

## **Beyond Stereotypes: Discovering & Proving Hidden Bias in Employment Cases**

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What is a stereotype? Webster's dictionary defines stereotype as:

Something repeated or reproduced without variation; something conforming to a fixed or general pattern and lacking individual distinguishing marks or qualities; especially a standardized mental picture held in common by members of a group and representing an oversimplified opinion, affective attitude or uncritical judgment (as of a person, a race, an issue, or an event).

It is the opposite of judging each individual in his or her own complexity. It is labeling someone, making assumptions based on preconceptions rather than on proven behavior. It is pre-judging – prejudice.

Stereotypes are alive and well in the United States. Jurors tend to view the strengths and weaknesses through the lens of their own stereotypes. In a recent study of mock jury research conducted by Sonia Chopra of National Jury Project/West the race and ethnicity of the plaintiff seemed to make a difference in win/loss rates, with the highest percentage of plaintiff verdicts occurring when the plaintiff was white.<sup>1</sup> This study was consistent with research examining actual jury verdicts in employment cases in California conducted by law professor David Oppenheimer at Golden Gate University Law School. For example, Professor Oppenheimer found that African American women who brought claims of either sex discrimination and/or race discrimination won just 17% of the time and that while 36% of men who filed an age discrimination claim prevailed, none of the women did.<sup>2</sup>

One way to counter the tendency of jurors to stereotype plaintiffs is to have more diverse juries. A recent study demonstrated that racially diverse juries spend more time deliberating and discuss more information as compared to homogeneous juries.<sup>3</sup> In addition, more diverse juries were more likely to share

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<sup>1</sup> Chopra, *Mock Jurors' Real Attitudes*, paper presented at 2006 NELA National Convention, San Francisco, CA.

<sup>2</sup> Oppenheimer, *Verdicts Matter*, 37 U. Cal. Davis L. Rev. 511 (2003)

<sup>3</sup> Sommers, *On racial diversity and group decision-making: Informational and motivational effects of racial composition on jury deliberations*. 90(4) J. Personality & Social Psychol. 597 (2006).

information and make fewer factual errors. Professor Samuel Sommers, the study's author concluded:

The argument could be made that in a homogeneous group, where everyone is like us, it's easy to be a little lazier, and take those cognitive shortcuts. Diversity seems to be one potential way to shake us out of that, and to attend more carefully to our surroundings."<sup>4</sup>

With the real potential for stereotyping to play a role in jury decision-making, fairer verdicts can be achieved by doing the hard work required to seat the most diverse jury possible and to minimize the effects of the stereotypes in telling the story of the case in order for the decisions to be made on the basis of a full understanding of the complexity of the human experience.

Every good trial lawyer knows that a key component in winning your case is to understand your audience. The client's story is at the heart of every trial, and it will be difficult to win if the story does not make sense to the decision-makers and relate to their lives. If a juror's background and experience prevents them from relating to the story, a plaintiff's verdict is difficult. Thus it is essential to have as full as possible of an understanding of the background and experience of the jurors and address the attitudes (including stereotypes) that flow from them.

Step 1 in addressing stereotypes is jury selection. There are two kinds of stereotypes relevant to jury selection – the stereotypes of the jurors and the stereotypes that infect your decision making during jury selection.

### **Jurors' Stereotypes**

Let's start with the jurors' stereotypes. To prepare for jury selection you must identify the types of stereotypes that may be filters through which the jury evaluates the evidence in your case. Jurors may have stereotypes about your client, plaintiffs and the courts in general, the defendant, the kind of work place involved in the case, and let's not forget stereotypes about plaintiffs' lawyers. The stereotypes may revolve around race, age, gender, occupation, appearance, and/or behavior. They may be long standing stereotypes or they may have developed because of recent events in the news (e.g., changing attitudes about people of Arab descent) or because of events in the juror's own life (being the victim of a crime committed by a member of a particular racial or ethnic group).

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<sup>4</sup> Reported in the April 17, 2006 issue of the New York Times.

Whatever the source, it is essential to identify those jurors who are cemented into a stereotyped view that will affect the way he or she processes the evidence in your case. The starting point is to explore what kind of contact each prospective juror has with members of the group that may be subject to a stereotype, the plaintiff's group. Less personal contact means a greater likelihood that stereotypes will be used; in the absence of real life experience, preconceptions from other sources such as TV or attitudes of friends or relatives become the only source of knowledge. Ask prospective jurors questions like: "What kind of contact do you have in your day-to-day life with [African-Americans, gay people, people with disabilities, etc.]?"

Second, it is necessary to articulate to yourself how that stereotype might be expressed:

- Women who are victims of sexual harassment usually do something to invite it.
- Black people tend to use complaints of discrimination as an excuse for their own shortcomings.
- Older people are less productive than younger workers.

The third step is to articulate that stereotyped perspective to the potential jurors:

- Some people think that .....

Expressing the stereotype in that way gives prospective jurors permission to voice their true feelings because you are acknowledging that other people may share that view. It makes it clear that you don't agree with that perspective, but encourages the jury to be honest on this point. It is important to remember that just because the juror does not express his true feelings during voir dire, does not mean that he does not have those feelings. Better to invite and learn the real attitudes before the trial than after you have lost the case because some juror was completely resistant to your client because of stereotyped views.

