

# How To Play Offense with Defense Witnesses

By Paulette Robinette, Ph.D.

## INTRODUCTION

When it comes to courtroom drama, plaintiffs often have the upper hand. The heart and soul of a good plaintiff's story lies in the power jurors have to right a wrong. An evil villain has caused harm to an innocent (or at least undeserving) victim and escaped without penalty...until now, when justice has been placed in the hands of good citizens empowered to correct injustice with the defendant's pocketbook. Defendants, on the other hand, are faced with the daunting prospect of giving jurors a sense of closure through inaction<sup>1</sup>. The temptation for defendants is great to try to dress up the status quo by negating the plaintiff's story—the defendant is not an evil villain, the plaintiff is undeserving, the plaintiff was not harmed, or the harm was not caused by the defendant. No amends are needed; justice has already been served.

Like many of my colleagues in the industry, I have counseled defendants to stop playing defense and adopt an affirmative case theory that replaces a plaintiff's melodrama. Jurors are more open to persuasion if they have a reason to be *for* a defendant, rather than simply armed with reasons to discredit or minimize the plaintiff's claims. However, unless positive messages are developed early in

the litigation—namely before witnesses are selected, prepared and deposed—we are confronted with the task of taking an affirmative stance at trial with largely defensive evidence. In many cases, this is unavoidable. And then there are times when an affirmative framing of the defense posture early on would have led the team to consider alternative witnesses and prepare witnesses differently for deposition and trial testimony so they came across to jurors as less *defensive* and more *persuasive*.

While the need for a story is widely accepted, the ability to develop effective storytellers can be easily derailed. Corporate defendants face the challenge of crafting an appealing positive story given the case facts and a secondary challenge of finding and developing witnesses who can communicate in a manner consistent with how jurors listen.

Defensive strategies often bring out the worst in juror decision making, while offensive themes may bring out the best. Jury trials are won and lost on the witness stand. You may be on the right side of the facts and the law, but your witnesses must carry the message in a way that is credible and compelling to jurors. This article explores the ways in which jurors process witness testimony, including factors that help determine what they retain and argue during deliberations, and examines the implications for preparation strategies that equip defense witnesses to be offensive forces for the case.



<sup>1</sup> Feigenson, N. (2001). *Legal blame: How jurors think and talk about accidents*. New York: American Psychological Association.

## HOW DO JURORS EVALUATE WITNESSES?

The extent to which jurors are ultimately persuaded by witness testimony depends in large part on variables related to the witness (*e.g.*, perceived credibility, honesty, likeability), the juror (*e.g.*, prior experiences and attitudinal predispositions), and the message (*e.g.*, valid arguments, consistency with other evidence). The Elaboration Likelihood Model (ELM) offers a useful tool for illustrating the way in which these forces have a collective impact on attitude formation and change among jurors.<sup>2</sup> While no theory is a perfect fit to all real-world experiences, the ELM framework can help us conceptualize what leads jurors to accept or reject witness testimony, and identify strategies for preparing witnesses to be more effective in the courtroom.

According to the ELM, there are two basic routes to persuasion.<sup>3</sup> The first is the *central* route, which involves the systematic processing of message content. This is the more cognitively challenging of the two routes, as it entails thoughtful analysis of the message and inferences regarding a recommended action should the message be accepted. Jurors who are motivated and able to engage in this type of processing (*i.e.*, high likelihood of elaboration) might weigh testimony against their own life experiences and

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other evidence presented at trial, and actively consider the implications of message acceptance on the jury's verdict. Attitudes formed or changed through this route are considered to be persistent and predictive of behavior, which suggests jurors who process through the central route may become your strongest advocates or harshest critics in deliberations, depending on whether their analysis led to acceptance or rejection of the message.

