



The
Current
Climate
For Today's
Nursing
Home
Defendant

by Shelley Spiecker, Ph.D. and Kevin Bouly, M.A.

- **Jury awards \$20 million in negligence suit against nursing home.**
- **Largest verdict in County history, \$21.5 million, returned against nursing home.**
- **State seeks \$45 million in nursing home case.**

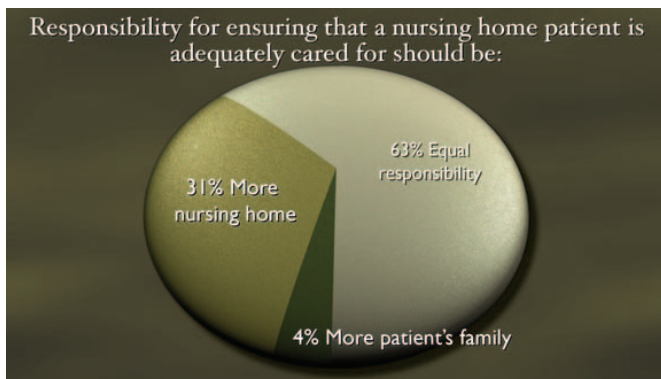
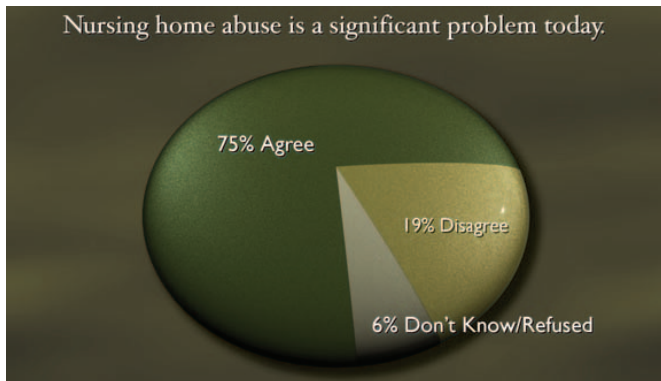
These are just a sprinkling of headlines that characterize today's litigation landscape. While jurors are more critical of corporate defendant conduct than ever before, there are some signs that the tide is turning in defendants' favor. Persuasion Strategies recently conducted two nationwide surveys, each based on responses from 500 randomly selected jury-eligible individuals in both the "post-Enron" era of February 2003 and the "post-CEO scandals" environment of April – May 2004. These survey results are contextualized within mock trial and focus group research to illuminate key jury attitudes regarding corporate conduct in general and nursing home litigation in particular that will help you evaluate and strategize your next case.

I. Nursing Home Abuse: A Recognized Problem With Realistic Expectations for Responsibility

Jurors today recognize nursing home abuse as a societal problem. While our research suggests that jurors' threshold for proving liability may be low in these cases, plaintiffs are likely to have more difficulty proving causation.

Specific research findings supporting this conclusion include:

- Fully 75% of potential jurors feel nursing home abuse is a significant problem today.
- While jurors' perceive nursing home abuse as a problem, the population is split with regard to the cause of elderly injuries. Specifically, 46% of the jury-eligible population agrees that "most injuries to elderly nursing home patients are the result of the normal aging process," while 48% disagree with this premise.
- Almost two-thirds (63%) of potential jurors believe the patient's family and the nursing home share equal responsibility for ensuring a nursing home patient is adequately cared for.



In determining liability, jurors look to factors such as the defendant's hiring practices, staff treatment of patients and communication with family members, distribution of profits to patient treatment, and the defendant facility's "report