### **Batson Motions**

Too often defense attorneys use racial stereotypes to guide their decision-making in exercising peremptory challenges, thereby eliminating the possibility of more diverse juries. There is often great resistance by plaintiffs' lawyers to challenging this practice in the interest of "efficiency," the desire to finish jury selection quickly, and fear of angering the judge. This is a big mistake.

The one area of the law around jury selection that has received substantial attention from the courts, including the U.S. Supreme Court, is around the issue of the discriminatory use of peremptory challenges. The courts have established reasonable standards and a clear process to use in determining discrimination in jury selection.

When the defense uses its peremptory challenges to exclude members of a protected group, the process generally is to make a challenge under Batson v. Kentucky, 476 U.S. 79 (1986).<sup>5</sup>

The procedure is:

When the challenge is made counsel should be prepared to provide:

- a) Race, gender or other cognizable category of parties;
- b) Race of group being improperly challenged;
- c) Number of that group in the panel and called to the box;
- d) Number of that group challenged;
- e) Number of peremptories used;
- f) Number of that group remaining;
- g) Other reason bias is important to the case.

If the judge finds a prima facie case exists,<sup>6</sup> the burden shifts to the defense to provide non-discriminatory reasons for its challenges. The court then determines if the defense has met its burden. Many states have their own case law on this issue, including different options for remedies. See, Jurywork: Systematic Techniques, Chapter 4 for a full discussion about challenges to the discriminatory use of peremptory challenges.<sup>7</sup>

The lesson of Batson and its progeny is that there are avenues to challenge the infection of the jury process with stereotyped thinking and discriminatory decisions. The goal of every employment case should be to have a true cross section of the community evaluate the actions of the employer in light of the

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<sup>5</sup> In Edmonson v. Leesville, 500 U.S. 614 (1991)The U.S. Supreme Court held that Batson applies to civil cases.

<sup>6</sup> See Johnson v. California, 125 S.Ct. 2410 (2005) which holds that a trial judge must only find whether there is a “reasonable inference of discrimination in determining whether an objector has met the prima facie burden.

<sup>7</sup> National Jury Project, *Jurywork: Systematic Techniques* (2005).

standards for fair and non-discriminatory treatment required by our civil rights laws.

### **Attorneys' Stereotypes**

The stereotypes of plaintiff attorneys can be just as dangerous as the stereotypes of the jurors or the defense lawyers. People are complex human beings and must be evaluated on the totality of their life experience and resultant attitudes. Of course, the more superficial the voir dire, the more the lawyer is required to rely on stereotypes. However, assuming the judge allows at least minimal exploration of juror attitudes, it is essential that the attorney identify the most relevant biases that prospective jurors might bring to the story of the case and eliminate jurors on the basis of their ideas, not just their demographics.

Sometimes stereotypes have some validity – e.g., the experience of African Americans as a group in the job market is different (and more negative) than the experience of most Caucasians as a group; thus attitudes towards employers are often more critical. However, even if a stereotype has some validity, the person in front of you might be the exception to the stereotype. Thus, analysis of each individual in all of his or her complexity is essential during jury selection.

In the National Jury Project study cited above, it was revealed that one of the most important issues in determining case outcome was the juror's attitude toward the concept of damages for emotional distress. Other revealing topics include a juror's beliefs about employer rights vs. employee rights, their own work experience and workplace expectations and perceptions about the extent of discrimination in society and the workplace today.

### **Stereotypes in Telling the Story**

In telling the story of an injustice in the work place, it is important to counter possible stereotypes about the role of the plaintiff in the dispute and they are many. Many jurors believe that if someone is fired or demoted or harassed, they must have done something to invite the negative behavior. They often believe that people of color who claim discrimination are using discrimination as an excuse to cover their own shortcomings. Most jurors these days start off suspicious of plaintiffs, believing they (and their lawyers) are trying to get rich off the legal system.

The most effective way to counter these stereotypes is to tell the story of the case around the common view of the employment relationship:

The employee brings to the job whatever skills, training and experience, puts in the time and produces something for the employer. In return, the employer must pay the employee and treat him or her with a certain level of fairness.

It is always helpful to keep the story focused on the employer – it did not do what it was supposed to do – it did not hold its end of the bargain. However, because of jurors' stereotypes about plaintiffs, it is always necessary to establish that the plaintiff upheld his or her end of the bargain – she did what she was supposed to do. The story must make clear that the plaintiff's motives are simply to work and do a good job and that at each turning point, the plaintiff made the right choices; it was the employer who made the wrong choices.

Relying on the heart of the story and repeating the themes it evokes will keep the jury's focus on the bad acts of the employer and help them to turn away from their own stereotypes or at least conclude that the plaintiff before them is the exception to the stereotype. It is not always possible to eliminate the jurors' stereotypes, but it is possible to tell a story that overcomes them, allowing the jury to feel comfortable with a large plaintiff's verdict.