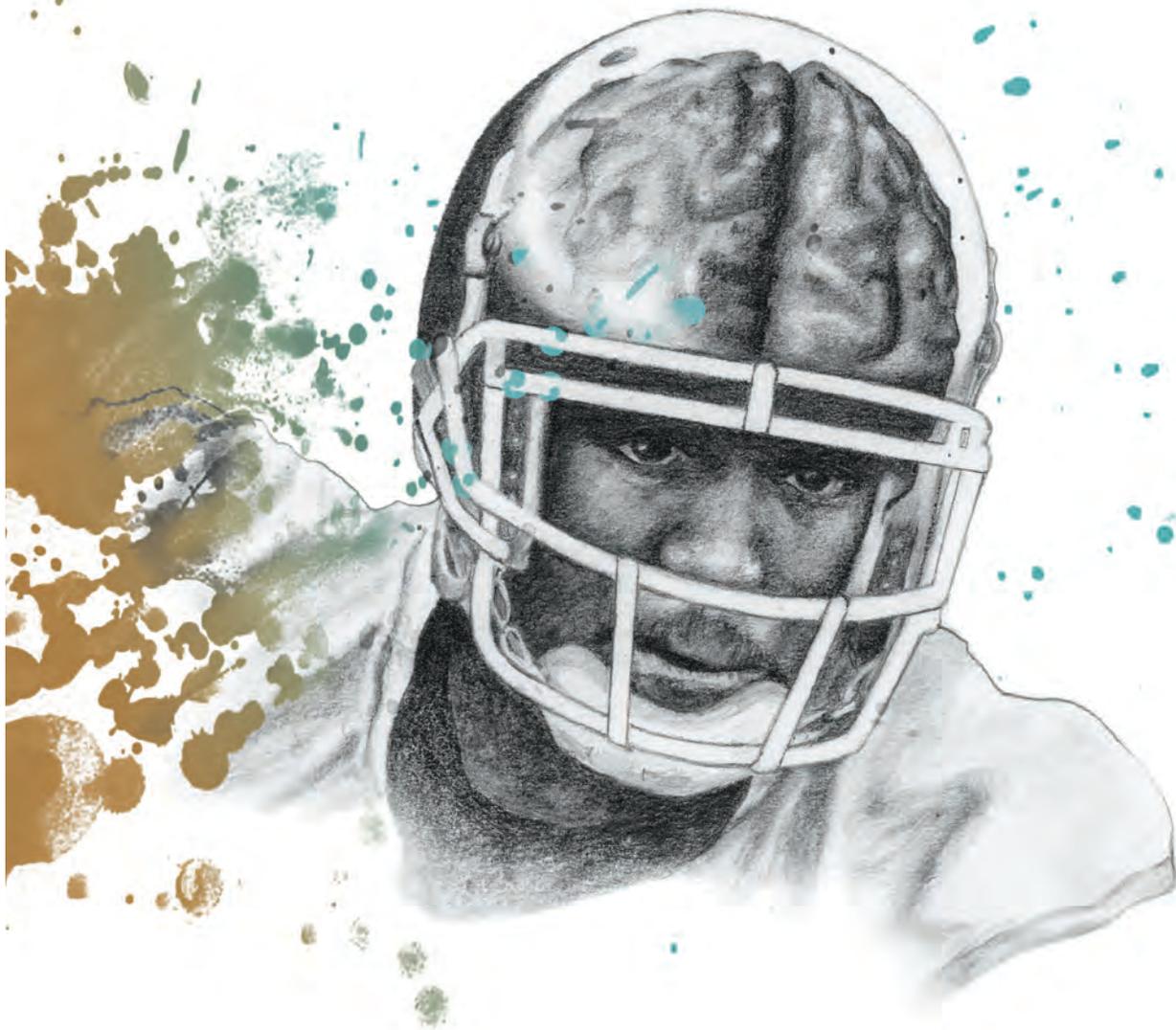


The Head and the Heart:

Juror Perceptions of Sports Concussion Litigation



By Kevin R. Bouly, Ph.D.

