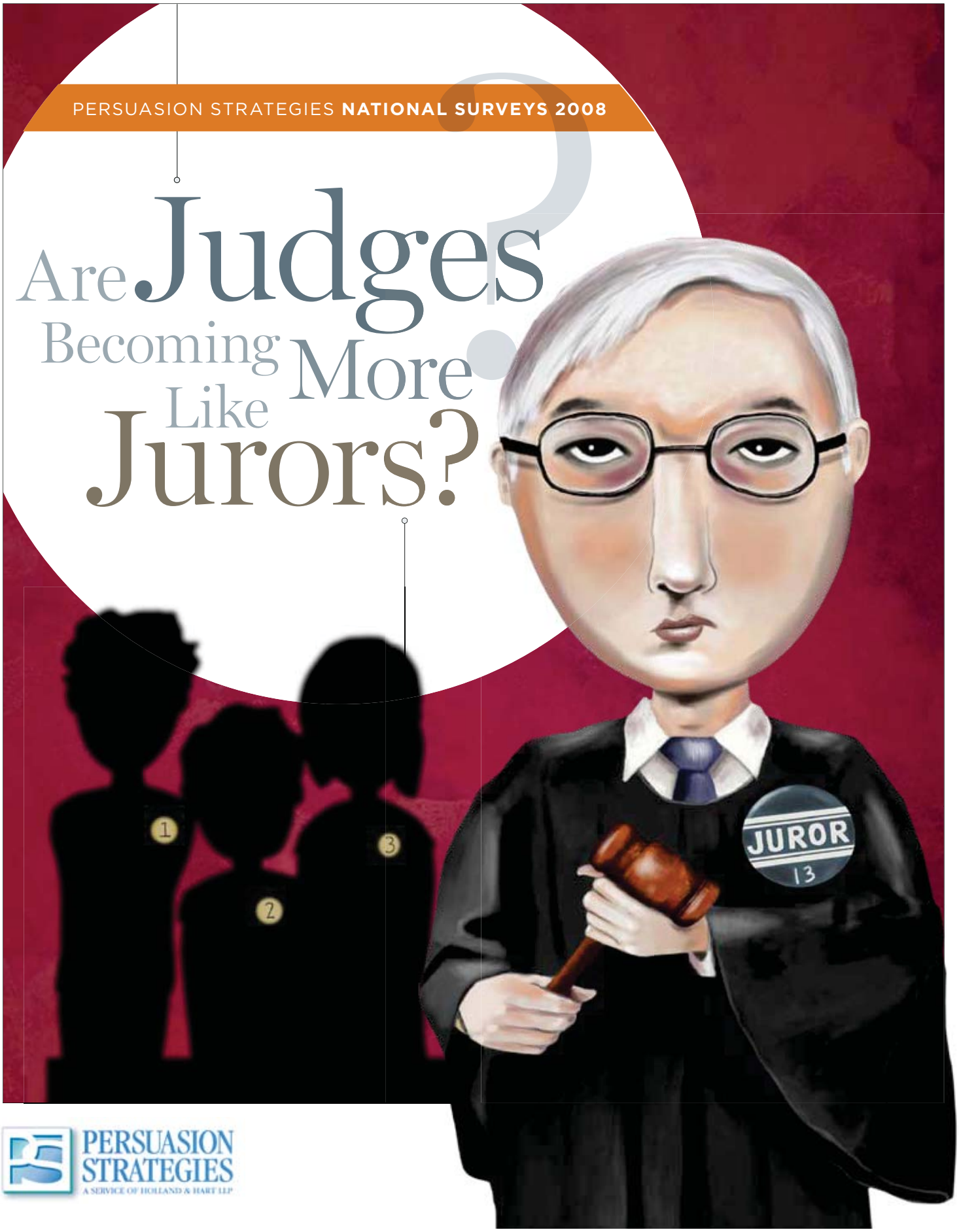
PERSUASION STRATEGIES **NATIONAL SURVEYS 2008**

Are Judges Becoming More Like Jurors?



PERSUASION STRATEGIES
A SERVICE OF HOLLAND & HART LLP

Are Judges Becoming More Like Jurors?

The short answer—***yes they are—and in some important ways.*** More significantly, judges and jurors are not as far apart as you might expect. The longer answer, detailed in the pages that follow, stems from our nationwide survey of federal judges and jury-eligible adults across the country as well as our ongoing field research with mock judges and mock juries. Judges' and potential jurors' answers highlight a number of conclusions that are critical to any attorney choosing the best decision-maker, or doing their best to adapt to either the judicial bench or the jury box.

