

COVID-19 Jury Focus Group Insights

IMS COVID-19 Research Insights Series:
*Threats, Opportunities, and Strategies for the
Commercial Litigation Community*

**Your jurors have changed.
Your trial strategy should, too.**
We can tell you how.

The COVID-19 pandemic has fundamentally changed the world. Assumptions that we had six months ago are being challenged and opinions are continuously shifting. Community views about COVID-19 will undoubtedly affect the potential jurors who will comprise the venire at your next trial.

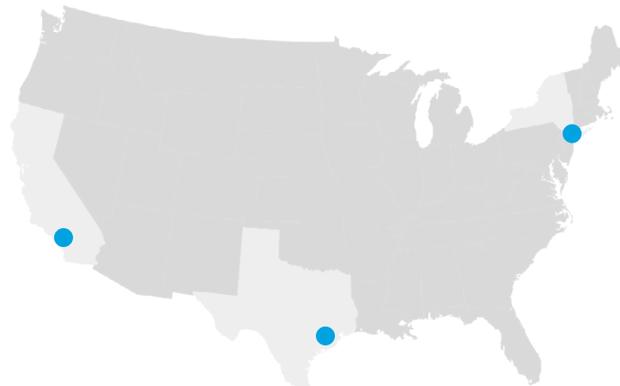
As the pandemic unfolded, IMS Consulting & Expert Services began conducting extensive jury and community attitude research to help our clients gain meaningful insights for their cases and practices. This summer, we conducted twelve focus groups with eighty-two mock jurors in representative venues across the country. We followed that research with surveys of almost 500 respondents in Chicago, Houston, Los Angeles, and New York. As you would expect from us, we are not yet done, our efforts are ongoing and will continue throughout at least the end of the year.

We learned how COVID-19 is affecting juror attitudes, including what concerns them, who they trust, who angers them, and whether parties to future litigation have done enough to avoid liability or to mitigate potential damages. We explored the ways in which their views have changed over time, their feelings toward their fellow citizens who suffered losses, their stances concerning how corporations should be responding, which entities they felt should be held responsible in various situations, and whether they believed those in positions of authority could be trusted. Our research data revealed quantified data on juror attitudes, freely-expressed opinions, and the general questions they asked throughout the research exercise.

In addition to collecting broad viewpoints and detailed demographic data, we explored mock jurors' thoughts on seven different industries, including insurance, nursing homes, and cruise lines. We selected these industries both to obtain data specific to each of them, and because investigation into each of these industries promised to reveal participants' underlying views about personal and social responsibility.

To help our clients navigate the complexities associated with cases and trials amid COVID-19, we have published and will be continuing to publish a series of insights developed through this and related research. An overview of our research and practical recommendations for integrating these findings into your practice can be found through our [COVID-19 Client Resource Hub](#).

Using the results of this research and our experience from more than 20,000 cases and well over 1,000 trials, our advisors have developed recommendations for clients in the areas of trial graphics, case strategy, expert witness recruitment and preparation, and jury consulting. We also invite you to contact us directly should you wish to discuss implications of our findings for your practice or a specific case.



3 Major venues

7 Litigation types

12 Focus groups

82 Mock jurors



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The Letter of the Law Amid COVID-19: Has the Pandemic Changed the Way Juries Use Logic And Checklists to Make Decisions?

By Clint Townson, PhD, Britta Stanton, JD, and G. Christopher Ritter, JD

Social science tells us that individuals process information in distinct ways, informed by their personality, background, perspective, and core values, among several other factors. One approach to processing information is identified as “checklisting,” which is the tendency to adhere to a claim’s technical and legal requirements while eschewing sentiments and emotions.

As the COVID-19 pandemic has unfolded, IMS has conducted extensive research to help clients gain a clear view of the context surrounding their cases. While the pandemic has implications for all juror types, it has presented an especially interesting dilemma for these “checklisters” who deploy highly-logical decision maps and mental checklists to make decisions.

When serving on a jury, checklisters tend to be tightly-bound to the letter of the law, the specificity of jury instructions, and the hard facts of a case. However, these are challenging and unprecedented times. The pandemic has wrought unparalleled hardship for communities, and its impacts have exceeded the preparations of most businesses. For some cases, plaintiffs will have suffered physically as well as financially.