It is difficult to say

when the problem began. Yet, concerns over the health risks related to concussion injuries, in all levels of sports, continue to grow. Medical experts have labeled sports concussion management a public health issue and lawmakers are increasingly involved.¹ Helmet makers, leagues, teams, and governing organizations like the National Football League (NFL) and National Collegiate Athletic Association (NCAA), are no longer on the sidelines. Lawsuits over sports concussion injuries are a reality and both popular media and academic voices are sounding off.² Attorneys have described well many of the legal implications of this “wave” of litigation,³ but we know little about how jurors perceive the unique aspects of sports concussion lawsuits. Four findings from our annual National Juror Survey, focused on sports concussion issues, begin to fill that void and address litigation and trial strategy in concussion lawsuits.⁴

Severe concussion is a sleeping gun.

Some of the damage is clear. An overwhelming majority of the jury-eligible population (84%) surveyed in late 2011 and early 2012 reported that a severe concussion is highly likely or somewhat likely to cause health problems in the future. Sports concussion plaintiffs (e.g., former NFL player Merrill Hoge) claim not only that severe concussion’s long-term consequences are necessarily unclear, but the fact that the anticipated consequences are uncertain is itself an aspect of the plaintiff’s injury. Jurors are asked to contemplate the degree of an unknowable injury that the majority believes is likely to have future consequences.

An athlete suffers a severe concussion while playing football. How likely is it that the concussion will cause health problems in the future?

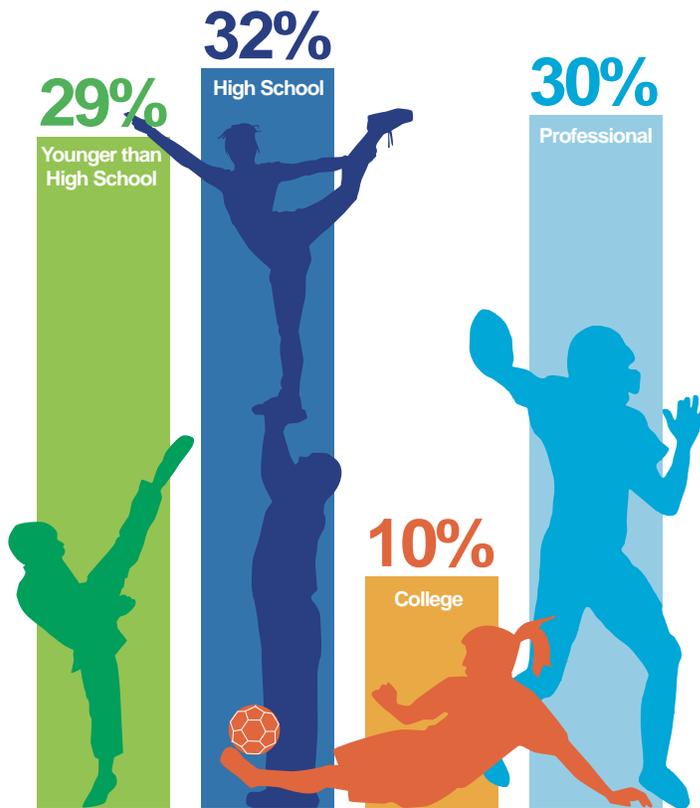


“[Concussion] screws up your memory.”

“It makes Alzheimer’s.”

*-Mock Juror Descriptions
of Concussion Effects*

What level of athlete is most vulnerable to significant health problems caused by a concussion? (percentage of survey respondents)



“The fact that concussions may lead to emotional problems has been an ‘aha’ for me in just the last year or so based upon the media.”

-Male Mock Juror

Importantly, potential jurors distinguish among the level of athlete most vulnerable to future concussion-related health problems, finding younger athletes and professional athletes more vulnerable than college athletes. Yet clear risk lies with jurors who perceive the scientific evidence of future harm at the time of the concussion as ambiguous, but are predisposed to believe plaintiffs are likely to suffer injuries down the road and should be compensated both for what is expected, and more importantly, what can't be predicted.

One explanation for the differing perceptions is that potential jurors view younger athletes as more vulnerable by virtue of continuing to develop physiologically, and suffering a concussion at a young age may halt or impact healthy development. Potential jurors may see professional athletes as more vulnerable due to violence that is unmatched at other levels. Regardless of the cause, trial counsel must address the fact that most potential jurors presume future harm related to severe concussions and view athletes as having differing levels of vulnerability to future harm.

Recommendation:

Keep jurors in the here and now.

