

The Millennial Juror: Seeing What is Really There

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Introduction

In *The Peregrine*, J.A. Baker wrote, “The hardest thing of all to see is what is really there.” We often fail to see accurately because we see what we expect to see, not what is really there. Have you ever filed a brief after reading it multiple times, thinking it has been written, edited, re-written, and proofread to perfection, only to find to great disappointment an error so obvious, it looks as if it had not been proofread at all? Our minds often supply the correction, despite what should be obvious to our eyes. For instance, in the sentence, “The horse ran though the gate,” our brain supplies the missing “r” from the word “through” despite our eyes seeing the word “though.” Cognitive bias can be a good thing when our brains correct misinformation for accuracy. However, cognitive bias can also lead us to erroneous conclusions when our bias, prejudice or pre-conceived ideas cause us to fail to see what is truly there. The challenge to see what is truly there is never more pronounced than during jury selection.

As courtroom lawyers, we often must make split-second decisions based on imperfect information. Sufficient time is seldom allowed by the court to permit us to truly get to know the jurors who will judge our case. Indeed, too often the jurors who speak up, revealing their own deeply held convictions and thought processes become the subject of challenges for cause or preemptory challenges, leaving us with a jury that we really do not know much about. However, if we exercise our preemptory challenges based only on stereotypes, bias, or prejudice, then we risk passing on a juror who may be a very good juror for our case. Moreover, we are guilty of the

very flaw we expect the jurors to avoid when they are charged that they are not to let prejudice, bias, or passion influence their verdict. We always go into a trial having identified the ideal juror to sit on our case. The challenge then becomes identifying those jurors who truly reflect our ideal juror without excluding good jurors simply because they do not fit the demographic. The demographic we will explore today is generational identification.

Generational Classifications

In selecting juries today, we may encounter five distinct generational types:

1. Traditionalists – the silent generation. These jurors were born between 1928 and 1945, ranging from age 74 to 91. This is the silent generation or, as penned by Tom Brokaw, “The Greatest Generation”. These jurors grew up during The Great Depression and World War II. Many experienced the challenges of poverty followed by prosperity. The Traditionalists are known for pulling together and sacrificing for the greater good. Many spent their entire work life with the same employer, and they were less likely to change jobs frequently. This generation adheres to rules. They have a dedicated work ethic, trust government, and are patriotic and loyal, accepting that duty comes before fun. The Traditionalist respects authority. They are usually good team players. Their social structure is built around the traditional family with men typically employed while women stayed at home raising children. The Traditionalist is conservative. The Traditionalist did not grow up with modern technology, struggles to learn it and may resent those that rely on it. They do not adapt well to change. They do not deal well with ambiguity. The traditionalist is frugal, private, trustworthy, and uncomfortable with social changes.
2. The Baby Boomers were born between 1946 and 1964 and are currently between the ages of 55 and 73. The Baby Boomers grew up during the Civil Rights Movement, the Vietnam

War, and the Cold War. They created the term “workaholic.” They generally believe that rules should be obeyed unless the rules are contrary to what they want, then the rules are to be broken. They hold positions of power and authority. They are loyal to their employer. They give maximum effort to go the extra mile in order to obtain a desired result. They are optimistic and team orientated, but will question everything. They are generally anti-government and anti-war. They want to make a difference and believe they can change the world. They are competitive, competent, and ethical but will challenge authority. They are confident and independent.

3. Members of Generation X were born between 1965 and 1980, ranging in age between 39 and 55. Generation X are known for ethnic diversity and generally are more educated than Baby Boomers. This is the generation of Y2K, the Watergate Scandal, and increased divorce rates. Generation X is the “latch-key kid”, because, unlike the Traditionalists, both Baby Boomer parents were in the workplace. Their perceptions were shaped by raising themselves, watching politicians lie, and having their parents laid off. They experienced an increase in personal computer use and the internet. This was the first generation to grow up with computers. They generally hold middle-management positions in the corporate world. They dislike being micro-managed, and they embrace hands-off management philosophy. Generation X defined the term “slackers.” They work to live rather than live to work. They adapt well to change. Many experienced disrupted vocational careers with numerous employers. They are the children of the parents who have the highest rates of divorce and downsizing. They ignore leadership and are unimpressed with authority. They are skeptical of institutions.

