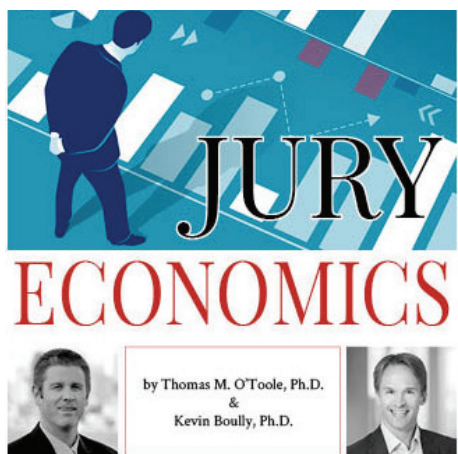


# Bar Bulletin

KING COUNTY BAR

*Happiness Is . . .*

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## Are Corporate Litigants Running Out of Advocates?

ing high-dollar verdicts. Many are left wondering if there is a jury left that can find for a corporate litigant. The short answer is, absolutely yes. However, research shows there may be some new and changing trends that inform the strategy for understanding and identifying bias against corporate litigants.

In the last few years, perceptions of banks, large corporations, and other institutions have grown increasingly negative. For some sectors of the jury-eligible population, opinions of large corporations were already highly negative, and had only a little room

to get worse. There wasn't much room for change among liberal Americans in particular. For people who identify as politically conservative, however, the change looks quite different, and the changes may surprise you. Conservative jurors have historically held tort-reform and pro-business views and could be counted on in the deliberation room to slow the plaintiff's momentum against a large corporation or at least put some downward pressure on damages. New research suggests this may no longer be the case.

There is no doubt that the conser-

vative narrative has changed in recent years, with distrust, anger, and conspiracy playing greater roles than ever before. We leave it to other analysts and longer-form publications to explain all the reasons in greater detail. We have seen this shift in values in our own research. In mock trials and focus groups going back a few years, we have noticed the disappearance of the tort reformer or pro-corporate juror. Sure, we still see some here and there, but

**JURY ECONOMICS**  
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A few weeks ago, another Seattle jury returned a punitive, high-damages verdict against a corporate defendant. The numbers are high. The litigation industry continues to talk about the trend towards nuclear verdicts, with all kinds of theories and explanations for why juries are return-

SPOTLIGHT ON  
**MEDIATION**  
STRATEGIES FOR SUCCESS  
Gillett Mediation

## Mediation and the Art of Compromise



**By Eric Gillett**

Mediation is the art of compromise. Mediation is also the science of how people act with one another. Mediation requires us to believe what we say and to recognize that those on the other side of our dispute believe what they say. For mediation to be successful and to end with a settlement, you may also be required to believe that your opponent may be right and you may be wrong. The rub,

the difficulty, is finding where your tolerance lies for the risk you may be wrong.

One absolute in litigation is that the fact finder, normally a jury, is not required and may not be inclined to believe you. They may also not be inclined to believe your opponent. And the instructions they are given by the court do not tell them to do so. The instructions they are given tell them to decide for themselves what they believe to be true based on the evidence they are presented and, based on their own life experiences, how they inter-

pret that evidence. So, it really matters very little whether you believe you are right. What matters is what they believe, and based on those beliefs, what they decide.

Some clients have a hard time understanding this nuance. As a litigator, you must make a concerted effort to explain to your clients that "truth" as we normally define that term, is not what you get in litigation. Their "truth," your "truth," is not what matters. It is the jury's "truth" that defines the result. It may be cold comfort to a client to recognize that all the "truth" they

hold dear matters for nothing once you put a case in the hands of a jury. Even if a jury finds for you, remind your clients, it is not necessarily because your truth prevailed. Anyone who has been on a jury or even participated in a mock jury experiment can understand that juries make many decisions based on factors you may never have anticipated, maybe not even on "facts" as you understand the facts. Your "truth" may or may not be their truth.

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## JURY ECONOMICS

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their numbers seem to be in decline. We more rarely observe the reliable pro-corporate voice from the prototypical conservative. What is happening?

### Increasing Conservative Anti-Corporatism (CAC)

According to a new study by Pew Research Center, conservatives and liberal Americans share similar opinions about corporations' negative impact on our country, which represents a significant shift for conservatives. In 2019, 54% of Republican or Republican-leaning Americans reported that corporations have a positive effect on the country. That is a solid majority. By October 2022, that number had shrunk by more than half, with just 26% reporting the same views only three years later. That is a dramatic shift in a very short period of time.

Oddly enough, from 2019 to 2022 there was a 2% increase in positive views of corporations among Democrats and Democratic-leaning Americans. That is a stark contrast to the 28% decrease in the same opinions by Republicans and Republican-leaners. Where once you could bank on conservative jurors having more pro-corporate attitudes than liberal counterparts, this new research shows that may no longer be the case.

A 2021 study by Gallup showed a similar trend, with a 17% decrease in Republicans who said they have a positive view of big business between 2019 to 2021. While there remain some important differences when evaluating political affiliation, at least some measures of anti-corporate bias are not among them.

### Some of These Things Are Not Like the Others

At the same time, both liberal and conservative Americans distinguish among different types of corporations. Overall, Pew Research shows opinions of banks and technology companies have become more negative since 2019, with the data showing 9% fewer positive views of banks and technology companies alike. Yet, when you look at the decrease by political affiliation, this shines a light yet again on a conservative anti-corporate trend. For Republican and Republican-leaners, reports of banks' positive effect on the country dropped from 63% (2019) to just 38% in 2022 — a 25% decrease in three years' time. For technology companies, the drop from 58% to 40% — an 18% drop in three years — leaves conservative Americans much less positive about technology companies than liberals, who remained at 58% in 2022. Put another way, conservative views of both banks and tech companies have worsened in the last three years while

they have changed very little for liberal-minded people.

### The Consensus Oasis

These studies also show some consensus among Americans about a few institutions. Small businesses and the military are generally well-regarded and political differences are tiny. About 80% of both liberals and conservatives have positive views of small businesses and about two-thirds of both political groups have positive views of the military.

When you slice the data to evaluate generational differences, some unexpected but additional consensus emerges. Age is completely irrelevant to reports that large corporations have a positive effect on the country, with approximately 25% of all four generational splits reporting that view. Proportions of Americans aged 18–29 were no greater than Americans 65+ to report large corporations have a positive effect on

the country in 2022. The same pattern is true of opinions of banks and small businesses. This is another signal of the changing landscape — where older jurors have historically been “safer” for corporate litigants and younger jurors more “unpredictable.” Now, the young liberal juror providing more moderate opinions than the older conservative juror can be considered in context.

### The Punchline

This is important to consider as you craft your jury selection strategy for cases involving corporate litigants. This research shows our once reliable stereotypes about the political leanings of jurors in these types of cases may no longer hold true. ■

*Thomas M. O'Toole, Ph.D. is President of Sound Jury Consulting in Seattle, WA. Kevin R. Bouilly, Ph.D. is Senior Consultant at Perkins Coie in Denver, CO.*

## Join Me in Leaving a Legacy of Justice

“As a fifty plus year member of WSBA, there was no question in my mind about joining the Justice Society and naming the Endowment for Equal Justice in my will. I want to make sure that people who need legal representation at critical times in their lives can access it, no matter how meager their resources. The Endowment is working to take some of the stress out of their lives with civil legal aid. The Endowment provides support in perpetuity for the Legal Foundation of Washington in making our communities more equitable places to live, work and raise a family. Please join me.”



— **DICK MANNING**  
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