Are these factors enough to push a checkliester to think beyond the letter of the law? Recently, we conducted a series of focus groups across three venues, and uncovered important insights to help answer this question.

The Makeup of a Checklist

Checklisters tend to focus on the technical legal requirements of a claim, rather than the sentiments and emotions a case offers. They are interested in definitions relating to various elements of a claim and tend to focus on the court’s jury instructions. At a cognitive level, they attempt to think carefully and rationally about the evidence presented, and then they compare their assessment of the case facts with the legal standard. They attempt to avoid relying on emotion. They try not to decide which side they “want” to win, but rather, see which legal elements are or are not met, then determine who is “legally entitled” to win. The legal elements that constitute something like negligence is important for them, as they compare and contrast their knowledge of the case to this standard. Consider the following statement from a Houston checkliester, commenting on a business interruption claim:

“[The lost revenue is] still not the insurance’s fault or responsibility; even through unprecedented times that we’ve never seen before...It’s still not in the policy and it’s not the insurance [company’s] fault. You still have to maintain within these laws. If it’s not written in there, [you can’t claim it.]” – Mateo, Houston

Practice Tip:

Checklisters can be persuaded by demonstratives like annotated jury instructions or decision flowcharts.

For this reason, checklists are often defense-oriented jurors. They rigorously scrutinize the evidence and are frequently swayed by arguments that focus on the legal arguments rather than emotional factors. Checklists generally do not waver from the legal elements when faced with plaintiff appeals to sympathy or out of concern for the plaintiffs' welfare. Even in instances of callous or calculating behavior by a defendant that undeniably harms a plaintiff, these types of jurors will focus only on whether the law has been violated.



Checklists can become powerful and influential jurors, as their preference for logical argument arms them to argue thoughtfully and persuasively. Since they tend to be bound to jury instructions and the law, they may prevail against emotionally-based opinions in the deliberation room. More neutral jurors are often drawn to their side, because the checklist's arguments are sound and match the evidence.

Additionally, checklists are often very dogmatic and resistant to others' appeals. You can see this at work in the film *12 Angry Men*, when Juror Eight holds tightly to the concept of reasonable doubt. In the movie, this juror is critical of the evidence – even to the point of swaying others, as checklists tend to do.

COVID-19, however, presents a brand-new form of litigation in a post-pandemic world. Plaintiffs' alleged damages have not been caused in 'standard' times, and pre-pandemic 'standard' law hasn't addressed the havoc wreaked by the virus. Under these circumstances, will a checklist still resist appeals to sympathy?

A Checklist's Perspective on COVID-19 Litigation

Our recent focus group research featured several checklists in each of the venues we studied. Unsurprisingly, they were quite vocal during group discussions. Their responses to the various case narratives were nuanced and largely based on the domain of the case vignette.

One such vignette is a business-interruption insurance claim, consistent with typical checklist behavior, several of those juror-types were wholly dismissive of business interruption insurance claims related to COVID-19. Digging deeper, we found the reason for a checklist to dismiss the claims was centered on the policy language. They zeroed in on the specific policy language involving "physical damage or loss," which became the lynchpin of their argument in favor of the defense. Several asked for clarity in defining these terms.

"This [case is] kind of difficult because I guess the policy says 'physical,' but you can also argue what 'physical damage' even means." – Alana, Los Angeles

"Have [the insurers] defined what 'physical loss' means? Is that physical structure or physical [loss] in your revenue, which would mean physical bodies?" – Sally, Los Angeles

A Houston respondent described the language of the policy not only as instructive to determine a legal claim, but as the basis for a moral decision that the insured knew what he or she was buying:

"I'm really big on definitions and making sure that everybody understands what a specific word or wording means. So when things are spelled out and clarified and the loss of understanding is limited, then it does change things...everybody needs to be on the same page in their understanding of policies and insurance."
– Christopher, Houston

Practice Tip:

Arm checklists on your jury with the language of your contract or policy. Consider giving them a handout to annotate.

Practice Tip:

Find a list of policies, regulations, even guidelines that a defendant violated and tie damages or harm to those violations.

