by preventing future corporate acts similar to the ones at issue and hence protecting others, or by sending a strong message for what they believe was a frivolous lawsuit or an act by a greedy lawyer to “shake down” a company. They will be inundated with complex scientific and/or medical testimony, typically by numerous experts, and they will often not understand the majority of its content. However, they will mentally “arrange” the data such that it fits within the parameters of what they believe is “common

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sense”.



You and your experts must drive this process using “common sense” to help them arrive at the desired destination. The jurors will quickly lose track of the technical information provided in the expert testimony, but will respond to testimony that fits the common sense narrative provided by

the attorneys.

Your case themes and narratives should address the following, as jurors are filtering their decisions based upon these considerations:

1. How does this personally affect me and my family?
 - a. Does it now or could it ultimately affect our health?
 - b. Could it negatively affect my employment or my family's livelihood?
 - c. Could it reduce my property values?
 - d. Is it negatively affecting my air, water, or soil in some way that could be harmful?
2. How does this affect our local economy?
 - a. Would a large verdict bankrupt an employer who provides jobs in our region?
 - b. Would companies be dissuaded from doing business locally? Attorneys must explicitly address these factors, because the jurors' answers to these questions will be what drives the verdict, and these will be their primary considerations when determining damages.

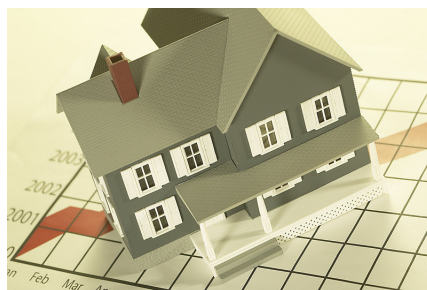
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Use Local Pricing Models: Local Real Estate Values as a Comparative Model for Cleanup Costs



Jurors want to do the right thing, and you need to give them the tools to do it. Moreover, they need to feel good about their decision, as they are generally inclined to take an action that ensures a clean, safe environment for their children and grandchildren. Many toxic tort cases are tried in economically depressed

and/or rural areas, and the venire is unaccustomed to hearing large numbers especially as it relates to property values.

Focus jurors on why remediation costs are exorbitant and inflated. You should use graphics to dissect for them the question: How it is that in a town with such low property values, where 10 acres of land can be purchased for X dollars, a one-acre "patch of dirt" would require a multiplier of millions? Put it into perspective for them. Provide cost comparisons using familiar landmarks - i.e., "The local Home Depot, that sits on several acres of land, only cost \$____. How is it that something a fraction of its size could merit millions more?" It will be hard for them to do this math, especially if they cannot be assured that their money will be used as they really intend.

In the case quoted at the beginning of this article, a three-week jury trial that ultimately went to the State Supreme Court, the plaintiff alleged that a large oil company had contaminated his property with naturally occurring radioactive materials (NORM). The jury agreed, and awarded him damages, but it was a substantial victory for the oil company, as it fell approximately \$80 million short of what the plaintiff's attorneys expected to recover.

Simplify Intellectual Ideas with Graphics

"Now how do we know that this money is going to really be used to clean up that property and not to buy a new Mercedes?" — Juror, NORM trial, post-verdict interview

Interestingly, jurors often question whether the plaintiffs will actually use any damages to clean up the community. Will the plaintiff actually use the money the jurors give him/her to clean up the property? They have no guarantee that he or she will not use it for personal gain versus the manner in which they intended.

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A defense attorney's job, and that of his experts, is to create doubt regarding the plaintiff's true motivations and the actions that he or she will ultimately take post-verdict.

Cross-examination of the plaintiff can be used to create doubt in order to limit damages, as jurors will not want to give big if they in any way question the plaintiff's true motivations.

“Even if you hadn't heard about it on TV or in the newspaper, you just take one look at those pictures, and it looked like Armageddon had come, like it was the end of the world, everything was on fire. You could see those poor people running for their lives.” – Juror, chemical plant explosion trial, post-verdict interview

In the above referenced case about a chemical plant explosion for which we worked on the plaintiff side, there was actually little evidence that any personal injury occurred. In fact, with the exception of severe facilities' damage, the case was lacking substantive elements other than evacuation, fear, and fright. The verdict did not reflect this reality, as the plaintiff's attorneys very effectively employed the use of graphics, and made it hard for the defense to rebut what the jurors had seen with their own eyes. The defense missed an opportunity to use simple but intuitive graphics to counteract the plaintiffs' graphics. This would involve showing the defense version of the same events with graphic explanation of what the plaintiffs were purposefully not showing, such as the true chronology of the events, the slow disbursement rate of the chemical, etc.