By Persuasion Strategies
Illustrations by Jason Bullinger

THE PERSUASION STRATEGIES NATIONAL SURVEY PROJECTS

Persuasion Strategies' 2008 National Judge Survey is our second nationwide survey of Federal Court Judges and Federal Magistrate Judges — a poll of 105 judges' opinions of attorneys, attorney performance, corporations, litigation, and the patent system. The diverse sample of respondents includes judges appointed by Republican Presidents (52 percent), and Democratic Presidents (20 percent), as well as Magistrate Judges (28 percent). Sixty-two percent of judges report they have presided over 50 or more trials and

PERSUASION STRATEGIES
A SERVICE OF HOLLAND & HART LLP

When the decision is yours to make, it can be an agonizing one: judge or jury? Would your trial-bound case benefit more from the single-person audience of a legally-trained mind or from the collective common sense of typical venue residents? Conventional wisdom supplies a familiar list of expectations that argue one way or the other:

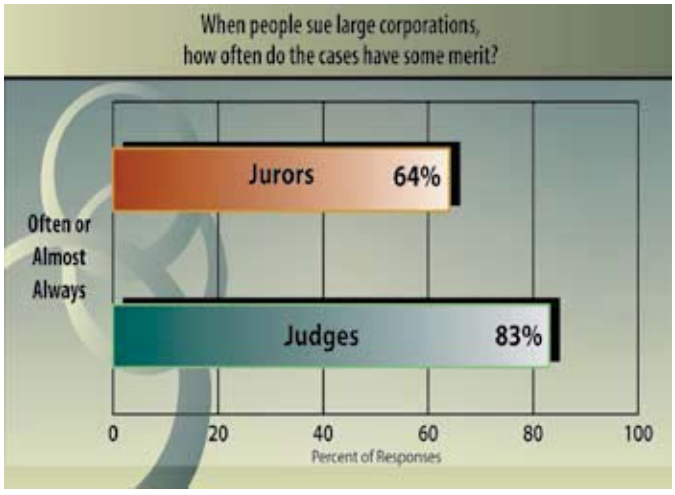
- *Juries are more sympathetic and moved by emotion, while judges are logical and systematic.* ***True?***
- *Juries expect 'right' and 'fair' conduct, while judges just expect adherence to the law.* ***True?***
- *Juries expect polished rhetoric and persuasive skill, while judges want you to get straight to the facts and the law.* ***True?***

The question is whether the differences we expect are as great as the differences that actually exist. Based on nationwide surveys of federal judges and jury-eligible adults across the United States and our field research with mock judges and juries alike, it's clear there are some critical areas of similarity. More importantly, the differences may be narrowing. Newer federal judges — those with ten or fewer years of experience, or 50 or fewer cases under their belts — are likely to hold attitudes in several important areas that are significantly ***more*** in line with jurors' attitudes in comparison to their more experienced counterparts on the bench. In the pages that follow, we explore the similarities and differences between judges and juries, as well as emerging trends in the attitudes of newer federal judges.

Some Expected Differences

Jurors' powerful bias against large corporations and presumptions about lawsuits are well documented (Persuasion Strategies National Juror Survey data, 2003-2008). Judges' opinions about Corporate America are less widely known. Based on our survey research, there are clear differences between judges' and jurors' perceptions that affect litigators.

Judges Have Greater Faith in the Legal System. Judges are also more likely to presume a plaintiffs' case against a large corporation has merit. It isn't surprising that judges demonstrate greater faith in the legal system since they are an integral part of that culture. Yet, 83 percent of judges profess more of a pro-plaintiff bent in their belief that an individual's case against a large corporation "often" or "almost always" has merit, while 64 percent of jurors responded in the same way (See Chart 1).



▲ CHART 1

Judges are Slightly Less Anti-Corporate. Perhaps not surprisingly, judges tend to report less extreme

(67 percent) have served on the Federal bench for 11 years or more. Respondents have presided over cases in areas including intellectual property (97 percent); energy/natural resources (86 percent); products liability (95 percent); appeals (73 percent); construction (97 percent); and employment (99 percent).

Persuasion Strategies' 2008 National Juror Survey is our sixth annual scientific public opinion poll examining the jury-eligible population's attitudes and opinions regarding legal issues. We asked 500 randomly selected jury-eligible respondents to complete a telephone survey responding to measures of attitudes toward corporations, litigation, intellectual property and patents.