Checklisters will point to the specifics of a contract or insurance policy and create arguments that offer fellow jurors structure; they will use legal rationale to guide the jury's decisions.

In an insurance case, this behavior most often favors the defense. A plaintiff policyholder's only recourse is persuading a checklister that even the strictest interpretation of the policy would include his claim, e.g., lost revenue due to government-mandated shutdowns. But these types of jurors cannot be expected to yield much latitude in their belief about coverage based on the policy language.

Still, there are case-types in which checklists favored the plaintiff. In our vignettes, checklists tended to favor plaintiffs in highly regulated fields. For example, they viewed nursing homes and employers as liable in the event of COVID-19 infections when the harm was a product of violating government standards or regulations for cleanliness or hygiene.

Specifically, most respondents held nursing homes to high standards, binding them to strict protocols for patient care. Several respondents even believed nursing homes should follow the same protocols as hospitals. Checklisters notably tended to view even minor violations of protocols and standards as a failure by the nursing home. That failure to follow the proper steps to adequately address the virus equated with likely liability for a nursing home.

"I think the family is justified to bring that lawsuit against the nursing home. The industry has standards and OSHA has protocols in place. [The government] sends people from the Department of Health to go and inspect whether the standards are maintained. The context that you gave us, you just told us that there have been lapses. I think masks and gloves are definitely an essential part of daily activities in the nursing clinic area. If they were unable to provide that, or if members or employees were not using it, then they definitely have to take the burden on themselves." – Simar, New York City

In a related domain, our employment vignette described how several employees had become infected with COVID-19 at a meatpacking plant, and that one worker had died. In our scenario, meatpacking plants were subject to the same type of OSHA protocols in terms of cleanliness. Checklisters viewed violations of these standards as causally associated with COVID-19 infections among workers and believed the employer should be liable in the event of a lawsuit. Referring to these OSHA protocols, one Houston respondent said the following:

"The employer is responsible. They're supposed to have a plan in place [in terms of hygienic standards]." – Javier, Houston

In many ways, checklisting jurors will seek out rules, regulations, and standards to guide their opinions of a given case. The key for counsel to persuade these powerful jurors is to identify the rules that will be probative in the eyes of a checklister, and use that type of evidence to powerfully argue their position.

Practice Tip:

Be prepared to set up "safety rules" during discovery and show they were (or were not) followed.

Jury Considerations

Do you want checklists on your jury? You may.

But first, you must identify those jurors in the venire and determine the best approach to appeal to them. Recall that these jurors are frequently formidable and persuasive in deliberations, such that even one checklister on your side can have huge implications for your chance at victory. The process of identifying them is best accomplished through a combination of several jury questionnaire items, voir dire, and background research.

IMS ExpertServices is trusted by clients at the country's most influential law firms to assist with jury selection. Our methods can help with the drafting of effective juror questionnaires to distinguish checklister traits, and we offer guidance during voir dire to identify checklisters in your venire panel.

