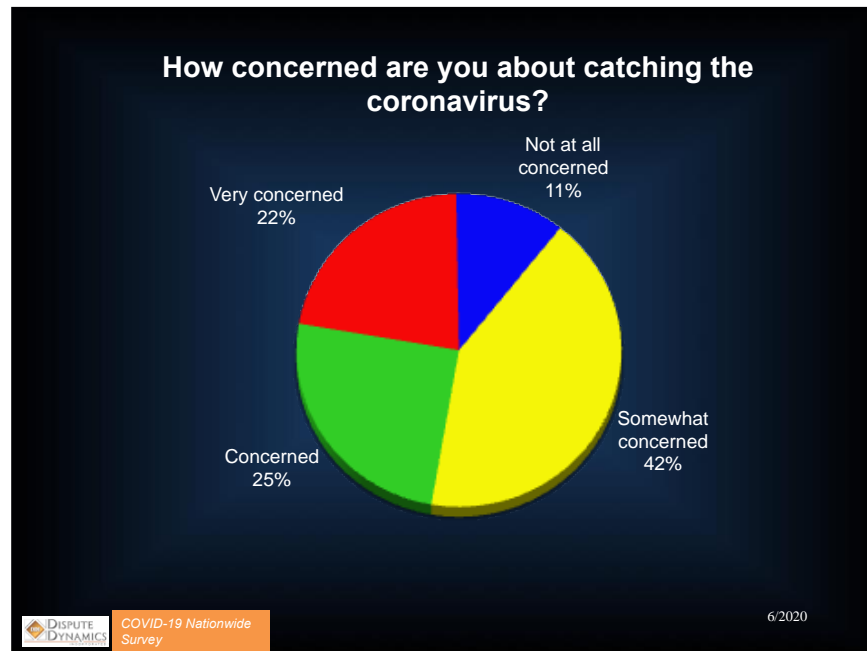


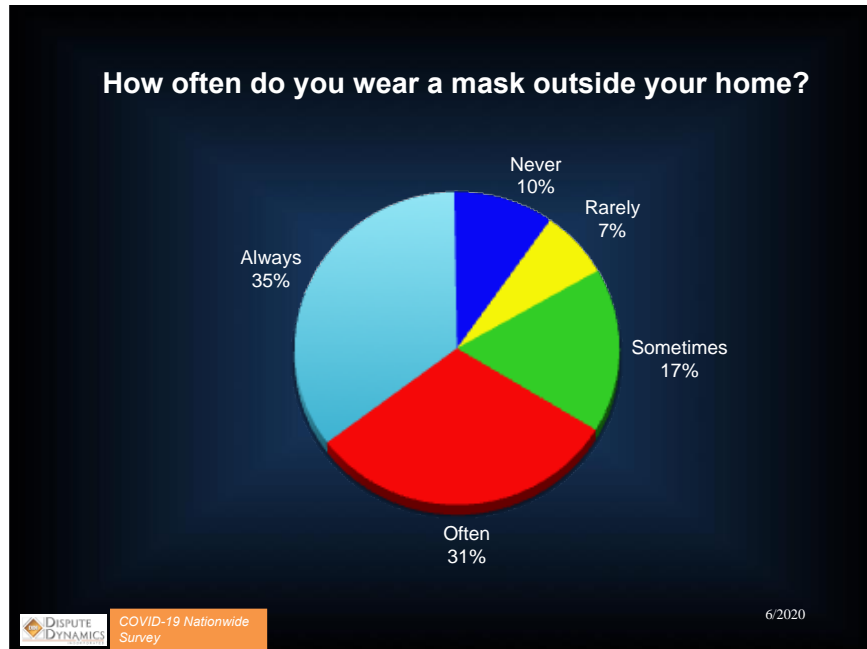
The Pandemic Has Made It Easier for Plaintiffs to Tell Their Story

In many respects, the pandemic has created the perfect storm for plaintiff attorneys, especially in employment cases. By now we are all too familiar with the plaintiff bars' use of the Reptile Theory, an approach which seeks to exploit the most basic human fears pertaining to safety. Let's take a closer look at how the pandemic has primed jurors.

