



Test the Waters, but Don't Assume that Bias is Forever: Deepwater Hasn't Translated to Deep Trouble for Energy Defendants

By Shelley Spiecker, Ph.D.



Six months after the public was riveted to press coverage of the oil spill in the Gulf, impact on energy defendants has been less doomsday than feared. In fact, this is one of the better times in the past ten years to be an energy defendant in front of a jury. Why? Much as the spill itself appeared to dissipate more rapidly than expected⁽¹⁾ the tide of public opinion has drifted away from concern over the environmental practices of energy companies, and toward concern over the economy. A recent Pew Research Center survey found the economy was identified as Americans' top policy priority for 2011 by 87 percent of respondents.⁽²⁾

(1) www.popsoci.com/science/article/2011-01

(2) Pew Research Center, January 5-9, 2011, <http://pewresearch.org/pubs/1865/poll-public-top-policy-priorities-2011>

In our own focus group and mock trial research and community attitude surveys, economic concerns are prompting individuals and jurors to appreciate the benefit the energy industry brings in terms of jobs and reduced energy prices with increased methods of traditional exploration and production.

"I came in with a reasonable view of oil and gas companies - that they're businesses. They have an obligation to their investors and they have an obligation to make money."

Oil and Gas Contract Case Mock Trial Juror

Speaking in defense of an oil and gas defendant in a mock trial, a Louisiana pastor recently vocalized his support of the defendant by referencing the standard of living the energy industry has afforded his community.

"I love the oil companies. I think the oil companies are the best friends of south Louisiana."

Environmental Case Mock Trial Juror

It also helps that historically, as gasoline prices increase, public support for expansion of traditional exploration and production practices also increases. ⁽³⁾

The Economy Is Important to Jurors

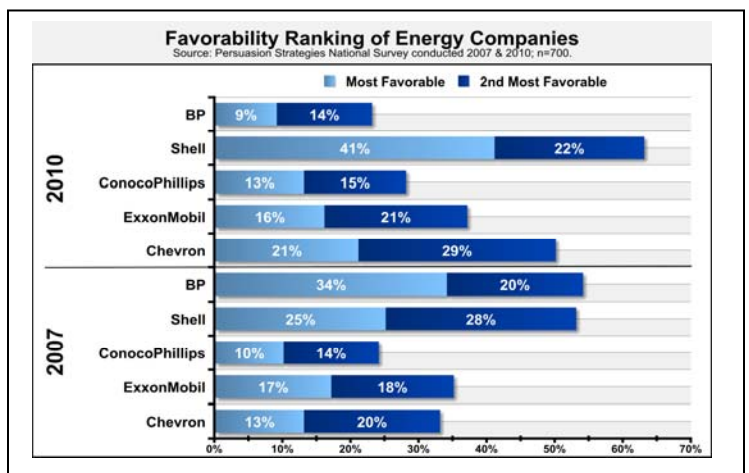
Jurors' focus on their own pocketbooks has taken attention away from the energy industry. Of course, it also helps that the industry has been more proactive in responding to media attacks. For example, BP's proactive website, www.bp.com, appears as the first hit for anyone googling for news about the disaster, and a November 14, 2010 CBS News' "60 Minutes" segment entitled "Shale Gas Drilling: Pros and Cons" conveys the industry's perspective in fair terms. ⁽⁴⁾

In March 2011, I had the opportunity to assist in jury selection in a royalty class action case against one of the world's largest energy companies. Through pre-trial research we knew that jurors' opinions regarding BP and its reaction to the Gulf crisis would be pivotal in predicting juror bias. We conducted a mock voir dire to hone the exact wording of the questions we knew would be determinative.

