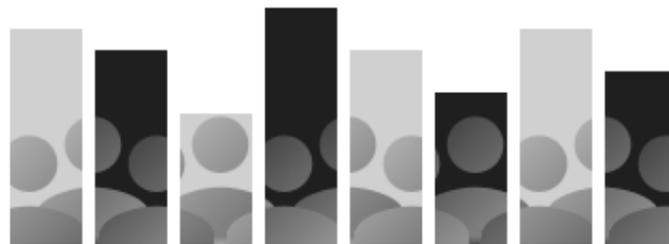


*Confidential Attorney Work Product*

# *Analysis of the Impact of Covid-19 on Jury Attitudes, Behavior, and Willingness to Serve*

Prepared: July 14, 2020

Report provided by



**Empirical Jury**  
LLC

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# Results

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## General

Cumulatively, we've surveyed almost 1,300 jurors to explore how Covid-19 is jurors, including how it is impacting their willingness to serve, their view of traditional trials, and their votes on liability and damages.

We asked the jurors a battery of questions about their views of Covid-19, their response to jury duty during the era of Covid-19, and their attitudes towards various types of trial (in person, virtual, etc.).

*Section I* covers the jurors' attitudes about Covid-19. This is purely descriptive statistics. It describes the prevalence of different views. It does not consider how those views impact juror votes on real cases.

*Section II* covers juror attitudes about existing in-person and virtual trial options, including synchronous and asynchronous presentation. This is offered as a way to begin a conversation about how to get back to having trials, while avoiding problems with under-inclusion of jurors.

In *Section III* we drill down on how juror attitudes impact jury behavior. For example, we investigate whether specific attitudes or experiences with Covid-19 predict jurors that are decidedly better for the plaintiff. And we evaluate whether jurors who would seek to avoid jury duty (or might be excused) based on Covid-19 risks or experiences, skew results for one side or the other.

*Section IV* discusses studies we ran on two medical malpractice cases. In short, to measure how Covid-19 impacted juror behavior, we *re-ran* two cases we studied before Covid-19. We did the second run of the cases in May 2020. The only change to these case presentations was that the first time we ran them, Covid-19 did not exist (at least in humans). For the second run, it did. The case presentations were identical to when we ran them previously. This allowed us to isolate and measure any Covid-19 Effect in medical malpractice cases.

At the beginning of each section we include a summary of some of the most interesting findings, followed by the full data set in chart form.

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# Section I: Jurors Attitudes and Opinions – Covid-19, Jury Duty, and Virtual/In-Person Trials

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## *Summary*

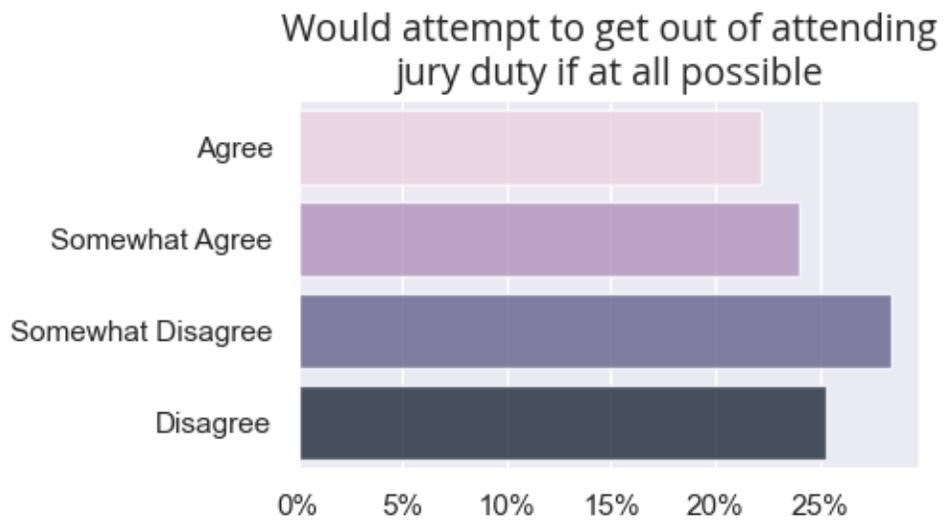
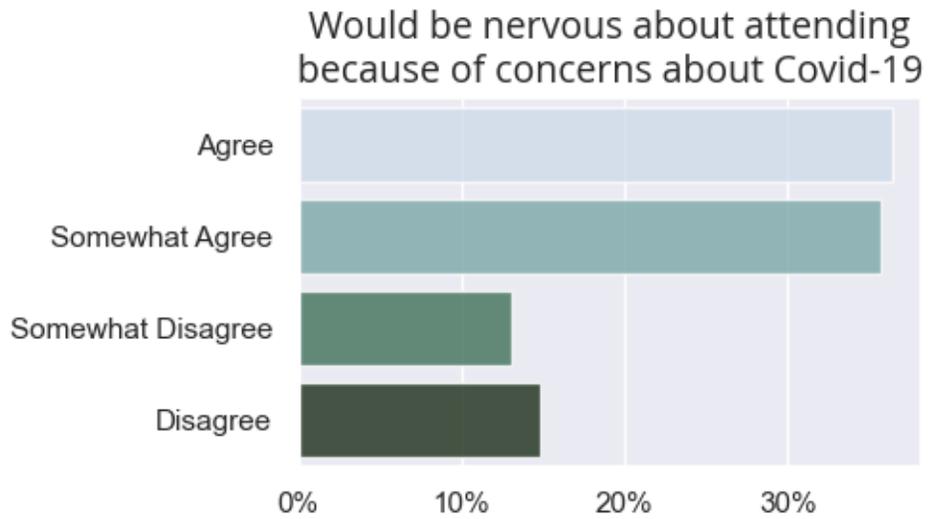
This section reviews the juror responses to a variety of Covid-19 related questions. It contains “descriptive statistics” – meaning it measures juror attitudes but does not measure how they impact jury behavior on real cases. Those results are contained in subsequent sections.

Some of the high-level takeaways from this section are included below.

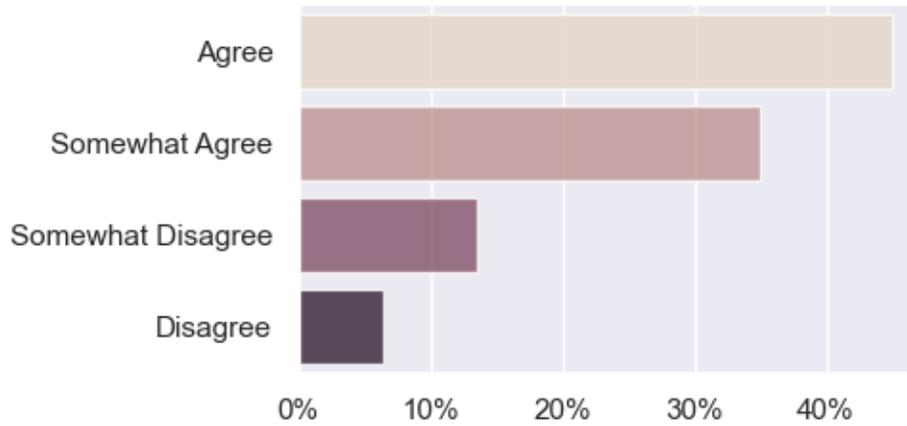
## Juror Attitudes Towards Covid-19, Masks, & Serving as a Juror

- Jurors are nervous about trials. Roughly 3 out of 4 jurors said they were nervous or somewhat nervous about attending a trial because of concerns about Covid-19.
- 46% of jurors said they would actively attempt to avoid jury duty all together as a result.
- A full 30% said they would ask to be excused due to their discomfort serving in close spaces.
- 9% said they would inform the court that if masks were required they would not or could not comply.
- A little more than 1 in 5 jurors would ask to be excused for what is likely a qualifying condition to seek to be excused (over 65, lung problems, heart problems, diabetes). This suggests that larger panels will be required.
- We asked jurors if they were forced to come to court, who they would blame. The vast majority said they would blame no one. Only a small share of jurors said they would blame the plaintiff or the defense, and they blamed those parties in equal portions. So, we found no evidence that the plaintiff would be punished for going to trial. This updates, and is inconsistent with, earlier findings from other entities who did research in this area.