Data on arbitrator opinions are drawn from Persuasion Strategies' 2007 National Arbitrator Survey (n=310). Except where noted, all relationships reported in this article are based on statistically significant differences at a probability level of .05 or lower.

Visit **www.persuasionstrategies.com** for more information.

JUDICIAL PERSUASION TIP #1: Know Your Judge

Judges are human. Certain tendencies and patterns define a great proportion of their behavior. Learn judicial preferences in general as well as your specific judge's preferences, and present a tailored message that is responsive to their needs and that directly addresses their concerns. Consider learning style, communication style, facility with similar case facts and patterns of past decisions in similar cases. If your judge prefers demonstratives and/or technology, incorporate visual elements in your briefing and develop a dynamic visual presentation for oral arguments. For instance, if your judge has heard dozens of patent infringement cases, develop novel ways of teaching your case while building on his or her prior knowledge.

PHOTOGRAPHY BY GETTY IMAGES

views than jurors on most questions about corporations, corporate litigants and lawsuits in general. Specifically, judges express only moderate levels of anti-corporate bias and are less likely than jurors to presume corporate deception. Less than half of judges (45 percent) believe a large corporation would lie "often" or "almost always" if it could benefit financially from doing so. A full 85 percent of jurors respond the same way.

Judges are also less likely to report unfavorable views of companies doing business in one of the least popular industries: oil and gas. While jurors have demonstrated increasingly negative opinions of oil and gas companies over the last half decade, judges' opinions of oil and gas companies are more likely to be favorable. Interestingly, jurors and judges report similar opinions of the other industries included in our survey — with one additional exception. While 88 percent of judges hold favorable opinions of law firms, only 58 percent of jurors report the same.

Judges Prioritize Law Over Ethics. Many attorneys presume that judges are able to separate various legal issues from emotional and persuasive appeals and focus their decision-making on the relevant legal rules. It is not unusual for counsel, particularly those working in litigation fields like personal injury and products liability, to assume the defense case is better suited to a bench trial where sympathy for an injured plaintiff and high damages requests will find less favor. While experienced litigators know that few judges are immune to compassion, it is understandable that judges say they give substantially greater weight to the law when it conflicts with personal ethics. Interestingly, judges are more consistent than arbitrators, who rank between jurors

JUDICIAL PERSUASION TIP #2: Focus Where Your Judge Focuses

A substantial number of surveyed judges say attorneys' biggest mistake in oral arguments is failing to focus on the most important issues or ignoring or failing to directly address judges' questions (See Chart 3 below). Assume you need to get more basic in educating your judge about key background facts. Pay attention to cues and questions that reveal judges' most critical concerns. Have the courage to make those concerns the center of your case and drop less salient issues or give them substantially less face time. In judges' own words, don't make the mistake of "wasting time on fringe issues" or "failing to address issues raised by the Court."

and judges in their preference for law over ethics (See Chart 2). When we conduct mock bench trials and mock arbitrations, we observe the participants' focus on the law to a large degree. They frequently consider aloud the ethics of the circumstances in the case.

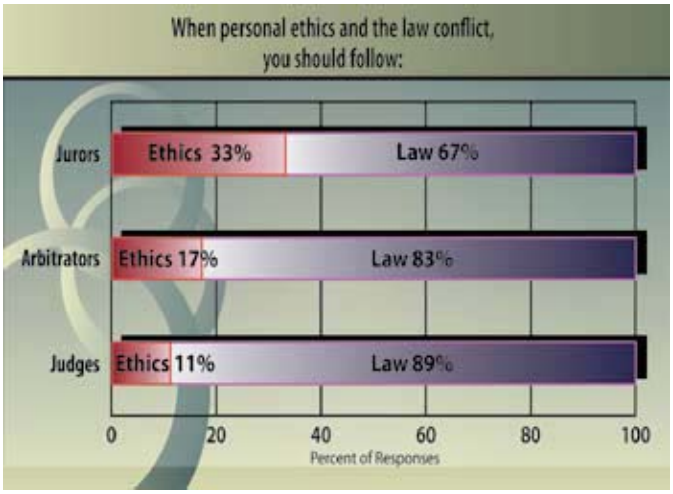
A Clear Similarity: Judges and Jurors Want Focused Attorney Communication

Naturally, the background and experience of a typical juror and a federal judge are likely to be quite dissimilar, so it isn't surprising that there are a few differences in their attitudes and behaviors. What may be surprising to litigators, however, is the degree of similarity between the two. Judges and potential jurors tend to be more similar than not on a number of subjects, including how favorably they see a number of different industries, the credibility of government agencies and the role of government regulators. To choose one example, 80 percent of judges and 82 percent of jurors believe government should police corporations more than they do now.