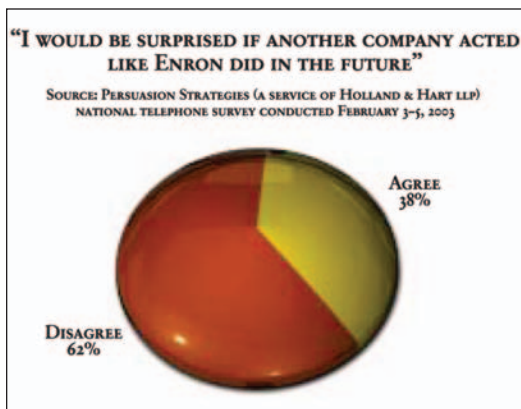
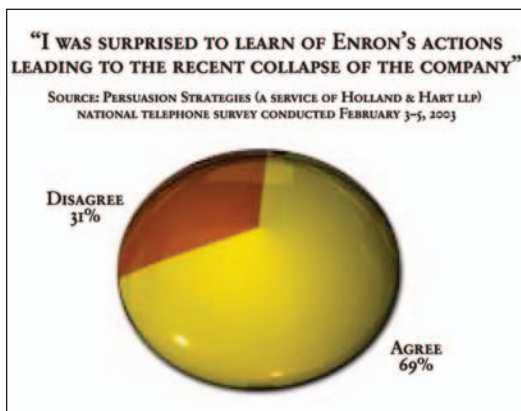
cards” from state inspections. In deciding causation, jurors compare and contrast the defendant and patient family’s control over the quality of care, the patient’s quality of life, and choices in providing alternative care to the elderly patient. The fact that a majority of the jury-eligible population believes that a patient’s family shares equal responsibility with the nursing home facility for patient care is consistent with an overall litigation trend in which jurors are evaluating plaintiffs with enhanced skepticism and criticism. For example, when it comes to evaluating parties’ responsibility to understand the terms of an agreement, 67% of jurors are likely to hold an individual and a company equally responsible, while 26% will hold the individual more responsible than the company and only 7% are inclined to hold the company more responsible. In short, today’s nursing home litigation jurors are more frequently asking not only, “What should the defendant have done differently?” but also “What notice was the family given regarding the resident’s condition, and what did the family do with that notice?”

II. The “Desensitization Effect” and Corporate Defendants

In the 10 months immediately following announcement of the Enron scandal, it was clear the scandal was on fact finders’ minds. References and

comparisons to Enron were a central focus during deliberations in every mock trial, mock hearing and mock arbitration Persuasion Strategies conducted after the energy giant’s collapse. Jurors, arbitrators and judges were all comparing a defendant’s conduct to allegations of Enron’s wrongdoing. Interestingly, survey research we conducted in the wake of the scandal found jurors disappointed but not astonished by Enron’s misconduct. For example, in February 2003, 69% of jury-eligible respondents agreed with the statement, “I was surprised to learn of Enron’s actions leading to the recent collapse of the company,” while only 31% agreed with the statement, “I would be surprised if another company acted like Enron did in the future.”

As seems to be the case with many startling events, the first occurrence of an Enron-like event is followed by public outrage. The second time a similar event occurs, outrage is likely to decrease. Enron and subsequent corporate scandals seem to cause a “desensitization” effect. In litigation, this translates to jurors’ increased willingness to expect and accept lower standards for corporate behavior over time, as jurors are sufficiently saturated with information and the “shock” of the defendants’ conduct wears off. The breast implant



litigation of more than 20 years ago is but one example of this “desensitization” effect. Jurors’ initial shock that a silicone product might cause autoimmune disease gave way to ready knowledge of the risks, which led in turn to increased scrutiny of the plaintiff and her knowledge of previous litigation.

Further evidence for a general “desensitization effect” with respect to today’s corporate conduct is found in subsequent survey research we conducted within weeks of the Spring 2004 “corporate executive trials” including Tyco, Adelphia, and Martha Stewart. We found no significant difference from the Winter 2003 post-Enron era in either the number of jurors believing that executives often cover-up their wrongdoing or that corporations lie for financial gain.