If you've watched one mock jury deliberating or interviewed one juror post-verdict, you know that jurors are not always processing (or at least communicating) systematically. Jurors often rely more on the *peripheral* route, which does not require extensive cognitive effort, but rather relies on cues such as the source's credentials, honesty,

attractiveness, and method of delivery. Jurors who accept or reject a witness's message through the peripheral route might dismiss the substance of testimony entirely with a reference to the witness's nonverbal behavior (*e.g.*, "I ignored what he said because I could tell he was lying...did you see how he kept blinking,

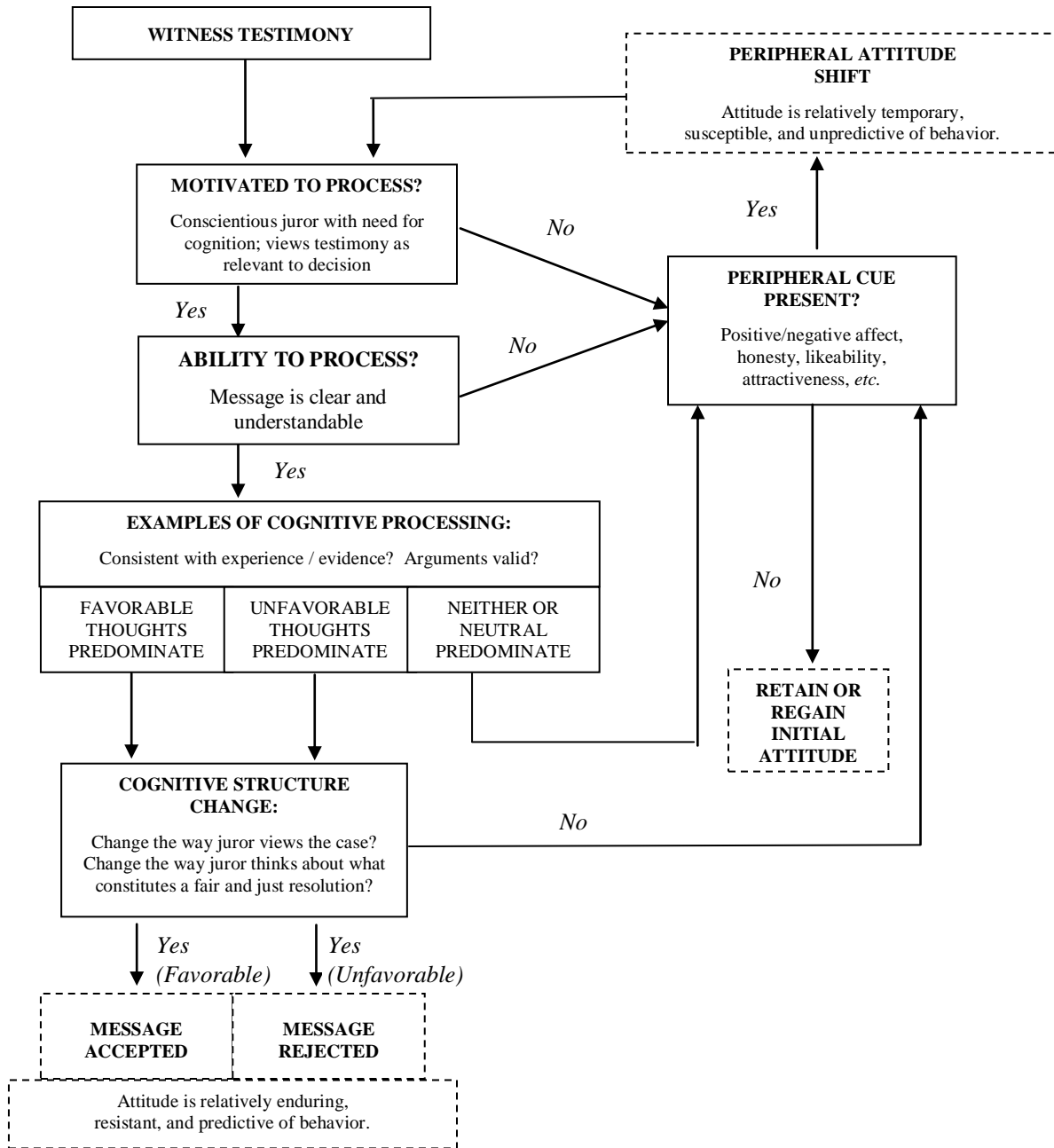
sipping water and glancing at his attorney during cross?"). While peripheral processing may lead to attitudes that are temporary and less predictive of behavior, this is no consolation to the defendant who learns that jurors dismissed the key expert's opinion because they could not understand it and didn't like the way the expert peered at them over his glasses.