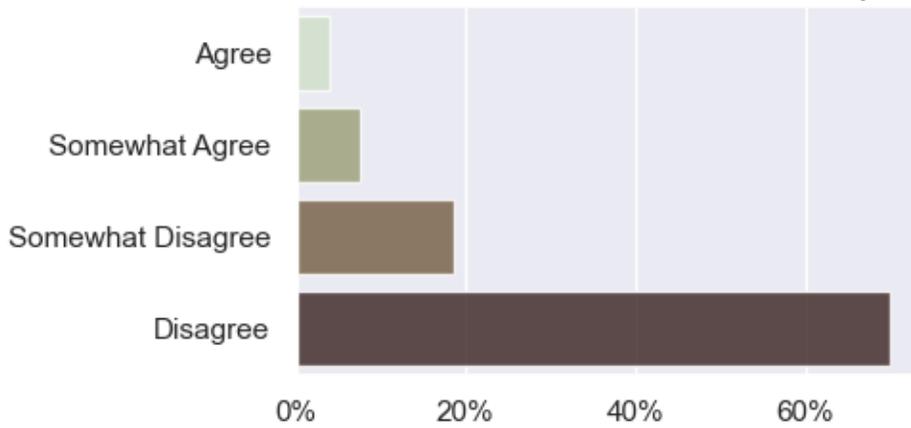
Full Charts



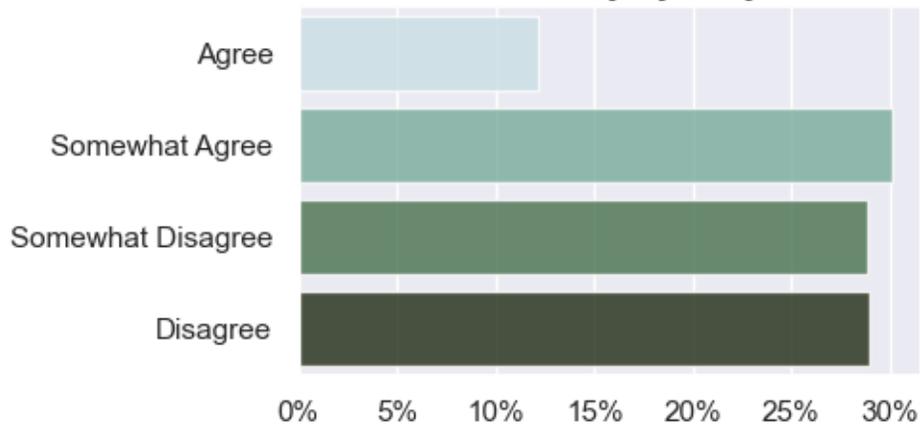
### Would attend because it is their civic duty



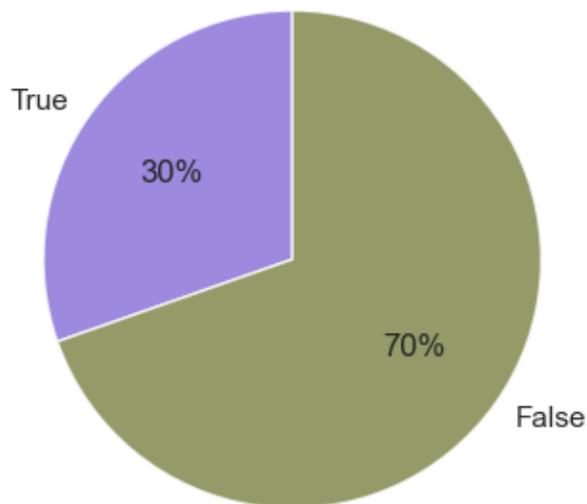
### Would not attend if a mask was required



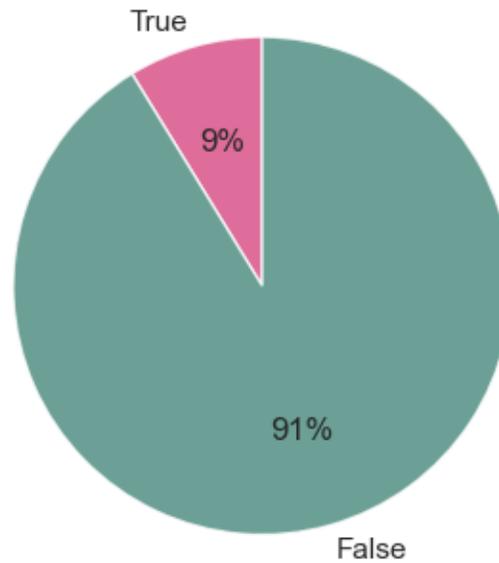
### Would be excited to be called to jury duty



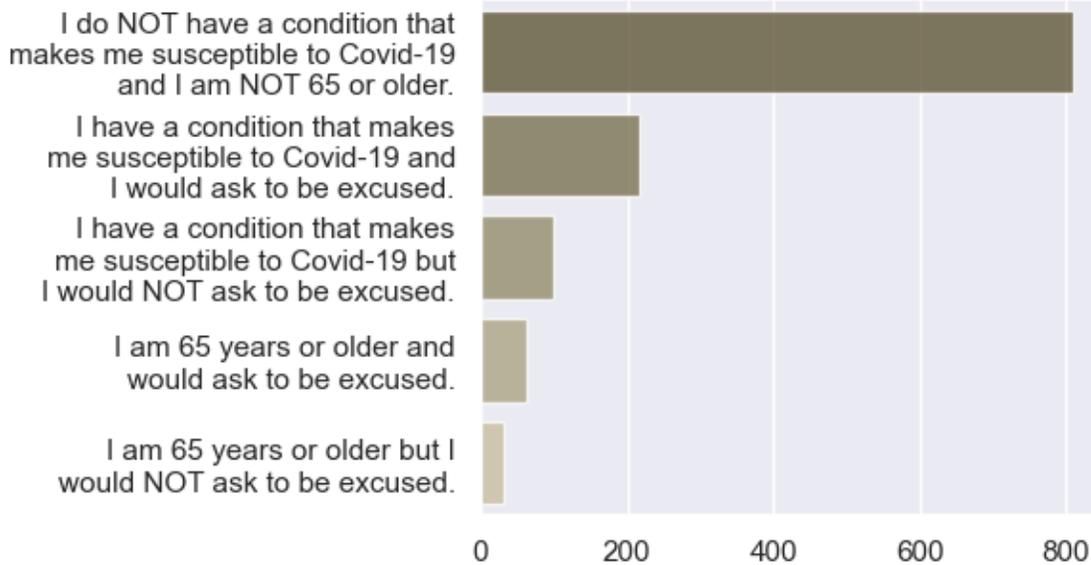
### Would ask the court to excuse them from serving (uncomfortable being in closed space with people)



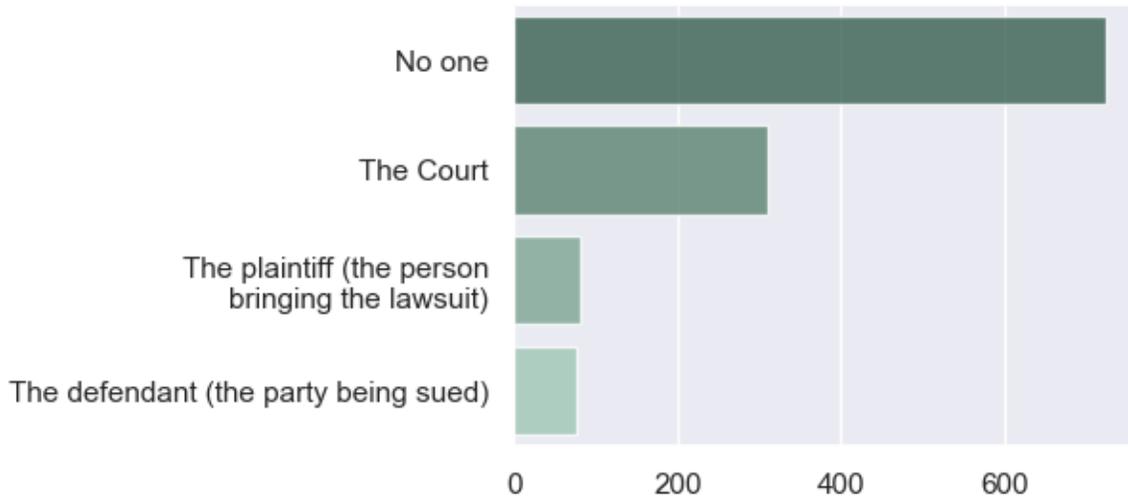
Would inform the court that they cannot comply with the requirements because they will NOT wear a mask



