Fox Rothschild Podcast

The Presumption of Innocence Podcast Series: Episode 13

The Science Behind Psychology in the Courtroom

Featuring Matthew Adams of Fox Rothschild LLP and Ann Greeley, Ph.D.

Adams: Hi everyone, and welcome to "The Presumption of Innocence." I'm your host for the day, Matt Adams. I'm also one of the Co-Chairs of our White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild.

Today, I have the great pleasure of being joined by Ann Greeley. I should say Dr. Ann Greeley, Ph.D., who is the Vice President of the Northeast Division of DecisionQuest, a U.S. legal support company. Ann, your background as a psychologist and trial consultant for 30 years is going be something that we are going to take a deep dive into today to understand the psychology of jury selection.

So before we get started, why don't you just give me a little bit about your background? I've always found jury consultants fascinating because they're applying psychology to a process that really, it's human nature, because we're talking about the legal system. We're talking about unpacking dispute resolution. There's nothing, I think, more profound and significant measure of humanity than doing that. So, talk to me a little bit about your background.

Greeley: I know, I find it fascinating too. Even after 30 years, I still think it's lot of fun to work in this business. I got into it a little bit backhandedly because I was doing teaching of psychology, group dynamics and personality theories, and all of that after I got my Ph.D. And then as I got into it more, I ran into some people who were doing this kind of thing, using the law involved with the psychology of jurors specifically. I found it fascinating, got involved in a few projects. The next thing I said, " I'm just going to do this full time."

I loved it. I thought, there's so many ways to use psychology. Understanding who is going to be doing the presenting at a trial, who's talking? Who's going to be listening at the trial? What are the jurors like? What kinds of things do you want to be saying to people? I just found it fascinating, so I decided to apply my skills there.

Adams: I think in particular, with respect to a criminal case where the stakes are just so high -- someone's liberty is at stake and essentially in the hands of your peers -- and for all the good that that brings, it is the greatest system designed in the history of the world. But at the same time, it's terrifying, because your fate is in the hands of your peers. As I see it, human experiences, human prejudices, all of that natural stuff that comes into our psychological makeup is at play in that dynamic, isn't it?

Greeley: Absolutely. I think you captured it when you said terrifying. Because I still think it's terrifying when you think about it. You're putting this group of people in who don't know the subject matter and they don't know the people involved and they're going to just learn it for the first time at a trial. It is pretty terrifying. I think what I find fascinating is that jurors don't come at this, as you said, as a blank

slate. We try to tell them they've just got to listen to the evidence and they've got to be fair and impartial. We hit them up with that right away at the beginning of a trial. But the reality is all those biases, all those prejudices, all those, what we call predispositions about a case, they all emerge as they're sitting there. Even though they're trying desperately to be fair, to be impartial. But they can't help it. The only thing they have to rely on is their experience in the world. That involves some biases and predispositions, particularly in criminal matters.

Adams: Yeah, I'm struck by the contemporary conversation about implicit bias, right?

Because I don't think any of us walk around every day and say, "I'm going to be biased today." But I think if you peel back a couple layers of that psychological onion, if you will, all of us have experiences that in some way, shape or form give us a bit of an implicit bias against something, right?

Greeley: Absolutely. Well, I don't think there's any way to get around having implicit biases, and it's one of the most important things. We're trying to think about ways to dig up or find out about what people's biases might be. Even if they're not aware of them, we can do it by asking them questions about various institutions. For example, we can ask questions about the government. We can ask them, "What do you think about crimes? Have you ever been a victim of crime?" Whatever. We might be able to figure out things about them that we might say, "This probably plays into their thinking. Even if it's not in the forefront of their mind, it's going to be a part of their thinking process, and it might be something even deeper." Of course, as we know something about racial biases, something about biases about people who've been convicted of a crime previously. There are all sorts of biases that go into these types of cases, absolutely, and our job is to dig them out, to ferret out what's there.

