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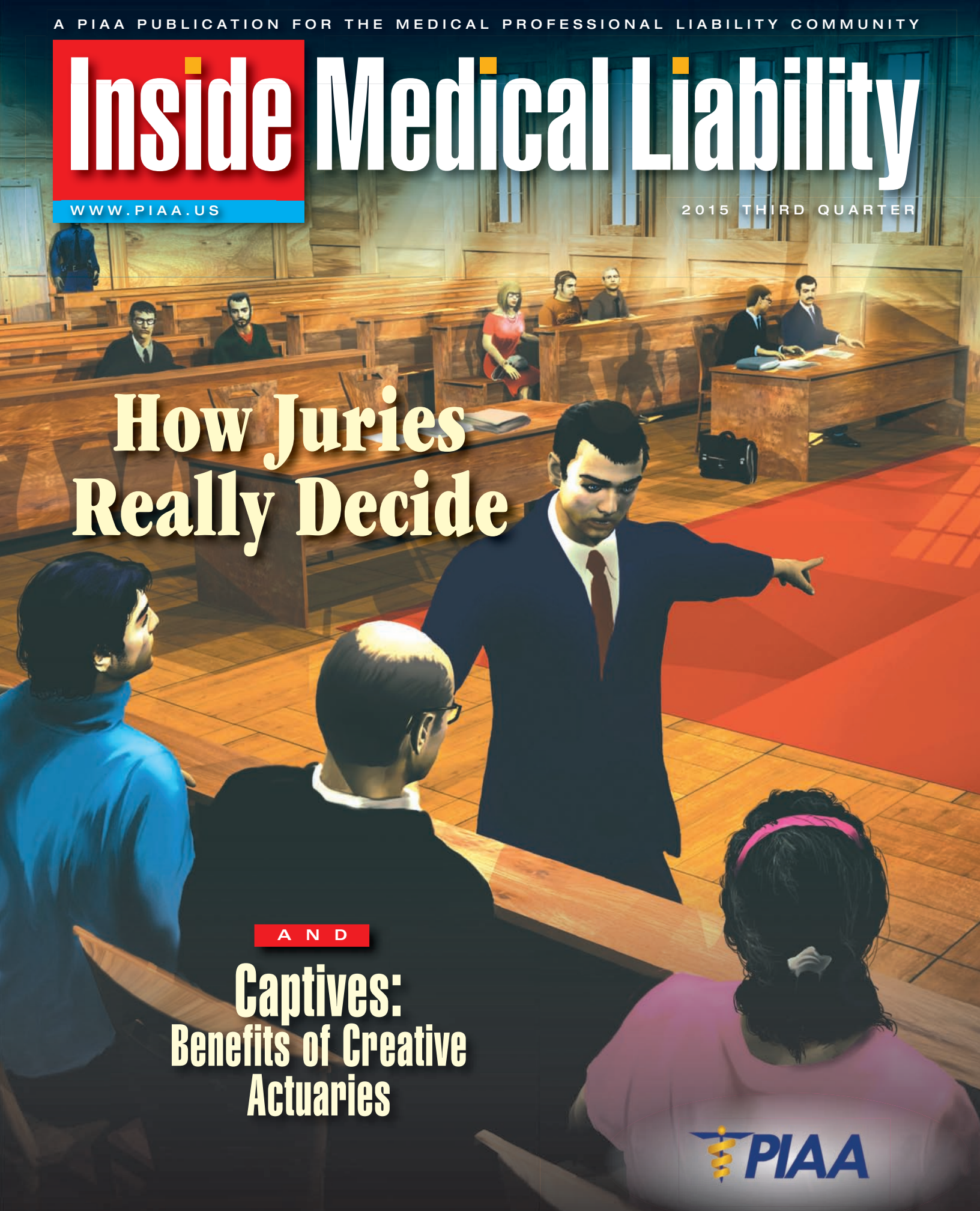

How Juries Really Decide

AND

Captives: Benefits of Creative Actuaries

PIAA

By Linda S. Crawford, JD

Why Winners Win: Preparing Witnesses for Testimony—Part One

A high percentage of healthcare professionals in this country can expect to be sued during their career.[1] Despite the presumption that juries are biased in favor of the plaintiff, the data points in the other direction, and yet, the common perception about how people actually decide cases is filled with misconceptions.

With healthcare professionals' and organizations' reputations—and large sums of money—hanging in the balance, it is helpful to know that what actually happens when juries decide these cases is highly predictable. What is the bottom line? It is that the witnesses you present, specifically the defendants, and the way they are perceived, are the keys to winning your case.

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The four questions jurors ask

First, let's consider how juries think. They ask a hierarchy of four questions: (1) Who can I trust in this lawsuit? (2) If I was in medical crisis, would I be in "safe" hands with this provider? (3) Under the circumstances of the case, did the provider do the best he could? (4) Did the provider make the right medical decision?

In Part Two of this article, I will discuss the variables at work in jurors' perceptions of the evidence presented in a case, and then suggest some techniques for effective preparation of witnesses.

