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Power, Corruption And Lies: How Juries Are Responding

By **Melissa Gomez** (February 8, 2018, 11:14 AM EST)

Stories of political corruption, corporate conspiracy and sexual harassment in the United States span the ages. So why has the reaction to them seemed to change in the past year? How does this phenomenon affect jury verdicts? What does all of this mean for litigators?



Melissa Gomez

Political Scandals

From land-acquisition bribes involving the Georgia State Legislature in 1795 to the Watergate scandal in 1972, political shenanigans have a substantial place in our history books. Consistent with the past, 2017 was no stranger to political mischiefs.

On one hand is the national scandal involving allegations that Donald Trump's presidential campaign colluded with Russia to steal and leak information about Hillary Clinton, swinging the election in Trump's favor. On the other hand, an organization connected to Clinton, the Hillary Victory Fund, is facing allegations over an \$84 million campaign fundraising scheme that some have likened to money laundering. New Jersey Senator Bob Menendez is also in the headlines, accused of taking bribes from a wealthy friend for political favors. His trial ended in a hung jury.

Corporate Conspiracy

"Profits over people" is a common mantra about corporate and financial misdeeds. The lure of the almighty dollar drawing people into wrongdoing is quite familiar in historical headlines. The tobacco industry, Enron and Wall Street firms have seen executives investigated and even jailed for schemes designed to increase shareholder wealth.

In 2017, more claims of corporate misbehavior abounded. Uber Technologies Inc. had to deal with accusations of spy programs, sexual harassment, discrimination and other troubling executive conduct. Equifax Inc. dealt with the fallout of failing to disclose both a system flaw and the resulting hack of information affecting 145 million people, while Wells Fargo & Co. uncovered over three million fake accounts created in its system without customer permission.

Sex Scandals

Interestingly, our research was unable to find historical reports of sexual harassment or aggression from before the sexual revolution ... or, actually, from before Anita Hill accused U.S. Supreme Court nominee Clarence Thomas of sexual harassment in 1991. Before then, sex scandals were primarily reports of "affairs," such as the 1802 accusation that President Thomas Jefferson fathered children through an "affair" with his slave, Sally Hemings.

It appears that the notion of revealing people who use sexual aggression as a power tool is

disturbingly modern. But it is unlikely that the incidence is as modern as are the revelations.

While allegations of sexual harassment by high-powered people have grown since Anita Hill, there has been a sudden explosion of harassment stories coming to light in the past few years. Allegations against Bill O'Reilly, Bill Cosby and Harvey Weinstein have accelerated the domino effect, leading to the sudden and spectacular downfall of men previously perceived as impervious to claims against them — men including household names like Kevin Spacey and Matt Lauer.

A New Reaction to Old Issues

So, political scandals, corporate misconduct and sexual harassment scandals have a secure place in history. Yet, somehow, something has changed. The incidence is not the change. The reaction seems to be. And while this reaction has been slowly growing in the past 20 or so years, a boulder appears to have broken the proverbial camel's back suddenly and dramatically in January of 2017. Stories of political, corporate and sexual harassment scandals are now followed by public reactions that are strong, pervasive and polarized. They have hit critical mass.

Coincidentally, this change coincides with the inauguration of the most controversial president in modern history — a president who has personally dealt with the trifecta of allegations involving political corruption, corporate greed and sexual harassment.

Journalists Sarah Almukhtar, Michael Gold and Larry Buchanan reported in a New York Times article called "After Weinstein: 50 Men Accused of Sexual Misconduct and Their Fall from Power:"

In what appears to be a seismic shift in what behavior is tolerated in the workplace, a cascade of high-profile men, many in the entertainment and news media industries, have since been fired or forced to resign after accusations of sexual misconduct that ranged from inappropriate comments to rape.

Seismic shift seems to be an appropriate term for it.

But it isn't just about sexual harassment. It isn't just about politics. It isn't just about corporate greed. Instead, it is about the American public's perception that powerful people and institutions use their authority to please themselves to the detriment of others.

Whether the perceptions are accurate or not in specific instances is not the point of this article. The impact of these perceptions on the community zeitgeist, in general, and on jury trials, specifically, is the point.

That impact is undeniable.

The Impact on Jury Trials

As a jury consultant for the better part of two decades, I have noted a sudden difference in jurors in both real and mock trials that I have observed in the past year. Since the start of 2017, I have witnessed markedly less willingness by jurors to compromise with one another, resulting in more hung juries (e.g., the Cosby and Menendez trials). I have also noted an increased desire for verdicts to "send strong messages." Jurors see jury service as more than their civic duty. They see their role as more than simply being the decider of facts. Instead, jury duty is giving citizens a voice in a way

that they find more powerful than a vote in a political election.

A sense of greater purpose by jurors in carrying out their duty is also not new news. There is even a term for it: Jury nullification is defined as a jury rendering a verdict contrary to legal standards because the jury disagrees with the law. Jury nullification has been known to the legal community since the age of slavery. Some of the first examples occurred in criminal trials in the 1800s when people were arrested and tried for helping to free slaves. Jurors rendered verdicts of “not guilty,” knowing the accused did what they were accused of. The jurors simply disagreed that freeing slaves should be a crime.