Adams: I'm struck by the fact that we did a little bit of an experiment at the firm a couple years back. We used it as a training exercise for some of our junior level associates. We brought in six different juries, and we tried the same set of facts to each of those six sets of juries. The outcomes of those mock trials each were distinctly different, on the same set of facts, the same participants. Ostensibly, the same participants, vis-a-vis, the types of witnesses and evidence. Some creativity left to the legal teams. In each of those six instances, we had little discrete differences. What do you attribute that to?

Greeley: It's fascinating for me, because we usually do two or three juries at a time if we do our mock trials or mock research exercises for that very reason. It is not just individual psychology that you're considering. You're not just thinking about that one person. You put it together with a group and you end up with a whole other group dynamic. So, it depends on who is the most forceful, who is the least talkative. Who has the strongest feelings about a particular topic that often will take the jury in a particular direction?

I believe in the system, I believe in the way that the collective wisdom of all the jurors comes together. But I have seen it change based on what kind of people are in my particular group and how many people are actively involved in making this decision, et cetera. All those kinds of things we think about as well as the individual psychology. The individual person's package, what they're bringing to the situation. It's a combination, in reality, with a jury.

Adams: So you're really playing a role in the selection of the ingredients to that pea soup, aren't you?

Greeley: Right. Exactly.

Well, we're trying to think about the individual psychology. How does that person play into the situation, but how will it interact? Sometimes it actually polarizes on a jury if somebody has a very strong opinion about this. And this would be helpful to our side, but then they end up polarizing the rest of the panel and they end up making those people feel more strongly in the opposite direction.

So, we're always trying to think about the permutations, as it were, in terms of what's the combination of individuals. But also, and I will say this has probably become the most important thing: What's the message you're going to give all these people? What could you tell them that's going to appeal to most of the people on the panel so that we can sway almost everybody, right? So that we can get that majority of people thinking that way that they might be able to take us to a unanimous verdict.

Adams: Yeah, and that's a great segue because I want to step back now from the background and the overview about what you do for a living and really start to talk about what value you bring to the trial team.

As a trial lawyer, I always am concerned about the message. I'm always concerned, setting apart the selection of jurors, even if I'm trying a bench trial or at a hearing before exclusively a judge, as finder of fact. There is always a careful consideration given to the messaging that we present and the way and the manner. The who and the what and the how.

Talk to us for a second about the psychology behind selecting the appropriate message and messenger.

Greeley: I think what's interesting to me is there's been a real shift since the early days of jury selection and jury consulting, I should say. We moved from not just worrying about who was going to be on the panel and who was going to receive the message, but more importantly to that, what should we be telling them?

The psychology of that is developing several themes that will resonate then with most of the people on the panel, as I said, so that you can perhaps come up with some more universal themes that will work for people. And so a lot of what we do when we're studying jurors, we're really studying the messages that the lawyers are putting out there.

And frankly, the messengers. We want to think about who's going to be most powerful telling this story? And it is a story, as we all know. I think most people who are practitioners in the litigation world know we've really got to tell a story and it's got to be powerful. It can't have too many themes. It can't have too few themes. It's got to be a powerful story for them to put into their own lives. It's gotta be something they can relate to.

That's a lot of what we're working with. How do we convey that? Who's supposed to tell the story? In these kinds of cases, it can be people who are familiar with the person who's the defendant. It might be, how are you going to rework the story of what law enforcement said, or what the individuals who were involved in investigating said. All those things come into play in terms of how are we going to get the message out there. Even if we develop a great theme, we gotta have great messengers too.

Adams: Let's unpack both of those topics.

Greeley: Okay.

Adams: How do you arrive at a great theme? When I was trained as a trial lawyer, it was, "Primacy and recency, primacy and recency. You want them remembering your message because it's the last thing they heard and the thing that they heard the most." That was hammered into my head. As a psychologist, I want to think that you view it a little bit more complex than that.