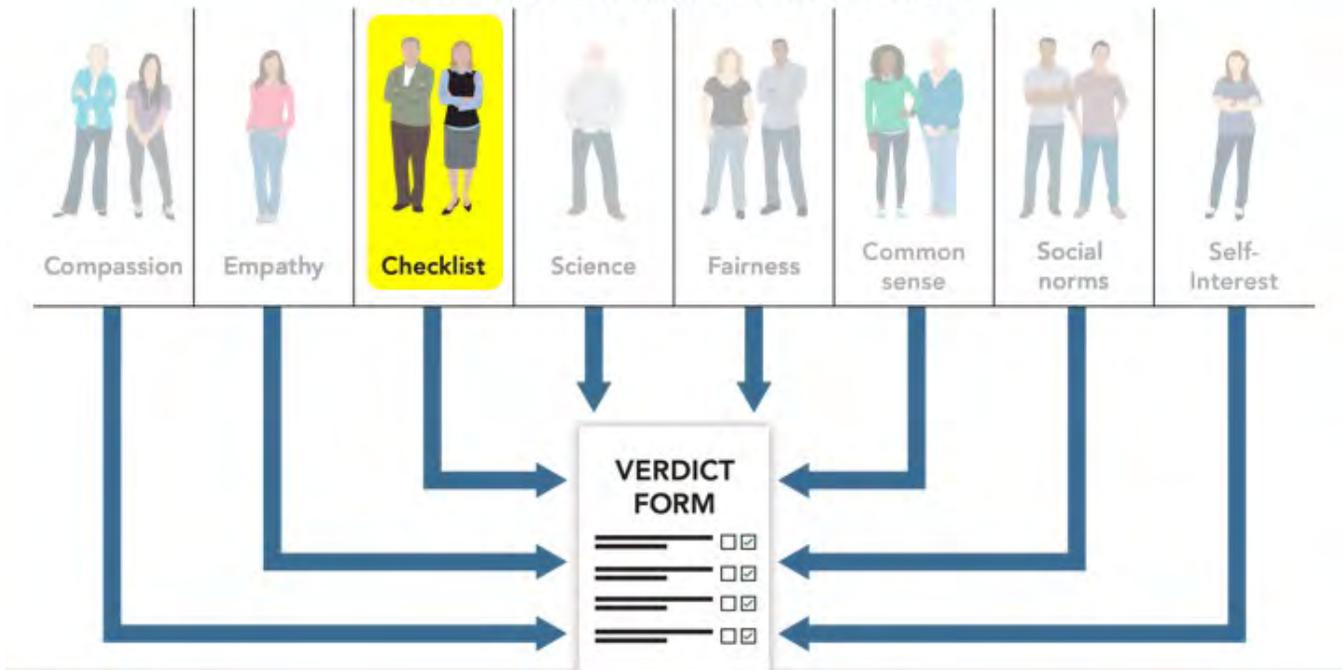
In addition to jury selection, another critical task is determining a strategy to best persuade these jurors. Since a checklister will cling to the written language of a policy or regulation to guide their decision-making, the best tactic may be to identify the most relevant standard for a given case and embrace it as the "theme" of the case. From the defense's perspective, this may involve touting the specific language of a policy or illustrating the jury instructions and describing the case as "simple." From the plaintiff's perspective, this might take the form of explaining the regulations that a corporation is bound by and arguing that violations have occurred even under the least rigorous interpretation of the regulations.

These tactical considerations may feel natural and instinctive to you. In fact, most attorneys are checklisters themselves.

Checklisters typically are among the most crucial jurors to consider during the course of a trial. They will be even more important post-pandemic to balance the raw emotional appeals that will be easy to leverage when talking about the destruction wrought by the pandemic. You may need checklisters to carefully scrutinize evidence and use the law to guide their opinions of a given case. Persuading them often pays dividends to attorneys, and COVID-19 litigation will be no exception. Our research indicated that checklisters view the different types of lawsuits in very nuanced ways, and the understanding of their perspectives will be crucial to prevailing in such litigation.



Core Values Used by Jurors to Reach Decisions



Learn more about additional insights related to our research through our [COVID-19 Client Resource Hub](#). Contact us today to discuss the needs of your case.

Jury consultants who contributed to the research and findings discussed in this report include:



G. Christopher Ritter, JD, Senior Strategy & Jury Consulting Advisor

Chris is a highly sought advisor for top clients seeking guidance and perspective on case theme and persuasion graphics development, witness preparation, as well as focus group and mock trial research. Chris graduated from the University of Chicago Law School and actively tried cases for nearly fifteen years. He served as adjunct professor of law at the University of California, Hastings School of Law for twelve years, teaching courses in trial practice and evidence. Chris has advised clients for more than twenty years on over 500 cases throughout the country, with more than 100 mock jury and focus group projects. He is a prolific writer, drawing on this depth and breadth of experience to share best practices and guidance for clients and peers. Chris's written works include three books published through the American Bar Association, and dozens of articles and case studies on topics including persuasion strategy, trial graphics, witness preparation, and trial war room management.