The most striking similarity, however, relates to a preference for better communication. When asked to report the single biggest mistakes attorneys make in oral argument, judges frequently cite a lack of focus and failure to address critical questions (See Chart 3). Judges appreciate and require the same level of clear and effective attorney communication that jurors expect. We hear the same criticisms in our mock trial and focus group research.

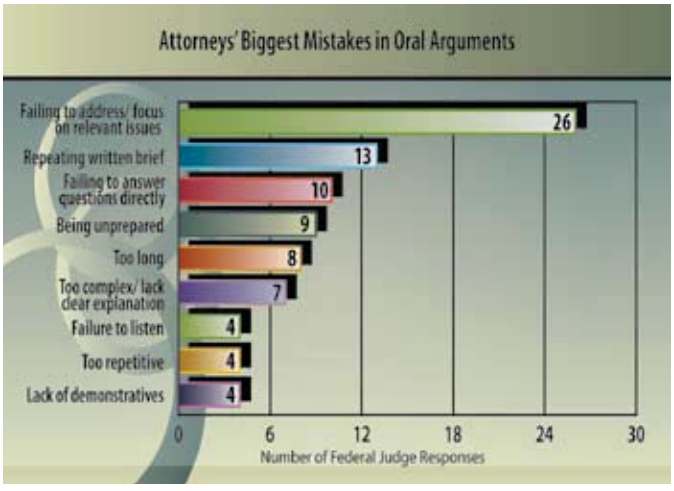
Most attorneys assume a need to simplify complex information when speaking to a jury. They spend the

▼ CHART 2



[1] *Differences between jurors and judges are statistically significant at 0.05.*

▼ CHART 3



JUDICIAL PERSUASION TIP #3: Use a Trial Theme

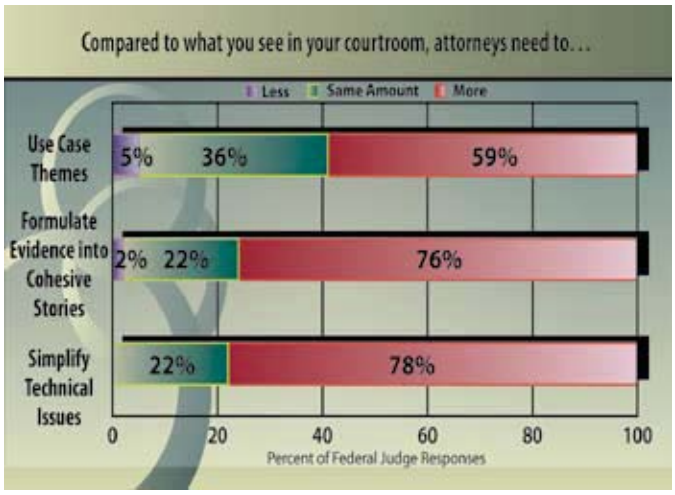
As a statement that unifies and communicates your view of the entire case, a theme works — for human reasons, not for jury reasons. While you wouldn't give your judge a theme that would "dumb down" your case, you do want your judge to benefit from this critical filter. An effective theme should be targeted to address your greatest weaknesses, holistic in addressing your case in general (not just a single issue), economical in using just a few well-chosen and memorable words, and easy to incorporate during multiple phases of your presentation.

time and effort necessary to make complex information clear. Many approach arbitration the same way, particularly for an arbitrator or panel hearing the case with fresh ears. However, attorneys may be taking for granted judges' ability to quickly grasp technical case issues. In the words of one judge surveyed, attorneys' biggest mistake in oral arguments is "assuming the court has command of background information." In our mock trial and focus group research experience, judges and arbitrators certainly have the sophistication and vocabulary to understand complex issues but they need counsel to do a stronger job of teaching them about new facts and concepts. Nearly four out of five judges (78 percent) want attorneys to do more to simplify technical issues. Less than half of arbitrators surveyed in 2007 said the same. Our survey responses clearly show judges often need more simplified presentations of technical issues than they typically hear.

Many judicial responses also suggest that the trial process has become tedious. As one judge aptly noted, "The mind can absorb only what the seat can endure." Judges desire more focused communication and greater organization from trial counsel. A substantial proportion of judges believe attorneys need to: use demonstratives more (60 percent); formulate evidence into cohesive stories more (76 percent); and be more organized (70 percent) (See Chart 4). Finally, more than half of judges (61 percent) believe attorneys need to prepare witnesses more and 55 percent also report that attorneys need to persuade more in the courtroom.