Greeley: That's still good advice, frankly. I find especially primacy, just in terms of opening statement. We do a lot of these things. We're thinking opening statement. What are you going to say to set the framework? They pick a certain party that they really kind of feel for and the basis of that is that combination of whatever the message is that you're giving them and their predispositions, again.

We're always thinking about what kind of experiences do people have that might be relevant to this situation. For example, even in white-collar cases, you're thinking about things like, have people been victims of crimes or do they trust the government, those sorts of backgrounds. So, we're thinking about creating a theme that then matches, to some extent, what people's expectations will be.

If you don't do that, you're never going to get anywhere. You have to assume that people have certain expectations about what happened here. In fact, one of them is that, you know how we say that the prosecution has to prove the case? You know what jurors think? They think that the defendant needs to prove that they didn't do something. So, even though we try to convince people that they don't need that information, we have to be cognizant the fact that one of the things jurors want or expect is that you're gonna tell me why this person didn't do what they're saying. It's like meeting the expectations that people have as you're analyzing that theme.

I know that's a lot to take in, but I think that's really the essence of it. You got to meet their expectations, the things that they want to know about the case. That's how we develop the theme.

Adams: Let's stick with this concept of developing a theme for a moment, because in my world, in the white-collar world, we often have very complex moving pieces. Something in the periphery that's buzzing over here, something that's buzzing over there, and our job is to try to distill it into a neat package. Sometimes it's not possible. Sometimes there's just too many moving pieces and the rules of evidence are such that you have to break it apart and then try to build it back together.

But I was involved in a trial recently where there were some complex software being operated. And the struggle was to find a way to take this complex software... that really didn't do much, the software actually at its core was pretty basic. But we needed to put it into terms that jurors would understand and it was a complex software used in the financial services industry to conduct a very complex series of trades.

One of the things that came up in our preparation was that the software itself really is nothing more than, like, eBay. It's a platform where a market maker meets a market taker and the software facilitates the handshake between the two. In the end, the software itself is not really doing anything except facilitating a transaction between two other parties and then letting the softwares for the market maker and the market taker communicate through a very kind of complex way. That was a eureka moment to the team, because putting it in terms of eBay was something we knew that jury was going to understand. We knew that most of those jurors were going to know what eBay was.

How do you help a trial team facilitate that eureka moment where we're struggling to unpack something that's very complex? We are hamstrung by the rules of evidence, which tend to be clunky, because in order to get this stuff before the jury, we can't just say it directly. We have to do it in a roundabout way through a questioning process. We have to worry about hearsay. There's a possibility of objections. All of that.

How is it that you can help a trial team get that theme and find that moment where you're like, "Yeah!" My view of it is that you have to immerse yourself in the facts pretty significantly.

Greeley: Oh, absolutely.

Adams: What's your method? What's your methodology?

Greeley: I think, again, I refer back to a lot of the mock trials and focus groups that we do. We're doing a lot of testing of these themes, and we're going to think about whether something is understandable to jurors. What do they need to know? Only what they need to know.

Second, what are they gonna believe about this case? I find it fascinating that the training process was in essence that simple. That's why your use of something like eBay to help them understand what the complexity was is important.

I don't think you need to make it any more complicated than it is. That's the main thing. Lawyers, to me, almost always wanna make things more complicated. So when we're testing, we're looking for, what's the most understandable way we can put this out there? What's the simplest way?

Like you said, boil it down. We're always trying to figure out how to boil it down in our research. Sometimes jurors will say to us, "I don't believe that machine was that simple. I think it was probably doing a lot more complex things and they just don't want to tell us about them." Or, they might say something as broad as, "I don't think anybody in the financial services industry can be trusted." We've heard that kind of thing before, too.

So, we're looking for all the little ways we can make it simpler, more understandable, more believable. Primarily, we listened for their words. Frankly, the words they use are the words we want to use. So one of them might have suggested to you -- if you've done jury research -- that it's just like eBay or it's just something else.

