

“Let Patients Choose”: Jurors’ COVID-Era Opinions of the Pharmaceutical Industry – Part 2

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“Let Patients Choose”: Jurors’ COVID-Era Opinions of the Pharmaceutical Industry – Part 2

Written by Katrina Cook

Medical care should be between a doctor and a patient. Pharmaceutical companies should not have a say in what medications we are allowed to take or what medications are available to us. It should be our choice. They are taking away the choice from patients and doctors.

– a recent mock juror

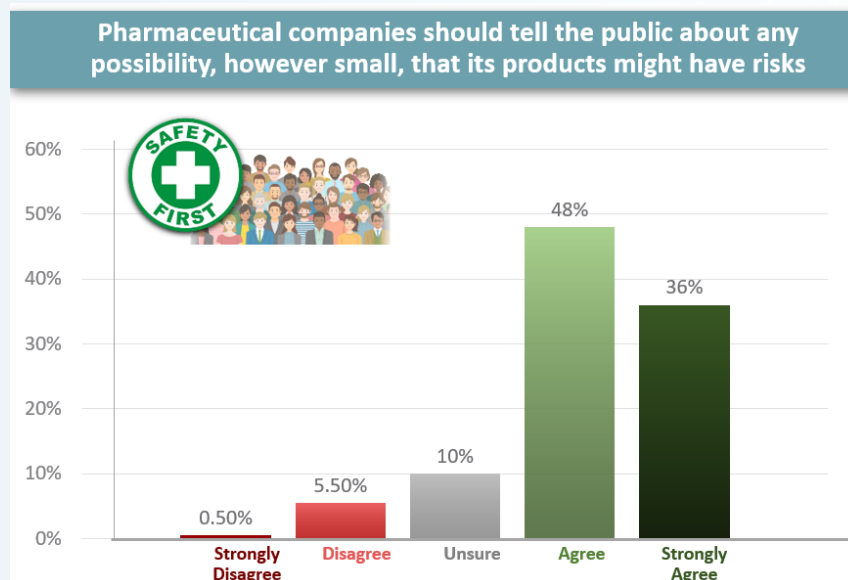
We hear it over and over in our mock trials: *Having a choice*. The ability to make an informed decision. Individuals experiencing an illness or injury enter a world that can feel out of their control. If there is no one directly responsible for their pain, they may transfer any anger they feel toward outside parties. At times, that ire focuses on the pharmaceutical manufacturers. Whether believing that drug prices are too high or that the risks of a medication weren’t adequately explained, jurors – like the one quoted above – frequently take a dim view of anything that seems to deny consumers the right to make an informed decision about their healthcare.

Part 1 of our reporting on our April 2020 survey about the pharmaceutical industry discussed jury eligibles’ overall views and distrust regarding pharmaceutical companies. Now, Part 2 will address our findings on jurors’ expectations for the

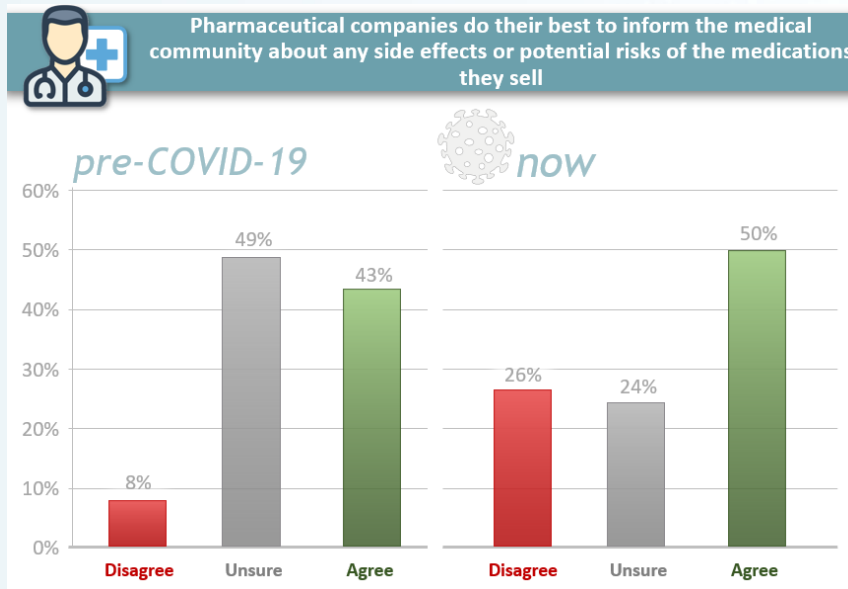
pharmaceutical industry in a post-COVID-19 world – that is, the extent to which jurors feel companies should provide information and take action to protect patients. We finish by offering a few ways you can begin to counter the legal challenges our results have identified.

