

Modern Jury Dynamics

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**A** trial theme conveys a message that leads to your desired outcome, and you must adjust your theme accordingly to connect with the dominant forces that shape your jury.

# The Generation X and Y Factors

Generational differences dramatically impact jury dynamics. In reaching a verdict, a jury will decide whether a defendant deviated from a “norm” (statute, duty, contract, standard of care, etc.) and whether that deviation caused

plaintiff’s harm. A jury compensates a plaintiff by placing him or her (to the extent possible with money) back to the pre-suit norm (pre-injury, illness or death), or pre-damaged condition. As beauty may be in the eye of the beholder, what constitutes a “norm” is in the eye of the jury. Knowing the “norm” of your jury is crucial in being able to sell your power themes to a jury and positively influence the verdict.

The same techniques Madison Avenue utilizes to sell products can be adopted by trial attorneys to convey effective trial

themes. A trial theme should be a multi-sensual message (visual, audible, and yes even spiritual—a connection with a juror’s innate sense of fairness and righteousness). A trial theme conveys a simple, powerful, memorable message to the jury that leads them to your desired outcome. Your message needs to connect with your audience. To craft an effective theme, you need to know your audience.

### Know Your Audience

A good trial attorney must be schooled in courtroom psychology, the art of persuasion, group dynamics, decision making, storytelling, theatrics, and a host of other disciplines. A “power theme” must connect with a juror’s life experience: educational, gender, socioeconomic, multi-cultural, and generational differences. But, will classic defense trial themes centered on principles such as “personal responsibility,” “plaintiff overreaching and greed,” “alternative causation,” “common sense,” “misuse of a product,” “sufficiency of warnings,” “limited corporate knowledge,” or “compliance with industry standards and governmental regulations” work with modern juries?

### The Modern Jury

A majority of the jurors on a modern jury

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are members of Generation X and Y. That is, jurors born between 1965 and 1995 will comprise the largest group of your panel. Their core values and life experiences are dramatically different than the Baby Boomers and the Greatest Generation. You need to understand how they learn and determine whether your “power theme” is going to connect with them. Generational dynamics is but one of a multitude of factors that affects a person’s core values. Other factors include socioeconomic, demographic, race, gender, education, family structure, religion, political affiliation, regional influences, and recent watershed events (housing and economic crises, 9/11, natural catastrophes, etc.). Once you understand those factors, you will need to consider how group dynamics may influence the actual verdict a jury renders. Another recent shift in juror composition and foreperson control is that women command a larger presence on the jury and are more often called upon as the forepersons. The *National Law Journal*, in its article, “The Female Factor,” May 18, 2009, first reported on this emerging factor. This rise of women in power roles has transformed the family unit (40 percent of women married to men out-earn their husbands), business (there are record numbers of women CEOs, and in top managerial positions), education (more women earn college degrees than men), and economics (majority of women in their 20s out-earn their male counterparts). This will become even more of a factor in the future as the power of women dominates Generation Y. Women are clearly the stronger gender force leading Generation Y and, as a result, the group as a whole will be shaped differently—a new “norm.”

Why does this matter? Think Hollywood, Madison Avenue, publishing, and how they all craft their messages and products differently when they want to target certain genders. They understand how they must connect with those differences. Think about which gender tends to like the following more than the other:

1. *Bridges of Madison County* versus *Apocalypse Now*
2. A Dodge Ram Truck versus a Volkswagen Cabriolet
3. *Fifty Shades of Gray* versus Vince Flynn’s *An American Assassin*
4. *Cosmopolitan* versus *Esquire*

5. The ballet versus ultimate fighting
6. Activia yogurt versus Ruth’s Chris
7. *The Hangover* versus *Bridesmaids*

Think of the marketing campaigns of colognes/perfumes, shampoos, video games, clothes, and jewelry. (When is the last time you saw a male jewelry commercial?) Now think of marketing and advertising campaigns for products and the product itself when the goal is reaching both genders—iPhone, Nike, Geico, and Verizon. Now add generational components to product marketing. It all matters to anyone who sells, and trial attorneys have to be master sellers if they want success in the courtroom.

Developing an effective defense theme that connects with the jury is critical to increasing your success rate. Know your jurors. Jurors tend to speak positively about the process only after a jury trial is concluded. Most begin their service not wanting to be there. You are taking precious time away from their families, careers, and normal routines. You have just forced them into a position that they would rather not be in: they are responsible for deciding the outcome of a dispute that will have real-life consequences for real people over a life-

time. You will force them to take positions and discuss intimate issues with strangers. Always remember, respect it, and deal with it. Generation X is especially frugal with the time you are getting from them. They demand “me time” and “family time.” Generation Y will be easily distracted and start to suffer withdrawal symptoms from not being “connected” while on a jury. Let’s meet the majority of those jurors comprising the modern jury: Generations X and Y.