I do want to add one more thing though. The only thing that makes me crazy is sometimes metaphors and analogies and other ideas can get turned around on you. You have to be careful whenever you use something. You've got to test proof your theme of eBay, for example, because you don't know whether it's going come back to bite you. They're going to say something about eBay on the other side, that makes it sound like, "Yeah and that's why these guys did something wrong."

Those are just cautions. The process is really, for me, listening to the jurors, that's the main way that I do it. I certainly analyze the scripts. I analyze the documents. But in the end, it's really about what the jurors tell us and that's why I'm thrilled about being able to test cases when we can get somebody to say, "Yeah, let's do a mock trial."

Adams: So in a way, you're really using the scientific method, because you're not just pulling these themes out of thin air, you're actually testing them and then making it an evidence-based selection process by which you arrive at a theme.

Greeley: Oh, absolutely. We often will figure out whether we even want to do other kind of experimental designs. Sometimes we give one jury one kind of information. We give another jury another kind of information. We might give them different jury instructions. We try to have multiple juries so that we can see how they respond to those different themes, those different messages. That's an important part of it. It is qualitative research. I will tell you, you know, we don't use a lot, we use a few people.

Although in our surveys, frankly, we do surveys a lot for jury selection purposes, and we might survey hundreds of people and get that information. What we're really talking about here is using mock trials, and that gives you more of that qualitative feeling. What did people say and how did they respond and why did they react? Why did they hate that idea so much?

Sometimes we throw things out, sometimes they love them. Sometimes we throw things out and they don't love them so much. So, that's what we're paying attention to. But it is a scientific process, absolutely.

Adams: Yes, and as a trial lawyer, I always have a fear of oversimplification. I am by design fearful of oversimplification. But when you put it in the framework of it's evidence based, that's a language I speak, the language of evidence. So, the reality is, the testing is critical in my estimation. Because you can have all the great themes you want but if you don't actually present them and gauge what the response is, you're not taking it to the full extent.

I could probably talk to you about selection of themes and messages all day long, but let's shift a little bit to the messenger. We are living in an environment -- and I think for the betterment of society -- where we have a significant focus on diversity. I think it's a byproduct of progress in society. I think it is a beneficial and useful discussion that builds on, frankly, a lot of the pain that our country has experienced as it relates to race relations and gender relations and a whole host of things that history has taught us. In the legal business in particular, we have received -- and I think rightfully so -- a lot of pressure from clients to diversify our legal teams, to ensure that we have adequate representation on staffing for cases.

I'm fascinated by your thoughts on how you select who the right messenger is. And I'll give you a little bit of a background: I recently attended an event that was sponsored by a bar association and it was federal judges talking about diversity and inclusion topics as it related to the legal profession. More than one federal district court judge said out loud to this audience of largely law firm partners, "Don't come into court and have your three associates sit there and hand you documents. Get them involved in the mix. It can't just be the one lawyer standing up and making the argument and all the rest are the worker bees shuffling around paper to ensure that the person talking knows what they're doing."

They basically said that they looked disfavorably upon that visual, that the stage I just set, which is perhaps what a lot of us who have come up in this field over the last 20 years or so are used to seeing. And these federal district court judges were saying, "Don't let me see that in my court."

I was struck by it. It had a profound impact on me as somebody who believes in all this stuff and somebody who supports diverse legal teams and all that. But to hear a judge who could actually determine a case, actually say it out loud, like, "I'm going to look disfavorably upon you. If you come into court, gray haired, white male partner and stand up, and then you have your associates..." You may have a diverse legal team. It's not just enough to have the people there standing with you and

maybe working behind the scenes, but the court was basically saying they have to be part of the process.

Greeley: They have to have a role. Absolutely. Let's face it, jurors respond the very same way. The judges are responding similarly to jurors in that they don't want people just there as, this represents that we brought in an African American person on my team. They don't want that. They think it's well, actually they despise it, I will tell you.

