

Ethical Considerations for Selecting and Catering to Millennial Jurors

Julia M. Beckley, Counsel
Dallas
+1 214 259 1854
Julia.Beckley@dentons.com

Ethics of Jury Selection

Age as a Factor

1. Are we allowed to discriminate (age, race, sex, etc.) in selecting a jury?
2. Is it ethical to discriminate?
3. Should you discriminate based on age?
4. What is the ideal jury?

The Ethics of Jury Selection

- **Duty to Zealously Represent Your Client** (Rule 4-1.3)
 - Duty of Diligence
- **Duty of Candor** (Rule 4-3.3)
 - Do not mislead the Court during Voir Dire
 - Do not lose the trust of the Court
- **Eliminating Bias**
 - There is a move to eliminate bias in the practice of law
 - Should this extend to age?
 - Does this conflict with duty to zealously represent client?
 - **Conscious and Unconscious Bias**
 - Do you unconsciously prefer a certain age group of jurors?
 - Should you try to address subconscious preferences?

Peremptory Challenges - Law

- Peremptory challenges may be “exercised without a reason stated, without inquiry, and without being subject to the court’s control.” (*Swain v. Alabama*, 380 U.S. 202, 219 (1965).)
- In *Batson v. Kentucky*, the Supreme Court prohibited the use of peremptory challenges on the basis of a potential juror’s race. (*Batson v. Kentucky*, 476 U.S. 79 (1986).)
- Although the Supreme Court has not ruled on striking a juror based on age, in *Cleburne v. Cleburne* the Court held that historically people have not been discriminated against based on age, and therefore, age discrimination was afforded only rational basis review. (*Cleburne v. Cleburne Living Centers*, 473 U.S. 432 (1985).)
- Currently the only protected categories for peremptory challenges are race, gender, and ethnicity.

Extending Batson to Include Age?

- Consider the ethical considerations that led to Batson.
- Should attorneys consider maintaining a diverse age group in a jury?



Peremptory Challenges - Attorney Choice

Balance:



Relationship with
the Court

Duty to get the
best jury for your
client

Your overall
responsibility to
the practice of
law

Ethics of Jury Selection Using Social Media



Duty of Competence

- Supreme Court Rule 4-1.1 & Comment 6:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. . . .

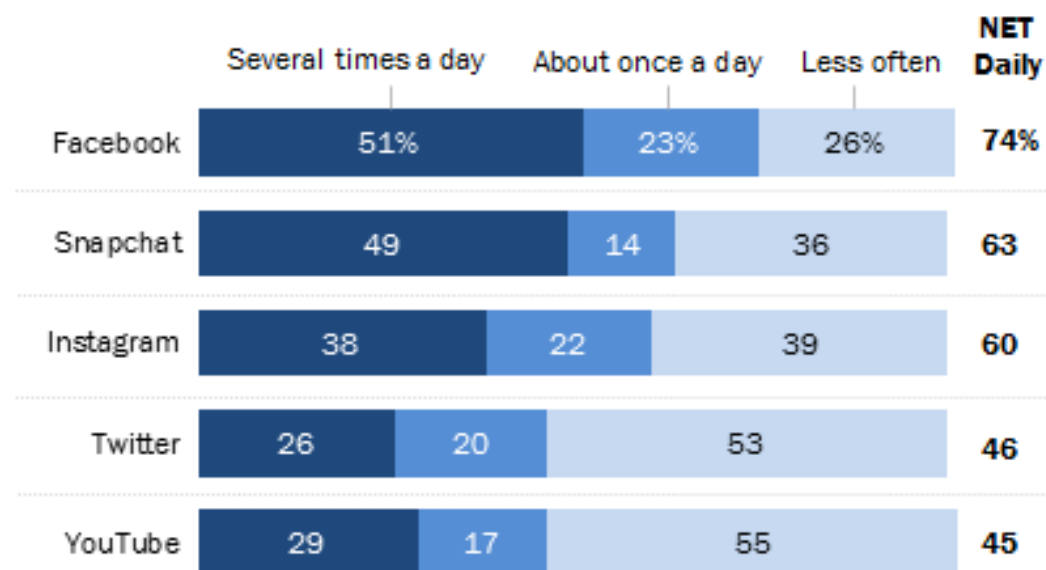
"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**"



Millennial Traits

A majority of Facebook, Snapchat and Instagram users visit these platforms on a daily basis

Among U.S. adults who say they use ___, the % who use each site ...



Note: Respondents who did not give answer are not shown. "Less often" category includes users who visit these sites a few times a week, every few weeks or less often.