These preferences for attorney communication suggest attorneys too often presume judges (and to some extent, arbitrators) to be substantially different from jurors and to process information much better than either judges or arbitrators. Our experience with mock bench trials, mock Markman hearings, and mock oral arguments, combined with this 2008 National Judge Survey data, show that a majority of judges process information similarly to jurors — and require the same type of clear, efficient, and persuasive communication that is too often reserved for a juror audience.

> ...A majority of judges process information similarly to jurors — and require the same type of clear, efficient, and persuasive communication...



▲ CHART 4

JUDICIAL PERSUASION TIP #4: Use a 'Break Apart' Oral Argument Structure

Attorneys often tell us that they can't prepare an oral argument for the bench the way they would prepare an opening to a jury because the judge will generally interrupt, setting them on a different track. That is true. The preparation isn't the same. Prepare for interruptions by structuring your oral argument, not as a single cohesive speech, but as a series of mini-speeches. If your judge interrupts, answer with the most relevant mini-speech. If your judge does not interrupt, present the mini-speeches in a default order. If you have done a good job of anticipating where your judge will focus, then you can use this technique to remain immediately responsive to your judge while at the same time staying with your own prepared content and themes.

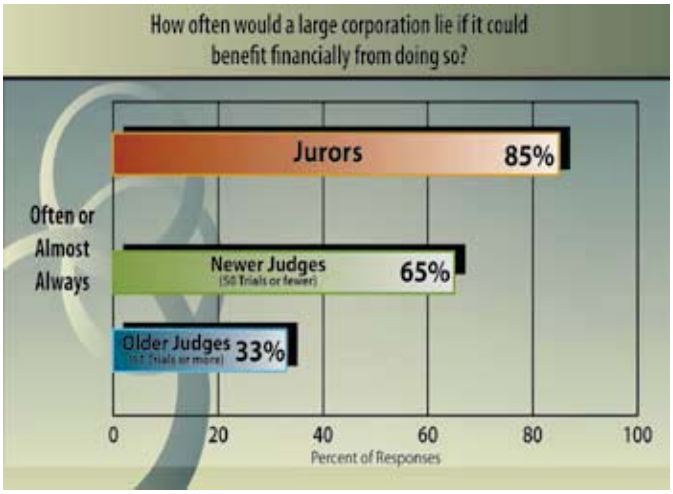
The New Generation of Federal Judges

Each judge and each juror is unique. Broad trends of similarities and differences between the two groups do not take away the need to get to know as much as possible about your particular decision-maker(s). Once we take a closer look at the federal judges responding to our survey, for example, we find that they are hardly a uniform group. In particular, the survey results reveal some important and unexpected differences based on the judge's tenure on the bench. Those who are newer to the bench — with fewer than ten years or 50 trials under their belts — differ from more experienced judges in ways that bring them closer to the attitudes observed in jurors.

Newer Judges are More Anti-Corporate. A fact-finder's view of corporations is a strong predictor of the way he or she will view many defendants and litigants. Anti-corporate bias has become increasingly prevalent and is by no means limited to any specific demographic of society. In conducting both national research and localized mock jury trials, we have long observed that a person's tendency to presume corporate dishonesty is one of the most powerful attitudes in those who more readily find against corporations. While judges on the whole are less likely than jurors to presume dishonesty (See earlier mention, page 4), newer judges are more comparable to jurors in this regard. In response to the question, "How often would a large corporation lie if it could benefit financially from doing so?," 65 percent of newer judges responded that the company would "often" or "almost always" lie (See Chart 5).

Looking only at the most extreme response category, 19 percent of judges with fewer trials would say that the company would "almost always" lie, a position taken by just two percent of more experienced judges. Importantly, we observed the same relationship whether we looked at the number of trials or the number of years on the federal bench: The belief that the company would "almost always" lie was shared by 23 percent of judges with ten or fewer years of experience on the bench, compared with the same attitude being held by just two percent of judges with more than ten years in service.