(3) Bolsen, T., & Cook, F. (2008). The Polls-Trends: Public Opinion on Energy Policy: 1974-2006 *Public Opinion Quarterly*, 72(2), 364-388 DOI:10.1093/poq/nfn019

In the mock voir dire, only two jurors in the panel indicated they had formed opinions of BP as a result of the spill, and only one of those two gave us reason to believe he would let his opinion influence his verdict. In the actual voir dire, three jurors in the venire indicated they had formed an opinion of BP as a result of the spill, and only one of the three had done any reading (beyond the typical media coverage) regarding the spill or BP's response. This juror gave us reassurance he would not be influenced by his research, and in fact he was struck peremptorily - by the Plaintiffs! The second opinion-holding juror also gave us reassurance, and we were successful in excusing the third juror for cause. This one case example typifies our experience in other cases in which jurors are increasingly giving energy defendants an open ear at the outset of a case. This is unlike our experience six and seven years ago in which far more prospective jurors vocally voiced anti-industry bias.

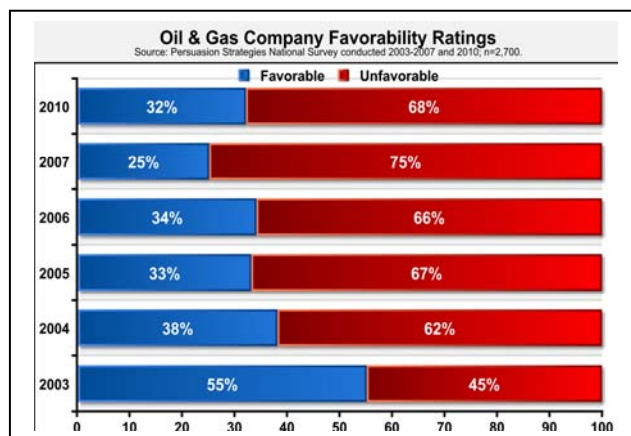
Are energy companies out of troubled waters yet? Of course not. Current events *do* impact public perception, as the following chart depicts.



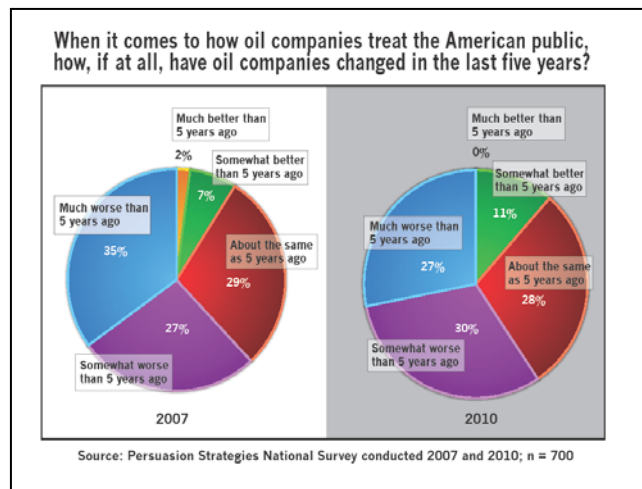
(4) www.cbsnews.com/video/watch/?id=7054210n&tagmnc:ol;lst:2

Corporate Desensitization

Additional data collected and compiled by my company shows that a majority of the population still holds an unfavorable opinion of the energy industry. However, the decrease in unfavorability from 2007 to 2010 is statistically significant. Moreover, what is more determinative of a fair shake in the courtroom is the increasing trend of jurors' self-recognition that they have been influenced by the media to form negative opinions, and an accompanying increased willingness to check bias at the courthouse steps.

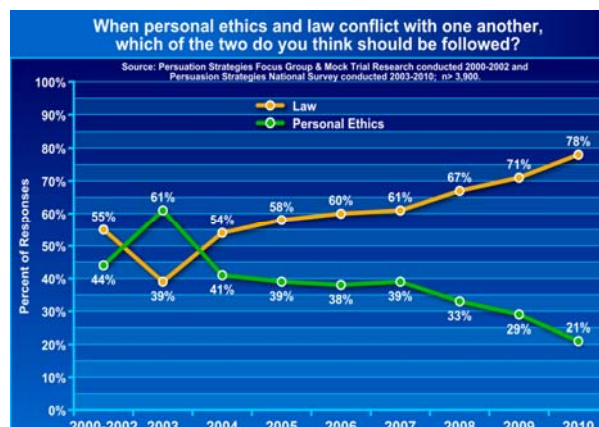


Concerns over the economy are not the only driving force behind jurors' willingness to keep an open mind. Perhaps surprisingly, the wave of corporate scandals several years ago had an indirect positive effect on public perceptions of the energy industry. No longer were oil and gas companies a lightning rod for negative media attention. Since Enron became a household name, people have become more desensitized to large corporations. In short, energy companies do not seem so bad after all.