Carolyn Spencer-Mork, Senior Jury Consultant

A jury consultant for well over a decade, Carolyn has consulted on over 250 cases throughout the country. As a socio-cultural anthropologist, she understands methods of communication, jury psychology, and group dynamics. She offers expertise in the areas of mock trial and focus group jury research, theme development, trial strategy, witness preparation, and voir dire and jury selection methodology. Carolyn is particularly skilled at designing jury research that helps clients gain strategic advantages early in the discovery process. Whether research involves testing potential witnesses in order to craft an effective company story, persuasively contextualizing damaging emails in advance of depositions, or developing an effective case theory to guide discovery, Carolyn helps her clients leverage early insights. She holds a master's degree in anthropology and is fluent in Russian.



Marion Stampley Jr., JD, Senior Jury Consultant

Marion is a jury consultant with expertise in focus group and mock trial research. He has worked on over 300 mock jury and focus group projects throughout the US and Canada and has extensive experience in the areas of research design, witness preparation, selection and management of shadow juries, jury selection for trial, and administration of post-trial interviews. Marion has managed and staffed several multimillion-dollar ERISA, trade-secret, intellectual property, and construction lawsuits, and he has also been a speaker for several CLE conferences and an adjunct professor at multiple universities. He holds a master's degree in communications with specializations in mediation and conflict resolution, along with administrative legal training, and a law degree.



Clint Townson, PhD, Jury Consultant

With a PhD in the field of communication, Clint knows how to deliver crisp, effective courtroom messages. His work as a university instructor enabled him to develop an adaptive instructional style which he now uses when he prepares different types of witnesses for trial. During his training as a trial consultant, Clint became skilled at evaluating mock trial data and identifying the traits that are predictive of verdict outcomes. Through collaboration with professors and fellow graduate students, he learned to apply quantitative findings to practical outcomes. Currently, Clint uses his social science background to help develop sophisticated research approaches, valid and reliable results, and theoretically-grounded strategic recommendations.

Strategy Advisors and Trial Consultants who contributed to the research and findings discussed in this report include:



Jason Barnes, Senior Strategy Advisor

Jason Barnes is a trusted senior advisor to the firm's top clients. A pioneer in the field of trial graphics since 1990, he helped to transform the standard of courtroom presentations from hand-crafted poster board displays to modern digital technologies. With three decades of trial experience, encompassing over 100 trials and more than 500 cases, Jason has a deep understanding of trial preparation and practice. He has a background in engineering, computer science, and graphic design and has contributed to books, presented CLE classes, and provided guest lectures to law school students. Jason serves as associate editor and is a frequent contributor to *The Jury Expert*, a publication of the American Society of Trial Consultants. Today, through his advisory work and thought leadership contributions, Jason continues to shape how technology and graphics are used in the courtroom.



Britta Stanton, JD, Strategy Advisor

As a former trial attorney, Britta pays rigorous attention to details and reviews case issues with laser-like focus. An experienced trial lawyer with nearly twenty years of practice in state and federal venues, and now as a trusted strategy advisor with the company, Britta has advised clients on hundreds of cases and trials. Britta has always been fascinated by the ways people are persuaded, develop beliefs, and make decisions. Thus, at the University of Texas, she chose to study advertising. She went on to Baylor Law School where she learned to persuade judges and juries as a trial lawyer. As an attorney, Britta has served as faculty for the National Institute of Trial Advocacy and worked with mock trial students to teach both law students and young lawyers the art of advocacy. Today, she helps the firm's clients explore how to best persuade juries using everything from trial technology and demonstrative evidence to effective witness preparation.



Jeremy Young, Trial Consulting Advisor

Over the last eighteen years, Jeremy has managed trial strategy development and graphic production for some of the country's highest-stakes trials. He has collaborated with trial teams on over 300 matters in virtually every area of litigation. Recently, Jeremy led our team's efforts on two closely watched trials; FedEx's defense of a \$1.6 billion criminal drug conspiracy case—a case that was abruptly dismissed shortly after opening statements—and the largest ever auditing negligence case to reach trial, where our client sought to recover \$5.5 billion, plus punitive damages, and received a settlement shortly after resting their case.

Jeremy has worked on numerous high-profile antitrust matters and led collaboration with the SEC on more than forty cases, including a trial that resulted in Waste Management's former CFO being found liable on all sixty counts of having falsified company accounts in a \$1.7 billion accounting fraud that remains one of the largest in US corporate history. Jeremy also assisted with the successful criminal prosecution in the 2001 San Francisco "dog mauling" trial.

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