If the word Vanna White isn't too old fashioned, in terms of... That's what it's like, they don't want a Vanna White. They don't want somebody standing up there. And they don't understand, frankly, that trial teams have always functioned that way, as you said. Trial teams have always functioned with the lead partner and the other people are just taking stuff -- it used to be out of boxes, now it's bringing stuff up on the screen, as documents but it -- used to be running back to get the document and pulling it up and running it up to the front of the trial team.

They want those people to be involved and they want them to take witnesses. They want them to argue, sometimes, some of the simpler issues. They sometimes want them to have that experience. The tough thing for me is, and we get asked that question all the time, "Do we need to have a diverse trial team?"

I say only if you're going, as you said, to utilize those individuals and they can bring something, not only to the preparation of the case. In terms of diverse thinking, will they bring some new perspective for you? Which they almost always do. And will they then be able to do something at the trial, because as you said, it can backfire. The jury doesn't like it if somebody is just being clearly utilized as a token. They'll use that word in post-trial interviews. They don't want to think that somebody was just there as a show. It's manipulative, and they're very sensitive to being manipulated about anything. But this is one of the various things that they really don't like, and it's easy enough to overcome if people are training their attorneys at the time. The biggest issue for me is you don't wanna throw somebody into a mix when they're not trained and can handle briefing a certain issue, or discussing a certain issue. You don't want to put them in that position because it'll just lead to less confidence, let's say, than more confidence. So, training's a huge part of that issue, making sure people that are of diverse backgrounds are getting the kind of training they need, so they can be in the courtroom.

Adams: Right. It's fascinating you should say that. Because I've always been taught, and my mentors as a trial lawyer have always taught me, that never underestimate the intelligence of the jury because they're always paying attention to everything. Every little discrete detail.

Greeley: Absolutely.

Adams: Let's make a hard pivot now that we've set the stage for what the message is. Now, let's talk a little bit about the recipients of that message, which are the composition of the jury. I know you and I have had occasion to talk offline and you've presented to me that you view jury selection as a process of deselection. Explain that to me.

Greeley: The most important thing you can do in jury selection is remember that you're trying to eliminate, I was going to say "get rid of" but that sounded pretty harsh. They've got to get rid of those people who are not going to be helpful. And by that, I mean, who've already made up their minds before they even hear the evidence. We know there are lots of people like that.

Frankly, during jury selection, I find it funny because I think some people say, "Oh nobody ever wants to serve." That's not true. Some people really want to serve. Some people are clearly like, "I don't want to be here and I don't want to serve at all."

And there's another whole group in the middle who are really willing to serve. But bottom line, the people who are the most biased against you to begin with, sometimes they even try to get on a panel. So you have to be careful and think about who might be the least helpful to my case, who might be against me from the very beginning. No matter what I say, they're not going to like a single thing that I have to say. Those are the people that you want to focus on the most.

It goes very fast sometimes. It can be fairly quick. Depends on the process. Depends on how much time you're going to get. You want to make sure that you are focusing on this because it helps, as you're sitting there doing your jury selection, it helps you to focus. I just really need mostly to get rid of certain people that are very bad for me. And if I get some other people and they're great, they might either be struck by the other side, because they're not going to like them, or they might be able to get on the panel and that's great. But what I'm most worried about is: Get rid of the people that are not going to be helpful, strike those people or get them off for cause.

Adams: All right, so we're living in a society where in my estimation, and I think many would share my estimation, that we're more polarized now as a society than perhaps at any point, at least in my lifetime. I venture to say in talking with friends, colleagues, family members, it's pretty much a universal belief that our society's really polarized right now. Would you agree?

Greeley: Yeah. Oh yeah, absolutely.

Adams: Okay. So, given what we agree upon about the polarization of our society, the polarization of America, what are you looking for as part of this process of deselection? How do you isolate the variable, the "thing" that you are going to look for to, as you said, eliminate prospective jurors?