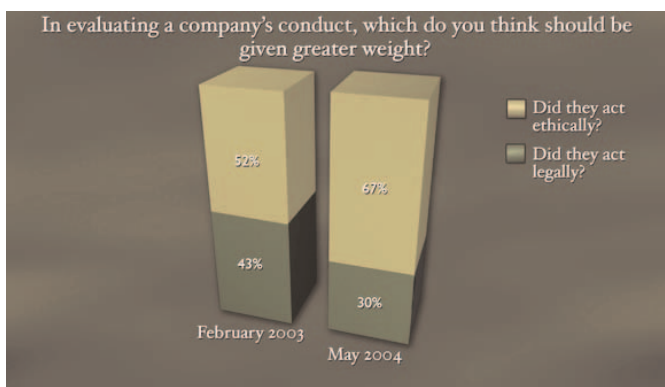
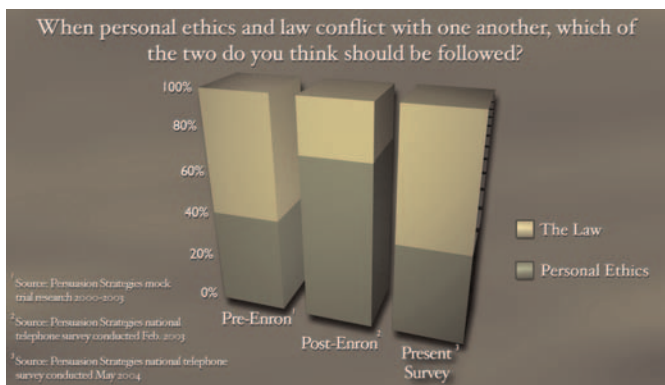
III. So What Is the Forecast for Nursing Home Defendants?

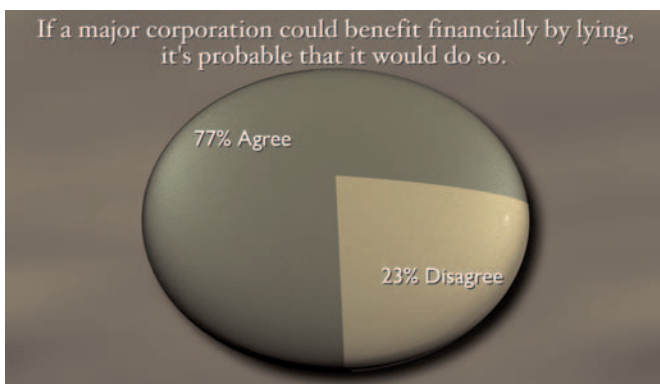
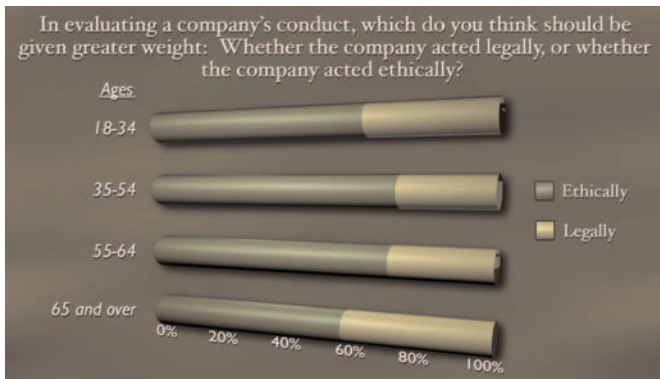
In short, there is promise for nursing home defendants, but there are still dark clouds looming. First, although nursing home litigation has received some media attention, in no way has the coverage been as extensive nor the topic as fully saturated as the financial scandals of Enron and others. It is possible that this litigation is now teetering on a delicate precipice. It may be sufficiently well-known as to indicate to jurors that nursing home defendants should know

better and take steps to be especially diligent with regard to patient care, but not sufficiently over-known as to tip off a desensitization effect.

Second, our research confirms that jurors consider the ethics of a defendant’s actions as much as, and in some cases more than, the legalities of the defendant’s conduct.

- While “post-Enron” jurors emphasized ethics over the law when the two conflict, current survey research demonstrates a rebound to near “pre-Enron” levels. Taken as a whole, findings reveal the importance of both ethics and the law.
- When evaluating a company’s conduct, two-thirds of jurors (67%) give greater weight to the ethics of a company’s behavior as opposed to its legality (30%). This is compared to February 2003 opinions, where 52% gave greater weight to the ethics of a company’s conduct, and 43% emphasized the legality of their behavior.