Source: Survey conducted Jan. 3-10, 2018.

"Social Media Use in 2018"

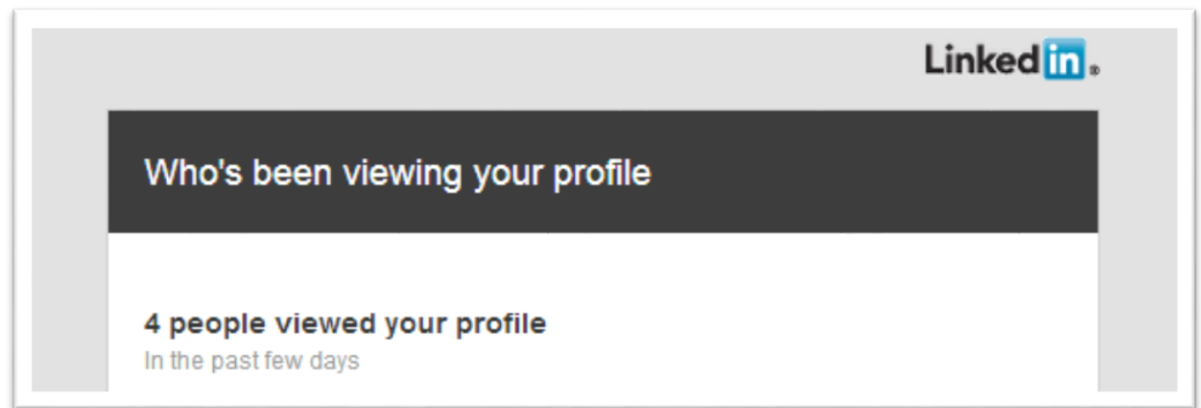
PEW RESEARCH CENTER

Duty of Competence - Social Media

- Missouri Supreme Court Rule 69.025 requires an attorney to research a jurors' litigation history
 - ***Johnson v. McCullough*** - The Court held that Missouri trial lawyers need to conduct certain specific internet searches about jurors after jury selection, but before the jury is empaneled. (*Johnson v. McCullough*, 306 S.W. 3d 551 (MO. 2010).)
 - ***Burden v. CSX Transportation, Inc.*** - The Court ruled that defense counsel, in a personal injury case, resulting in a substantial verdict for Plaintiff waived any objection that two jurors' gave false statements during *voir dire*, because Counsel failed to conduct internet searches that would have disclosed the false statements. (*Burden v. CSX Transportation Inc.*, 2011 WL 3793664 (S.D. Ill. Aug. 24, 2011).)

Duty of Competence - Social Media

- Considerations:
 - Juror Privacy
 - Rule 3.5 - do not communicate ex parte with jurors:
 - Do not “friend” potential jurors
 - Do not gain access to private accounts
 - Do not message potential jurors
 - Do not comment on potential jurors accounts
 - Avoid “Linked-In” notification



Competence Overview

- Social Media presents problems because it is both - *publicly available information* and *communications by potential jurors*.
- It is important to only access information that is public and avoid any action that informs the potential juror that you viewed their information.
- Because the information is public, you may have a duty to investigate juror's online statements.



Competence Overview

- Best Practices:
 - In Missouri, review each juror's online presence at least prior to the impaneling of the jury to determine if there are any false statements, or you may waive your right to object.
 - Stick to social media sites that you are confident do not notify the viewer that you visited their page (i.e. avoid LinkedIn)
 - Do not take any actions that could be seen as communicating through social media.



The Ideal Jury

1. What type of case is it?
2. Does the age of a juror potentially have an impact on their understanding of the case?
3. Does the age of a juror potentially have an impact on the impression of your client?
4. Does the age of a juror potentially impact how you present your case to the jury?
5. Will the jurors age impact the potential outcome of the case?



Millennial Jurors

83% Sleep With Their Phones



Who Are Millennials?