So, jury nullification is about as new as political and corporate shenanigans. But it becomes more prevalent as the community sees a need for change, and as mistrust in the establishment grows. For example, I recently watched a deliberating mock jury render a verdict in a trucking case based on what they believed industry standards for hiring and monitoring drivers should be instead of what the standards actually were. The jurors saw the standards as insufficient. Understanding that the trucking company’s actions complied with standards, this jury rendered a verdict against the company with intent to change those standards.

This is happening in real trials as well.

In 2017 there were headline-making verdicts that included awards of substantial punitive damages against powerful defendants. Philadelphia County saw a \$200 million settlement by the Salvation Army after a jury found punitive damages were warranted in a case over the deadly collapse of a Philadelphia thrift store — the defendant settled before we could learn what the enraged jury was going to award.

2017 also saw the staggering \$8 billion verdict handed down against JPMorgan Chase & Co. in a case brought by a widow alleging mishandling of her husband’s estate — the largest punitive damage amount ever awarded in Texas. A Cook County jury rendered a \$53 million compensatory verdict against the University of Chicago Medical Center for allegations that failure to timely deliver a baby caused permanent brain damage — the court did not allow punitive damages against the medical providers, but it appears that the jury found a way to make a statement regardless.

Perhaps most incredible was the \$150 million verdict against AbbVie Inc., alleging its testosterone gel AndroGel caused the plaintiff’s heart attack. The jury solely levied punitive damages against AbbVie for its corporate decisions, despite not awarding any compensatory damages to the plaintiff. The judge in that case tossed the decision as “logically impossible.”

Jurors are sending strong messages about what they see as right and wrong. It is time for those of us in litigation to pay attention to the messages jurors are sending. It just may change the way we try cases. Scratch that: It should change the way we try cases.

The Research

After my anecdotal observations, I wanted to conduct a closer analysis. My team and I dove into our database of juror preconceptions, built through aggregated data we had collected from jury-eligible adults over the years. We wanted to understand whether this shift in juror attitudes was quantifiable. What we found was fascinating.

We ran analyses of basic juror preconceptions regarding corporations from our sample of jury-eligible adults. Data collected between January 2017 until the present (396 jurors) was compared to a normative sample of responses to those same questions between 2011 and 2015 (1863 jurors). We omitted 2016 to eliminate the impact of the election and the political transition.

Comparing data from the two samples, general opinions of corporations seem to be souring. The data showed that 48 percent[1] of potential jurors since Jan. 1, 2017, agreed that most corporations are more interested in profits than safety. This was a notable increase from 43 percent[2] in prior years,

but this analysis did not quite reach statistical significance.

The statistically significant change in opinions seems more related to a company's direct impact on, and communications with, the public. Specifically, since 2017, about half (48 percent[3]) of respondents agreed that companies lie to the public about their products' safety. This is a statistically significant increase from the 31 percent[4] who agreed to this perception in the prior years.[5]

The most telling thing about the shift in attitudes is the message potential jurors want to send with their verdicts. While some core opinions may have remained somewhat stable, recent respondents are less willing to compromise, and they are more willing to use damage awards to voice their discontent with vigor. Specifically, since in 2017, 20 percent[6] of respondents indicated that they believed that damage awards in lawsuits have gotten too high. This is a statistically significant[7] decrease from the 28 percent[8] who believed so in prior years. This data becomes even more compelling when we consider it next to the barrage of large verdicts in the news.

Finally, as a result of our observations, we collected some fresh data to sum up what we were seeing. We asked 170 potential jurors whether they believed that an important part of a jury's job is to send messages to society with its verdicts. The majority (56 percent) agreed it is.

What It Means for Powerful Litigants

Jurors are homing in on where the power lies in a case story, and how that power is used. Jurors expect the establishment to use its power and influence to positively affect the community. They are attuned to social concerns, and link the story of a case to the bigger societal issue they perceive within that story. Jurors will render verdicts to make statements about the societal issues they care about.

When litigating cases with powerful people and institutions, it is imperative to take a step back and reflect on where the power lies in a case, and how it may be perceived. Will the power be seen in a way that supports or contradicts likely assumptions? Will the use of power be viewed as benefiting the community, or neglecting the community for personal gain? Will there be a message for jurors to send through their verdict?

The United States' recent political climate has put a spotlight on power, and how power is used. Discontent has caused anything that smells of the establishment to be critically scrutinized. Juries are sending messages through verdicts. They have had enough.

As Bob Dylan sang, "the times they are a-changin'." Well-rooted power establishments need look at how their power is perceived. It may be time for those establishments to uproot the way they have been trying their cases and change with the times.

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[1] Out of a sample size of 194.

[2] Out of a sample size of 204.

[3] Out of a sample size of 69.

[4] Out of a sample size of 83.

[5] Likelihood ratio of p less than .05.

[6] Out of a sample size of 396.

[7] Likelihood ratio of p less than .001.

[8] Out of a sample size of 1660.

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