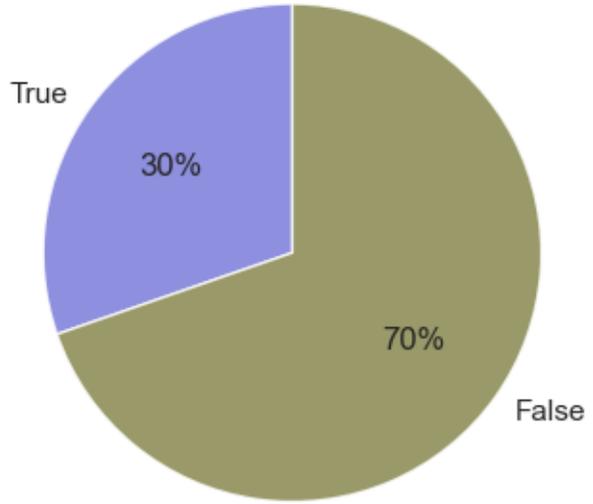
### Court Allows Excusable Conditions



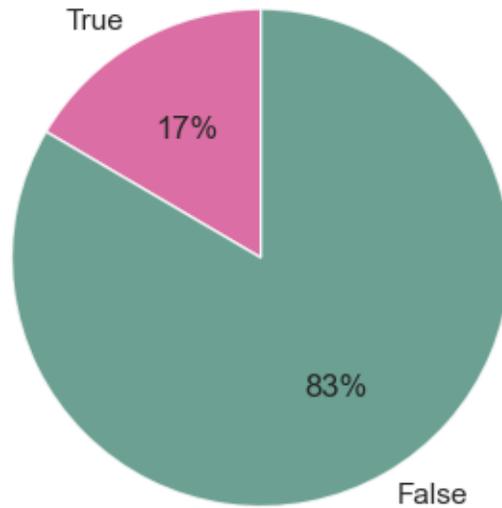
If they are forced to come to court they would blame:



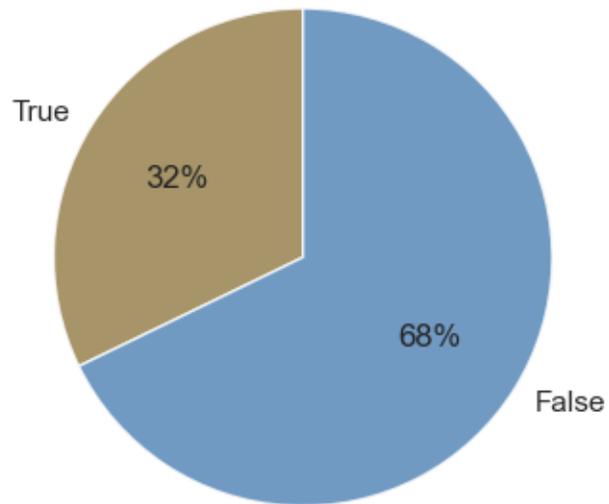
Know someone who had or has Covid-19



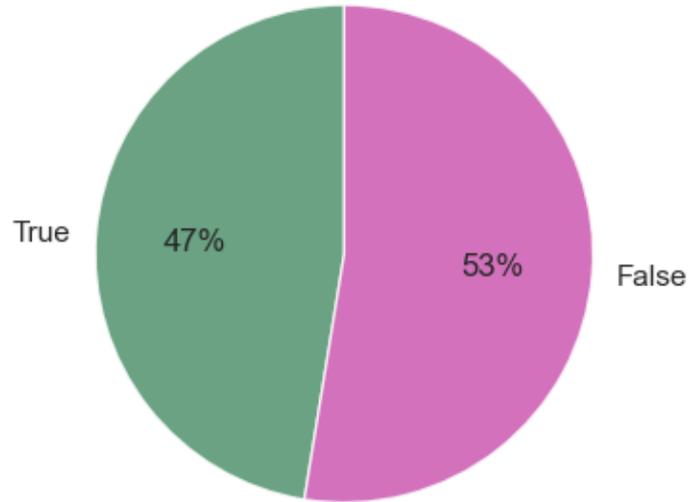
Know someone who has become seriously ill or died from Covid-19



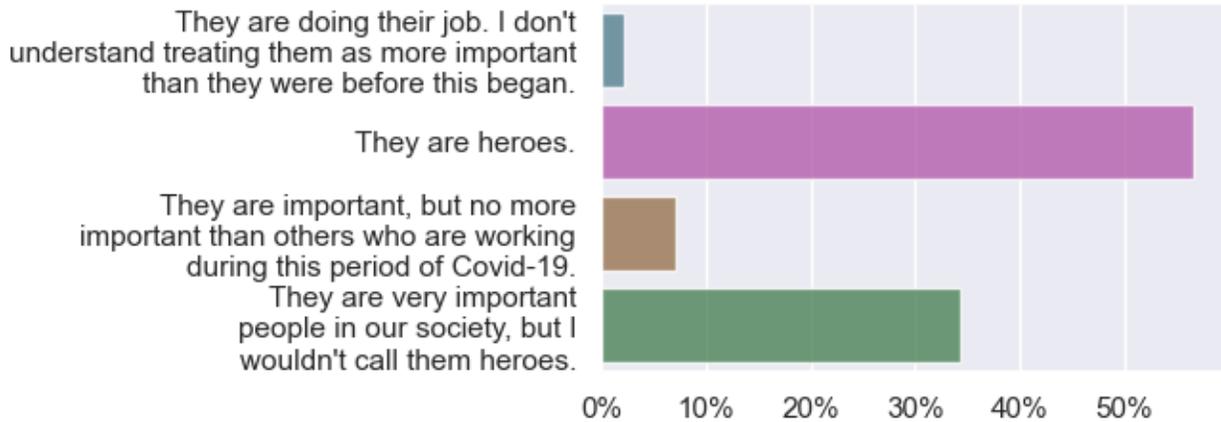
Covid-19 seriously impacting ability to earn income



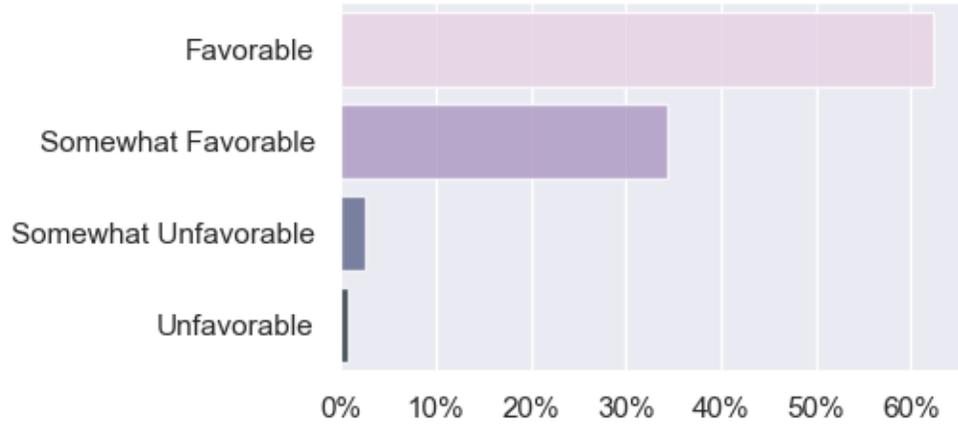
Love someone who works in healthcare and is putting their health at risk during this period of Covid-19



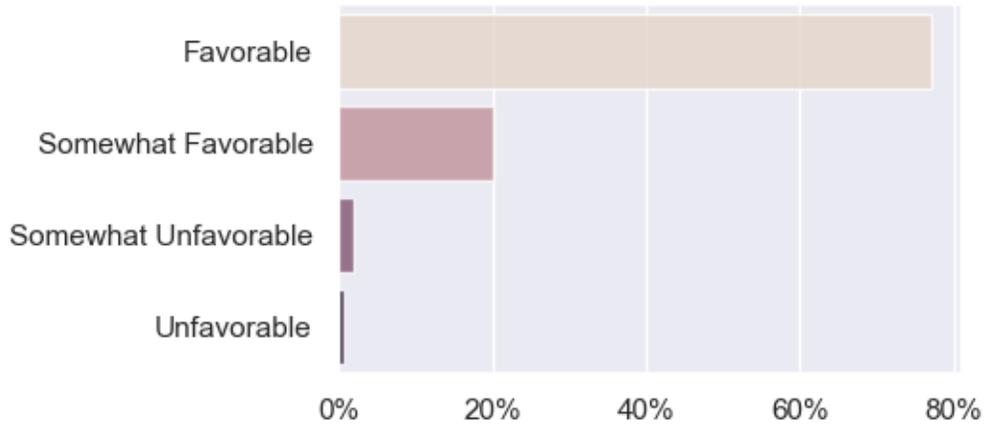
View of healthcare workers (doctors, nurses, etc.)



