

FROM VIRUS TO VERDICT HOW THE PANDEMIC RESHAPED JURY DELIBERATIONS

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The COVID-19 pandemic left no aspect of life untouched, and the legal system was certainly no exception. Just a few days before offices and courts began to close in March 2020, a federal judge allowed a juror who fell ill to deliberate via FaceTime. From that point forward, our concept of a courtroom was forever changed.

Clients, litigators, and jury consultants quickly adapted to the new world order. Whether it meant conducting depositions, mediations, and hearings through virtual platforms, delivering voir dire from behind masks and plexiglass, or discussing cause challenges with the judge and adversaries through wireless headsets, we all found a way to connect while remaining distant. At

the same time that judges, lawyers, and clients adapted, something less tangible was happening as well: group dynamics among jurors were evolving. Jurors not only distanced themselves from one another physically, but their ideologies grew distant as well.

Before the pandemic, jury consultants at Immersion Legal saw only two hung juries between 2015 and 2020. Within the first two years of returning to jury trials in late 2020, these same consultants were involved in 12 trials that resulted in hung juries and subsequent mistrials. Beyond this striking disparity, Immersion Legal experienced three additional juries who were only able to reach a verdict after receiving the court's

Dynamite Instruction or Allen Charge, and we all noticed that juries seemed to be deliberating much longer than in years past. Now, nearly half a decade later, we still haven't seen a return to the status quo, which suggests a trend that extends much deeper than avoiding the virus. This left us wondering what could be driving these outcomes.

To better understand these trends, we studied the shifting attitudes among the venire members in focus groups and community attitude surveys, and we observed how deliberations unfolded in mock jury trials – both virtual and in person. What we observed was an increased polarization of ideas and opinions. It wasn't that jurors

grew more or less anti-corporate following the pandemic; rather, they grew further apart. Among the topics we saw a greater divide were attitudes toward government regulations, opinions on personal responsibility, attitudes on employment issues and corporations, and numerous other factors that could influence case outcome.

Within the greater social context, this emerging trend is known as the tribal effect. Traditional tribalism refers to a social phenomenon in which people identify strongly with a particular group, often based on a shared cultural or ethnic identity. While this can cultivate a sense of belonging and support, it can also lead to conflict and the exclusion of non-group members. Among juries, this bond is not necessarily rooted in a shared cultural or ethnic background but rather in strongly held beliefs or ideological factors.

Many of us experienced how the pandemic exacerbated a divide within our communities on fundamental issues such as race, public health, human rights, employment practices, and politics. To be sure, this was not the first time we've seen divisiveness within the U.S., but for the first time in history, citizens had a public platform to spout these views – one that did not even require them to leave the couch: social media. Rather than going to work or school each day, taking the kids to sports practice and socializing with friends and family, we sat in front of TVs, cell phones and computers, watching celebrities, experts and politicians argue. And then we shared these things, showed our support with “likes” and commented about them on social media. It's no wonder we saw so many friendships, partnerships, and marriages fall apart during that time. It's also not surprising that this divide extended to the jury box.

Trial jurors and mock jurors alike hold strong opinions, but in recent years, rather than trying to see the other side's perspective or reach a compromise, jurors appear to be alienating themselves from those who think differently. The differences in political ideology among jurors have led some deliberations to devolve into personal attacks. For example, in two recent mock trials for cases unrelated to politics, the consultants at Immersion heard mock jurors make comments to each other in deliberations, such as, “You probably voted for Trump” and “Now I know why you're still wearing a mask.”

The increased polarization and hostility have been too much for some jurors to bear. Within a single year, our clients saw three jurors in three separate trials ask to be excused from deliberations due to the stress caused by the contentiousness in the jury

room. One juror we interviewed after the trial ended reported that the animosity he experienced during deliberations led him to switch his vote on one of the verdict questions from defense to plaintiff, but the stress of being pressured to abandon his principles led him to worry about his physical and mental health, and he ultimately asked to be excused before the jury reached a verdict.

Our divisive political climate plays a role in the fractious juries, but it is not the sole cause. While it is yet to be seen the extent to which the new administration may fan the flames of political divisiveness moving forward, social distancing played a role in the divisiveness seen to date. Prior to the pandemic, jurors frequently ate lunch together and spent sidebars and courtroom breaks making small talk. This made them more inclined to feel like “one tribe” during deliberations, encouraging jurors to respect others' perspectives. Sharing meals has historically played a crucial role in how people bond, and studies examining social interactions in a post-pandemic world have found that team members, like company employees, report feeling more connected to peers when they are able to share a meal instead of eating in an isolated environment. Beyond feelings of connectedness, the Allen Curve, a concept rooted in communication and organizational psychology, further highlights how physical proximity precipitates the likelihood that people will work together.

If proximity brings us together, it's only reasonable to assume that social distancing pushes us apart. This finding is supported by our own observations in both actual and mock trials. Jurors have largely kept their distance from one another even as mandated social distancing waned, and we aren't seeing the same sort of camaraderie among jurors as we had in past years. Further exacerbating the issue is the evolution of the smart phone. Now, when judges announce a break or sidebar, the jurors all reach for their phones in concert, as if the judge had called for a “phone check break” instead. To be fair, there were always some jurors who dined solo or kept to themselves during breaks, but they tended to be the exception. Now, friendly conversations between jurors have been replaced by mindless scrolling and endless consumption of news. And the content that jurors view on their devices simply strengthens their pre-existing beliefs, thanks to the clever algorithms that tend to feed us more of what we've already consumed.

The more distant jurors are throughout the trial, the more difficult it is to reach consensus in deliberations. We have seen, unsurprisingly, that virtual mock tri-

als, which minimize opportunities for social interaction, are more likely to result in hung juries than in-person exercises. In fact, because we typically see very little movement in how mock jurors evaluate the case before and after a remote deliberation, Immersion's jury consultants now recommend that online jury research be focused on obtaining focus group feedback from a large sample of individuals rather than trying to emulate deliberations to achieve a group verdict.

In real life, a hung jury can be seen as a “win” in some cases, but it is usually in a client's best interest for the jury to reach a resolution. There are ways to encourage basic juror interactions throughout the trial, such as asking the judge to exclude cell phones from the courtroom, for example. Another approach our teams have explored is providing lunch for the panel once they've been selected by either agreeing to split costs with opposing counsel or sponsoring it anonymously. Instead of stepping out to find a meal at the closest establishment and eating in isolation, jurors can share a meal where it is easier to build a bridge with a stranger. In short, although the COVID-19 pandemic appears to have driven a wedge between jurors, there are steps parties and courts can take to foster greater cooperation that will benefit the jurors themselves, the parties, and the overall civil justice system.



Christina Marinakis, J.D., Psy.D. is CEO of Immersion Legal Jury. She has over 20 years of experience in jury research, study, and applied practice in law and psychology. Clients have lauded Christina as an insightful, trusted advisor who is the “best in the business” at jury selection and developing pithy trial themes. Christina is inside the courtroom nearly every week assisting counsel with voir dire and has developed jury selection methods which have led to well over a hundred successful verdicts.



With over eight years of dedicated experience in litigation consulting, Juliana Manrique has assisted trial teams by facilitating mock jury trials and bench trials, performing qualitative and quantitative data analyses, and providing recommendations on case strategy and thematic framing. Juliana also assists litigators with jury selection by helping draft juror questionnaires and voir dire questions and providing in-court support.