Before we lambast jurors for relying on peripheral cues, we should keep in mind that without the use of heuristics (mental short-cuts), none of us would be able to function in daily life, let alone process the quantity of evidence jurors are asked to consider in complex cases. That said, the model illustrates key factors that encourage jurors to process witness testimony through the central route and adopt an attitude

<sup>2</sup> Boccaccini, M. T. (2002). What do we really know about witness preparation? *Behavioral Sciences & the Law*, 20, 161-89.

<sup>3</sup> Petty, R. E., & Cacioppo, J.T. (1981). Epilog: A general framework for understanding attitude change processes. In Petty & Cacioppo (Eds.), *Attitudes and Persuasion: Classic and Contemporary Approaches* (pp. 255-269). Dubuque, IA: William C. Brown Company; Petty, R. E., & Cacioppo, J.T. (1986). The elaboration likelihood model of persuasion. In L. Berkowitz (Ed.), *Advances in experimental social psychology* (Vol. 19, pp. 123-205). New York, NY: Academic Press.

that favorably predicts their behavior during deliberations. Below is a graphical depiction of the ELM model that has been simplified and adapted to reflect juror processing of witness testimony.<sup>4</sup>



<sup>4</sup> See Petty, R. E., & Cacioppo, J.T. (1986). The elaboration likelihood model of persuasion. In L. Berkowitz (Ed.), *Advances in experimental social psychology* (Vol. 19, pp. 123-205). New York, NY: Academic Press for original copy of diagram.

## WHAT ARE THE IMPLICATIONS FOR WITNESS PREPARATION?

So how do we prepare witnesses in a way that encourages jurors to process testimony cognitively, embrace the message, and argue the point in deliberations? And how do we prepare witnesses in a way that helps ensure that peripheral cues do not derail a strong message? Sometimes we give up too easily on the defense side. We think we must rely on the argument to carry the day. So witnesses are well-prepared to stay on message and we put our faith in finding defense-oriented jurors who have high need for cognition, understand the message and an uncanny ability to ignore peripheral cues that distract from or undermine the message. Unfortunately, few cases are tried in venues with more than a few of these jurors on the panel. For the vast majority of jurors, persuasion depends on *both* central and peripheral cues. Practical implications for preparation of witnesses are noted below.

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### I. Message Construction

The first step is developing a strong message that resonates with jurors *and* witnesses. Defense witnesses, particularly corporate representatives, need to see how their testimony fits into a larger narrative that reassures them jurors will be open to what they have to say. Jurors need to hear an affirmative case theory that gives them a reason to listen. And if we can convince jurors to listen, we want to make sure that systematic processing of the message will anchor cognitive changes in ways that help, not hurt. Key elements of a strong case theory include the following:

a. *Worthy Party*—for the corporate defendant, worthiness is not about

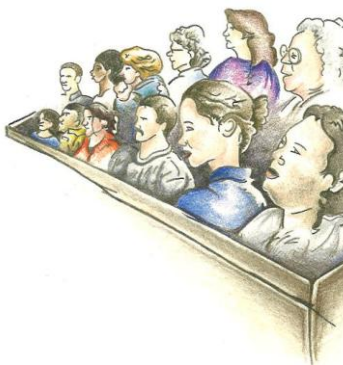
corporate responsibility writ large (charitable donations, natural disaster recovery efforts, investment of profits, *etc.*), but rather the motives and behaviors of individual actors who played a role in this case. Does the plaintiff's characterization of the company fit with what jurors learn about the individuals involved? Are these good people who exercised their best judgment under the circumstances?