Greeley: We have seen, I mean, there's no denying that whether people have more conservative attitudes or more liberal attitudes has a huge impact. Particularly in white-collar cases, a lot of what people are thinking about is their attitudes toward the government, whether the government is an overreaching government, is too controlling. Or, do we need more regulations? Do we need more government to intervene to control companies? And those sorts of attitudes that frequently surface in these kinds of situations. So what we hope for is, as you know, it's called voir dire. We hope for an extensive voir dire where we can ask people questions about their views. Maybe not directly ask them about their political views, but let's face it, even if you ask them what source of news they have these days, you can tell to some extent what their political attitudes are.

So, many times we hope for a questionnaire when we're doing jury selection, so we can get people to be more honest with us about those views and we can ask them questions that will assess that. Then we also hope for some extensive or at least moderate amount of questioning that goes on to the panel.

Some people will be honest. Some people won't be honest, I'll tell you, but some people will be honest and say, " I have very strong views about that and I could not be fair in this situation." We hope for many opportunities to question them and think about what are their attitudes towards crimes? How much do they trust the government? How have they fared? Have they had any bad experiences themselves or had a relative have a bad experience in this situation? I know many times we see people having strong views because they've got a relative who had some kind of run in

with the law perhaps, and it may not have any relevance to this situation. This might be very different, but that still has a bearing, then, on whether they're going to be able to listen to the information in the case or whether we're looking at automatic bias. A little bit of that awareness of their implicit bias, perhaps, but a lot of it is in their awareness, so it would make it explicit bias that they have about those kinds of issues.

Adams: I'm hearing a lot about the experience and the demographics of the jury veneer. In the same way that we were limited in the theme generation process, right? We're limited because the rules of evidence provide these clunky framework for us to bring forth facts at trial. We have to be constrained by them and it's a question and answer process, and hearsay is not admissible and all the sundry of things that we can't do box us in with themes.

It sounds to me, like you've devised a way to assess this because a lot of the stuff that we'd want to directly ask is patently off limits in a jury questionnaire or voir dire process. You're hitting it right at some of these lightning rods in our society, talking politics, talking religion and in many instances, those are off limits. What roundabout way do you use to get at distilling down what these people believe and what their experiences are and where they come from to shape a view of how they would react to certain facts?

Greeley: I wouldn't say we can't ask all the questions. I think some of the questions are already embedded into our system. Attitudes toward law enforcement or, "Would you believe somebody who's in law enforcement who's testifying more than anybody else." Some of those standard questions still show up on the questionnaires that they're answering: "Have you ever been a victim of a crime?" So we can get at some things that are out there that the court will allow you to ask. But again, we're looking at other background experiences, whether it's their occupation, whether it's their hobbies. Sometimes we can ask these questions. Sometimes the judges just don't want to have anything to do with it and you can't ask them about their TV viewing habits or what kind of social media they're on.

But sometimes we can put that into a questionnaire and a lot of times you get a lot of good feedback that is really religiously or politically oriented. You know, if somebody's the head deacon in their church, you know, if they put that down as a leadership position we sometimes ask, "Well, what kind of leadership positions you are, any community services that you've gotten involved with or clubs or that sort of thing or groups that you belong to?" That can be very powerful in terms of understanding not only their attitudes, but also their leadership abilities, which again is another part of what we're trying to explore when we're talking to them.

Adams: I'm slowly beginning to believe that I'm being psychologically profiled as we speak.

Greeley: Tell me more, sir.

Adams: I want to take another seemingly hard pivot and I want to talk a little present day application. But I know in reviewing your CV that you've published now extensively on the psychology of jurors in the age of coronavirus. And we are, hopefully coming out of this crisis, but it's a lot slower than anyone thought. So much for two weeks.