Jurors decide cases as much with their hearts, as with their minds. They are likely to view some plaintiffs (and plaintiff classes) as more vulnerable or simply more sympathetic than others – critical intelligence to inform risk in a given venue. More important for concussion defendants, however, is addressing two juror biases in concussion litigation: hindsight bias (that helmet makers and leagues should have known then the risks that we know now) and presumption of future harm. Combat these biases by focusing jurors' attention on the here and now of every aspect of trial.

Model in voir dire how you must make do with only what you know in that moment about prospective jurors, about the judge, about the testimony, and that the future may turn out differently than we all expect. Ask jurors about their perceptions of that reality. Ask them about Monday Morning Quarterbacking and emphasize that the remedies include living in the present and relying only on what you know at a given moment.

Use time-restricted visuals to focus jurors on the risk information that was known at the time decisions were made, and encourage jurors to see the evidence as the defendant perceived it in the real world.

Consider admitting to a specific amount of compensation for future harms in order to discourage juror speculation and unbridled compensation.

Helmet makers and leagues have the greatest responsibility to protect players.

The science of sports concussion continues to evolve and play a role in concussion-related litigation. Major research programs are engaged in ongoing studies and some findings suggest that newer football helmets lower concussion risk,⁵ a finding that can represent a risk and a benefit to helmet makers and sports leagues.

“I think [helmet makers] have a big responsibility...because that is what they’re making to protect you.”

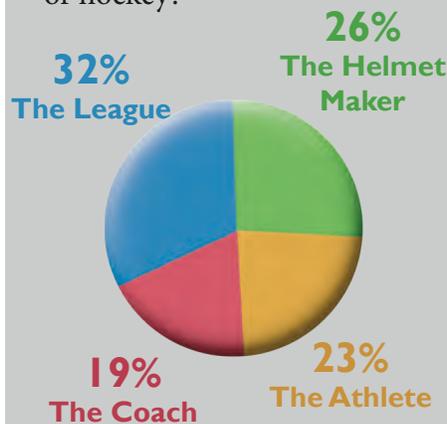
-Female Mock Juror

Perceived power to have prevented a negative outcome is a key aspect of juror decision making. Potential jurors believe helmet makers can manufacture and sell helmets safe enough for astronauts and are likely to wonder why safer sports helmets were not developed sooner by defendant companies or required/recommended by a defendant team or league (again, hindsight bias). Plaintiffs pursue evidence that helmet makers knew of dangers and chose not to make safer products, thereby failing to protect players who had a right to believe they were being protected. At the same time, evidence that newer helmets are safer may also support a juror conclusion that helmet makers have responded to knowledge of risk by improving the technology and making players safer. Potential jurors generally view leagues and helmet makers as the most powerful vehicles of player safety.

“If you can find something that [helmet makers] shortcut here or they got materials there or they had it manufactured in China and had it tested over there and should have had it tested here, that’s negligence in my view.”

-Male Mock Juror

Who should be held most responsible for protecting athletes from head injuries that occur while playing a team sport such as football or hockey?



Some characteristics distinguish potential jurors’ perceptions of who should be held most responsible for athletes’ head injuries. For instance, females (30%) are more likely than males (20%) to report helmet makers are most responsible. At the same time, males (31%) are statistically more likely than females (18%) to report the athlete as most responsible. Self-described Democrats (37%) are more likely than all

other political affiliations (21%) to assign the greatest responsibility to the helmet maker. These and other factors such as potential juror ethnicity, as well as key attitudes, are statistically significant predictors of jurors’ reports of the party most responsible for player head injuries.

