
Probing the Mind of a Mold Juror

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Over the past decade, the volume of litigation regarding hazardous mold and “sick building syndrome” has increased exponentially. The prominence of mold-oriented litigation has not escaped the watchful eyes of the media and the public. The public has received a steady diet of news stories in print and broadcast media that portray ever-increasing concern from government officials and health care providers about the potential adverse health effects of mold. In response to this media hype and advertisements that claim indoor air can be significantly more polluted than outdoor air, consumers scramble to buy air purification products for their homes.

The experiences and attitudes that accompany jurors to the courtroom have a substantial impact on their verdict decisions and damage awards. The fact that mold has been labeled “the new asbestos” only fuels the public’s paranoia about this invisible, odorless health concern. This moniker alone is likely to provide a sufficient psychological push to move jurors off-center and align them against defendants in mold litigation.

Unlike jurors who served on asbestos cases, jurors sit-

ting on mold cases will be affected by media exposure surrounding asbestos litigation. Moreover, the advent of the SARS epidemic is likely to compound jurors’ fears regarding invisible airborne contagions. Media coverage regarding the mounting reports of other respiratory illnesses (such as asthma) over the past decade position jurors hearing mold cases in a significantly different psychological posture than jurors in asbestos cases. Understanding how jurors’ preconceptions about mold affect their information processing during trial is an essential task for the trial team. The most effective strategy to understand how jurors process information in mold cases is to conduct pretrial jury research (e.g., community attitude surveys, focus groups, and mock trials).

Juror Psychology

The Courtroom Scenario

Jurors in mold cases are unwilling participants in a not-so-dramatic story. Their presence is compelled by the courts; in return, they receive an inconvenient schedule, uncomfortable chairs, and very poor pay. That is not an

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ideal foundation to establish a persuasive relationship with jurors. Moreover, jurors enter the courtroom with an unrealistic sense of how a case will unfold. Their expectations have been shaped by their exposure to television courtroom dramas such as “Law and Order” and “The Practice” and by movies such as “Class Action” and “Erin Brockovich.” The courtroom is a novel social environment for most jurors, who are thrown from their daily routines into an extremely ritualized setting for which they have no real comparison. Rather than feeling like the triers of fact, jurors often feel like neglected spectators who are forced to sit on the sidelines of the courtroom to listen to completely different versions of the same events.

Jurors are seldom prepared for the decision-making task that confronts them. As a result, they must work through various psychological stages until they can embrace their role as triers of fact. And while some jurors are able to accept their role as decision-makers, many never achieve a comfort level with this role because they are not able to overcome their aversion to conflict.

One reason why jurors experience anxiety in their role as triers of fact is that they do not feel qualified as experts regarding the issues they must decide. Jury research provides invaluable insight as to the best strategy for making jurors comfortable in their role as decision-makers. To be sure, this process involves more than a few comforting words from counsel.

Part of the task of making jurors feel comfortable as decision-makers can be accomplished by recognizing that they are cognitive misers. Because a mold case is not likely to include “sexy” elements that pique jurors’ interest and enhance their desire to monitor the proceedings closely, they are unmotivated to devote substantial cognitive energy to understand the underlying issues. Jury research allows the trial team to understand how best to present their case. Whereas attorneys often want to present highly detailed evidence that resembles the listings from the New York Stock Exchange in the Wall Street Journal, jurors would much rather process a “USA Today” version of the case.

Jurors’ Mental Processes

The preferred organizing scheme (cognitive map) jurors use to understand a case is to develop their own story. Because jurors develop “their story” very early in the case, opening statements exert an inordinate impact on jurors’ evaluation of the case as a whole. The stories that jurors conjure can be based on the lifetime of experiences and attitudes they bring to the courtroom; jurors use these as their filter to understand the story of a case. We now present a few of our findings from our national research on ju-

rors’ preconceptions regarding mold.