4. Generation Y, or the Millennials, were born between 1980 and 1995. These are the jurors ranging in age from 23-39. The Millennials are known as the “entitlement generation.” This is the most ethnically diverse generation. Generation Y grew up with technology and rely on it 24/7. This is the least religious generation. They are shaped by exposure to school shootings, terrorist attacks, including the attacks of September 11, 2001. This generation was exposed to the rise of the smart phone, iPad, iPods, social media, including Facebook and Twitter. Generation Y saw the death of landline telephones, payphones, and video rentals. This generation saw the transformation of the economy from flat to recessive, but hope to be the next generation to turn around all the “wrong” they see in the world. They are concerned about security. They are independent and think for themselves. They are achievement oriented with high expectations of employers. They believe they are entitled to higher pay due to their technical skills. However, they are willing to trade high pay for fewer hours. This generation, like Generation X, work to live rather than live to work. While they are individualists, they are also group oriented. Generation Y wants instant gratification. They are more culturally and racially tolerant and more accepting of change. They believe policies and procedures are supreme. They share strong anti-corporate beliefs and lack trust in companies. They respect their elders. They believe their voice is important and should be heard over multiple media platforms.
5. Generation Z are those born after 1995. This generation will be shaped by the War on Terror, the Financial Crisis of 2008, Mobile Banking and Mobile Media.

Communication Styles

The Traditionalist

As each generation has distinct characteristics, each also has a distinct communication style. The Traditionalists grew up without modern technology and prefer to communicate in a manner consistent with the technology available during their generation. They prefer one-on-one discussions and face-to-face conversations. They prefer written letters rather than email. The best way to communicate with Traditionalists is to present your client's story in a formal, logistical manner. Respect must be shown for the Traditionalist, age and experience, using sir, ma'am, mister and Mrs. in voir dire. If your defendant has a solid history, emphasize that history and tradition with the Traditionalists. The Traditionalists will prefer written instructions to assist them in reaching a verdict. They will pay attention to the words you use rather than your body language. Keep things simple, do not waste their time, and get to the point. In using technology, be aware of the difficult balance between the Traditionalist's desire for not much technology and the Millennials' expectation of a high tech presentation. The Traditionalist likes simple demonstrative evidence, such as graphs and tables. They respect structure and hierarchy, so be careful if your client did not follow proper policy and procedure. However, if your policies support your defense, then emphasize the written policies and procedures.

The Baby Boomers

The Baby Boomer generation is comfortable with texts and emails, but prefer telephone conversations or face-to-face conversation. This generation will speak in an open and direct manner. During voir dire, expect them to answer in a direct and thorough manner. However, they also expect to be pressed for details. They will welcome questions about themselves and have a desire to express what is important to them. They will focus on your body language, as they learn by hearing and seeing. They relate well to storytelling methods, such as the use of timelines. They

value hard work and commitment to career, so it may be helpful if key witnesses are long-term employees to emphasize that aspect. They also care about image and reputation, so focus on any positive image or reputation within the community. They learn best when their personal experience can be tied to the case.

Generation X

Generation X is more likely to rely on technology than their Baby Boomer parents. They use cell phones, but they prefer to only be called at work. Communicating by email is preferred. Generation X is more receptive to short, concise and simple messages that are reinforced with demonstrative evidence. Provide short sound bites. Visual aids prevail over long documents. Their approach is more hands-on in learning. Provide an element of entertainment and engage quickly, leaving no down time. Avoid buzz words or company jargon. Tie your message to results. Generation X will be skeptical of expert witnesses, so highlight the expert's achievements and work experiences as opposed to credentials. Generation X has a strong sense of entitlement and, like Millennials, tend to favor compensation if someone is injured regardless of fault.

Generation Y

The Millennials are completely “plugged in” to technology. This generation is described as “digital native”, because they are the first generation born into the daily use of computers, internet, and social media. The use of modern technology is a natural way to connect to people, and the Millennials grew up with technology and constantly rely on it. They prefer to communicate through social media or text messages, rather than by telephone or face-to-face. In communicating with Millennials, like Generation X, they expect to be entertained. Keep the message simple and use short sound bites. The Millennials are used to communications in 140 character tweets or disappearing Snapchat messages. Use videos and pictures that consolidate information and

illustrate key points. The Millennials have short attention spans and get bored quickly. You must act fast or lose them. The subject must be interesting and engaging to retain their interest. You must perfect your client's message to easily digestible and memorable themes. Reinforce this message throughout the trial. Long, convoluted explanations and redundant testimony will cause Millennials to tune out. Use language to portray visual pictures. Millennials are tactile learners and like the hands-on approach.

The Millennials expect openness, sincerity, credibility, and transparency. Any inconsistencies in the documentation needs to be addressed. Exploit any credibility issues of the plaintiff and discuss issues of personal responsibility. Personal safety is key, so be careful if a claim relates to safety, as it will have greater appeal with the Millennials. The Millennials value loyalty, and they will not be sympathetic to a party who has betrayed the trust of another.