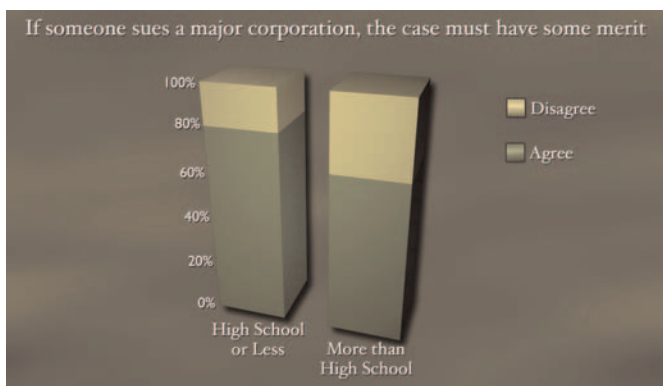


- Across all age groups, juror eligible adults are more likely to emphasize ethics rather than law in evaluating a company's conduct. However, statistically significant differences exist across the age groups. The age group most likely to emphasize the law is those 65 and older, while those most likely to emphasize ethics are aged 35 to 54.
- While a majority of employed people said the law should be followed when it conflicts with personal ethics, they are likely to give greater weight to a company's ethical behavior when evaluating company conduct. Specifically, employed persons emphasized a company's ethical performance rather than the legality of their behavior more often than did students, retirees, or the unemployed.

Willingness to judge a defendant by an ethical as well as legal standard, coupled with jurors' inherent distrust of corporate defendants, creates an inherent burden of persuasion for every nursing home defendant. Examples of jurors' inherent corporate defendant distrust include:

- More than three-quarters of potential jurors (77%) agree or strongly agree that if a major corporation could benefit financially by lying, it's probable that it would do so. Similarly, 82% of jurors surveyed in February 2003 believed a major corporation would lie if it could benefit financially.
- The majority of jurors also feel personally removed from corporate values. 67% disagree or strongly disagree that "business executives share my values."
- Actual attitudes toward given executives depend strongly on the executives' industry. For example, while only 35% report that their impression of "business executives" is somewhat or very unfavorable, fully 67% say that their impression of oil and gas company executives is somewhat or very unfavorable.
- Potential jurors view corporate defense lawyers just as unfavorably, or even a bit less favorably than other lawyers. Even personal injury plaintiffs lawyers, known for their television advertisements, have a slightly higher favorability rating than corporate defense lawyers.

- As of April 2004, within weeks of the Tyco mistrial and Martha Stewart's conviction, 86% of jurors believed executives of big companies often try to cover up the harm they do. Attitudes are consistent with February 2003 findings, when 83% of jurors believed "executives of big companies often try to cover up the harm they do."
- Approximately 72% of potential jurors agree that if someone sues a major corporation, the case must have some merit. Similarly, 75% of those surveyed in February 2003 agreed. Individuals with high school education or a less agree at an even higher rate (nearly 80%).

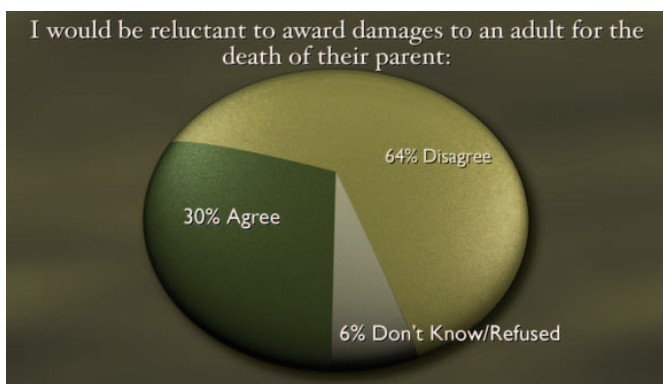


Fourth, social science research confirms the authors' experience that jurors conflate liability, causation and damages decisions.[1] As a result, strong liability evidence will bolster an otherwise questionable causation or damages case.

Finally, with specific regard to nursing home litigation, the research suggests that jurors are open to awarding damages against nursing homes. Moreover, jurors are not yet viewing nursing home abuse as a "problem solved" in society. Evidence of substantiated patient neglect or other

liability carries the potential for a substantial damage award. To illustrate:

- Half of the jury-eligible population (50%) believes that the number of lawsuits against nursing homes will force nursing homes to shut down in the future.
- Almost two-thirds (64%) of potential jurors would not be reluctant to award damages to an adult for the death of a parent.
- Potential jurors exhibit a generally high reliance on the system to promote corporate responsibility, with 70% of all respondents agreeing that trials have played an important role in promoting corporate responsibility and 78% agreeing that a jury trial is an effective way to address corporate wrongdoing.