In terms of mold litigation, jurors will rely on any information available to them, no matter how relevant or reliable this pre-existing “database” may be. While some jurors may have thoroughly researched the issue using independent and reliable sources (e.g., when purchasing a home air purification system), other jurors may base their opinion of the health consequences of mold on office scuttlebutt after their place of employment was diagnosed as a “sick building.” Still others may base their opinion solely on information from media sources (e.g., advertisements for air quality products or news stories). Finally, the only thing some jurors may have heard about mold (while chatting over the fence with their neighbor) is that it is “the next asbestos.”

Despite jurors’ experiences and attitudes regarding mold, they tend to evaluate information and make decisions very quickly based on scant information. Jurors evaluate the veracity of a story after hearing only a fraction of the information. In a matter of minutes – or even seconds – jurors form their evaluation of a witness, evidence, or argument. In addition to their experiences and attitudes, jurors rely on heuristics to form their evaluations of new information.

Heuristics refer to the “cognitive rules of thumb” jurors follow when they evaluate information¹. Rather than focus their attention on the details of a message (systematic processing), jurors utilize heuristics to minimize their cognitive workload. An example of a cognitive shortcut is the credibility heuristic: “She sounds like she knows what she is talking about, so I’ll believe her.” Another example is the representative heuristic: “If it is invisible and airborne, it must be like asbestos and therefore dangerous.” The use of graphics and demonstrative evidence in court is effective because they take advantage of jurors’ tendency to want simplified messages that require little cognitive effort.

Jurors’ Behavioral Processes

As spectators of courtroom events, jurors are not active information processors. With the exception of very few venues, jurors are not permitted to ask questions. Yet, we know from our research (especially pretrial focus groups and mock trials) that jurors have many case-related questions that are unrelated to the truncated nature of the presentations (e.g., jurors not understanding key facts and testimony). Moreover, many jurors are either unmotivated or not allowed to take notes. Jurors’ lack of motivation to attend to the proceedings renders their attention span, information recall and decisions even more significant.

Demonstrative exhibits are an effective persuasive strat-

egy to overcome jurors' "cognitive laziness" because jurors are visual learners. Due to its vivid nature, information presented in a visual format exerts a substantial impact on jurors' case evaluations. Our research has revealed that jurors often recall graphic exhibits during deliberations, while counsel's oral arguments do not enjoy the same level of recall. By simplifying the decision-making task for jurors with graphic exhibits, counsel also benefits from jurors' tendency to follow their hearts rather than the law when deciding cases. Results obtained from our national research indicate that almost half (49%) of jurors will do what they think is right, even if their decision runs contrary to the judge's instructions. In short, although jurors may appear irrational to counsel when deciding on a case, there is a psychological method to their "madness."

Prevailing Attitudes Regarding Mold

Jurors' awareness and attitudes will evolve as news stories related to the health consequences of mold proliferate in the media. Included in those news stories will be jury verdicts and damages awards from trials across the country. Mold claims have jumped from about \$8 million through the first quarter of 2000 to about \$94 million through the present. And jurors are notorious for using previous damage awards as a benchmark (or "anchor") for their verdicts and damage awards.

In addition to the recent surge in insurance claims, the economic windfall enjoyed by the air purification industry is evidence of the public's growing fear over the health risks posed by exposure to mold and other environmental contaminants. A recent study by the Fredonia Group projects that sales of purification systems will grow 5.6% annually to \$3.5 billion by 2006. While other industries are suffering record losses from a sagging economy, manufacturers of home and office purification systems are reaping the benefits of the public's paranoia.

The Fear Factor

Like asbestos fibers, mold spores are invisible and odorless airborne particles that pose a health threat to humans through something so basic and necessary as breathing. Health threats that are not detectable by the human senses automatically arouse fear in the public, and fear is a powerful emotion that can be extremely difficult to overcome. (It is beyond the scope of this paper to detail jurors' psychological reactions to fear-arousing messages.)

