

The Current Climate For Today's Nursing Home Defendant

by Shelley Spiecker, Ph.D. and Kevin Bouilly, 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.**

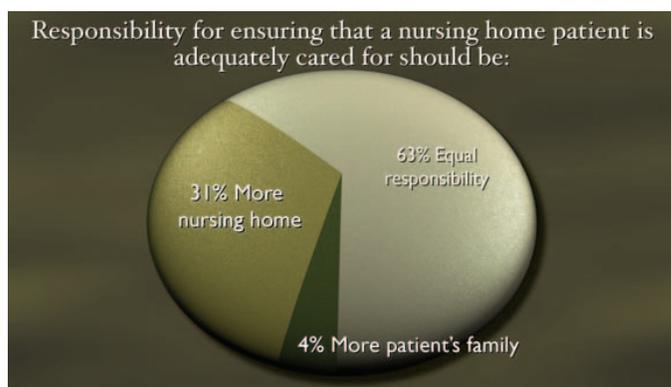
These are just a sprinkling of headlines that characterize today's litigation landscape. While jurors are more critical of corporate defendant conduct than ever before, there are some signs that the tide is turning in defendants' favor. Persuasion Strategies recently conducted two nationwide surveys, 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.

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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.

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.”

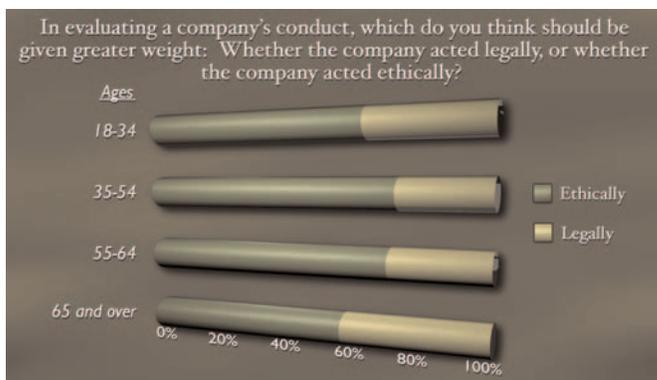
As seems to be the case with many startling events, the first occurrence of an Enron-like event is followed by public outrage. The second time a similar event occurs, outrage is likely to decrease. Enron and subsequent corporate scandals seem to cause a “desensitization” effect. In litigation, this translates 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.

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.

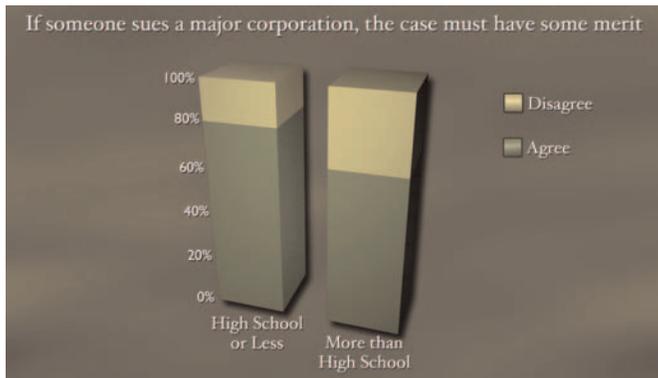
- While “post-Enron” jurors emphasized ethics over the law when the two conflict, current survey research demonstrates a rebound to near “pre-Enron” levels. Taken as a whole, findings reveal the importance of both ethics and the law.
- When evaluating a company’s conduct, two-thirds of jurors (67%) give 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. Third, 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:



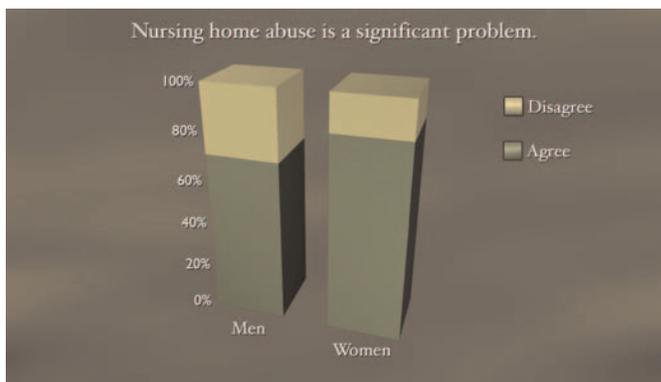
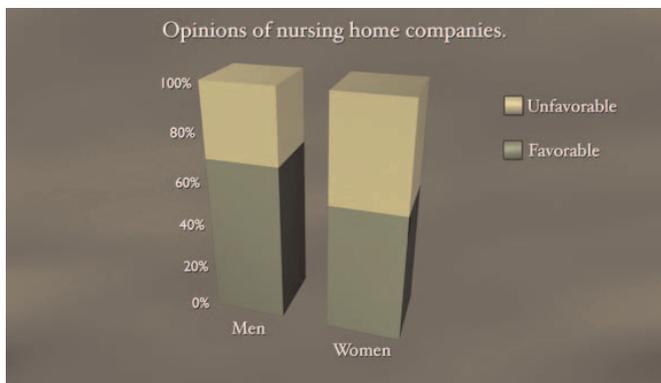
- Half of the jury-eligible population (50%) believes that the number of lawsuits against nursing homes will force nursing homes to shut down in the future.
- Almost two-thirds (64%) of potential jurors would not be reluctant to award damages to an adult for the death of a parent.
- Potential jurors 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.

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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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