Millennial Jurors and What Do They Mean for Your LTC/ALF Case

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I. Introduction

From our perspective, a successful witness projects two things: likeability and credibility. Even after a disaster deposition, the witness will get a second chance at trial – and in the courtroom, being just a few feet away from the jurors can help to connect with them from the outset.

To ensure everyone is on the same page about the definition of a millennial, the most commonly accepted definition are those people born after 1980 or 1982, meaning they graduated from high school in 2000 – hence the term millennial. Right now, millennials are the largest age group in the United States and make up more than one-fifth of the population.

This means it is difficult if not impossible to avoid millennials on your juries. During the last two years, we have conducted multiple nationwide surveys to gauge with greater reliability the millennial mindset that could help or hurt your case, and whether this group of jurors is really as bad as the stereotypes would have you believe.

Well, the numbers are in – and our research shows they are actually worse.

Our focus group research has shown they are the least likely of any demographic group to side with the defense. Just 17.4 percent of millennials have sided with the defense during our last 11 years of jury research. Overall, 40 percent of our focus group participants have been defense jurors (this low number reflects the fact that we typically conduct focus group research on extremely challenging cases.

The following sections address why millennials are more likely to be plaintiff oriented before they even enter a courtroom, and the best strategies to engage and appeal to this difficult age group.

II. Millennials Make Their Own Judicial Rules

For millennials, “Question Authority” isn’t just a bumper sticker slogan – it’s a way of life. In fact, the term “millennial” seems synonymous with nonconformity. Studies by such well-known institutions as the Pew Research Center have confirmed two of the defining characteristics of millennials we already suspected: Their respect for authority is tenuous at best; and they tend to shun or distrust long-accepted social structures such as marriage.

Our research shows we should add jury service and judges to that list of suspect institutions. Our poll demonstrated millennials are much more likely than older generations to flout a judge’s instructions on a number of issues.

Perhaps that’s because one of this generation’s formative experiences was the Great Recession, the devastating product of an era in which outright lies and “robo signing” were seen as acceptable ways to process and fund home loans. In that context, it’s hard to fault millennials for their mistrust of powerful figures and authority. The popularity of books, movies and television shows such as “The Hunger Games” and “Breaking Bad” reflect millennials’ fondness for antiheroes and challenging the establishment.

It follows, then, that the courts may not win as much respect from a millennial as they did from his or her grandfather. For example, 45 percent of millennial respondents believe it’s acceptable to judge a lawsuit on what they believe to be most fair, rather than “the letter of the law.” For those 35 and older, that number plummets to 30 percent.
Another question from our survey asks whether participants would consider lawyer fees while deciding on damages in a trial even when a judge has instructed jurors not to consider those fees. A total of 33 percent of millennials said they would defy the judge’s instructions, compared to just 23 percent of participants 35 and older.

Similarly, 31 percent of millennials said that as trial jurors they would be inclined to use the Internet to do outside research about the case – even when the judge instructs them not to. That number was only 13 percent for those 35 and older. This troubling statistic means that if any of the country’s 80 million millennials are on your jury, they may well be disregarding your highly paid experts in favor of a Wikipedia page or what they can unearth about your witness on Instagram.

With this in mind, millennials clearly need to be regarded with caution during voir dire, especially in a case where a verdict could turn on misinterpretation of a jury instruction or outside research. Still, they typically want to view themselves as being fair, and urging jurors to fairly follow the law can appeal to millennials’ desire to see themselves as good, fair people.

III. Goldilocks Could Have Told You: Which Voir Dire Query Is the Best Predictor of Verdict?

The question is simple, but it can tell you more about a potential juror’s leanings than any other you might ask. During our 12 years of research involving thousands of jurors, the response to this question has been extraordinarily predictive of verdict – especially if that verdict is for the plaintiff.

This question has nothing to do with demographics or any other stereotypical correlation you might assume this is leading toward. In fact, it’s a question Goldilocks might have asked had she found herself in a courtroom instead of a home occupied by the three bears and their extreme – and just right – beds, chairs and bowls of porridge.

