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Keeping Up With the Modern Jury as a Corporate Litigant

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Special to the Legal

“Why can’t they be like we were, perfect in every way? What’s the matter with kids today?” —Lyrics from “Kids,” Bye Bye Birdie soundtrack

Millennials are defined as people born from the early 1980s to the late 1990s. They grew up at the turn of the millennium, entered the jury pool, and have been bewildering trial lawyers ever since.

The millennial mindset has been of great interest to older generations who seek the key of how to understand and motivate these young people. Millennials have been perceived as entitled, narcissistic, impatient and lacking in loyalty, but smart and motivated all at the same time.

Millennials have also been described as more motivated by making a difference than making money, and more interested in knowing what they can do about the news rather than just hearing about the news. They want to have a personal impact on society by being a part of organizations that make such an impact. Companies are beginning to use this desire to make an impact to



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motivate millennials as employees. It is the same issue that we need to consider in communicating to millennials as jurors.

It all begs the question: How will these young jurors see their jury service as a platform to make that impact, and what kind of impact do they want to make when it comes to a case with a corporate litigant?

RELATIONSHIP WITH INSTITUTIONS/BUSINESS

Millennials grew up in one of the most severe recessions in our nation’s history. They are educated, equipped with college degrees, but burdened with student debt. They entered a

recession-era workforce of limited job opportunities.

Deloitte has been conducting longitudinal research on the millennial perceptions of corporations and employment in the Deloitte Millennial Study. In its 2016 survey of 7,700 college-educated and employed millennials across 29 countries, the study found that two-thirds of millennials expected to change jobs within five years and 25 percent planned on leaving their job

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within a year. The data from the U.S. Bureau of Labor Statistics showed the same—millennials who had been in a job for a year were most likely looking for a new one.

Pew Research Center also conducted an extensive study of millennials in

adulthood. It called them “unmoored from institutions.” Specifically, Pew found that members of the millennial generation tend to be:

- Unattached to organized politics and religion.
- In no rush to marry.
- Linked by social media.
- Burdened by debt.
- Optimistic about the future.

Given the era in which they came of age, the strained relationships millennials have with institutions are no surprise. They have grown up with media that unabashedly criticizes governmental institutions, no matter which political party is running it. Promises made to them about the educational institutions were broken—they attained the advanced degrees they were told would offer success, but could not pay their bills with the jobs they got, if they could find jobs at all. They started their professional lives in an era of massive layoffs and scandals associated with known powerhouse business institutions. Institutions failed millennials and so millennials responded with skepticism and mistrust, but they have lost neither their desire to make things better nor their belief that they can do so.

In its 2017 survey, Deloitte found that millennial opinions of corporations are improving. For example, 65 percent agreed in 2017 that businesses behave in an ethical manner as compared to only 52 percent believing so just two years before. Similarly, in 2017, 62 percent agreed that business leaders are committed to helping improve society compared to 53 percent in 2015.

In 2017, Deloitte also found that 76 percent regard business as a force for positive social impact, and a whopping 88 percent say business, in general, is having a positive impact on the wider society in which they operate.

While millennial relationships with corporations appear to be improving, it is unclear why. It could be because millennials are changing as they mature, face more responsibility and gain professional experience from inside companies as opposed to judging them from outside. It could also be because businesses are changing their practices to accommodate millennial employee values. It is probably a combination of the two.

The question for corporations in litigation is whether they are learning to communicate with millennials as jurors the same way they are learning to do so with millennials as employees.

The Deloitte data suggest a critical issue for corporate litigants in jury trials. Namely, millennials appear to have greater expectations of businesses than to simply run their businesses. Instead, millennial jurors are looking for businesses to use their power and influence for being a positive influence in society. Millennials are attuned to social concerns, and are likely to link the story of a given case to the bigger societal issue they perceive within that story. For example, in a mock trial regarding a serious injury case, strong millennials on the panel expressed concern about whether the large corporate defendant in the case “set the precedent” for the rest of the industry regarding safety practice and oversight. Deciding that it did, these jurors evaluated the defendant based on the precedent they felt should be set as opposed to the industry standards already in place.

COMMUNICATION AND TRANSPARENCY

For millennials, information has been available at the push of a button. They are constantly connected to family and friends (some of whom they have never seen in person, but maintain

relationships in cyberspace). With constant connection, millennials are more likely to share details about their personal lives with their cybercommunity. They are immediate and transparent in their communication. They expect immediacy and transparency from others, including institutions as well.