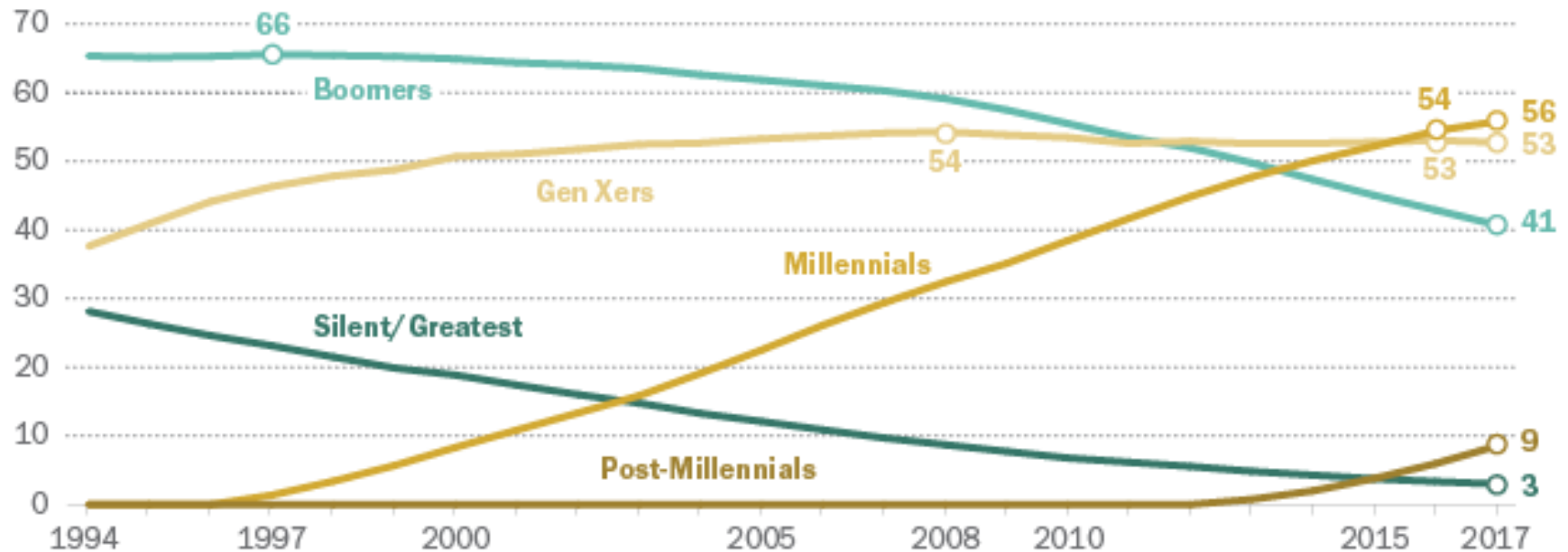
- Born between 1980 and 1996 (ages 21-37)
- Over 70 million Americans
- Approximately 20% of population and 47% of work force - It will be 75% by 2030
- Born digital



Who Are Millennials?

Millennials became the largest generation in the labor force in 2016

U.S. labor force, in millions



Note: Labor force includes those ages 16 and older who are working or looking for work. Annual averages shown.

Source: Pew Research Center analysis of monthly 1994-2017 Current Population Survey (IPUMS).

PEW RESEARCH CENTER

Millennials

- Millennials are powerful jurors because they:
 - Are more likely than previous generations to award high damages;
 - Highly confident - believe their opinions are as valuable as anyone else's, regardless of age;
 - have less trust in corporations than any other generation;
 - have a “change the world” mentality and are susceptible to the so-called reptile effect¹;
 - are highly confident and believe their opinions are as valuable as anyone else's – regardless of age; and
 - as they were born in a digital era, expect lawyers to know how to use technology – and to use it well;
 - Prior generations value privacy – Millennials value social connectivity.

¹ The Reptile Theory stems from the Golden Rule to “do unto others as you would have them do unto you” which asks the jury to place themselves into the plaintiff's shoes. Plaintiffs' lawyers employ tactics throughout the course of the trial to tap into the jury's “reptilian brains,” associated with their survival instinct, which drives them to protect not only themselves but their entire community as well.

What Millennials Want From A Trial Lawyer

- It's showtime! Without access to smartphones and social media while court is in session, the trial must provide them with the entertainment they are prohibited from using.
- Millennials value their time and appreciate presentation. They expect technology computer-generated visuals, video, and millennials never having lived without a lawyer's failure to appropriately use technology not prepared; or is careless, disorganized.
- Millennials grew up being exposed through the Internet, and want a trial that is not boring. Millennials also place high value on authenticity; they view as fake or dishonest. Millennials prefer a trial that is seemingly authentic by obviously rehearsed speeches and spiels.



The Problem With Giving Millennials What They Want

- Millennials want quick blurbs and material they can quickly scan so they can move on to the next headline. But by giving them the concise information they desire, trial lawyers run the risk of the jury not retaining information long enough to get through the deliberations.
- Trial lawyers must balance the brevity millennial jurors expect with the need to have them remember important evidence so they can store it, retrieve it and argue for your side.