We are now into basically our third year of moving through a significantly disrupted life because of COVID and no thing has been more disrupted than the judicial system. I personally argued the case before the New Jersey Supreme Court related to the use of certain technological means as a substitute for in-person proceedings as an accommodation because of the pandemic.

I lost, but some of the core tenets of our legal system involve things like confrontation. And that's getting a three dimensional view of a witness in a witness box, seeing when they're tapping their foot or they're nervously twitching under the desk or whatever, because that helps in the assessment by the finder of fact. In a two-dimensional Zoom screen world, that doesn't work. Talk to us for a minute about what you are encountering during this weird time where we have gone into this virtual hibernation.

And candidly, I hope we come out of it because I think it's a far less effective way of interacting. I think human beings desire intuitively the need to interact and see people in two dimensions.

Greeley: Yeah, direct contact.

Adams: And be close to people and touch, touch people and be able to feel their energy in close proximity. And I don't think that this flat screen of a pixelated video is much of a substitute for that, particularly as it relates to judicial proceedings. What are you experiencing and observing from the perspective of how the pandemic has really complicated this dynamic?

Greeley: You mentioned several different kinds of ways. Let me start by saying what's happened with regard to technology. I think we have yet to see what's going to happen with that, especially if we do get into a period where we're not going to see as many remote activities, hearings, et cetera.

I have to say, I think it's been helpful to me. We've been able to do a lot of online research. We started to do that before the pandemic, and then we really were able to do that. I know a lot of lawyers are appreciating the online hearings or online meetings or settlement property.

Adams: I hate them.

Greeley: Okay. I thought maybe you like not having to drive to the courthouse, but, okay. I was going to say, I don't think people like them as much as in-person contact. And I wouldn't say there's any substitute probably for more in the courtroom when we're talking about a case, we're talking about a trial. I'm certainly not seeing people saying we think that's a good idea.

What we're seeing is, the biggest issue has been getting jurors to the courthouse, as you mentioned. The biggest issue is, are jurors afraid? And we have found that jurors are afraid. We've been studying it over two years, and the reality was, initially, many people were going to not go to the courthouse. They wanted to postpone their jury service. So as a result of that, we were skewing the pool, because the more of the people who were afraid were not going to go to the courthouse. Those people tended to be more pro plaintiff. The fearful people were more Democratic or liberal types of people. Those people were not going to the courthouse. Some of the more defense-oriented people were saying -- again, it's correlated, it's a proxy, frankly, for some of their political attitudes -- they were saying, "I don't think it's that big a deal. It's a hoax. I don't think it's going to be that scary to be at the courthouse."

So, we're getting different groups of people showing up at the courthouse and then the judges were intervening by saying, "Well, okay, we're going to make everybody wear masks." Oh, that changes the dynamic there. The whole group of people who said, "We'll go to the courthouse," don't want to wear masks as often as the people who were saying, "I'm fearful. Okay, I'll wear a mask and I'll go." And then the judge would say, "I think we need to have everybody vaccinated." That changes the dynamic again.

So the biggest issue for us has been a) we do see differences in people's fear levels as related to verdict. But we also were seeing vastly changing populations of people who were able to go to the courthouse. So, our pools were changing and the pools were even changing within a single trial. The judge would change his or her mind and say, "I think we're going to wear masks. I think we're not going to wear masks, but we're going to have everybody be vaccinated."

It's been really confusing, frankly. And I think the lawyers are experiencing that. We all hope for maybe more opportunity to have what would be a full-fledged venue that is fully represented in the courthouse and be able to choose or deselect from that panel rather than having them deselected before they even get there.

Adams: My biggest observation from the COVID pandemic and its impact on judicial proceedings has been a skewed demographic due to age. The younger more, perhaps, risk-tolerant demographic shows up and maybe you have the people who are into the masks, the people who are not, the people who are into the vax, the people who are not. You can obviously distill some leanings or political ideology from those demographics, but age seem to be one that took a huge hit.