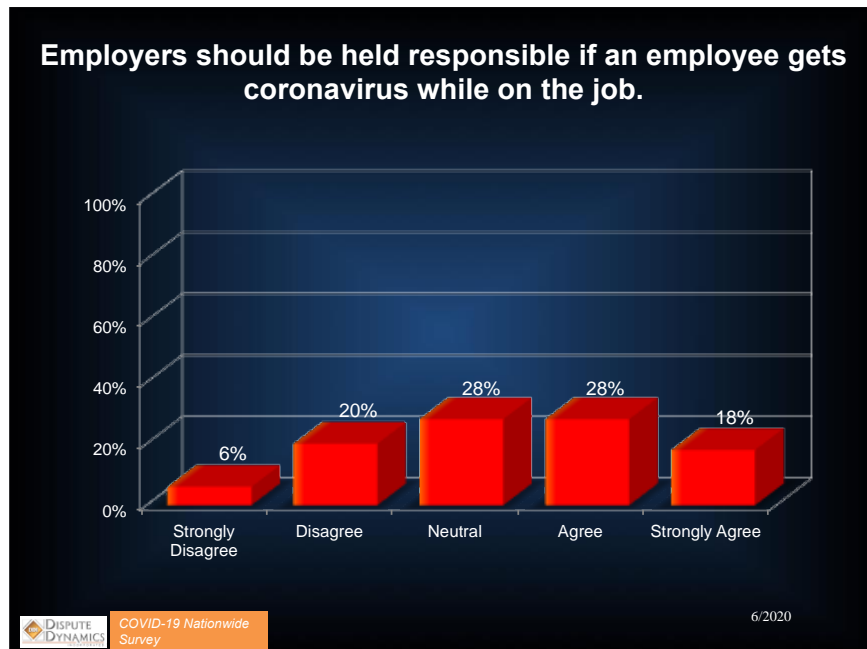
One of the most significant effects of the coronavirus pandemic is an increased focus on safety – both personal safety and safety of the community. According to a recent national survey of 321 participants conducted by the trial consulting firm of Dispute Dynamics, Inc., about half of the participants were concerned or very concerned that they would contract the virus.



For many, this concern has led to action. People have altered their behavior. Safety equipment like masks are now a part of everyday life for the first time. Indeed, over two thirds of the survey respondents claim to always or often wear a mask when they go outside.

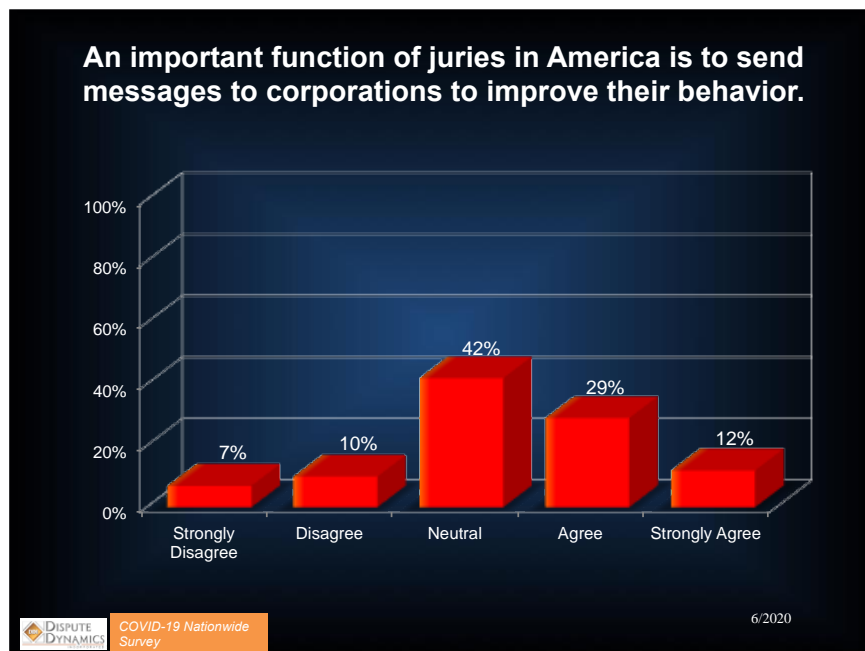


Reptile Theory seeks to make the employer completely responsible for employee safety on the job. The employer has a duty to provide a safe workplace. This begs the question: Will potential jurors be predisposed to hold the employer responsible if an employee contracts the coronavirus in the workplace?