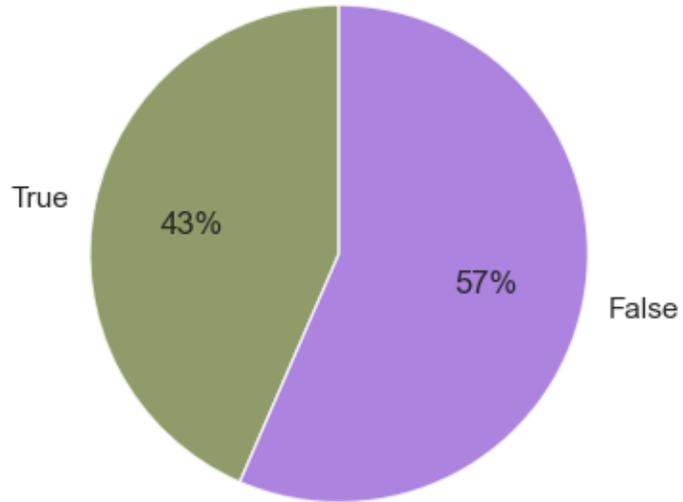
### View of doctors



### View of nurses



## Support limiting lawsuits against Healthcare Professionals



## Section II: Juror Attitudes Towards Trial Options

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This section explores how jurors feel about various trial options that have been floated by bar organizations, academics, and various lawyer led organizations (such as AAJ, ABOTA, and the ABA).

We asked jurors about how they would prefer to serve as jurors. We presented them a variety of options. The full description the jurors received is included in the textboxes on the following pages. These are the specific descriptions of the trial “options” jurors were presented.

After the descriptions included in textboxes, we explore the data. We also share some observations about two of the trial options.

It is our view that new and novel approaches to trial need to be seriously considered in order to avoid producing jurors that are not representative of the community. Traditional methods could risk excluding significant hunks of the pool, raising Constitutional concerns.

Imagine that you were given five choices of how to serve as a juror. These were provided to you by email from the Court, before you attend. Rank the options from the ones you like best (#1) to the option you like the least (#5).

### **Option 1: Video Trial from Home**

How You Will Participate: The trial is recorded and cut. It happened a week or two before. You watch a video of the trial on a tablet or computer. You will watch this video from home. If you don't have a way to watch it at home, the court will provide you a tablet or other way to watch it. You will have to pay attention. You will have to check in on occasions to show you are participating, and you will have to answer a few questions at the end of the trial to show you paid attention. They will be easy but are designed to make sure you were listening. You will vote for who wins at the end of the case, after having a group video call with other jurors who watched the case.

Time: The trial is expected to take one week of watching, with about 4 hours of video per day. You will have to watch each day, but you can watch at whatever time you'd like during the day.

You will be paid the normal rate for jurors.

### **Option 2: Video Trial at Court**

How You Will Participate: The trial is recorded and cut. It happened a week or two before. You watch a video of the trial on a tablet at the court, sitting in a cubicle separated from others. A jury assistant will come by and help with any technical problems. A person will be in the room to make sure you pay attention. You will vote for who wins at the end of the case, either from a safe distance after talking with jurors, or by video chat

Time: You will watch 2.5 hours in the morning and 2.5 hours in the afternoon. You will have two breaks in the morning and two in the afternoon. In total, you will be at court from 9-4pm.

The trial is expected to take one week of watching.

You will be fed lunch. You will be paid the normal rate for jurors.

### **Option 3: Video Feed – Live at Home**

How You Will Participate: The trial is video streamed to you at home. You watch the video on a tablet or computer. You will watch this video from home. If you don't have a way to watch it at home, the court will provide you a tablet or other way to watch it. You will have to pay attention. You will have to check in on occasions to show you are participating, and you will have to answer a few questions at the end of the trial to show you paid attention. They will be easy but are designed to make sure you were listening. Sometime, you will have time you are not watching, as the court will handle issues with the attorneys that you cannot hear, etc. You will vote for who wins at the end of the case, after having a group video call with other jurors who watched the case.

Time: The trial is expected to take two weeks of watching, with about 4 hours of video per day. You will have to watch each day, between 9am and 4pm. You will need to remain available to watch, so that if there are delays or breaks, you are available to start when the court is ready.

You will be paid the normal rate for jurors.

### **Option 4: Video Feed – Live at Court**

How You Will Participate: The trial is video streamed to you while you sit in a separated space at the court. You watch a video of the trial on a tablet at the court, sitting in a cubicle separated from others. A jury assistant will come by and help with any technical problems. A person will be in the room to make sure you pay attention. You will vote for who wins at the end of the case, either from a safe distance after talking with jurors, or by video chat

Time: The trial is expected to take two weeks of watching, with about 4 hours of video per day. You will have to watch each day, between 9am and 4pm. You will need to remain available to watch, so that if there are delays or breaks, you are available to start when the court is ready.

You will be paid the normal rate for jurors.

### **Option 5: Normal Trial with Distancing**

How You Will Participate: You will watch the trial like jurors typically do. You will view all evidence and witnesses in person. You will be safely distanced from other jurors. At the conclusion of the trial, you will decide who wins by discussing with other jurors, in a large room with safe distancing.

Time: The trial is expected to take two weeks of watching, with about 6 hours of watching (counting dead time or delays). You will be at court from 9-4pm.

You will be fed lunch. You will be paid the normal rate for jurors.

## Summary of Results

- 41% rated watching a trial at home, on their own schedule (asynchronous), as their first choice.
- Another 26% rated watching a trial at home, streamed live (synchronous). These two together mean that 67% of jurors would prefer to serve at home.
- Notably only about 1 in 5 jurors (23%) viewed a traditional trial as their first choice.

Below we share some of our early thoughts on the feasibility of modern, novel approaches to jury trial.

### *Asynchronous Presentation of Evidence by Video – After Case Concludes*

The presentation of trial evidence by video, to be watched on a juror's schedule is feasible. It would be shown to jurors *after* the trial concludes. This has a few advantages, and also presents challenges.

Advantages include the fact that if the case settles, as often happens during trial, no jury time was used. Further, if there is a mistrial, no jury time was used. And most mistrials could be avoided by editing out the objectionable information. Similarly, any evidence that is admitted, then later determined to be inadmissible, can be edited out. Further, showing jurors only actual trial presentation would significantly shorten the amount of time required of jurors. It would also produce a full video record for appeal.

Disadvantages include additional effort to edit video, the loss of the ability to pick jurors before trial and then shape the trial to the panel, and the ability to have jurors ask questions.

If a court attempted asynchronous presentation, it would likely involve the following steps:

1. Recording the trial, editing out all the dead time (objections, times lawyers approach the bench, technical issues in the courtroom, recesses, conferences held in chambers, etc.);
2. Cutting the video into specific lengths – perhaps one hour each;
3. Having lawyers review edited footage to raise any concerns;
4. Creating a set of questions for each segment of video that test to make sure jurors paid attention. These questions should be agreed to by the parties and submitted. The goal of these questions would not be to exclude jurors for failing to understand complicated issues. Instead, they would check to make sure the juror is paying attention. For

example, a question could be as simple as, “When the expert was talking about the accident, did he use visuals?” Or it could be, “At the beginning of the plaintiff’s testimony, she discussed a specific fear at length. What did she discuss?” A set of 3-5 questions would be created for each segment of video (or a set of 10-15 questions could be created for a day worth of video);

5. Jurors would be excluded when they miss above an allowable number of questions.
6. After the trial concluded, all the remaining jurors (or some subset depending on how the court proceeds) would be allowed to deliberate virtually or in person. Another option would be to have many more jurors in total, set a rule of decision (for example 66% of the votes must agree), and eliminate deliberation.
7. A verdict would be rendered.

This option merits exploration because 1) it could allow for broader juror participation, 2) it would save overall juror time, 3) it could be more inclusive of jurors with difficult schedules (assuming technological issues could be resolved) and 4) jurors prefer this option.