The older people were almost universally excused. Even the older lawyers had concerns about being in the courthouse. Just on that, as it relates to the composition of the jury, certainly a defendant has a right to a jury of his or her peers. So, if it's an older individual and you've got all young people who may have biases against old people, you got a problem there.

Furthermore, a defendant has a constitutional right to a lawyer of their choosing and if you eliminate a population of lawyers that might be 65 plus, not only are you eliminating a pretty experienced group, but you're impacting the constitutional rights of that defendant. It's still a mess. It's getting better, but it's a mess.

Greeley: I think that's right. I think I would add that into the mix. I still think politics played the biggest part in what I was seeing as the skew, but I would completely agree with you that fear of COVID is what we're talking about. And so if there's a group that's going to fear it, it's going to be the older group that's going to fear it more because it's more dangerous for them. And thus, they were getting eliminated as a part of that. Absolutely agree that there's a skew in that part, and I certainly would agree that we wouldn't want a whole group of attorneys to be left out of the mix because they fear for their own lives, in that sense or feel like they have to choose between being in the courthouse or feeling safer.

So I know it's been complicated. And like I said, the part of it's the most complicated to me is the ever-changing nature. One minute, as we go up one minute, we go down, the restrictions change. In Philly one day doing some research and the mask mandate was in recently and then the next day when I was not doing my research, the mask mandate was gone. So it was strange, just to be experiencing it, live like that. It's really been an issue.

Adams: Yeah, I want to take one last hard pivot, and that is to talk about some high-profile examples of jury consultants really adding benefit to the trial team and draw a little bit on your experience, maybe get a few war stories from you.

When I think of jury consultants, the first place my mind goes to, and maybe it's showing my age a little bit, but it's the OJ Simpson case. It's Jo-Ellan Dimitrius picking, first of all, the legal teams' move to transfer venue out of one jurisdiction to another, then coupled with some of the racial themes that played out in that case, and then coupled with the composition of the jury to which that was

presented. That to me is perhaps one of the most significant examples of a jury consultant having supreme value in selecting a jury and helping to mold the message. Give me some other ones.

Greeley: I don't know if I can give you specific cases, because of course we can't talk about the cases for the most part, unless we were caught on tape being there.

Adams: I'm only basing my assessment off of what I observed in the media.

Greeley: I will tell you that I knew Jo-Ellan Dimitrius. I still know her. I worked with her. We did a lot of research together. I know a lot about the preliminary techniques in that case and those have been used in many other cases since then, having to do with doing research outside the venue and doing pre-testing, doing a lot of surveying of the venue.

One of the things that she brought us to and other people brought us to, I think, is the idea of really knowing what the population is going to say before they say it. Again, she did an awful lot of testing.

I know there have been a ton of other cases jury consultants have been involved in recent years and I think the thing they bring to it is three things. One is this preliminary research that they're doing. They survey the venue heavily. They do a lot of intimate mock trial testing so that they know more about what the jurors are actually going to say. They do assist in change of venue, which we've done many times to try to find a venue that is more suitable or more favorable for us. We've also worked with a lot of the witnesses in the trials to get them ready so that they are able to present whether they themselves, maybe the defendant doesn't have to testify, but the other people around them that might have to testify are ready to talk to the jury. So it certainly has had a huge impact.

Adams: Yeah and I'm struck by the fact that in everything you've told me today, Ann, there is this underlying evidence-based approach. There's this underlying testing methodology.

Greeley: Absolutely.

Adams: And in discussing jury consultants, it's not just that we're hiring some psychological profiler essentially. It's that we're hiring a scientist to go in and actually do social science research.

Greeley: Absolutely.

Adams: Then draw conclusions from the social science research.

I think that to me, Is the most fascinating component of what we've discussed today. That's all the time that we have for today. We'll see you next time on "The Presumption of Innocence." I'm your host, Matt Adams. Thank you so much, Ann, for joining us today, as we unpacked the psychology of jury selection. Take care.

Greeley: You're welcome.