Choice Matters

To understand what type of information jurors expected pharmaceutical companies to disclose, we asked jurors whether pharmaceutical companies should tell the public about any possible risks, however small, with their products – and 84% agreed or strongly agreed. As mentioned previously, jurors want pharmaceutical companies to allow consumers to make an informed choice. For example, in one of our mock trials, where jurors felt the pharmaceutical company had failed to properly disclose side effects associated with one of its drugs, one juror argued, “The consumer deserves the right to make a choice. Tell them all the side effects of the medication and let them choose. This plaintiff might not have chosen to take this medication if they had known about all the risks.”



We also asked jurors whether they believe pharmaceutical companies adequately notify the *medical community* about any risks associated with their products. As the below graph depicts, pre-COVID-19,¹ 43% agreed, while only 8% disagreed; post-COVID-19, 50% agreed, but the percentage who disagreed rose to 26%. Jurors want to feel as though they have an informed choice in their healthcare, and don't necessarily trust companies to provide that choice.



Action Matters

But how do jurors evaluate the actions the pharmaceutical industry has made or should make relating to the COVID-19 crisis?

To answer this pressing question, we asked jurors to agree or disagree with the following statement: "Companies that make pharmaceuticals, medical equipment, and masks should be providing these items to hospitals for free until the pandemic is

under control.” Fifty-four percent of jury eligibles agreed with this statement, while only 21% disagreed.

Assessing this finding by jurors’ reported political affiliation revealed a significant difference between liberals and conservatives. That is, political liberals were more likely than conservatives to agree that companies should be providing products to hospitals for free. This makes sense given the general trend of liberals expecting more from corporations and having a more community-oriented mindset. However, it is noteworthy that even conservative individuals were more likely to agree than disagree; this attitude breaks somewhat from the typical conservative views of being more understanding of the demands of profit-driven businesses and less likely to expect corporations to engage in charity work.

Next, jurors reported whether they felt companies that have started to manufacture products to help in the fight against COVID-19 have gone “above and beyond” in their duty to the public, and 71% of jurors agreed these companies had. Political leaning once again distinguished trends in this finding, with conservatives being more likely to strongly agree. This aligns with previous data suggesting that political liberals tend to have higher expectations for corporate intentions and actions – they are therefore more likely to believe that corporations are merely doing what they should be doing in response to a global crisis, rather than going above and beyond.

Political trends aside, while potential jurors tend to expect pharmaceutical companies to pitch in to help with the current crisis, they are also willing to give credit when they feel the company has done so.

Combating Challenges for Pharmaceutical Industry Defendants

So how can we use what we've learned to develop trial strategies for pharmaceutical industry defendants? Here are a few thoughts:

1. **Discover Bias During Voir Dire.** Crafting effective voir dire questions that target risky attitudes, such as those we've discussed, can help identify some of the most biased jurors who may be less willing to hear a pharmaceutical defendant's story. However, sometimes jurors may be unwilling to admit bias in front of others. To create a more accepting atmosphere, we advise structuring questions in a way that normalizes bias, and makes jurors feel more comfortable admitting they *may* be biased. It can also help to phrase questions such that jurors feel as though they are part of a similar-minded group, rather than the odd person out. Starting a question with "How many of you believe...", for instance, allows jurors to be one of many, rather than a single dissenting voice.
2. **Craft a Thematic Case.** Plaintiff attorneys frequently utilize many of the challenges revealed in this survey data as themes in their cases: "This company valued profits over safety." "The plaintiffs weren't given a choice." Themes like these attempt to vilify defendant pharmaceutical companies. Jury research, or a brainstorming session with a seasoned jury consultant, can help you craft affirmative themes to

counter the plaintiff's allegations and help clearly convey your case story to the jury.

3. **Craft a Good Company Story.** While it may be tempting to only respond to the plaintiff's themes, it's also essential to think about what *positive* company story you want to convey to jurors. How can you humanize the company? What distinguishes it from others in the industry? What steps has it taken to communicate information to consumers? Was it involved in any goodwill efforts to stem COVID-19, such as making masks, donating funds, or focusing on a vaccine? It's important to let jurors know what your company *did* do, not just what it didn't.

Final Thoughts

Negative attitudes toward the pharmaceutical industry persist, and jurors have high expectations about personal choice and company transparency. At the same time, however, it does appear that jurors' assessment of pharmaceutical companies' actions during the COVID-19 pandemic could generate future goodwill. When combined with the proper trial and public relations strategies, defense counsel should be able to increase jurors' receptivity to their story, despite jurors' attitudes.

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