▼ CHART 5

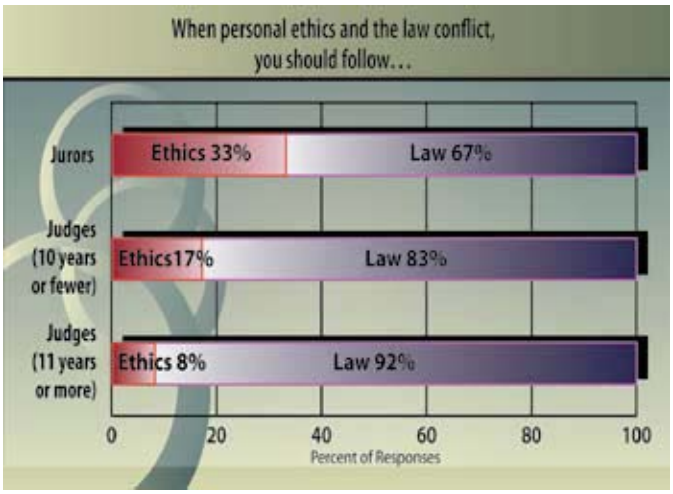


While judges on the whole are less likely than jurors to presume dishonesty, newer judges are more comparable to jurors in this regard.

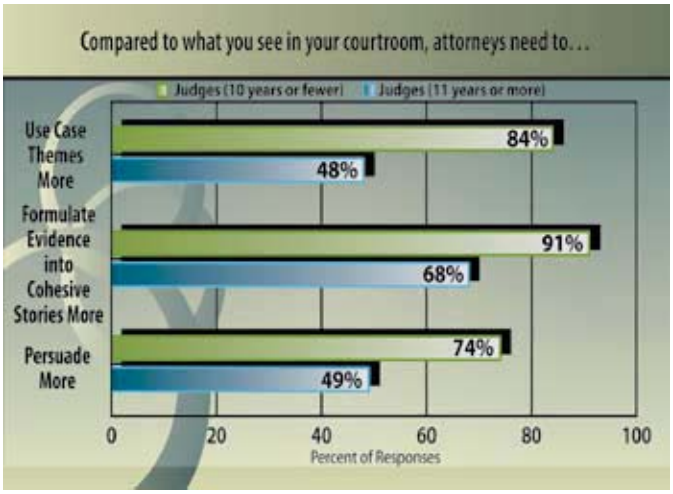
JUDICIAL PERSUASION TIP #5: Engage Your Judge Visually and Verbally

Despite having an education level much higher than the average juror, nearly two-thirds of judges surveyed want more demonstratives. This may surprise attorneys who assume that trials to the court need no graphics. The process of creating a "Big Picture" graphic can also have an unexpected benefit of helping you focus and clarify your main theme. With 78 percent of the judges requesting simplification of technical arguments, the benefit of visual aides to increase learning complex concepts is well established in educational research. Our survey points out that this is even more true for newer judges, who tend to be more media savvy and expect more engaging and persuasive presentations. While graphics play an important role in communicating case themes, attorneys must still tailor visual concepts to the fact-finder.

▼ CHART 6



▼ CHART 7



Newer Judges are More Likely to Prefer Ethics Over Law. A majority of older and newer judges, as well as jurors, report a preference for the law. Notwithstanding that, we find that in both mock trials and actual trials, the substantial minority of decision-makers who report preference for ethical judgment are also more likely to hold litigants to a higher standard, in effect expecting not just legal conduct but ethical conduct as well. Here again, judges with ten or fewer years of experience are more likely to prefer ethics over law when the two conflict (See Chart 6).

Newer judges report a greater preference for more persuasive and effective communication.

Newer Judges are More likely to Demand Effective Persuasion. Beyond showing a greater degree of skepticism of corporations and a greater willingness to emphasize ethics, there is one other important way newer judges distinguish themselves from their more experienced counterparts and makes them more similar to juries: Newer judges report a greater preference for more persuasive and effective communication. Juries expect your case presentation to take the form of a cohesive story and experienced attorneys know that juries respond to an effective trial theme and benefit from an attorney's use of other persuasive techniques as well. While many judges similarly expect attorneys to use the best persuasive and communicative tools (See

earlier mention, page 6), it is remarkable that newer federal judges have an even stronger preference. In completing the statement, "Compared to what you see in the courtroom, attorneys need to....", judges with ten or fewer years of experience are more likely to respond