b. *Solid Foundation*—given that trials are largely determined by the facts of the case and the specific questions jurors are asked to answer, a strong theory must have a solid legal and evidentiary foundation. The theory must be developed with an eye toward legal standards jurors will be asked to apply during deliberations. Likewise, a rhetorical spin is just spin if not supported by the evidence.

c. *Consistency*—a persuasive theory of the case will resonate in part because it is consistent with what jurors already believe about the way the world works and how people behave in particular circumstances. If the theory flies in the face of common sense—*e.g.*, characterizes a large corporation as entirely unmotivated by profits, describes all physician-patient exchanges as lengthy discourses on the risks and benefits of a new medication or procedure—it will invite skepticism among jurors *and* witnesses who cannot provide honest testimony to buttress the theme. In addition, a persuasive theory will be supported by multiple witnesses who offer testimony that complements,

rather than contradicts, the overarching narrative.

- d. *Moral Appeal*—a strong theory does not revolve around an attack on the opponent’s narrative, such as discrediting the plaintiff or shooting holes in the causation theory, it prioritizes an appeal to higher values that motivate jurors to support your side of the case. This is where too many corporate defendants cede to the other side, assuming for example that the moral appeal of compensating an innocent victim will trump any moral appeal associated with voting for a corporate defendant. This perspective leads to a case theory that is defensive by nature (“we just have to convince jurors that the plaintiff is wrong”) rather than a positive message that demonstrates why a defense verdict is fair and just. Examples include a focus on personal responsibility, reaping the benefits of hard work, and even hope to a sympathetic plaintiff who has come to believe her injuries are irreparable.



The case theory naturally evolves through interviews with witnesses and document discovery, eventually developing into a core set of themes that will be used to anchor the opening statement, direct examination outlines and closing argument. However, establishing the general framework for an affirmative case theory early on will point us in the right direction. Whereas a defensive strategy often leads to the selection of corporate and fact witnesses who reduce the risk and experts who live to criticize the opposing

expert’s theory, an offensive strategy will encourage the selection of witnesses who can tell a positive story.

Consider the impact of a positive framing of the case on a witness’s state of mind in preparation. The typical fact or corporate witness does not have the larger story in mind and may feel defensive about things they have written or said being taken out of context. Educating these witnesses on the larger story helps them relax and simply provide the necessary context for a particular piece of evidence. While there are exceptions, most witnesses perform worse when they feel pressured to be an advocate or to focus on how their words will be used against them by the other side. Witnesses need to trust the trial lawyers and other witnesses to complete the picture and arm jurors with what they need to reach a fair decision.

## II. Increasing Jurors’ Motivation to Process Witness Testimony

As the ELM suggests, there are individual characteristics that help determine whether the receiver (a juror) will critically evaluate the substance of a message (witness testimony).

While most take the job seriously, some jurors are more conscientious about their duties than others, and some have a much higher “need for cognition” (Cacioppo & Petty, 1982)<sup>5</sup>. Motivation, however, is not merely a “jury selection” issue. If we want jurors to attend to the substance of a witness’s testimony, we must make it clear to jurors—as early as *voir dire* and opening, and certainly in the first few moments of a direct examination when jurors are most attentive—*why* the witness is relevant to jurors’ decisions. Jurors who are encouraged to see the

<sup>5</sup> Cacioppo, J.T., & Petty, R.E. (1982). The need for cognition. *Journal of Personality and Social Psychology*, 42, 116-131.

big picture and how this witness fits in will be more motivated to analyze and evaluate the message.

### III. Increasing Jurors' Ability to Process Witness Testimony

The greater the complexity at trial, the more jurors will be forced to rely on peripheral cues to reach their decisions. A key challenge in witness preparation is to simplify highly technical or scientific concepts, eliminate the use of jargon, and incorporate real-life examples that help jurors understand what a concept means. If a witness's message is clear and understandable, jurors are more likely to process the message on the merits, rather than resorting to peripheral cues.