The public's fear of mold is activated in part by their perception that they have little to no control over the invisible airborne spores. Although consumers are buying air purification systems at a record pace (which may reduce the problem), air purification is no panacea. Repeated state-

ments from the government and "experts" that there is no known safe level of exposure to mold ratchet up the public's fear and uncertainty surrounding mold. Labels such as "toxic mold" serve only to heighten the public's anxiety over the risk of exposure.

That the U.S. Environmental Protection Agency has intervened with published guidelines for dealing with mold problems only lends credibility to jurors' perceptions that mold poses a serious risk to human health. Jurors generally perceive the federal government as an independent "expert" with no vested interest in the outcome of mold and sick-building litigation. As a result, jurors are likely to perceive the government's involvement as the official word that mold poses a genuine threat to human health, which in turn reinforces plaintiffs' claims.

Jurors are readily able to identify with plaintiffs in mold cases. Jurors own homes, live in apartments, and work in office buildings that could be infected by hazardous mold. Jurors are likely to perceive that victims who live in apartments or who work in sick buildings have little to no control over the quality of their indoor air. Although jurors may perceive that homeowners can exercise more control over indoor air quality than tenants and employees in sick buildings, they are unlikely to believe that a person should have to go to extraordinary lengths (i.e., to make a substantial investment in an air purification system) to ensure the quality of the air in their home.

Homeowners sitting on a jury do not want to be in the situation of the plaintiffs: Being forced to make a choice between the risk of exposure to toxic mold and diverting substantial sums of money from necessary family expenses to air purification systems that may or may not ameliorate the problem. Whether the danger is real or imagined, this uncertainty of exposure to an undetectable contagion activates jurors' fears.

The Dangers of Mold

The danger associated with exposure to mold does not have to be scientifically verified in order for jurors to side with plaintiffs. It is a small psychological leap for jurors to extrapolate from a few cases that there is a link between exposure to mold and illness. Again, jurors' perceptions of health hazards are affected by the media. The availability bias exerts a substantial effect on how jurors perceive the relationship between a potential health hazard and the danger posed by that hazard.

The availability bias refers to how an individual's attitude is affected by the ease with which information is recalled. When forming their attitudes, people rely on information that is most easily recalled. Due to repetition and the

vividness of the media, news stories about mold and sick buildings often create an unrealistic link between health hazards and disease. This effect is best illustrated by the American public's fear of flying. Despite the fact that flying is clearly safer than travel by automobile, a substantial percentage of the public fears flying more than driving. This is due to the sensationalistic coverage of air crashes, though such accidents occur very rarely. The events of 9-11 have served to heighten the public's fear of flying, though terrorist attacks in the United States are also rare.

Jurors' predispositions play a large role in their perception of health hazards. They seek out information that is consistent with their belief systems and discount information that conflicts with their attitudes. A few notable instances of a health hazard affecting a relatively small number of individuals are often sufficient for jurors to perceive a real threat; jurors extrapolate from the few relatively isolated instances to reify a potential risk into a real threat.

One of the most significant types of information jurors rely on is "other similar incidents." Jurors exhibit a strong tendency to weight the consistency of information very heavily. They are easily able to make the psychological leap from hearing about a few isolated incidents to perceive that a potential health hazard poses a reliable and consistent health threat. This effect is especially true for hazards that are undetectable by human senses. It is common for jurors to conclude that if there have been a few valid reported cases, then there must be many more unreported cases.