The plaintiffs kept it simple, but highly impactful. The actual explosion and ensuing chaos was relatively short-lived as the fire was out in less than an hour, and contained on-site. However, the plaintiff's attorneys showed so many dramatic, pictorial versions of the fire, smoke, and flames from so many different angles at various locations at the plant, the impression was given that this was something on par with the California wildfires that went on for several days, destroying thousands of acres, and driving entire communities from their homes. They then made the case that the chemical released was very bad, and very dangerous. They used a simple chemical molecule and had their expert extrapolate how harmful it could be and its potential to be dangerous. He did this with hypothetical scenarios that were wholly inapplicable to this case.

When the Defense expert's highly intelligent and rational explanation involving two days of testimony outlining how the dose and exposure levels required to achieve the plaintiff's scenarios did not exist in this case, it was all for naught. The jurors had already made a critical “common

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sense” connection based upon the visual graphics and the chemical’s potential to do harm. In their minds the “dose” was everywhere and the plaintiffs will be lucky if they do not develop some horrible cancer at some point in the future from this very dangerous chemical. The pictorial

graphics created an atmosphere of horror, and subsequent outrage permeated the courtroom. Additionally, the educational graphics gave the jurors ammunition in their war against this reckless company that had a total disregard for plant safety whom they came to believe was manufacturing very dangerous chemicals anyway.

Simplify the complex by using pictures, high quality graphics, to help jurors understand concepts like pathways of exposure, dose, contamination, and other key constructs that are critical to your case. Your graphics should be case-specific and integrative. The graphics will be your teaching tools, and you will be constantly referring to them throughout the duration of the trial. They should communicate concepts that may be difficult to grasp when presented verbally, but given this visual support jurors will be able to process and understand your message. When telling your story verbally and visually, be sure to use consistent verbiage throughout, and reinforce your themes with simple analogies and even taglines. These are the words that will be used by the jurors during deliberations to speak to each other and make their arguments to fellow jurors. You need to provide them with their verbal arsenal.

Desensitize Jurors to Chemicals:

“Who knows what’s going to happen since they breathed in this stuff? Didn’t you hear the man say it could cause cancer?”- Juror, pesticide case, post-verdict interview

Your experts are the best vehicles for these simple but profound teaching moments. Help the jurors cut through the plaintiff attorney’s fear mongering - “This mass exposure, even in the most minute dose, has poisoned the town’s citizenry, probably for generations to come, and no one can be sure what the long term effects to this population will be.” Have your experts physically show by way of comparison, even with a simple demonstrative aid supplemented by the relevant graphic, how exposure to the identified chemical could not have caused the alleged harm. Reinforce this message with simple graphics, a single slide with simple pictures that depict

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examples of everyday items containing the same chemical routinely found in the jurors' homes and offices that they would never consider harmful or in any way dangerous.



A good defense attorney will counter emotional and inflammatory language with neutral verbiage. The plaintiff's attorney will employ language that is meant to evoke very powerful, derogatory images of horrible things yet to come. Use consistent language that is very

simple, benign, and matter of fact. Do not allow yourself to be led by the plaintiff attorney's vocabulary. At trial, a staff member should make note of all of the volatile language (contamination, highly-polluted, devastated, irreparably damaged, etc.) and its context, and you should seek to consistently neutralize this within the same context. A "mass explosion" is merely "the occurrence" or "the event".

Demonstrate a Need for of Benefit from the Chemicals

Reinforce how the chemical itself or its derivatives serve a purpose for the jurors in their daily lives. Remind them that, as with most things in life, there are some trade-offs. Oil is an obvious example as it is difficult for most jurors to imagine their lives without a car, despite the environmental impacts. Air-conditioning, plastics, cell phones, medications, toothpaste, etc., are all examples of chemical-containing items that people would be very hard pressed to do without.

Give Jurors the Task to Guide the Community

It is your job to chart the jurors' course, and you must be the calm in the storm. It is imperative that you not engage in the emotional atmosphere that the plaintiff's attorney is attempting to create, as he/she knows that once this gains momentum, it will be difficult for you to level the playing field.

You must be personable yet logical, and a firm yet friendly voice of reason. Jurors are looking for guidance. Show them where to go and how they should get there.

For more information regarding DOAR's approach to trial strategy consulting, please visit us at www.DOAR.com or call us at 800.875.8705.