The results of studies designed to test the impact of peripheral cues on juror evaluations of expert testimony are informative. Cooper and Neuhaus (2000)<sup>6</sup> evaluated the effects of expert witness credentials on juror perceptions of the witness and verdict preference. They found jury-eligible participants rated high-paid, frequent testifying experts as not likeable, not believable, and (most importantly) not effective at persuading them to support the expert's side of the case. When the message was presented in language jurors could understand, this "hired gun" effect disappeared. Effects of message clarity were also present in groups exposed to expert witness testimony where the witness had more moderate credentials and pay. While the tendency may be to recruit a top-dollar expert witness with the most impressive vita, unless the witness's testimony is clear and motivates jurors

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to listen, what may appear as attractive qualities in a witness could end up becoming peripheral cues which invite criticism from jurors. The challenge with the high-paid, frequent testifier is that he/she is often the one who wants to state an opinion and have it viewed as correct, "because I said so." The most effective experts are those who respect the jury's need to understand a message before they will simply take someone's word for it—even if that someone is a renowned expert.

### IV. Encouraging Message Acceptance

If jurors are motivated and able to process the message via the central route, they will be more likely to evaluate the substance of the witness's testimony on the merits. This cognitive exercise may involve considerations such as:

- Is the testimony consistent with my personal experience?
- Is the testimony consistent with other evidence in the case?
- Are the arguments valid?

The result is a number of thoughts that may lead to attitude formation or change in the juror's mind. If the message is consistent with what the juror already "knows" from life experience and prior evidence, and the arguments accepted as valid, the witness's testimony is more likely to produce a favorable attitude that is resistant to change. If the converse is true and unfavorable thoughts predominate, the message may produce a "boomerang" effect, leading the juror to not only reject the message, but adopt a firm attitude in opposition to the witness's side of the

<sup>6</sup> Cooper, J., & Neuhaus, I.M. (2000). The "Hired Gun" effect: assessing the effect of pay, frequency of testifying, and credentials on the perception of expert testimony." *Law and Human Behavior*, 24, 149-71.

case.<sup>7</sup> Either reaction may cause the juror to think differently about the entire case and what constitutes a fair and just resolution.

Much of the work that encourages message acceptance occurs at the level of message construction, when developing a case theory that is consistent with the evidence, grounded in the law, and appealing to jurors' overall sense of justice. Additional work is needed during witness preparation to increase the likelihood that jurors will be persuaded by what a particular witness has to say. One of the most common substantive reasons we hear from mock and actual jurors for rejecting a witness's testimony involves a violated expectation. The corporate witness who comes across as honest and carries the message well can still crash and burn if he doesn't know what jurors expect him to know—*e.g.*, the CEO who repeatedly defers to others is dismissed as the “one who is in charge of everything but responsible for nothing.” Likewise, the expert who ventures outside her area of expertise will give back the ground gained on direct (and then some) when the limitations of her knowledge are exposed on cross.



credibility gives jurors wide latitude to discuss a topic most feel more comfortable with than whether they were persuaded by the plaintiff's mechanism of action theory or the defendant's review of the scientific literature.

The witness preparation session must go beyond substance to address the way in which the witness's testimony is delivered. The persuasion literature supports three general constructs subsumed under jurors' evaluations of witness credibility, each of which deserves attention in witness preparation:

a. *Competency*—if a witness knows what he is talking about, jurors expect him to sound like it. Some witnesses have never had to explain their backgrounds to people with whom they do not share a common history or base of understanding. Reducing their experiences to a few key points that quickly convey competence in a way jurors find meaningful takes time in preparation. Another key issue related to perceived competence involves powerful versus powerless speech patterns (O'Barr, 1982).<sup>8</sup> Some witnesses unwittingly adopt powerless speech patterns that

communicate a lack of confidence, such as hedges (“I think,” “perhaps”), hesitations (“uh,” “um”), and amplifiers (“very,” “most certainly”). The challenge in preparation is to distinguish between uncertainty that should be addressed and explained, versus speech patterns that convey uncertainty where none exists.

b. *Trustworthiness*—in an adversarial world with ambiguous and conflicting evidence,

## V. Preparing for the Peripheral

Whether peripheral cues such as a witness's perceived competence, honesty or likeability are evaluated to the exclusion of or in addition to the substance of her testimony, all jurors consider these cues at some level. Legal instructions regarding the evaluation of witness

<sup>7</sup> Petty, R. E., & Cacioppo, J.T. (1981). Epilog: A general framework for understanding attitude change processes. In Petty & Cacioppo (Eds.), *Attitudes and Persuasion: Classic and Contemporary Approaches* (pp. 255-269). Dubuque, IA: William C. Brown Company.