#### *Synchronous Presentation of Evidence by Video – Jurors Watch Live at Home*

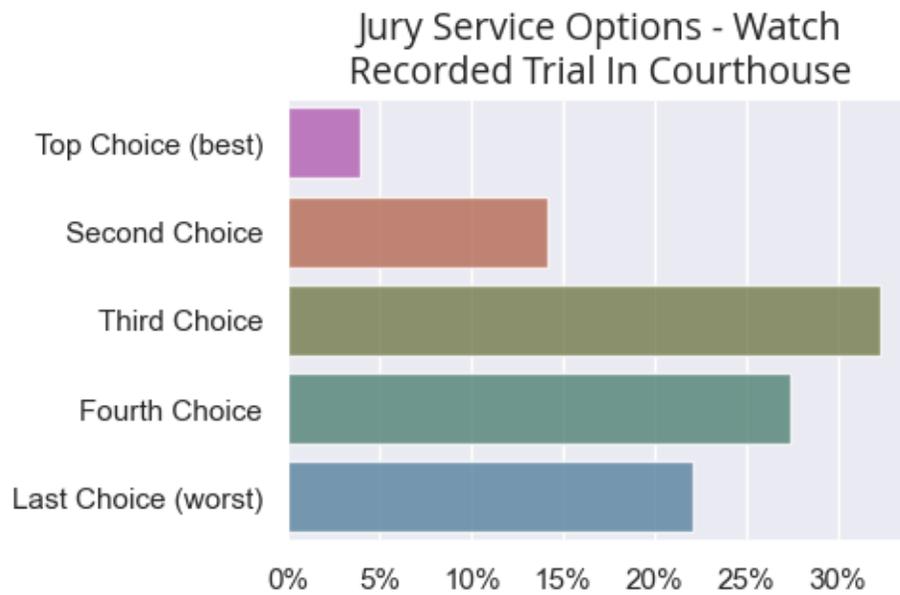
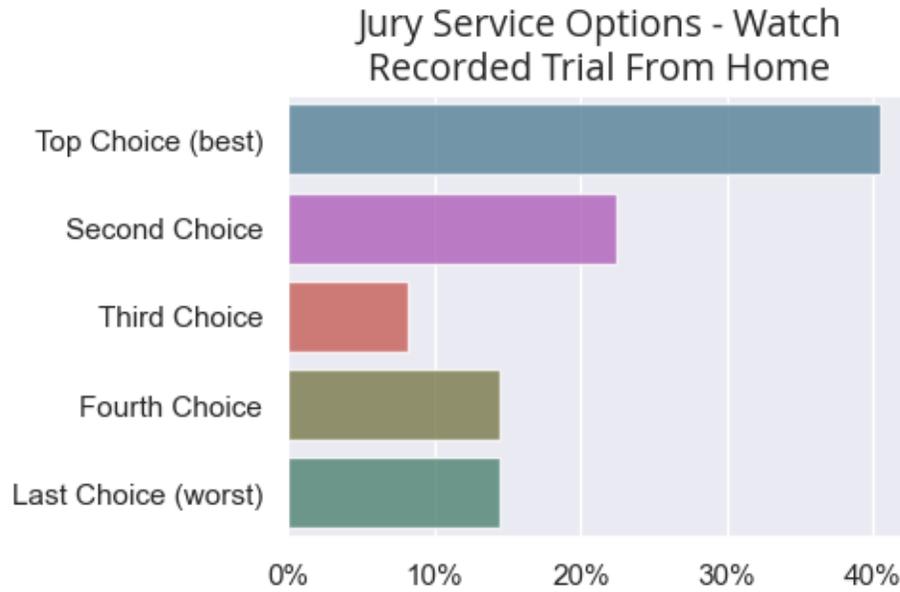
Jurors could also view a trial live streamed. This has been done with high profile trials, and recently in a Zoom trial. This approach has some advantages and disadvantages too.

Advantages include the fact that it is more like the current trial paradigm. It would preserve the right for jurors to ask questions. It allows for checking juror attention visually (by looking to see if they are watching) and could also allow various attention checks (such as placing an image on the screen for two minutes), then asking jurors to report what they saw.

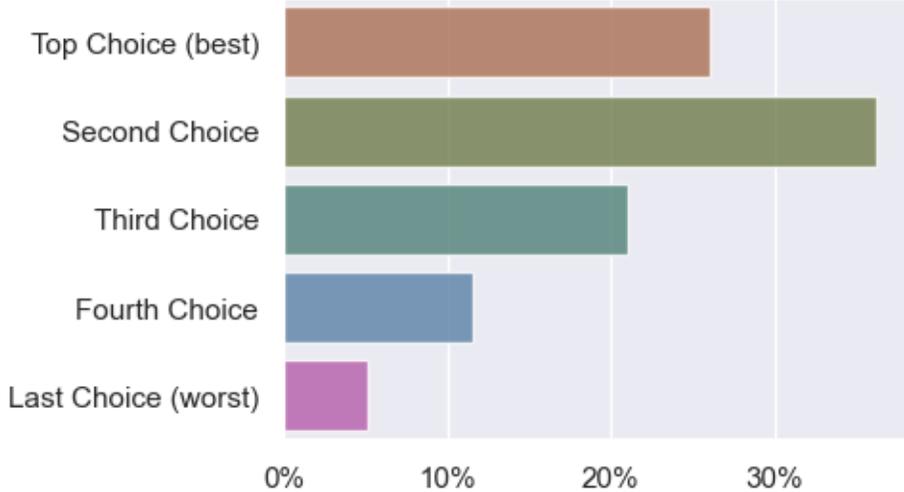
Disadvantages include needing a better overall wifi connection, more consumption of juror time, and a fixed schedule for jurors. Jurors only slightly prefer this option to in-person trials.

Another “in-person” option would be to set up video streaming in the courthouse but to let jurors watch outside the courtroom. This would make distancing easier and might reduce the need to exclude as many as 1 in 5 jurors for qualifying conditions that make them especially susceptible to Covid-19.

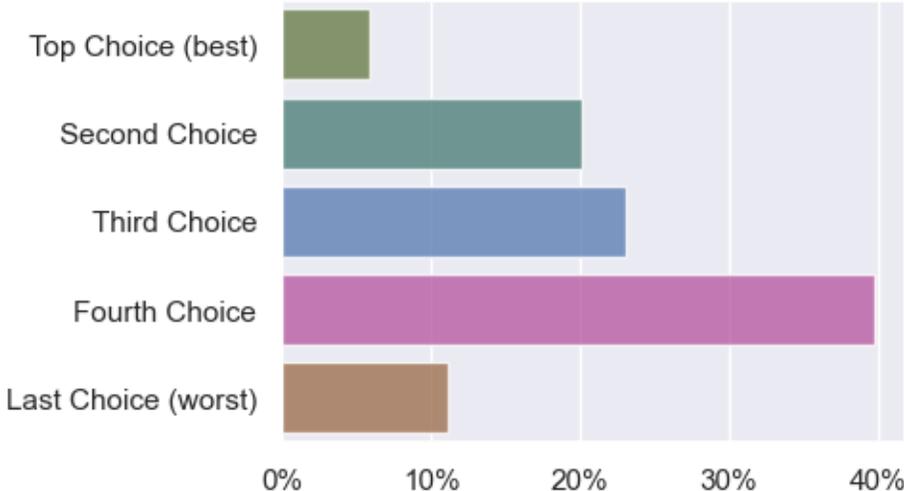
Full Charts



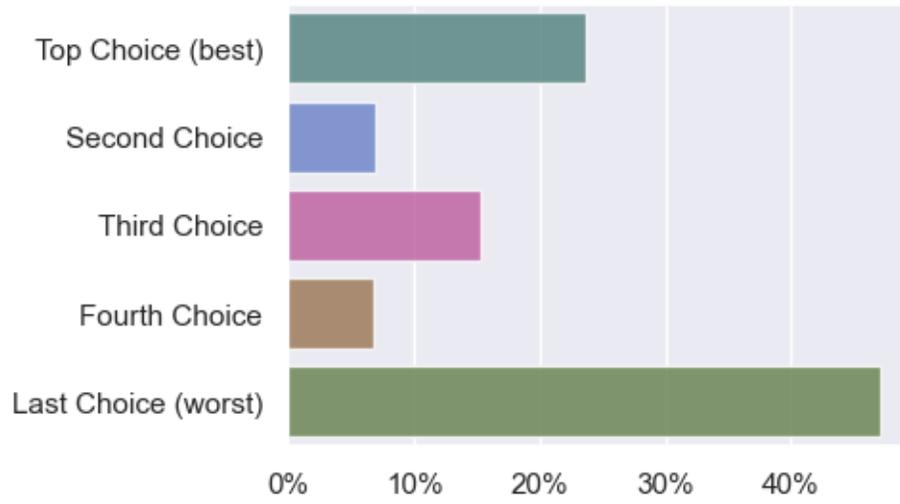
### Jury Service Options - Watch Live Video At Home



### Jury Service Options - Watch Live Video In Courthouse



### Jury Service Options - Traditional Live Trial With Social Distancing



## Section III: Juror Attitudes and Impact on Liability Decisions – Medical Malpractice

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In the charts below, we look at how juror responses to various questions correlate to their ultimate decision on liability in two real cases we studied. The goal is to move beyond descriptive statistics about how prevalent attitudes are and to drill down to whether and how they impact jury behavior. The focus of this section is on medical malpractice cases.