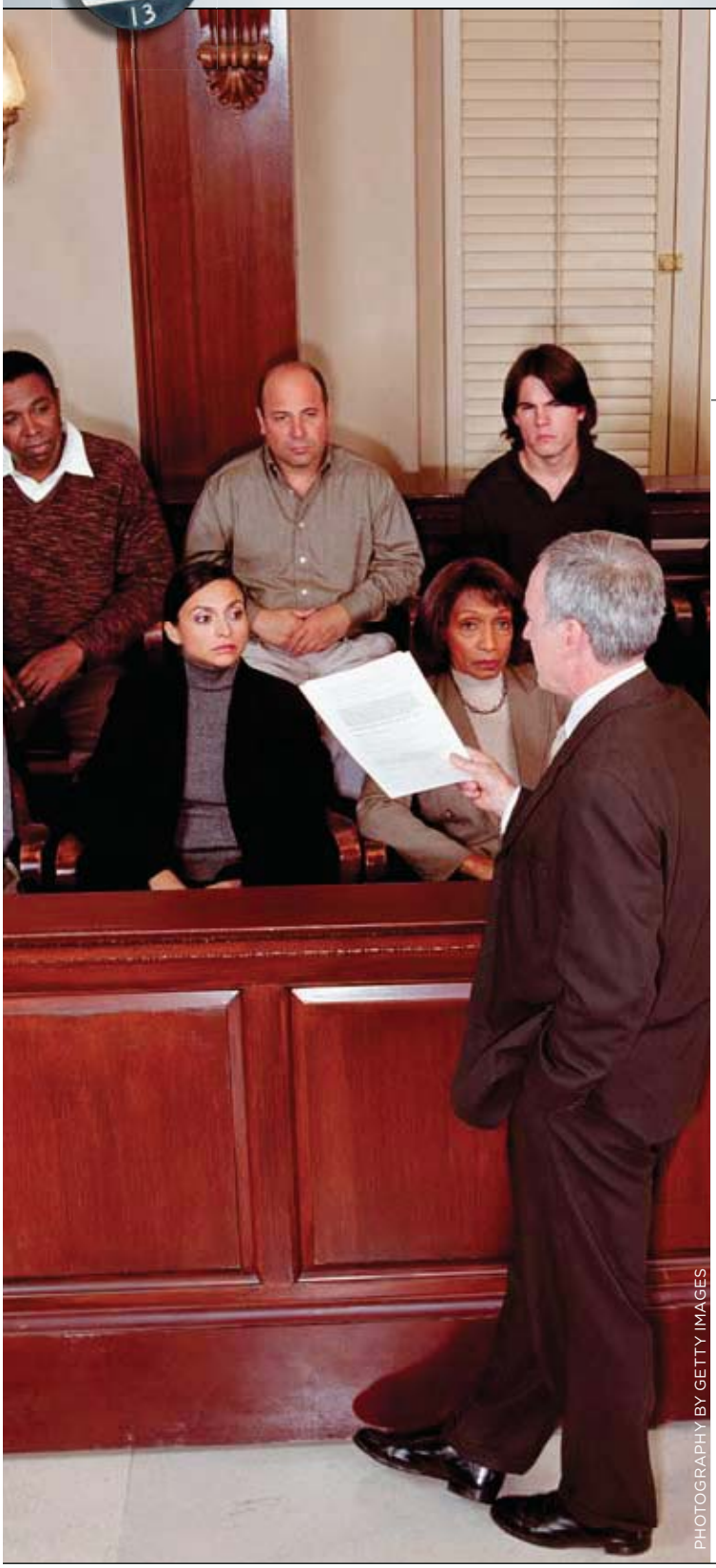
> ...While good communication is always beneficial, newer federal judges have higher expectations for good courtroom communication...

that attorneys should use case themes more, formulate evidence into cohesive stories more, and generally persuade more (See Chart 7).

Again, we see similar results when we look at the number of trials over which a judge has presided. Judges with 50 or fewer trials are more likely to believe attorneys should do more to formulate evidence into a cohesive story, prepare their witnesses for testimony, and employ good organization. In short, while good communication is always beneficial, newer federal judges have higher expectations for good courtroom communication than do their more experienced colleagues.

There are two ways to interpret these results. First, judges are changing and the less experienced judges are just the first wave of a judiciary that is even more similar to jurors than judges have traditionally been. Or, second, it takes awhile for judges to develop a distinctive judicial mindset that sets them apart, to a degree, from jurors. Newer judges simply may not have reached that point yet. Without completing research over time, it is not possible to say which scenario best explains these differences. But one conclusion remains true either way. When you adapt your case to a judicial audience, you have a very good reason to give strong consideration to the experience level of that judge before you decide whether that judge will see your case much differently than a jury would. ●