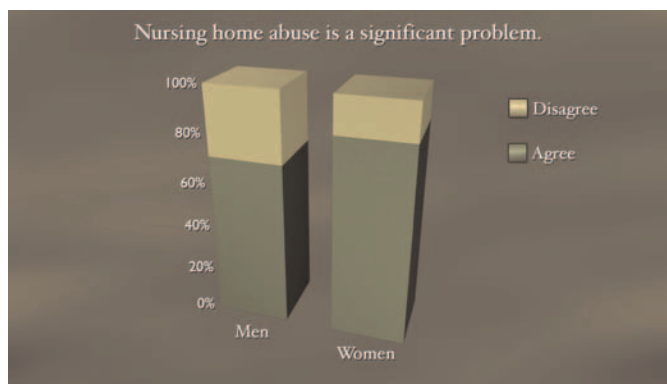
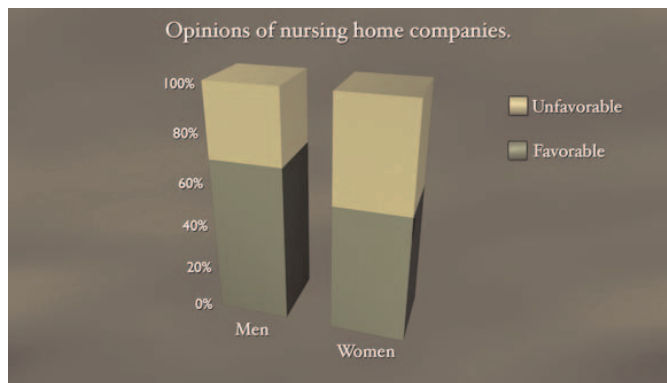
To address the forecasted litigation climate, defendant nursing homes need to embrace their persuasive burden to convince jurors they acted honestly, ethically, and responsibly. In addition, defendant nursing homes are wise to recognize that jurors will evaluate not only its conduct, but its conduct vis-à-vis other comparator care facilities specifically and corporate America more generally.

Jurors will be asking not only, “What did this company do well?” but also “How does this company stack up to others?”

IV. Juror Characteristics That Can Make All the Difference

As trials regarding corporate conduct take center stage in the media, jurors are increasingly forming opinions and biases regarding litigants’ behavior. Nursing home defendants are not immune to enhanced scrutiny and jurors’ predispositions. Interestingly, over half (57%) of the jury-eligible population holds a favorable opinion of nursing home companies. In contrast, 95% of the population holds favorable opinions of small businesses, 60% hold favorable opinions of accounting firms, 50% hold favorable opinions of insurance companies and law firms, and only 37% hold favorable opinions of oil and gas companies. Thus, knowing which juror characteristics are suggestive of potential anti-defendant bias helps refine jury selection strategy and enables counsel to make more intelligent use of peremptory challenges. Key findings regarding juror characteristics in nursing home litigation include the following:

- In general, men and singles have more favorable opinions of nursing homes than women and married persons. Specifically, women and married persons are more likely to believe nursing home abuse is a significant problem and are more likely to fault nursing homes for patient injuries as opposed to attributing them to normal aging conditions.



- Employed individuals are more likely to have negative opinions of nursing homes than are students, retirees or the unemployed.
- Individuals from lower income households (\$25,000/year or lower) and those without college degrees are more likely to believe lawsuits will force nursing homes to shut down as compared to those earning greater amounts or having a college degree or higher.
- Individuals working for many different employers over their career are more likely to believe lawsuits will force nursing homes to shut down than are those working for only one or a few employers.
- Individuals who have been employed by a large company (500+) are more willing to award an adult damages for the death of a parent.

- Divorced or separated individuals are more willing than single or married people to award damages for a parent's death.
- Notably, previous lawsuit experience is not significantly related to any nursing home attitudes measured in this survey.
- While previous research has shown political orientation to be related to some anti-corporate sentiments, conservative, moderate, or liberal orientations were largely unrelated to nursing home attitudes.

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¹Greene, E. (1989). On juries and damage awards: The process of decision making. *Law and Contemporary Problems*, 52, 225-246.



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