### Statistically Significant Predictors

Two questions were statistically significant predictors of how jurors voted on liability. They are included below.

**Would be nervous about attending trial:** 72% of jurors agreed that they would be “nervous” about attending trial because of concerns about Covid-19. The 27% that disagreed – essentially saying they would not be nervous about attending trial – reduce the average win rate by 16%. The result is statistically significant, with a p-value of .01.

**Support limiting lawsuits against healthcare professionals:** 43% of jurors supported limiting lawsuits against healthcare professionals. Among those jurors, the win rate falls by 11%, and the difference is statistically significant (p value = .02).

### Questions Trending Towards Statistical Significance

When a question is not quite statistically significant, one can't say with certainty the observed effect is real. However, when the numbers are close to statistically significant, it is often worth noting the result and considering it in light of other available data. This is because one reason the effect might not appear significant is simply because a larger sample is needed to detect the effect with more confidence.

**Know Someone Who Has Become Seriously Ill or Died from Covid-19:** 16% of jurors know someone who became seriously ill from Covid-19. Those jurors produce a win rate that is 11% higher than average. The result is not statistically significant, but it isn't that far off (p value = .16).

## Limits on the Results

We looked only at win rate in this first run. We may also explore damages. In past studies we have sometimes seen that attitudes do not impact liability, but they might impact awards. We plan to explore those effects in future work.

## How to Read the Charts Below

The charts below read as follows:

Column 1 is labeled participants. It tells you the percentage of participants that held a specific view about the question or statement presented. That statement/question is shown in orange, above the chart.

Column 2 shows the raw “win rate” for that type of juror. This is the percentage of those jurors that voted for the plaintiff in the case.

The final column compares the “win rate” for those jurors against the average for all jurors. This final column is probably the most important, as it shows if the juror attitudes were predictive of results in the case that are different at a statistically significant level. Put another way, this column tells us if the juror attitude correlates to a particular outcome.

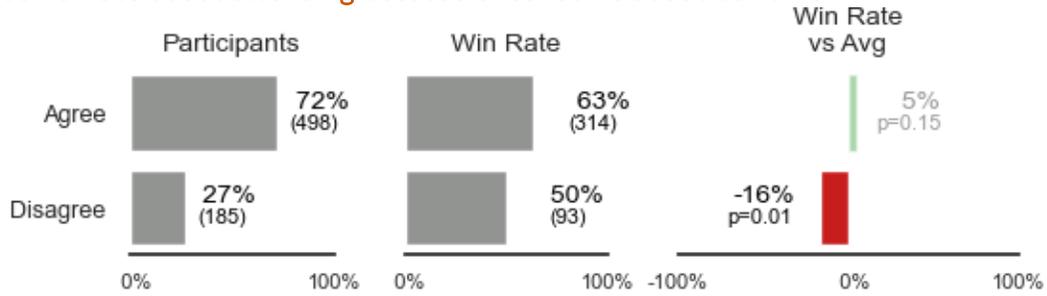
In this last column, an increase in win rate is shown in green. A decline in the win rate is shown in red. If the difference is statistically significant, the results are in bright green or red. If the difference is not statistically significant, the colors are faded out.

Finally, for the statistically inclined, the p-value is displayed for the last column. A p-value of .05 or less is traditionally considered statistically significant for scientific studies.

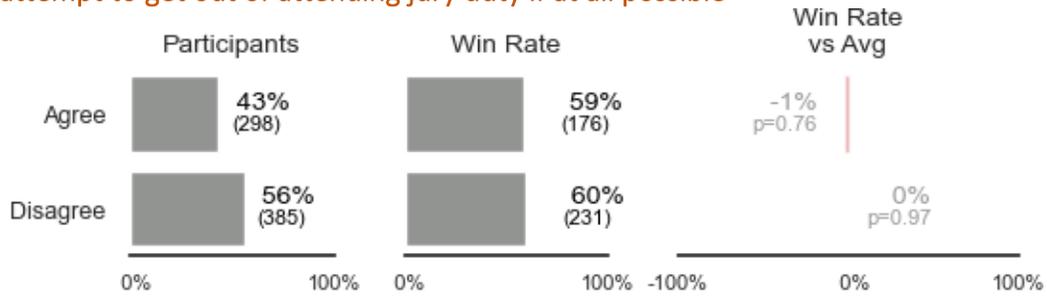
Only two questions predicted specific juror variation from the win rate that were statistically significant. Several others produced results that are trending towards statistical significance. They will be mentioned after the statistically significant results.

Full Charts: Significant, Trending, and Not Statistically Significant Results

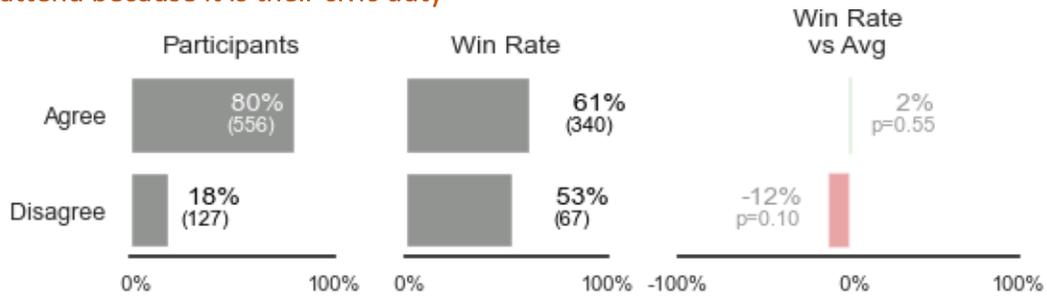
Would be nervous about attending because of concerns about Covid-19



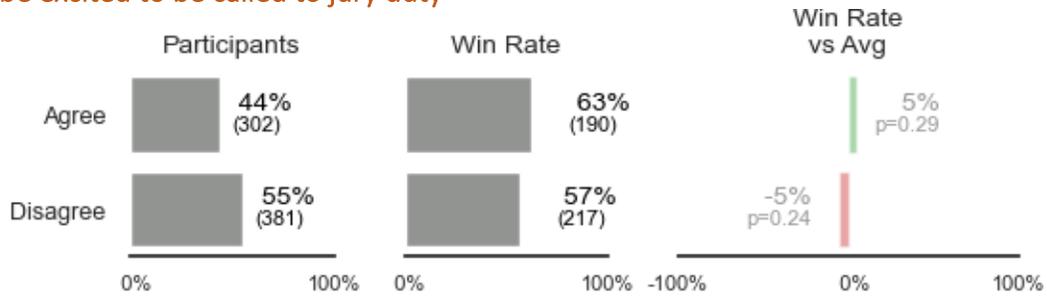
Would attempt to get out of attending jury duty if at all possible



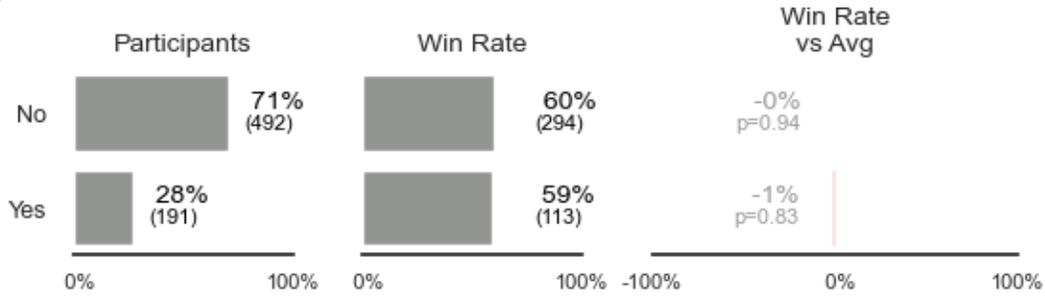
Would attend because it is their civic duty