Intrigued yet?

Should the judge allow it, we believe the most important question to ask during jury selection is whether those in the venire believe filing a lawsuit is too hard, too easy or just right. In our experience, jurors who believe filing a lawsuit is too hard are 1.5 times more likely to side with the plaintiff regardless of the type of case, the demographics of the parties or any other factor.

The converse is also true, although not quite to the same extreme. Those who believe filing a lawsuit is too easy are 1.3 times more likely to find for the defense.

On the bright side for defense teams, we have observed a slight upward tick in the defense-friendly responses to this question during the past few years. In 2012, we fielded a national survey that showed 23 percent of respondents believed it is too hard to file a lawsuit, and the same percentage believed it is too easy. When we asked the same question this year, 21 percent indicated it is too hard to file a suit, and 26 percent said it is too easy. (The remaining percentage indicated it is “just right.”)

Still, the responses remain just as predictive, even though fewer people provided the plaintiff-leaning answer. The data shows the same people who believe it is too hard to file a lawsuit are also more likely to award money even if they don’t believe a plaintiff suffered injury, and are also more likely to say they would ignore a judge’s instructions on key issues such as the law, Internet research during trial and factoring attorney fees into awards.

And as you might expect given the other findings we have highlighted during the last couple of weeks, millennials just happen to be the most likely of any demographic group to believe it is too hard to file
a lawsuit. In this age group, 26 percent of respondents stated it is too hard, versus just 18 percent of those 35 and older. In contrast, 17 percent of millennials believe it is too easy to file a lawsuit, while 30 percent of the older subset gave this response. Although we can and do suggest strategies for handling other issues that may present themselves during voir dire, for this issue we have one recommendation only: avoid if at all possible those who believe it is too easy to file a lawsuit.

From our perspective, the explanation behind this correlation likely stems from the perception among such jurors that a defendant is presumed liable until proven otherwise. When it comes to civil law, this common snap judgment could be construed as, “If somebody gets sued, there must be something to it.” Although a judge may tell a jury to listen to all of the evidence before forming a conclusion, our research has consistently shown a high percentage of potential civil case jurors may enter the courtroom already favoring the plaintiff.

We have frequently asked over the years whether people believe that if a lawsuit makes it to a courtroom, it must have some merit. The number has remained steady at around two-thirds favoring the plaintiff’s case from the get-go.

For our most recent survey, we also broke down the responses by age. When we consider only millennial responses, those who believe the plaintiff’s case must have some merit if it gets to the trial stage soars to nearly 80 percent.

As much as millennials may distrust institutions such as the legal system, they appear to be even more sure than those 35 and older that there is some mechanism that “authenticates” cases before they get to the trial stage. We have heard this misconception during focus groups around the country, and many jurors are truly surprised to learn the only requirement for a case to be filed is an ability to pay a nominal fee and a willingness to see it through to trial.

Given that millennials are going to be in your jury pool, and statistically more than three out of four will likely enter the courtroom already believing the plaintiff’s side has at least some merit, it is worth exploring who shares this attitude during jury selection and attempting to rehabilitate such jurors through education of the entire panel.

**IV. When ‘I’m Sorry’ Is the Right Thing to Say**

Nothing gives attorneys and their clients more heartburn than the decision about whether to apologize for mistakes. Many worry that eating a little crow is tantamount to admitting liability and giving up on the case.

That’s not our view. Although we believe only a small percentage of cases call for an apology, our experience during focus groups and trials has taught us that in certain cases, admitting to a mistake and apologizing is exactly the right thing to do.

Take the case of a surgeon who has operated at the wrong site. No matter how many expert witnesses you have who will testify that “it happens” and there are reasonable explanations for how it happened, our experience has taught us you cannot convince a jury operating at the wrong site is anything but negligent.

In such a case, admitting to the mistake and apologizing isn’t just the “right thing” to do in the moral sense – it’s the right thing to do in the strategic sense.