<sup>8</sup> O'Barr, W. M. (1982). *Linguistic evidence: Language, power & strategy in the courtroom*. New York, NY: Academic Press.

jurors are looking for someone they can trust. Often a general impression of a witness is all jurors retain by the time they enter deliberations. If overly anxious or defensive, a witness may exhibit the same nonverbal behaviors that people associate with deception (e.g., self-adaptors, speech hesitations, sudden body shifts). As a result, jurors may be unwilling to factor this witness's testimony into their decisions, and may even use it against the defense during deliberations, on the basis of wrongly interpreted manifestations of anxiety.

c. *Dynamism*—effective witnesses make an impression. They offer *new* information that jurors find interesting and important to their decisions. They are dynamic speakers who capture and hold jurors' attention with the use of eye contact, focused gestures, real-life illustrations and visual aids.

A common mistake in witness preparation is to focus on the mechanics of delivery without attempting to address the source of negative peripheral cues. For the best trial lawyers, time is a luxury. There is always pressure to sacrifice the important for the sake of the urgent in witness preparation. Giving a witness the opportunity to share his thoughts and feelings about the case—without critique—is a non-essential that often falls by the wayside. A relaxed, exploratory conversation with a witness before “getting down to business” on the matter of content and delivery will do wonders for making the preparation session more productive. Stimulating prompts include:

- How would you summarize what this case is about?

- How would you describe your role in the case?
- If you could sit down with jurors and have a conversation with them, what are the key messages you would want to communicate?
- What do you think would be most difficult to explain?
- Are there any concerns that come to mind when you think of testifying?
- After you have testified, how do you hope jurors will describe you?

Answers to these questions shed light on what is at stake for this witness and provide an opportunity to address the *source* of anxiety rather than spend futile time in preparation treating the symptoms. Sometimes the simple act of verbalizing their concerns helps witnesses get past them and focus on telling the truth about what they know.

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Take, for example, the corporate witness whose answers reveal her suspicion that jurors will never listen to her or believe what she has to say. She has seen a wealth of public opinion data that suggests jurors are biased against corporate America and eager to use the company's deep pockets to compensate the plaintiff. This cynicism filters into her testimony and delivery in predictable ways—at times she sounds defensive or hesitant, as she thinks about how a plaintiff's attorney will twist her words and use them against her. At other times she comes across as indifferent or resigned on topics one would expect her to care passionately about. This witness needs to find common ground with jurors, for their sake and her own. She needs to recognize and appreciate the reasons why her testimony would be well received by the average person, and why jurors would find the defense case theory persuasive.

## CONCLUSION

Defense witnesses can be offensive forces for the case. Understanding the forces that impact jurors' willingness and ability to process the substance of a witness's testimony provides insight into the most effective preparation strategies. The most persuasive

witnesses are those who motivate jurors to listen, offer a clear and consistent message, and deliver that message in a competent, honest and memorable way. By prioritizing an affirmative framing of the case theory and focusing on the testifier's state of mind during preparation, we can bring out the best in our witnesses.

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## About the Author



Paulette R. Robinette is President and Founder of *JurySync* – one of the nation's most respected litigation consulting firms. Dr. Robinette is best known for her strategic, yet practical ability to translate complicated evidence into simple messages that resonate and persuade. She has extensive experience in complex

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Dr. Robinette earned a doctorate in Legal Communication and master's degree in Litigation Studies from the University of Kansas with specific emphasis on public attitudes toward corporate responsibility. She can be reached at 913-338-4301 or [probinette@jurysync.com](mailto:probinette@jurysync.com).



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