The Choice Between Law and Ethics

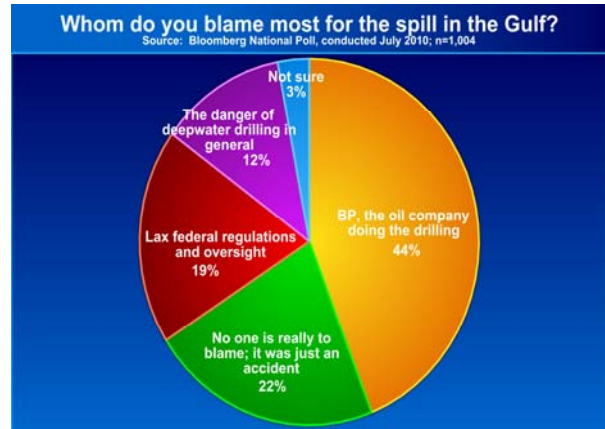
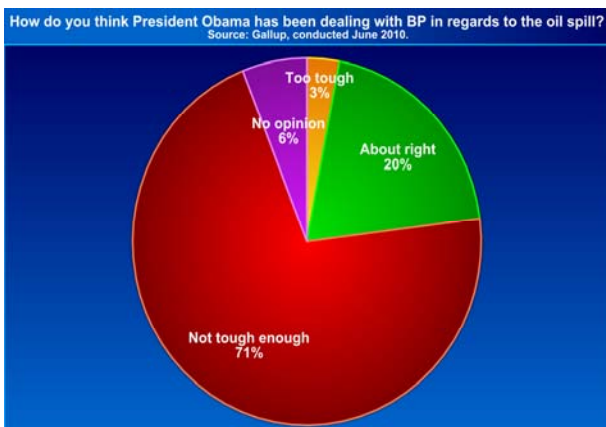
Accompanying corporate desensitization, we have observed an increased willingness by jurors to evaluate cases based on the legal instructions governing the dispute and less on a sense of fairness or equity. For over ten years we have tracked an inherent tension in juror decision making between an inclination to make a decision based on a sense of righting some perceived wrong, or following instructions governing a dispute. As the following chart depicts, despite a blip in 2003, associated with Enron, we have observed an increasing trend of jurors' willingness to follow the law over personal ethics when the two conflict.



Along with an increased willingness to check bias, we have observed an increased focus on individual responsibility. Not only does this benefit an energy company in litigation against an individual, we have also observed it to help with the perception that oil and gas companies are too powerful. In a recent jury selection, jurors were polled on whether they felt oil and gas companies had too much control over gasoline prices. While approximately one-third responded affirmatively, almost the same number recognized that the public, as gasoline consumers, are just as responsible for gasoline prices as energy companies.

The Roles of Personal Responsibility and Differentiation

A third factor helping to impact reduced juror bias is best described as “refocused resentment”. Many Americans perceive a failure of government to fulfill the promises made in the 2008 election. As the public becomes increasingly disheartened over government’s inability to improve the lives of average Americans, coffee shop talk has turned from gasoline prices to politics. The following two charts help illustrate jurors’ frustration with the government’s handling of the Deepwater Horizon crisis.