If the defense attorney stands in front of the jury and makes negligence arguments that even their own jury consultant thinks are a stretch, you stand the very real chance of angering the jury and eroding the credibility of what may be a very strong causation case. The jury might conclude your client needs to be
“taught a lesson” with a big verdict, whereas a sincere apology might convince them the lesson has already been learned and to take a long, hard look at the merits of causation. At the very least, the jury might be less likely to take out its anger by adding an extra zero to the damages award.

From our perspective, if your chances of prevailing on negligence depend on the stars aligning and everything breaking your way, it might be time to consider an apology.

Of course, only in the rarest circumstances would we recommend admitting a mistake actually caused the alleged harm. Most of the time, you’ll simply acknowledge a mistake was made and the defendant has learned from it. By making that acknowledgement from the outset instead of fighting a losing battle, you can credibly dispute the remaining liability questions on more favorable ground.

However, this advice comes with one very important caveat: If your jury is stacked with millennials (those younger than 35), apologies carry extra risk. Our recent survey of potential jurors nationwide found millennials were several percentage points more likely than older jurors to say that if a defendant apologized, they would be more likely to side with the plaintiff and award more money. Thirty percent of millennial jurors said an apology would make them more likely to side with the plaintiff, compared to only 23 percent of jurors 35 and older. Similarly, 21 percent of millennials said an apology would make them award more money, compared to only 11 percent of older jurors. (It is worth noting, however, that solid majorities of all age groups said an apology would not influence their decisions).

V. Judge Not, Lest the Ricochet Hit You

Criminal history, lax healthcare compliance, Facebook party photos of bongs and booze – it can be easy to identify ill-advised life choices by plaintiffs and be tempted to trot out these items in front of a jury if you think it might produce a negative bias.

But it’s crucial to consider your jury composition before you do so, as it might backfire among younger jurors. Our recent survey included a question about whether it would be fair to introduce information about a plaintiff’s history of drug use or criminal activity. That answer – 55 percent believe such information is fair game, and the other 45 percent said they would be offended – was consistent across all age groups. Similarly, about two-thirds of participants indicated it is appropriate to use the plaintiff’s social media postings as evidence.

Respondents were also asked how learning such information would affect their opinion about a case if they were “on the fence” about their verdict. Overall, 55 percent of the respondents said it wouldn’t matter (47 percent of millennials and 59 percent of those 35 and older). The number who said it would make them more likely to side with the defense was even more consistent (27 percent overall, 24 percent of millennials and 28 percent of 35-plus respondents).

Where the age divide manifested itself was in responses about whether the defense’s decision to include supposedly damaging personal information would make jurors more likely to find for the plaintiff. Just 13 percent of 35-plus participants chose that option, in contrast with a full 29 percent of millennials. This seems to echo the fallout we have observed in coverage of the police shootings of civilians – the civilian’s background doesn’t matter, especially when it wouldn’t have been known to the officer. All that matters is that the civilians, or in the cases of our lawsuits, the plaintiffs, were treated unfairly.

These findings may give you pause when you decide how much to dig into the plaintiff’s background – and whether to use what you find. We strongly advise exploring all jurors’ social media presence before trial to see whose online persona could be construed as troubling. From our experience, those jurors are the most likely to be offended by the defense’s use of the plaintiffs’ social media.
VI. This Land Is Whose Land?

During our recent survey, we asked participants to characterize a number of different issues as a “major” or “minor” problem, or not a problem at all. Opinions on illegal immigration created by far the largest spread in perspectives. Although 63 percent – nearly two-thirds of 35-plus respondents believe illegal immigration is a major problem, just 30 percent of millennials said so. Nearly 20 percent of millennials don't see illegal immigration as a problem at all, compared to only 6 percent of those 35 and older.