PHOTOGRAPHY BY GETTY IMAGES



PHOTOGRAPHY BY GETTY IMAGES

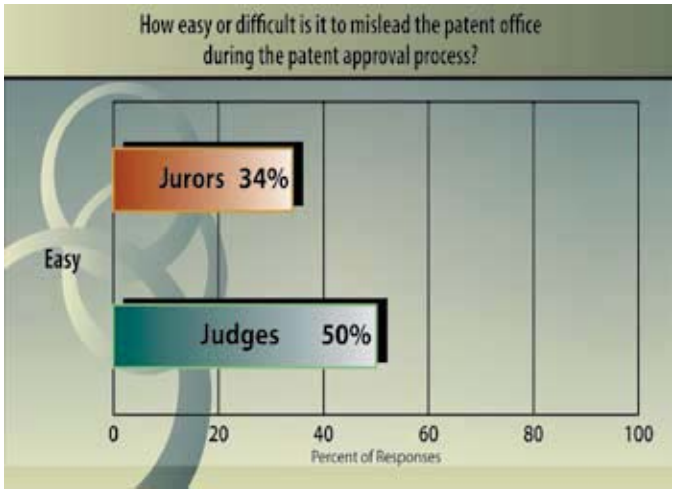
Judges and Juries in **Patent Cases**

Persuasion Strategies' 2008 National Juror and National Judge Surveys also focus on intellectual property litigation — patents and the patent process in particular. Exploring this specific litigation area gives greater depth to comparisons between judges and jurors as decision-makers.

Judges and Jurors Support Patent Protection. Judges and jurors express strong general support for the concept of protecting intellectual property with patents, with 98 percent of judges and 94 percent of jurors saying they support the process of protecting inventions with patents. Both judges and jurors also share positive views of the result of patents on the market, with a strong majority of both populations believing that the patent process helps competition (70 percent of judges, 67 percent of jurors).

Judges Have a More Realistic View of the Patent Process. Survey and mock trial research, as well as anecdotal data, clearly establish jurors' general deference to the USPTO and to the patent process as a whole. Jurors tend to glorify the American inventor and support the patent process as a

▼ CHART 8



"Jurors tend to glorify the American inventor and support the patent process as a vehicle for American innovation. ...In contrast, judges tend to hold a less glorified view of patents and some patent holders."

vehicle for American innovation. In our 2008 survey, 76 percent of jurors believe it is difficult to get a patent for an invention today and 66 percent believe it is difficult to mislead the PTO during the patent approval process.

In contrast, judges tend to hold a less glorified view of patents and some patent holders. Specifically, 45 percent of judges but only 24 percent of jurors believe patents are easy to obtain, and 50 percent of judges but only 34 percent of jurors believe it is easy to mislead the patent office during the patent approval process (See Chart 8). We have seen this same perception echoed in mock Markman hearings, mock arbitrations, and mock jury trials.

Jurors are also more likely to believe a patent should protect an inventor for a longer period of time. Nearly one quarter of jurors (23 percent) believe that current patent exclusivity periods (15-20 years) are "too short," while only a small minority of judges (7 percent) agree. Three-quarters of judges (76 percent) believe 15-20 years of patent exclusivity is "just right." Despite differing views of the patent process in the ways shared above, more than three-quarters of both jurors and judges presume that inventions receiving patents are often or almost always innovative and unique.

Jurors Have a More Critical View of Certain Patent Owners.

Jurors and judges differ in their opinions of companies who acquire patent rights for the purpose of suing accused infringers — commonly known as "patent trolls." Fully 67 percent of jurors believe patent-holding companies are less deserving of money damages than an original inventor, compared to just 47 percent of judges.

These results supplement the general findings of our surveys. The fact that differences exist at the more specific patent litigation level confirms that judges and jurors are likely to hold distinct attitudes and perceptions that are dependent on the litigation type, as well as the many factors that vary from case to case.

Think outside the (jury) box.

Beyond juries, there are judges, arbitrators, mediators, boards and other vital factfinders—all of them deciding complex cases and all of them requiring persuasion in order to see your case in its best light. Persuasion Strategies helps corporate counsel persuade all legal decision-makers by bringing together the best in your visual and your verbal message.

- Litigation Consulting
- Demonstrative Graphics
- Legal Videography
- Advocacy Training

Contact: Kenneth T. Broda-Bahm, Ph.D.
Phone: 303-295-8294
555 17th Street, Suite 3200, Denver, CO 80202
Kbrodabahm@persuasionstrategies.com
Past-President, American Society of Trial Consultants

PERSUASION STRATEGIES
A SERVICE OF HOLLAND & HART LLP

www.persuasionstrategies.com