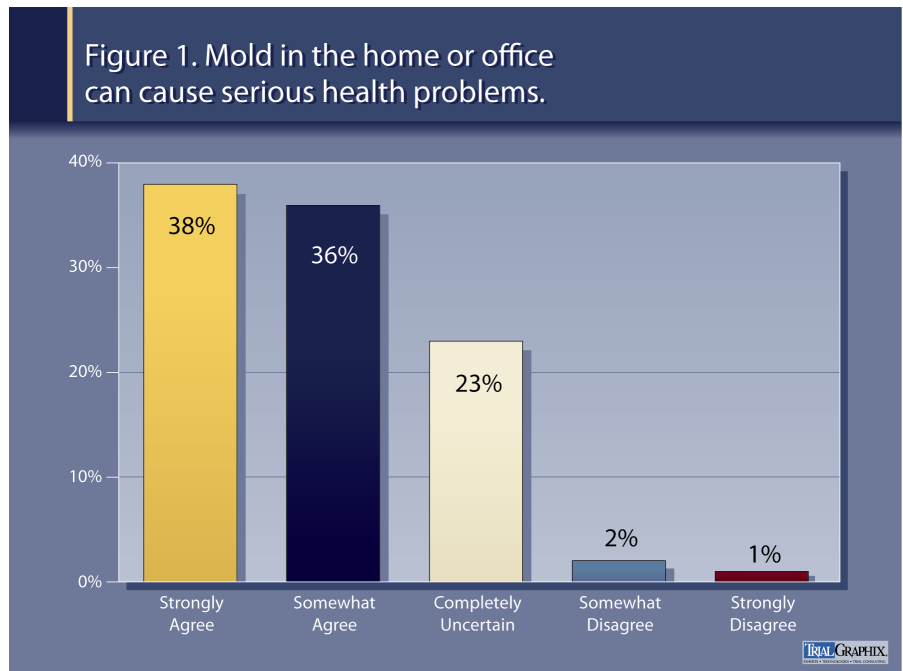
One strategic concern that has emerged from our focus group research is: "How can we create a bridge between jurors' common sense and the available science?" We know that jurors often resist pallid scientific data, opting instead to rely on their experience and pre-existing attitudes. Overcoming these attitudinal biases is possible when jurors are provided with an appropriate psychological foundation that does not threaten their attitudes. Despite any state-of-the-art facts in scientific journals linking mold exposure to health problems, jurors use their perception as the reality behind their decision-making.

Community Attitudes

National research by KrollOnTrack/TrialGraphix has provided useful insights regarding the prevailing biases and attitudes among jury-eligible adults. Over the course of pretrial focus-group and mock-trial jury research across

the country, we have interviewed over 1000 potential jurors regarding their awareness and perceptions of mold and sick-building syndrome. The participants in our research have been drawn from venues all over the country, including rural, suburban, and urban settings. It is beyond the scope of the current paper to detail all of our findings. However, we found some interesting emergent trends.

Awareness of sick-building syndrome. Across the country, 40% of the surrogate jurors in our research have heard of "sick building syndrome." However, the results of our re-



search indicate that jurors' awareness of sick-building syndrome is venue-specific. For example, in DeKalb County, Georgia (metro Atlanta), twice as many people (80%) reported hearing about "sick building syndrome" as in Cook County, Illinois (40%). This finding may be attributable to a number of high-profile news stories in the Atlanta media regarding mold.

Direct experience with mold-related illness. Although approximately 12% of the population reports that they have experienced some health problem associated with mold, there is a difference across regions. In the Southeast, for example, jurors are almost twice as likely (15%) as jurors in the Northeast (9%) to have experienced health problems associated with mold.

Perceptions of mold at home or the office. Thirty-eight percent of the jurors strongly agree that mold at home or in an office can cause serious health problems (see Figure 1, next page). Similarly, more than a third (36%) of the jurors in our sample somewhat agree that mold in the home or office can be a serious health problem. Thus, almost three-quarters (74%) of the jurors agree that mold at home or in

an office poses a serious health risk.

See Figure 1

Perceptions that employers need to keep employees safe. Again, close to one-half (41%) of the jurors strongly agree that employers need to do more to keep their employees safe from the health effects of mold in the workplace (see Figure 2, next column). Over one-third (37%) of the jurors somewhat agree that employers need to do more. In total, more than three-quarters (78%) of the jurors agree that employers need to do more to protect employees from the health consequence of mold.