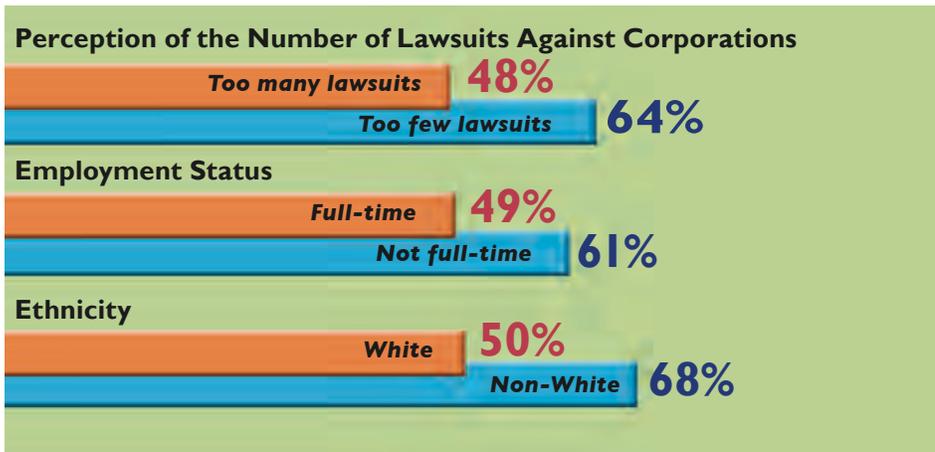
While concussion defendants may offer “assumption of risk” defenses asking jurors to consider a player’s role in his own injuries, potential jurors have differing reactions to who is responsible for a player’s repeated exposure to risk. Juror assessments are often based upon an evaluation of the parties’ power and knowledge, and the parties’ use of power and knowledge to make choices. That assessment often results in jurors’ focus on the entities with the greatest resources: in concussion litigation that means the helmet makers, the leagues and the teams/organizations – not the players.

Recommendation: Level the playing field.

Demonstrate how your client used its power and choices fairly and effectively – always with player safety as a primary goal. For a league like the NFL, this means demonstrating how the league took seriously its duty to protect its players and communicated consistently (or at least used responsibly) its knowledge and resources.

Openly endorse the plaintiff(s) at trial. Make the strategic decision not to aggressively attack their credibility. Instead, make sure jurors see them as active consumers of medical care and medical knowledge, with the power and ability to know much more than the average juror about the health risks of their sport.

Proportion of potential jurors who would pursue a lawsuit against a helmet maker knowing the company could have offered a helmet with greater protection:



Many jurors can see themselves as plaintiffs.

Fifty-four percent of surveyed potential jurors reported they would probably or definitely pursue a lawsuit against a helmet maker if they suffered a severe head injury and the helmet maker could have offered a more protective helmet. Juror attitudes and experiences (and to some extent, demographics) are statistically significant predictors of willingness to pursue a lawsuit against a helmet maker. For instance, the perception that there are too few lawsuits filed against large corporations is predictive of a greater likelihood to report willingness to sue a helmet maker for a head injury.

Perceptions of sporting good manufacturers' product testing is a crucial aspect of jury decision making in all sports product cases, and is a relevant predictor of potential jurors' attitudes.

"I assume the federal government has certain testing requirements, but I think a good company and a sound company should proactively test their product on the basis of what they believe they need to do to make it a safe product."

-Male Mock Juror

Specifically, 62% of potential jurors who believe sports products companies often or almost always place products on the market that are not adequately tested say they would probably or definitely pursue a lawsuit against a helmet maker. Just 48% of those who believe sports products are rarely or almost never placed on the market without adequate testing say they would do the same.

"I would want validation that it was tested by a third party."

-Male Mock Juror

Other attitudes, including perceptions of environmental harm caused by corporations and frequency with which lawsuits against corporations have merit, are also related to increased willingness to pursue a lawsuit.

Recommendation:

Develop a high-risk juror profile.

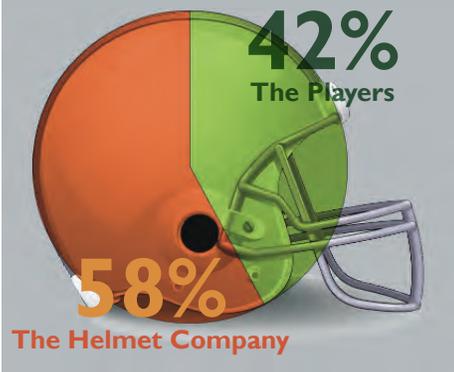
A high-risk juror profile in a sports concussion lawsuit against a helmet maker and the athletic team and/or league should focus on a number of critical juror attitudes. The following are among a set of statistically predictive high-risk juror attitudes:

- *Believes there are too few lawsuits against large corporations*
- *Believes sports products are not adequately tested before being placed on the market*
- *Believes jury verdicts are the only way to force change in the sports industry*
- *Believes the government should police corporations much more*
- *Believes corporations should be held to much greater responsibility than individuals*

Helmet makers and leagues bear significant responsibility for concussion-related injuries.

We asked jury-eligible Americans to consider a few brief lawsuit scenarios and indicate their initial leaning in the case based on a limited description. As summarized below, based only on the information provided, potential jurors assigned the league/organizing body (NCAA or NFL) or the helmet maker with the majority of responsibility for a football player's concussion-related injuries.