1. Who can I trust in this lawsuit?

Trust is the basis of all relationships, but the legal system is more complicated than many other situations, given the participants.

Attorneys. Lawyers have a fundamental problem in society—they are paid to speak for others, not for themselves, and juries believe that they will say and do just about anything to win cases. The research consistently finds one thing. Attorneys receive low marks for trustworthiness.[2,3] A survey of federal jurors found that—after the trial was over—less than one-third of them believed that either side's attorneys cared at all about truth or justice. Advocating for others' positions is the attorney's job. People know they aren't there to say what they personally believe but, instead, what other people need them to say. The result is that people don't trust that what they say is the truth.[4]

To make matters worse, attorneys are not especially accurate in their own perceptions about how they come across in the courtroom. Another study found that there was no correlation between the number of trials attorneys had done or their years in practice and jurors' opinions about their rapport, enthusiasm, or articulateness. In fact, the longer an attorney had been in practice, the more likely it was he would underestimate how nervous he was and overestimate how

friendly he seemed to be.[5]

What does matter to judges and juries? Two things: knowledge of the facts and sincerity. In a survey of judges in six states, talent and a pleasing personality were dead last in judges' perceptions of attorneys.[6] They wanted, and what our research has shown juries want, hard work and commitment to clients. Well-prepared attorneys garner more respect from jurors, and jurors believe the attorney's case is stronger.[7] People also want commitment—a belief in the client and the client's cause. A moderate display of emotion is appropriate when genuine, but jurors do not like extremes. They want a level of emotion that seems appropriate to the injuries, for plaintiff's lawyers and for defense attorneys, and an appreciation of the seriousness of the injuries, without appearing to be unduly cold.

Our experience indicates that a genuine sense of commitment resonates with juries. It conveys a balance between "acting" and "just doing his job." In a study comparing legal competence and relational skills, researchers found, not surprisingly, that if there is a combination of high relational skills and high legal competence, an attorney will "be rated most expert, attractive, trustworthy, helpful, likely to charge a fair fee, likely to have a client follow advice, likely to have repeat business, and likely to be recommended to others by his client." What may come as a surprise is that excellent relational skills trumped competence: "An attorney with high relational skills was seen as trustworthy and satisfactory by clients regardless of the attorney's legal competence, suggesting the prime importance of relational skills."

Hard work and commitment do make a difference, especially to clients. However, as one study showed, in only a little more than 1% of all trials did the presence of superior defense counsel cause the jury to reach a verdict that differed from the verdict the judge would have reached if he had been trying the case without a jury.[8] At the end of the day, the quality of lawyering can be outstanding, and we may still lose. It is not the primary reason that we win.

Experts. There are actually people in the courtroom who are trusted less than the lawyers: the experts. Many people believe that the side with the best experts wins.[9] Not so. The "hired gun" perception is alive and well in the legal system. Indeed, there is a fair amount of research confirming just how skeptical juries are. A 45-year retrospective study of all jury research came to the following conclusion: "Perhaps the most notable observation about expert testimony, however, is the overall lack of impact it appears to have on jury decisions."[10]

In one experiment with mock jurors, the experts were designated as "court appointed," in order to minimize the "hired gun" effect. There were two variables in the study, the amount the expert was paid,$4,800 or $75, and the expert's credentials. The combination of high pay and impressive credentials proved significant. This expert was considered less trustworthy, less believable, less honest, less likable, and also more annoying. The researchers also tested for the effects of compensation and complexity of the testimony. The high-complexity/high-pay expert was deemed least trustworthy. The most trustworthy expert was, again, the one with testimony that was easy to understand and a low compensation. Generally, the higher the pay, the less trustworthy the expert was found to be, although in this study, there was a dramatic difference between the two fees, more than we would expect in an actual case. Even in the best of the scenarios, though, jurors reported skepticism about all the experts, including when they were court-appointed.[11]

Actual jurors report that the experts usually cancel each other out. Some typical juror comments: "Each side's got its own witnesses and they're trying to win." "Pay me $300 per hour and I'll testify too—for either side." "He may have had a big long list of academic degrees, but he's just like the rest—trying to help the lawyer win his case."[12] And it isn't just juries who are skeptical. Fully 79% of judges in one survey did not think expert witnesses were impartial, and 57% thought that experts were just "hired guns" who gave biased testimony.[13] This doesn't mean that decision-makers can't benefit from a "good" expert, but other issues must be decided first.