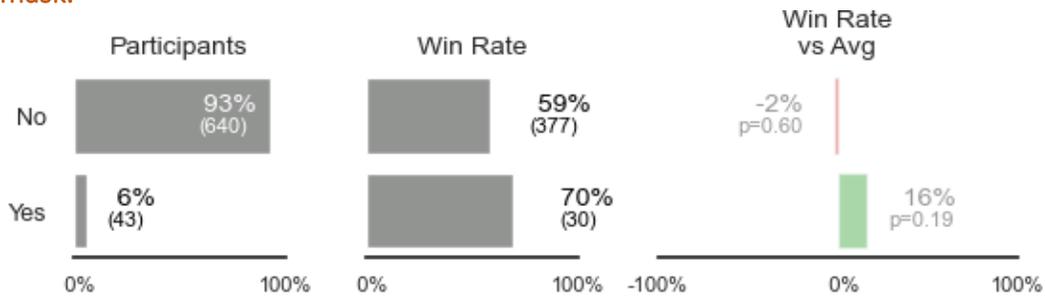
Would be excited to be called to jury duty



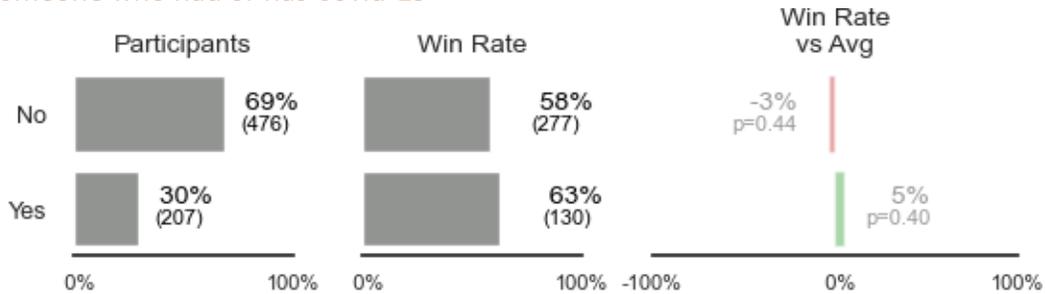
Would ask the court to excuse them from serving (uncomfortable being in closed space with people)



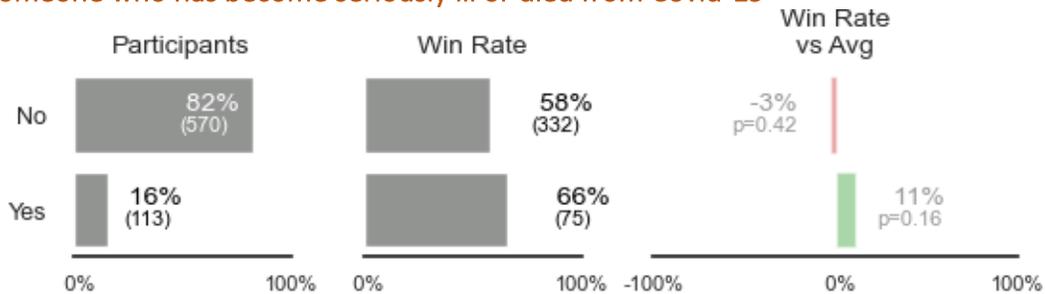
Would inform the court that they cannot comply with the requirements because they will NOT wear a mask.



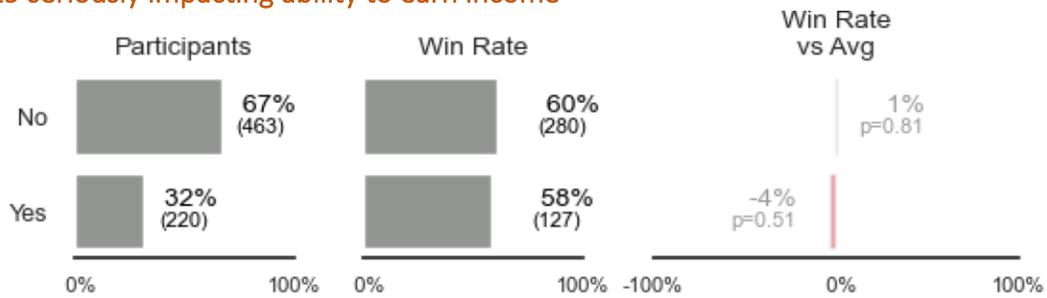
Know someone who had or has Covid-19



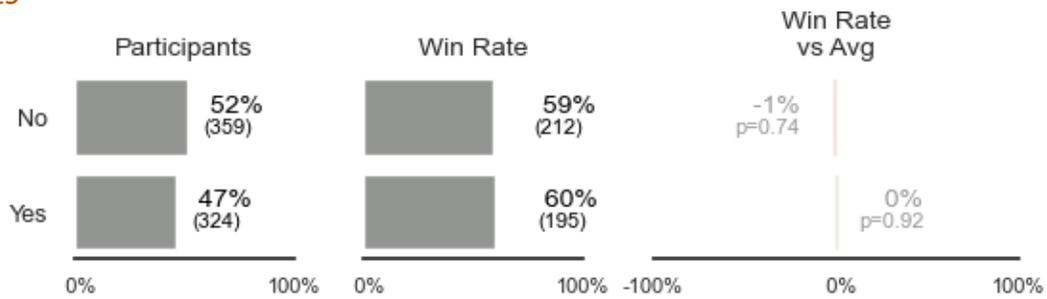
Know someone who has become seriously ill or died from Covid-19



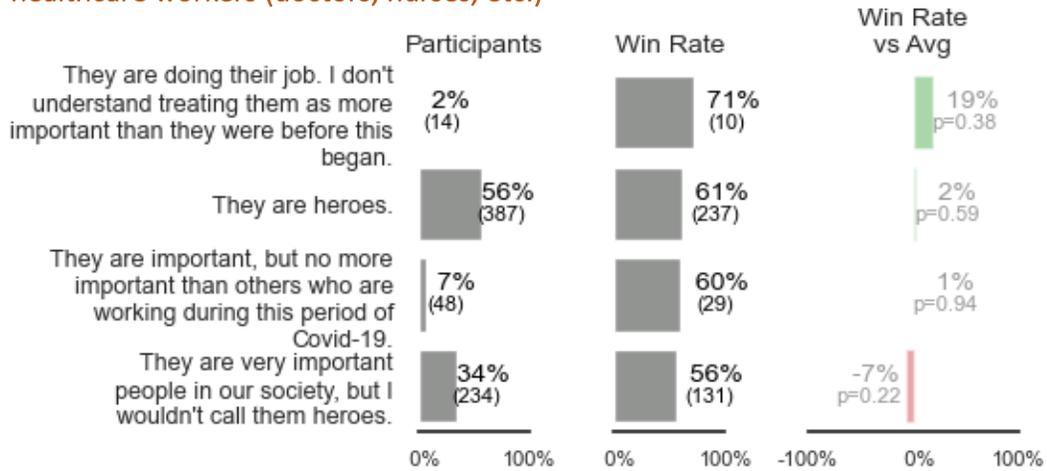
### Covid-19 seriously impacting ability to earn income



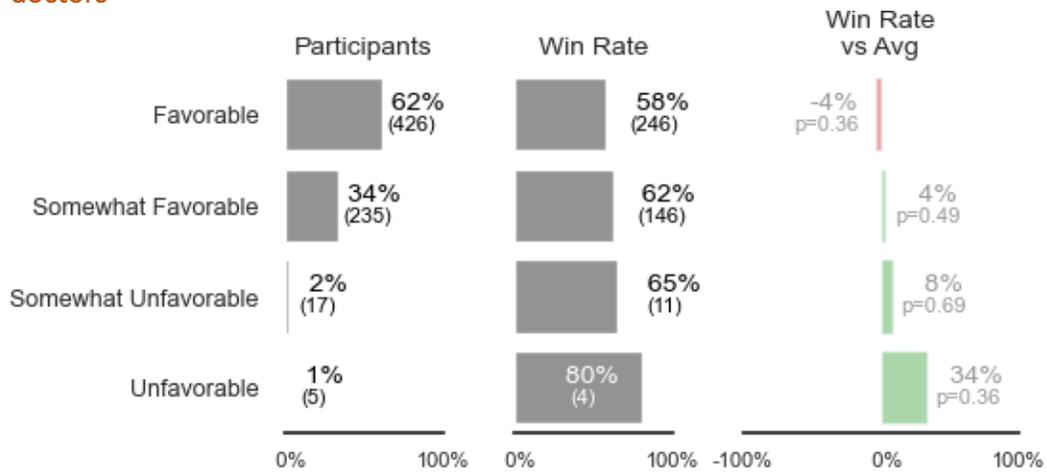
### Love someone who works in healthcare and is putting their health at risk during this period of Covid-19