These numbers beg the question about the reason for this huge difference in perspective. Could it be the assimilation of immigrants into America, the growing number of mixed-race Americans or millennials’ mindset of universal acceptance? A Pew Research poll conducted in March of 2016 showed the major factor in the acceptance of immigrants, revealing that 76 percent of millennials say they “strengthen the country because of their hard work and talents,” whereas only 48 percent of baby boomers agreed with this statement.

During our focus groups, we have noticed correlating outlooks among age ranges. From our master data file of hundreds of cases from the past nine years, we have found those older than 40 are 1.7 times more likely than younger jurors to believe U.S. immigration laws should be tightened.

These findings can have clear implications for some of our cases. For example, in one 2014 case, jurors were asked if they prefer a doctor trained in the United States or India, where 100 percent of those younger than 20 years of age answered “it doesn't matter” compared to the majority of those older than 50 responding “United States.” Although it may not be a direct correlation to immigration views, it still shows that to the younger generation, countries of origin are less of a concern.

VII. Debunking the “Me Me Me” Millennial Myth

Between the constant selfies and perceptions of entitlement among millennials, it’s easy to believe this age group is far more concerned with throwing shade than caring about others. However, when it comes to evaluating the merits of lawsuits and damages claims, their sympathetic nature and desire to help the underdog makes them troubling jurors for the defense.

During our recent survey, millennials were far more likely to agree that sympathy would affect their verdict in a case – even if a judge told them it shouldn’t. For this question, 46 percent of millennials answered in the affirmative, compared with just 36 percent of those 35 and older. Both numbers are troubling, but the fact that millennials are 1.3 times more likely to ignore a judge’s authority and base their verdict on sympathy for the injured begins to tear at the image of self-centered youths who think more about Pokémon than plaintiffs. This statistic shows clear compassion for a person in need, regardless of their actual right to receive damages under the law.

This desire to help the underdog stems in part from the literature that formed the foundation of millennial childhoods, including the Harry Potter series, in which a poor, orphaned wizard brings down the powerful elite. We see this behavior often during our focus group research, as millennials are far more likely to overlook plaintiffs’ mistakes, or personal responsibility, based on the perspective that if these jurors were “in their shoes,” they would expect similar empathetic treatment.

This clearly is a factor when evaluating the potential damages for a case. Millennials’ attitude toward money – especially if it is going to be paid by a large company to an individual – tends to be, “If they can afford it, they deserve to pay it.”
During our survey, millennials displayed a strong inclination to give higher awards if the defendant is a large corporation, hospital or insurance company. This strongly anti-corporation attitude is evidenced by a recent study from the Intelligence Group, which revealed 72 percent of millennials would rather be their own boss than work for someone else.

Given that millennials grew up during the era of Occupy Wall Street, big-bank crashes and Bernie Madoff Ponzi schemes, perhaps it is no surprise this age group displays a strong negative bias against “corporate” defendants. For us, the big surprise was how significant the bias gap was between millennials and those 35 and older.

Respondents in the recent Jury Impact/MFour survey were asked to pick three different damages scenarios from a variety of options in which they would assign “high damages.” Those 35 and older focused only on the type of plaintiff identified, with babies, the elderly, those younger than 18 and single parents as the most likely to be awarded big money. Millennials also selected single parents, babies and the elderly as the most sympathetic plaintiffs – but were also far more likely to award higher damages if the defendants were Fortune 500 companies, hospitals or insurance companies.

That same study asked how it would affect a juror’s award if the defendant was a large corporation. Seventy-three percent of those 35 and older said the defendant’s status would not affect their award, and only 25 percent said they would give a larger award to the plaintiff. By contrast, just half of millennials said there would be no effect, and a full 44 percent said they would give more money to the plaintiff simply because the defendant is a corporation.

These findings make it clear that for corporate defendants, it is best to avoid millennial jurors if at all possible – or at least give them a thorough going-over during voir dire. Especially for millennials who embraced Bernie Sanders during his presidential bid, their idealistic, anticapitalist mindset could prompt them to try to use a verdict against a big-money defendant to “change the world.”