The plaintiff. Contrary to popular opinion among many healthcare professionals, jurors are not particularly sympathetic to the typical plaintiff. Indeed, there is such a strong presumption of sympathy toward the plaintiff that the Federation of Insurance Corporate Counsel made a videotape, "Handling Sympathy in Jury Trials." The tape suggested strategies for "counteracting the natural compassion that jurors feel for severely injured plaintiffs."[14] However, consistently in our research and that of others, this presumption has proved to be completely false.[15] Indeed, jurors actually have a bias against plaintiffs. As Valerie Hans found in her research, "Jurors' suspicions about plaintiff's claims led them in most cases to dissect the personal behavior of plaintiffs, with seemingly no limits. Jurors criticized plaintiffs who did not act or appear as injured as they claimed, those who did not appear deserving, and those with pre-existing or complicated medical conditions. The state of their marriages, their treatment of their children and coworkers, and their financial status were all subject to close examination."[15]

Jurors ask themselves whether attorneys urge plaintiffs to lie or exaggerate their injuries.[15] They, and the public at large, believe that there is much too much litigation in the U.S., that there has been a "litigation explosion."[16,17] Surprisingly, this opinion was also held by patients who had actually filed lawsuits themselves. Of those who did file, about 70% agreed with the position that there are too many medical professional liability (MPL) lawsuits filed each year.[18] Jurors are suspicious of individuals who are asking for compensation in a situation where they (the juror) may have had a similar experience, but did not take action, referring to the plaintiff as "money hungry." To a great

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extent, plaintiffs come into the courtroom with the deck stacked against them, which is just the opposite of what the defendants may presume.

The defendant. The most important testimony in the case comes from the healthcare professionals testifying for the defense. Only rarely do actual jurors report they thought that the defense witnesses lied or exaggerated. Indeed, those in the medical field continue to be the most trusted people in the country.[19] So it is vitally important that the defendants themselves be present during the trial. Jurors look at individuals. And frankly, they report to us that they draw negative inferences from a defendant's absence. It is difficult to trust, let alone answer the other questions noted at the beginning of this article, if there is no one there to identify with. Only the defendants themselves can make that connection.[20]

2. If I was in medical crisis, would I be in safe hands with this healthcare professional?

All MPL cases revolve around questions of safety and a sense of "abandonment" by the healthcare professional. Was he competent for the task at hand? In their professional capacity, there is no question that healthcare professionals are held to a higher standard than others in assessments of the quality of their decisions. Persons and organizations who are in positions of authority are, and we might argue should be, held to a higher level of responsibility.[21] Patients and jurors need to feel reassured that they would be in safe hands in the defendant's care, since their lives might well depend on it.

That is why credentials are not particularly important to jurors. In our research, only about 25% of the competency issue was decided on the basis of credentials, and that was focused primarily on experience, not education and training. Jurors believe that the more experience a healthcare professional has, the more competent he is. But the most important element for jurors in determining safety is a belief that the healthcare professional uses good judgment. Jurors want careful, thoughtful healthcare professionals. In actuality, they want the worriers. The whole concept of worry is linked to the notion of rumination (thinking something through very carefully), and that dovetails with Question 3.

3. Under the circumstances, did the healthcare professional do the best he could?

The number one thing jurors say to us when defendants win is, "They did the best they could." Jurors talk in human terms. When they speak well of an organization, they speak in terms of individuals as well. Jurors understand that motivation makes a difference in the decisions a provider makes. They want a provider who has a personal stake in those he cares for. That is why the concept of worry is such an interesting one. Jurors understand that you don't worry if you don't care. They do believe that a provider who cares about patients makes better judgments.

Tell a jury what motivates people and organizations, and then they will decide whether hindsight bias will apply.[22] Of course, by the time the case comes to trial, there has clearly been some sort of bad outcome. Once they learn about that, people have a tendency to exaggerate their capacity to predict the inevitability of the outcome.[23] That works against defendants. People sitting on the jury already know that the patient had a problem, sometimes a fatal one. This is the "creeping determinism" or the "knew-it-all-along effect." The only way a defendant can overcome this is to prove to the jury that he was careful, thoughtful, and, beyond that, had the best interests of the specific patient in mind—that his motivations were pure.[24]

4. Did the healthcare professional make the right medical decision?

Why are the facts of the actual case the last thing that jurors decide? Because, in order to choose which side's version of the evidence they will gravitate to, they must have made a basic decision already: "This is the party I am leaning toward." This is especially true in cases, such as MPL cases, where experts testify virtually 100% of the time. The experts present completely opposite views of the medicine involved in the case. The jury can't believe both of them, so they have to choose whom to listen to. First, they decide about the party in the case they will favor; then, they decide about the experts. And what matters to juries in evaluating experts? What counts is an ability to be truly helpful, to explain things in nontechnical, lay terms. Such experts are generally described as good teachers, with sound credentials and acceptable motives.[25] The goal of witness presentation is to convince the jury that our view of the medicine is the right one by convincing them that those who testify meet the test of character.[26]

This is the usual way people make decisions: If they don't buy the messenger, they won't buy the message. First, the jury must believe that the healthcare professionals can be trusted, their patients are in safe hands, and they are motivated to do the best for their patients. In short, people want healthcare professionals who exhibit character—whether in the examining room, the operating room, or in a deposition or courtroom. In the law, we call it credibility. If decision makers don't answer yes to the first three questions here—the ones that are the foundation for credibility—juries won't give us the benefit of the doubt on the medicine. PIAA

Editor's note: Look for part two in the Fourth Quarter 2015 issue of Inside Medical Liability.

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