Dozen of football players experienced major health problems related to concussions suffered while playing football. Those players are now suing the company that designed and manufactured their helmets, claiming the company ignored evidence that other helmet designs could have provided better protection from injury. What percentage of responsibility for the players' injuries would you assign?



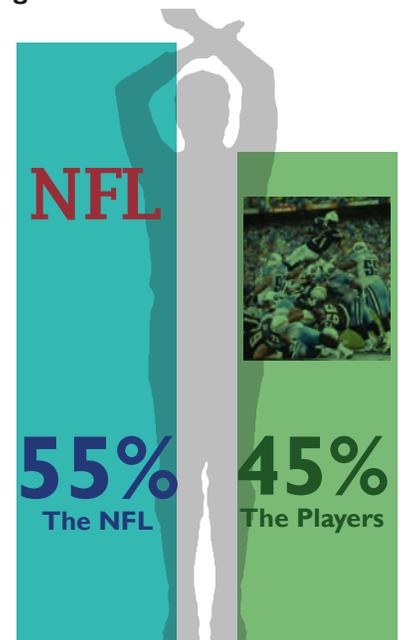
A number of factors predict potential jurors' decision to assign more than 50% of responsibility to the helmet company. Specifically, 68% of non-white respondents assigned the majority of responsibility to the company, while just 43% of white respondents did the same. Results showed several factors that were predictive of reports that a helmet company should be held most responsible in the class action scenario presented, including a person's political orientation and 2008 Presidential election vote.

Obama voters are more likely to assign majority responsibility (50% or more fault) to a helmet company.



Broader anti-corporate bias is also related to greater responsibility for the helmet company, with 66% of those who believe there are too few lawsuits against corporations assigning the helmet company the majority of responsibility for players' injuries, while just 39% of respondents who believe there are too many lawsuits report the same. Perceptions of the role of government regulation of corporations, as well as corporate harm to the environment, among other perceptions, are also predictive of potential jurors' decision to assign majority fault to the helmet maker.

Dozens of retired professional football players experienced major health problems related to concussions suffered while playing football. Those players are now suing the National Football League, claiming League executives ignored known risks associated with concussions and chose not to protect players in order to ensure the game remained exciting for fans. What percentage of responsibility for the players' injuries would you assign?



Potential jurors assigned the NFL an average of 55% of responsibility for player injuries in a scenario based on current class action litigation filed against the NFL.

Several factors in the preliminary analysis were also predictive of potential jurors' assignment of more than 50% responsibility to the NFL in the above scenario. Perceptions of presumed fault for a sports related injury are predictive of potential jurors' decisions to assign responsibility to retired NFL players. Fully 70% of potential jurors who report a sporting goods injury is generally, or almost always the product's fault, assigned the NFL more than half of the responsibility. Only 41% of those who felt a sports injury is generally, or almost

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always the individual's fault did the same. Perceptions of corporate environmental harm and lawsuits against corporations are also powerful predictors of the NFL's responsibility for players' injuries.

As shown in the chart above, potential juror demographics may also play a role, with a consistent pattern that males

Female potential jurors are more likely to assign less responsibility to NFL player-plaintiffs.

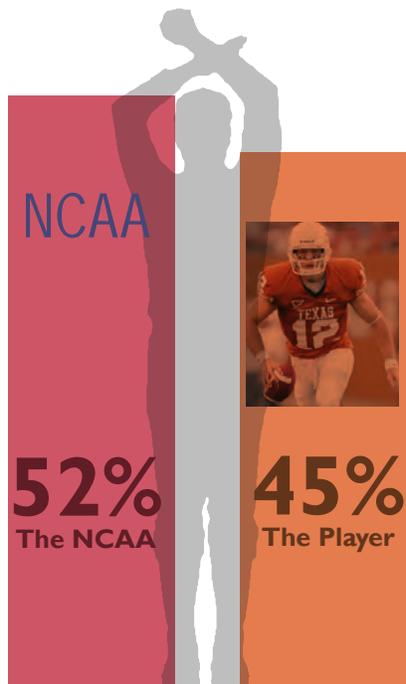


are more likely than females to report opinions and perceptions favorable to helmet makers, teams, and leagues. Non-white respondents (57% versus just 43% of white respondents), and those who are not employed full time (54% of respondents versus 40% of those employed full time) are more likely to assign 51% or more fault to the NFL.