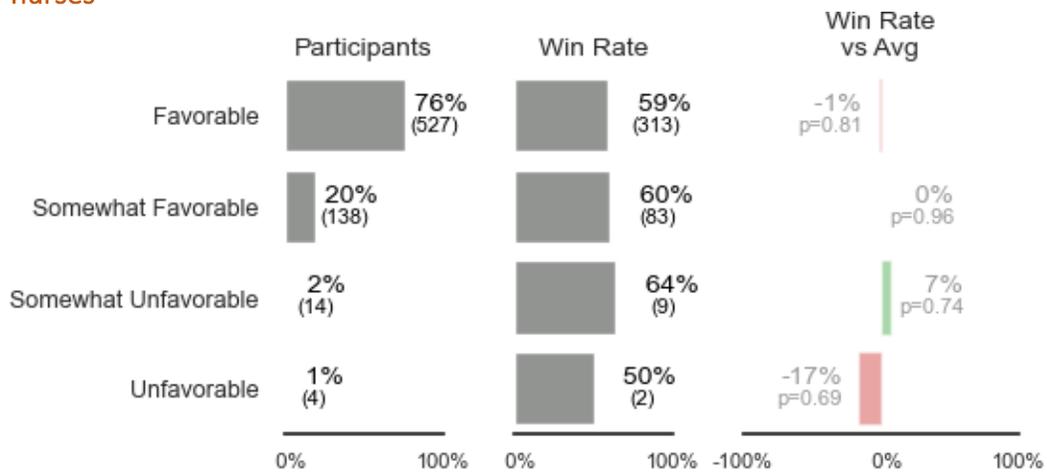
### View of healthcare workers (doctors, nurses, etc.)



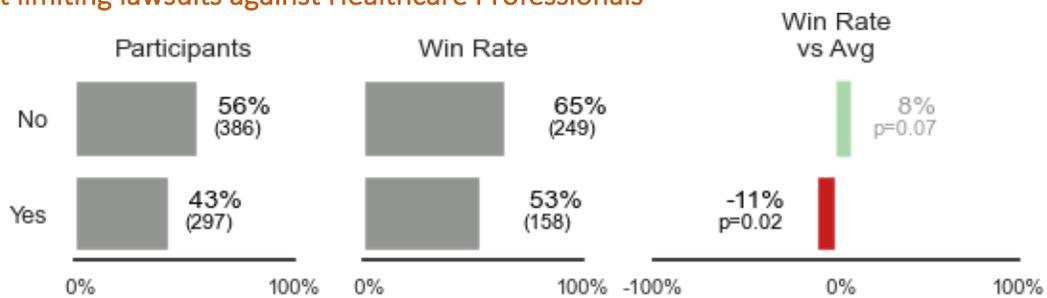
### View of doctors



### View of nurses



### Support limiting lawsuits against Healthcare Professionals



## Section IV: Comparing Med Mal Results Pre Covid-19 and in May 2020

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In addition to the other work discussed above, we also took two past medical malpractice cases we studied for clients and re-ran them in May 2020. The goal was to see whether, holding the case presentation constant, we saw changes in win rate or damages. The two cases are briefly described here, then we review the results Pre Covid-19 and from May 2020.

**Case 1:** Doctor diagnoses cancer via punch biopsy. Performs a left breast mastectomy and right breast reduction. Post-operative biopsy fails to identify any cancer cells. Head of Department orders review of punch biopsy slides, but they are missing. Meanwhile, doctor who performed the surgery calls the patient and tells her he has good news. Patient won't need chemotherapy or radiation because they "got it all." No real defense, but not technically admitted liability.

**Case 2:** A newborn suffers a middle cerebral artery stroke. The plaintiff argues that this was caused by the inappropriate use of vacuum during birth and points to the fact the baby was born with right sided bruising. The argument is that the damage to the right side is found on the surface, all the way to the brain.

Defendant hires some pretty good experts who say that there is no good scientific literature showing vacuum damage can cause a stroke. Defendant argues that vacuum use is common and was appropriate. Argues that likely cause of stroke was a clot that migrated from the placenta.

Results of Study Prior to Covid-19 and in May 2020

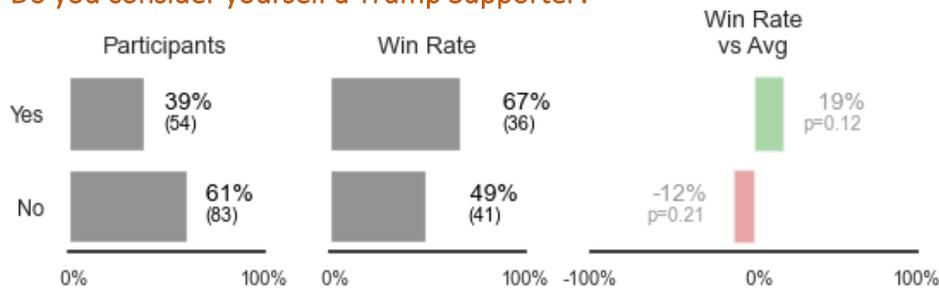
Win Rate		
	Pre Covid-19	May 2020
Case 1: Cancer	98%	93%
Case 2: Vacuum Birth	55%	56%

As you can see from the charts above, the win rate in the Cancer Case fell, but overall, not enough to take it from strong-case status. The vacuum birth case changed only slightly.

When we looked at the jury analytics for the cases run in the Covid-19 era, we saw a significant breakdown in reliable predictors. For example, Trump jurors are typically low value jurors in medical malpractice cases. However, with changing views of doctors, including a trend towards progressive jurors viewing doctors as heroes while Trump supporters sometimes seeing doctors as those seeking to restrain liberty, we are seeing typical predictors change.

For example in one of the cases, these were the results. Trump supporters returned a win for the plaintiff 67% of the time. Non-Trump supporters returned a win rate only 49% of the time. This was a change from the pre-Covid results. It certainly could explain the change in damages. In our experience, Trump supporters award less in damages, which can account for the smaller damages awarded in these cases.

Do you consider yourself a Trump Supporter?



## Takeaways

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- Jurors remain nervous about attending trial due to Covid-19. 3 out of 4 report being “nervous” or “somewhat nervous.”
- 30% know someone who has had Covid-19.
- 17% know someone who became seriously ill or died from Covid-19.
- If a court excluded all those who request exclusion because they are a) over 65 years old, or b) have a health condition that likely makes them uniquely at risk for complications from Covid-19, this will likely eliminate at least 1 in every 5 jurors.
- 46% of jurors report they would actively seek to avoid jury duty because of Covid-19.
- 30% of jurors said they would ask to be excluded due to concerns about close spaces.
- 9% of jurors would refuse to wear masks, likely causing their exclusion.
- 43% of jurors now support limiting claims against healthcare workers. These views reduce the win rate for the plaintiff by 11%, likely requiring exclusion of those jurors in medical malpractice cases. Given the prevalence of this view, medical malpractice panels will need to be much larger in order to avoid busting the panel.
- The combination of facts above means that, particularly in medical malpractice cases, 50% or more of jurors could be excluded during selection. And in the remainder of cases, the number is likely to exceed 40%.
- Jurors who report they are “not nervous” about jury duty due to Covid-19 significantly diminish the win rate for plaintiffs.
- The 16-17% of jurors who know someone seriously harmed by Covid-19 drive up the win rate for plaintiffs by 11%, but these effects have only been observed so far in medical malpractice cases.
- 76% of jurors have a favorable view of nurses while only 62% have a fully favorable view of doctors.
- Most jurors don’t “blame” anyone for asking them to come to jury duty. When they do blame the plaintiff or defense, they blame them in roughly equal proportions.
- If given the choice, jurors want to participate in trial from home. 4 in 10 rate their first choice as watching the trial on video at home, on their own schedule. Another 2 in 10 rate watching the trial live, from home as their first choice. Only 2 in 10 rate trial as it is currently carried out as their first choice. The remainder want to watch the trial via streaming or on their own schedule, while at court. The option of watching at home would likely seat a more diverse and representative jury.
- Medical malpractice liability rates are not falling, contrary to conventional wisdom. In a very strong case, we saw a 5% reduction, but this was not statistically significant. In the

other, we saw a 1% increase, and this was not statistically significant either. This is in part because some groups, such as Trump supporters, are showing signs of increasing skepticism about doctors and are producing higher win rates than they did prior to Covid-19. This seems to be offsetting any decrease in win rates among those who may view healthcare workers more favorably than they did before Covid-19.