Perceptions that mold causes more serious health problems than currently realized. The public's fear associated with mold is reflected in our data (see Figure 3, next page) showing that 33% of the jurors strongly agree that mold causes more serious health problems than we realize. More than one-third (34%) somewhat agree that the health consequences of mold are more than currently recognized. Taken together, these results indicate that 67% of the jurors believe that the health problems associated with mold are not fully realized.

Profiling Process

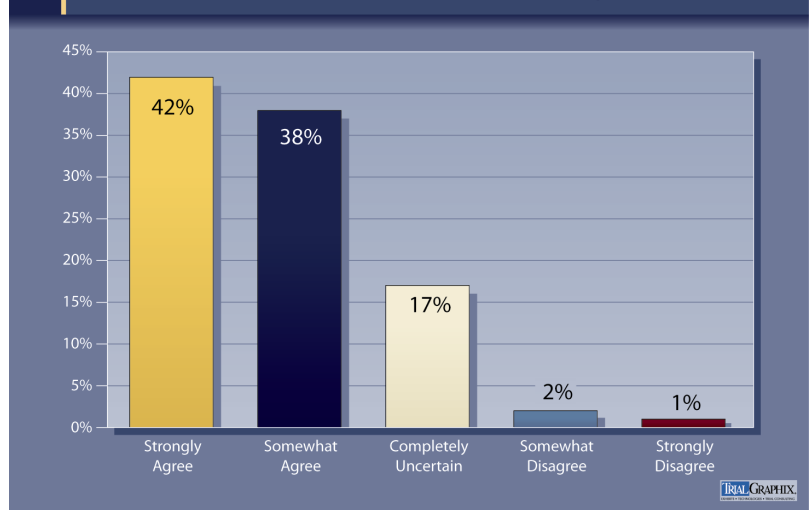
Deselection Strategy

Both authors have been asked by clients to identify "jurors we want to seat on the jury." However, the real goal of jury selection is to **deselect** the most dangerous jurors from the venue. Although our national research has revealed a number of demographic profiles, it is necessary to conduct research that focuses on profiling within the venue.

A pretrial juror profiling survey provides the trial team with invaluable intelligence on the experiences, attitudes, and demographic characteristics associated with jurors in the venue who are likely to find against the client. By interviewing a statistically significant sample of jurors in the venue, we can develop a reliable profile of the most dangerous jurors.

A second strategy is to conduct Multiple Focus Group research. Although this methodological strategy is typically not used for juror profiling, a large enough sample of surrogate jurors can provide some insight into the characteristics associated with plaintiff-oriented jurors. Multiple Focus Group research is designed to reveal the decision paths followed by plaintiff- and defense-oriented jurors. Pretrial jury research is extremely beneficial to the trial team in assessing potentially dangerous jurors. In addi-

Figure 2. Employers need to do more to keep employees safe from the health effects of mold in the workplace.



tion, pretrial research provides a psychological canvas of jurors for counsel to use as basis for painting their indoctrination of the case. Pretrial jury research reveals the key issues about which counsel must inoculate jurors during voir dire so as to minimize the persuasive effects of counsel sitting at the other table.

Summary

Our research reveals that a substantial minority (40%) of jury-eligible adults are aware of "sick building syndrome." Moreover, jurors who are aware of this idea have already developed polarized attitudes regarding the health risks posed by exposure to mold. As jurors become increasingly aware of the health hazards reported to be associated with mold, it is likely that their attitudes will become further polarized. To determine the most effective strategy to overcome jurors' biases against mold defendants, conducting pretrial jury research is a necessary first step. Probing the minds of mold jurors in pretrial jury research provides the trial team with valuable insights regarding useful trial strategies to address the psychological hurdles that the media, family, friends and co-workers have established.

References

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