Generational Differences in Damage Awards

The attitudes displayed by millennial jurors has affected their views on the damages in litigation. Data compiled from mock trials with over 700 surrogate jurors from 32 different jury research exercises reveals that Millennials are significantly more likely to reward higher damages in almost any type of case. The median damage award of non-millennials is \$3,500,000. However, the median damage award of Millennials is \$6,000,000. Jury research reveals comments by Millennials such as, "It is just money and they have lots of it." "He should get everything possible." "Let's do the right thing and give him everything." "The defendant is a big corporation so who cares."

Juror Challenges Based on Age

Strikes for Cause

Can I challenge a juror based on age? Under Alabama law, a juror may be subject to a challenge for cause if that juror falls outside of the age requirements in the juror qualification statute. The Alabama code establishes qualifications for jury service including the following:

- (a) A prospective juror is qualified to serve on a jury if the juror is generally reputed to be honest and intelligent and is esteemed in the community for integrity, good character and sound judgment and also;
 - (1) Is a citizen of the United States, has been a resident of the county for more than 12 months and is over the age of 19 years;
 - (2) Is able to read, speak, understand and follow instructions given by a judge in the English language;
 - (3) Is capable by reason of physical and mental ability to render satisfactory jury service, and is not afflicted with any permanent disease or physical weakness whereby the juror is unfit to discharge the duties of a juror;
 - (4) Has not lost the right to vote by conviction for an offense involving moral turpitude.

Alabama Code § 12-16-60. If a juror is under the age of 19 or is unfit due to mental or physical impairment, the juror is not qualified to serve as a juror. That potential juror can be struck for cause. Those jurors who are too young are usually identified during the jury qualification process and are excused from service. However, we often see jurors who are impaired due to age. Although Alabama has eliminated a maximum age limit, the juror must be physically and mentally fit to serve, or that juror may be struck for cause.

Preemptory Challenge

Can you exercise a preemptory challenge based on age alone? While this use of a preemptory challenge would be a “group-based” challenge, it is not prohibited. The case of *Batson v. Kentucky*, 475 U.S. 79 (1986) prohibited the use of preemptory challenges solely because of a juror’s race. A classification based on race is subject to strict scrutiny, and a preemptory challenge may not be based upon the juror’s race under the Equal Protection Clause. The court expanded *Batson* to gender and national origin in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) and *Hernandez v. New York*, 500 U.S. 352 (1991). In the case of *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), the Court extended *Batson* to private litigants in civil cases. However, classifications based on age are not subject to the “strict scrutiny” standard that applies to classifications based on race, gender, or national origin. The rule in *Batson* has not been extended to preemptory challenges based on age. The First and Tenth Circuits have expressly stated that age is not a protected category under *Batson*. (*Sanchez v. Roden*, 808 F.3d 85, 90 (1st Cir. 2015); (*United States v. Cresta*, 825 F.2d 538, 545 (1st Cir. 1987); (*United States v. Heimstetter*, 479 F.3d 754 (10th Cir. 2007). As for the Eleventh Circuit, it does not appear that there is an express holding of this kind. The Eleventh Circuit has, however, found that preemptory challenges for potential jurors' youth is legitimate and non-discriminatory. See *U.S. v. Williams*, 214 Fed.Appx. 935, 936 (11th Cir. 2007); *U.S. v. North*, No. 18-11476, 2019 WL 1012015 (11th Cir. 2019).

Thus, if a *Batson* challenge is made based on the use of preemptory challenges on the basis of age, the party raising the challenge cannot establish the prerequisite finding to establish a “*prima facie* case” of discrimination, therefore the Court should not require “age-neutral” reasons for exercise of the preemptory challenge. While a potential juror may be the subject of a preemptory challenge based on age without constitutional implications, would you want to use a preemptory

challenge based on nothing more than the age of the juror? You may be wasting a preemptory challenge if you do so. Moreover, while the Court has never extended *Batson* to cover “age-based” discrimination, is that issue settled? As the Baby Boomer generation has aged, advocates in elder law continue to argue that classifications based on age should be subject to “strict scrutiny” analysis. Professor Nina Kohn makes a compelling argument in her article, “Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decade’s-Old Consensus, University of California Davis, Vol. 44, 213, 282.

Conclusion

As we lose the Traditionalist generation and the Baby Boomer ages, our juries will consist predominantly of Generation X, Y and Z jurors. Regardless of the generation of the juror, communication is paramount. Our themes, creative use of technology and trial tactics must speak to the younger generations. Most importantly, we must learn to see what is really there, so that we can persuade others to do the same, regardless of the generation.

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