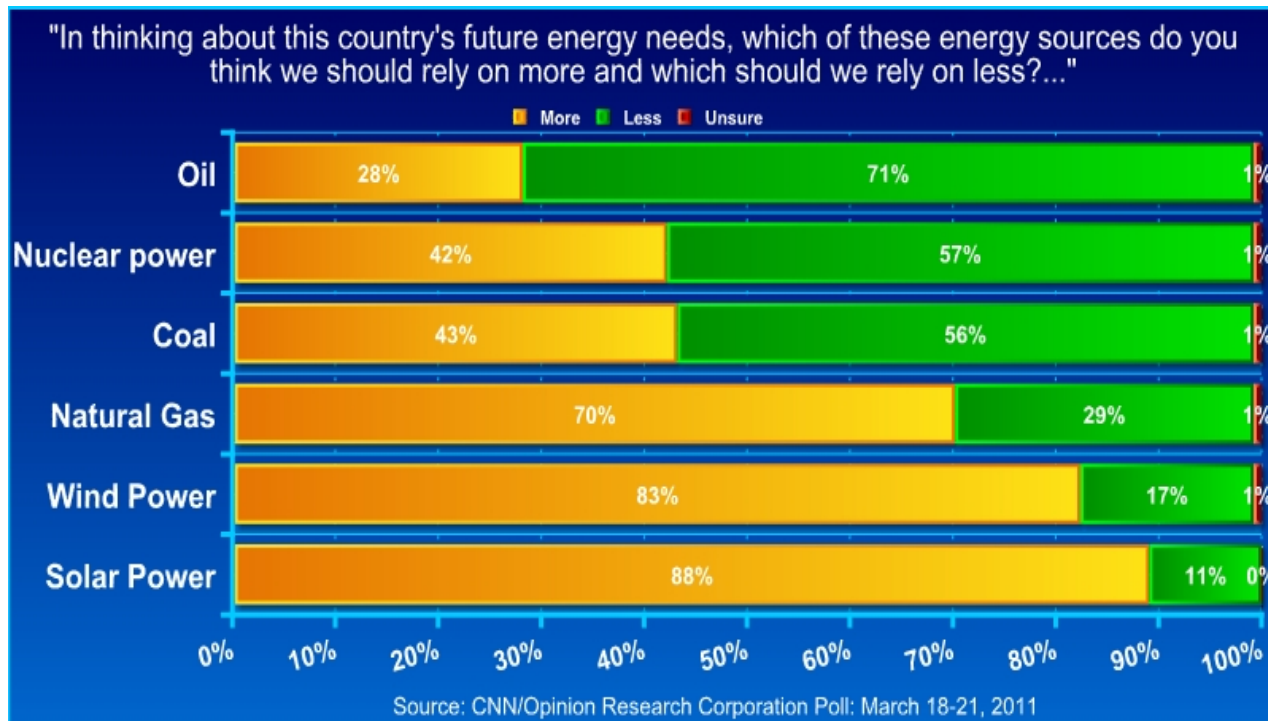


Finally, we have observed an increased willingness to evaluate energy companies on the merits of a particular case, rather than paint an individual company with an anti-industry brush. The words of one mock juror in royalty case summarize this observation nicely.

“Whether or not the corporation is good should be assessed completely independently of what the industry is. It is tempting to say people in the oil and gas industry are evil because they are polluting. But I think that a company’s integrity should be assessed independently of that.”

Royalty Case Mock Trial Juror

Not only are jurors differentiating individual energy companies, they differentiate various segments of the energy industry. As the following chart suggests, jurors’ perceptions of the natural gas energy segment are more positive than perceptions of coal or oil.



The economy, corporate desensitization, increased personal responsibility, and a willingness to differentiate are four key factors working in energy company's favor in the courtroom today. That said, there is still work to be done. Just like BP's need to pursue a reassuring presence in the Gulf, energy companies need to continue testing the specific facts of their cases through pretrial research. We recommend pursuing effective public relations campaigns, implementing litigation strategies that highlight actions the company has done well, putting business practices in context, and reassuring jurors that their general concerns about energy companies need not determine their reactions to the facts in the case at hand. There is good reason to believe walking into a courtroom today doesn't mean deep trouble for an energy defendant. ■

Shelley Spiecker has been advising attorneys on case strategy, courtroom persuasion and jury selection for over 18 years. With a doctorate in legal communication, Dr. Spiecker has extensive experience in the design and analysis of mock trial and focus group research. As a Senior Litigation Consultant at Persuasion Strategies, Dr. Spiecker is a national leader in strategic trial solutions in energy litigation and is frequently asked to lecture on emerging research findings. Learn more about Dr. Spiecker at www.persuasionstrategies.com.