The combination of being unfamiliar/uncomfortable with having to wait for information (or, even worse, not having information at all) and expectations of transparency can present an issue when presenting to a millennial mindset in a jury trial. Of course, the discussion of using technology to present documents and exhibits in trials is no longer new. Technology in the courtroom has become commonplace, as it should be.

Transparency issues apply not only to how jurors receive information in the courtroom, but also about the expectations jurors have about the information available to companies and litigants in the context of the case story. With available technologies, jurors often expect businesses to have consistent access and oversight to all aspects of the business. For example, in trucking case mock trials, I have heard jurors question whether a truck was tracked via GPS so the company could know, in real time, where it was, what it was doing, its speed, and how many hours the driver had driven without rest. In a case in which an assault was perpetrated in a parking garage, jurors expected the company that owned the business to have video footage readily available so the perpetrator could be easily identified.

Technology is all-knowing and all-seeing, and millennial jurors often expect it to be there. What do you do when it is not? While you obviously can't create information that isn't there, it is critical to understand

and acknowledge where these expectations may enter jurors' minds so you can manage it, setting the framework regarding the technology and information that was available at the relevant time.

What does this all mean for attorneys representing corporations?

Millennials and their impact on juries have been a consistent topic of conversation in my practice. What is fascinating for me is that both plaintiffs and defense attorneys have expressed concern about how to communicate with millennial jurors effectively. In fact, both my plaintiff and defendant clients have been concerned enough about millennial jurors to keep these younger jurors off their panels.

Therefore, as an empiricist, I decided to look at the juror attitude data I have compiled over the years to see how what I have collected relates to these larger scale projects by Deloitte and Pew. With my database of the 3,261 jurors I have surveyed across the United States (883 millennials and 2,378 older jurors) through mock trials and community attitude surveys, I compared the perceptions of jurors who would fall into the "millennial" demographic as compared to older jurors. The results were quite compelling, and painted a picture consistent with the Deloitte and Pew reports. Specifically,

- 65 percent of millennials thought fairness was more important than the judge's rules when a jury makes a verdict decision. Less than half (45 percent) of older jurors believed the same.
- Only 26 percent of millennials thought a company needs to fulfill its moral obligations over legal obligations. Thirty one percent of older jurors think the same.

The discrepancy in the millennial data between perceptions of fairness or moral obligations and rules or legal

obligations as applied to jurors versus companies has enormous implications. It tells us that millennials are more likely to feel companies are bound by the rules but that jurors need to focus on the greater good. This is likely because millennials don't trust the institutions enough to forgive them for operating outside of the rules. At the same time, millennials don't trust establishment rules enough to take those rules at face value. Therefore, jurors make a meaningful difference by voicing what they feel the rules for companies should be, and then interpret the actual rule to fit that perception—just like the example of the young panel that decided the corporate defendant set a precedent for other companies and then judged its behavior based on the precedent.

Additional findings in my database include:

- 40 percent of millennials believe that corporations should be made to pay more money in lawsuits because of their greater ability to pay compared to 30 percent of older jurors.
- 50 percent of millennials believe most corporations are more interested in profits than safety compared to 40 percent of older jurors.
- 50 percent of millennials believe companies should be held responsible for accidents that happen on their property, regardless of the circumstances compared to 43 percent of older jurors.

Importantly, though, both 82 percent millennials and 82 percent older jurors denied that they would automatically give an individual the benefit of the doubt in a case against a corporation. While millennial jurors focus on making an impact, that impact is not always averse to corporations. The hundreds of cases I have worked on involving individual and corporate litigants have proven this point true. Millennial jurors can see both sides of a case. They can

see that an individual is wrong, even when a corporation is on the other side.

What this means is that millennials come from a vantage point that can be troubling for corporations, but that does not mean it can't be overcome with a smart strategy.

The key is to present a story in line with what the jurors will see as fair and which gives them a sense of purpose in finding for your side of the case. We must understand where jurors see their decision as making a bigger point to society. These kinds of messages are no longer solely for individual litigants.

THE MILLENNIAL IMPACT

The Deloitte study also reported that "more than 60 percent indicated that their leadership skills (are) not being fully developed" as a reason for a desire to leave their current place of employment. Leadership equals impact. Long gone are the days in which we could assume that younger jurors will concede to the older and wiser jurors on the panel. Millennials have a unique perspective and a voice that will be heard on the jury. It is critical to understand how those voices will echo the message you want relayed, so they can relay it in the deliberation room.

One thing is certain; just as soon as we get a handle on this generation, the next one will enter the jury box and perplex us anew. •

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