Adapting To The Millennial Juror

- Meeting millennials' expectations without alienating jurors of other generations presents a unique challenge for today's trial lawyer. Here are some tips for overcoming this challenge, and effectively presenting your case at trial:

1. USE TECHNOLOGY, AND USE IT WELL
2. CHANGE IT UP, CHANGE IT UP, CHANGE IT UP
3. IF YOU DON'T HAVE EVIDENCE, EXPLAIN WHY
4. BE POSITIVE
5. SHORT, SIMPLE, REPEAT
6. KEEP IT REAL
7. BE DIFFERENT

1. USE TECHNOLOGY, AND USE IT WELL

- Use of PowerPoint in openings, closings and with key witnesses is helpful – but it *must* go beyond bullet points
- Use video clips where possible
- Create and use demonstrative evidence
- Employ audio, not just visual aids

For example, your opening statement should immediately capture jurors' attention by setting the stage for what is about to unfold. Introduce the cast of characters and the role each one will play, using pictures or video clips wherever possible. Use technology to show the jury the evidence they should be on the lookout for during trial.

2. CHANGE IT UP, CHANGE IT UP, CHANGE IT UP

- Do *not* stick to one medium throughout the trial.
- Switch between visual media (e.g., from a PowerPoint to the Elmo).
- Show some real paper, stack some books.
- Go black. Turn off all visual media and interact directly with the jury.
- Use long, strategic pauses to regain the attention of your jurors, especially before you have something important to say.
- Always remember, a picture is worth a thousand words.

Change-ups not only keep the juror's attention, but they also capture perceptual strengths of each juror (i.e., you will have visual, verbal, aural, and physical learners on your jury). Change-ups will also ensure you are not alienating jurors from other generations.

3. IF YOU DON'T HAVE EVIDENCE, EXPLAIN WHY

- Jurors are skeptical of a void in evidence – especially young ones, as they expect everything to be accessible online or captured by video surveillance.
- Tell them early and often why a document or video footage does not exist so they do not hold it against you/your client.

4. BE POSITIVE

- To combat anti-corporation biases, weave positive company themes into your presentations and examinations.
- Try to have a company representative present at trial, but be strategic in your selection of this representative.

5. SHORT, SIMPLE, REPEAT

- Key themes should be short and in simple language.
 - Remember, this is a generation that tweets in 140 characters or less and can carry on entire conversations using only emojis.
 - Just think, the widely-known and well-received TED Talks are limited to 18 minutes; long enough to be serious, but short enough to hold people's attention.
- If possible, the entirety of the defense case should be short and succinct, including the cross-examinations, opening statements and closing arguments. You do not want to be the one viewed as wasting their time.
- Millennials can take in a lot of information at one time, but that doesn't mean they can store it all, so when making a critical point:
 - Repeat it. Then repeat it again.

6. KEEP IT REAL

- Be authentic and relatable.
- Be prepared, but don't look too rehearsed.
- Don't underestimate the value of voir dire. It is a great time to convey to jurors that you are not a slick corporate lawyer out to trick them.

7. BE DIFFERENT

- Millennial jurors want to see a cast of characters, each one different from the others.
- Your trial team should be diverse, where possible. And women and minority attorneys should be given a meaningful role during trial, not simply be note-takers or runners.

Your Ethical Obligations

- Understanding millennial jurors is important to maintaining your ethical obligations:
- Zealously Represent Your Client (Rule 4-1.3):
 1. Keep in mind shorter attention spans - if you lose their attention, try a new tactic;
 2. Infuse your presentation with technology;
 3. Use different forms of technology throughout trial, don't rely on just one form;
 4. Remember honesty and corporate values are important to millennial jurors and find a way to incorporate that into your trial;

Conclusion

- It can no longer be business-as-usual in a courtroom. Millennial jurors have the potential to greatly influence outcomes.
- Understanding this demographic is a necessary safeguard against adverse verdicts and high damage awards.

The end.

- Julia M. Beckley

Julia Beckley is Counsel in the Complex Tort division of Dentons' Dallas office. She has litigated through all stages of complex torts and products liability cases on both coasts, in state and federal courts. Ms. Beckley has served as trial counsel on behalf of local companies and as well as Fortune 500 corporations.

Thank you

The logo for Dentons, featuring the Chinese characters "大成" followed by the word "DENTONS" in a bold, sans-serif font, all contained within a purple arrow-shaped graphic pointing to the right.

Dentons US LLP
2000 McKinney Avenue
Suite 1900
Dallas, TX 75201-1858
United States

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com.