In a final litigation scenario, potential jurors were asked for their impressions of a class action dispute by college football player plaintiffs against the NCAA.

As in other scenarios studied, the perception that there are too few lawsuits against corporations (57% of those who believe there are too few versus just 34% of those who believe there are too many) are related to assignment of 51% or more responsibility to the NCAA. Those without supervisory experience in their work (50%) are more likely than those with supervisory experience (37%) to assign the NCAA more than 50% of responsibility.

A college football player suffered a number of concussions while playing college football. He now suffers from significant health problems related to those concussions and is suing the National Collegiate Athletics Association (NCAA) for failing to enact policies it knew could prevent and help treat head injuries in college football players. What percentage of responsibility for the players' injuries would you assign?



Additional survey data supports the conclusion that jurors are likely to view the NCAA much like they would a corporate entity, and bring aspects of anti-corporate bias against the NCAA in the courtroom. Specifically, we have had discussions with mock jurors about perceptions of the NCAA and some have immediately focused on the NCAA's profits and its responsibility to have safeguards for players in place.

“College sports makes a lot of money and they do recruit a lot of people to fill these teams and sometimes they are gone through, like I said, and probably not all the safeguards are not in place as they should be.”

-Male Mock Juror

Potential jurors' attitudes about government regulation of corporations are also related to assignment of responsibility to the NCAA. Specifically, 51% of potential jurors who report the government should police corporations more assigned the NCAA 51% or more responsibility. Just 26% who report the government should police corporations less did the same.

**Recommendation:
Test your venue early.**

Every venue is different and trial risk in each venue depends on a variety of case-specific factors. The attitudes, experiences, and juror characteristics associated with leanings in concussion disputes provide a basic idea of possible risk in a given venue. Early focus groups and/or survey research in a specific venue will contextualize these findings and put a finer point on your client's risk.

More importantly, the lessons learned in early research will allow you to make informed decisions in discovery and garner the testimony and evidence proven to be more persuasive to jurors in your case.

References:

¹ See for instance the Testimony of Jeffrey Kutcher, M.D. on “Legal Issues Relating to Football Head Injuries, Part II,” before the United States House of Representatives Committee on the Judiciary. January 4, 2010.

² See for instance, Keating, P. (2011). “Coming to a Head.” *ESPN Magazine*. Retrieved March 28, 2012 from <http://sports.espn.go.com/espn/news/story?id=5970086>

³ See Staar, W. (2010). “The Coming Wave of Concussion Litigation.” *For the Defense*, August 2010. Published by the Defense Research Institute.

⁴ This report is based in part on Persuasion Strategies/K&B National Research National Juror Survey spanning December 2011 and January of 2012. See endnote for more details.

⁵ See for instance, Collins et al. (2006). “Concussion in Professional Football: Performance of Newer Helmets in Reconstructed Game Impacts.” *Neurosurgery*, 59(3), 591-606.

Cover Illustration: Pam Miller, 2012.

Persuasion Strategies and K&B National Research conducted a jointly designed national research study of 391 jury-eligible participants that focused on four areas of jury-eligible participants’ perceptions: 1) sports product safety and litigation; 2) concussion injuries and concussion-related litigation; 3) athletic product advertising; and 4) corporate conduct more generally. This survey, completed in January 2012, furthers findings from numerous questions Persuasion Strategies has asked on a national scale in past years, allowing us to evaluate changes in perception over time, if any.

To have a more detailed conversation about how these findings may affect your litigation strategy, please contact Kevin Bouly at [krebouly@persuasionstrategies.com](mailto:krbouly@persuasionstrategies.com) or 303-295-8476.



Dr. Kevin Bouly has been active in litigation consulting since 2001. His doctorate in legal communication focuses on persuasion, small group influence, and jury decision making. Dr. Bouly has conducted and analyzed research and advised on a full range of plaintiff and defense cases. Dr. Bouly has been Associate Editor and advisor to the American Society of Trial Consultants’ jury research and courtroom communication publication, *The Jury Expert*. Dr. Bouly is also currently co-authoring a book for the American Bar Association Section of Intellectual Property, entitled *Patently Persuasive*. Outside of work, Kevin likes to fly-fish, climb mountains, and watch his three dogs hog the furniture.