DDI found that 46% of the participants indicated that employer should be held responsible if an employee contracts coronavirus in the workplace. Only 26% of participants disagreed with this statement.

Corporate greed is often a centerpiece of plaintiff stories, providing a selfish motivation and vehicle for enhancing damages. “Profits before safety” is a theme that regularly underlies plaintiff’s story. This plaintiff theme is being reinforced by media coverage of corporate actions, or inactions, related to the pandemic. Recent media stories have highlighted examples of apparent employer foot-dragging in shutting facilities, installing safety procedures, and providing safety equipment to employees across a wide variety of industries. But where do potential jurors come out on this issue?



In both these statements reflecting a pro-plaintiff position, participants agreeing with the statement outnumber those who disagree by approximately 2 to 1. A sizeable number of participants are neutral and, based on our experience, are willing to consider the point. Not only is this fertile ground for increasing damage awards, it creates some unique opportunities for whistleblower claims which otherwise might be difficult to prove.

What steps can the defense take to counter plaintiff's attack? Develop the case in a manner that puts jurors in the shoes of the individual defense witnesses and have these witnesses answer the questions on the jurors' minds. One of those key questions will be, "What would I have done?" By anchoring testimony in behaviors and facts that many jurors find reasonable and are willing to defend, the witness gains credibility.

Developing a palatable defense story needs to start even before depositions are taken. As early as discovery and the initial interviews of potential witnesses, it will be useful to identify and elicit information that can be used to create a vivid picture of events that is anchored in what jurors think is reasonable behavior and consistent with their own experiences. These can be expanded upon in depositions. Some topics jurors will be interested in include:

1. Were some of the upper level defense witnesses working in the same environment as the plaintiff and so personally at the same risk? What facts can be developed to counter the perception that the decision-makers are insulated and safe?
2. From whom, and how quickly did the company seek objective expert guidance? For example, point out the company had people dedicated to monitoring the CDC recommendations and had set up a procedure to implement them. Describe how the company changed procedures as the expert recommendations changed. Jurors will be asking, "What would I do?" and this goes to that point. Relying on the experts could be a theme. That may mean the "Doctors at the CDC." Jurors rely on guidance from their own doctors. (To the extent that the company decision-makers were getting mixed messages from the experts as well as the government, point out that the company took all inputs into consideration and had to wade through these mixed messages.)
3. Remind jurors that the situation was very fluid as new information and advice was publicized daily. For example, early on the experts did not encourage the use of masks whereas they are now mandatory in many situations. Explore how the short timelines and changing knowledge of the virus impacted the thought processes of the witnesses and the decision-making process. Flesh out the late nights and weekends the witnesses worked. Emphasize the stress the witness felt to get it done right. This was not "business as usual."

4. Documentation of events is likely to be incomplete and/or sloppy documentation so will need to be explained. Rather than sound defensive, it may be possible to make this a positive point by developing a theme of “acting quickly.”
5. There were shortages of masks and other equipment. What did the company do to solve this problem? Tell the story of chasing supplies, calling suppliers all over the world, creative solutions developed in-house. Mention the partial successes. While working from home can be mentioned, remember that many jurors will have jobs where that is not an option and they will want to know what was done to protect employees like themselves.
6. Bring out all the company actions that plaintiff was not aware of. Rather than attacking plaintiff directly, consider positioning plaintiff as not having all the information. Attacking essential workers is likely to anger many jurors.
7. Were employees kept informed in a timely manner? This may be an area that was not handled the best way possible given the circumstances. A thematic approach may be to say that the witness/company’s primary focus was on trying to solve problems and understand the consequences of changing events. It may be useful expand the scope of the story to bring out the need to spend time with customers and suppliers since the whole supply chain was disrupted. It should be obvious but jurors need reminding.
8. Saving as many jobs as possible is also a potential theme to develop. The company was (and is) fighting to survive. Our experience in prior crises is that jurors do not want to put jobs at risk.
9. There has been a strong movement country-wide recognizing essential workers. Point out all measures the company undertook to express gratitude and create a safe environment.

As trials restart, many jurors will continue to feel unsafe. As a result, it will be even more important than ever to build a thematic defense case anchored in those behaviors and experiences that many jurors will bring to the courtroom. Identifying those relevant attitudes and experiences early in the trial preparation process and then using them to guide information gathered to shape of the defense story will be critical.

Please feel free to contact us with any questions.

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