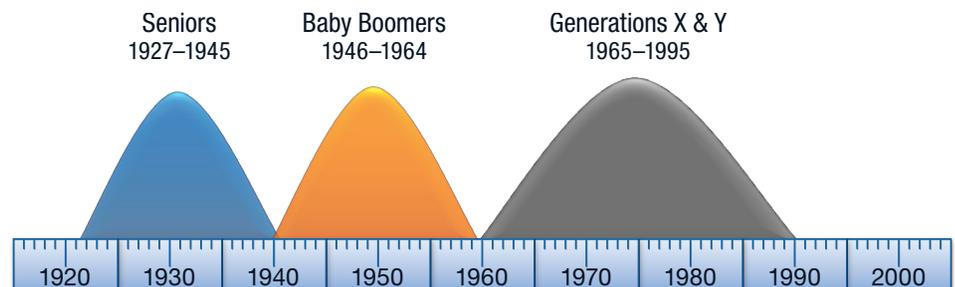
The generational makeup of today’s jurors is dramatically different than in the 1980s and even the 1990s. Consider the two graphs below.

The United States adult population consists of:

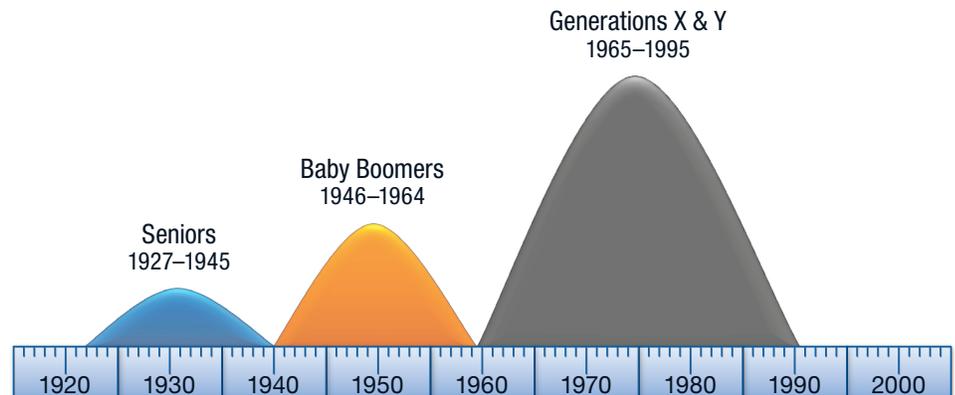
Baby Boomers (age 47–65):	80 million people
Generation X (age 31–46):	47 million people
Generation Y (age 18–30):	76 million people

Sixty percent of your potential jurors could come from the Generations X and Y. Juries will still have individuals from the Greatest Generation (66 and above), but those numbers continue to shrink. Since Generation Y has the highest unemployment rates, are unmarried, and thus, have

#### United States Jury Pool—1995



#### United States Jury Pool—2012





fewer family obligations, they are likely to be a larger proportion of any generational group that will be available to sit as jurors without any hardships.

### The Generations

Generational differences arise because individuals are shaped by the life experiences they have during their forma-

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tive years (*i.e.*, “nurture”). Therefore, it is important to understand the key events of each generation and how those events may have influenced core values. Some of Generation X’s major life experiences include: the end of the Vietnam War, the Watergate scandal, the dot-com rise and burst, HIV and AIDS, the end of the Cold War, the rise of personal computers and the Internet, the OJ trial and LA riots, Y2K and a “not-my-fault,” “me” society. Generation X individuals tend to be alienated and loners (but independent and resilient), overeducated (extremely entrepreneurial), underachieving (demand work/home/life balance), apathetic (ambivalent) and cynical (realistic and skeptical). Studies have shown that members of Generation X tend to prepare for the worst and speak their minds.

Remember Generation X had been coined “slackers.” Their attitudes have been characterized as being disrespectful, cynical, and defiant as to authority. In light of these traits, defense attorneys should refrain from attacking plaintiffs who do not diligently look for work post-injury, have a checkered work history, or do not follow the rules (at work, on products, etc.)—as more likely than not, those themes will not resonate with Generation X. Generation X has had a fluid, fragmented, and disrupted vocational career with numerous employers and are the children of parents who have the highest rates of divorce and downsizing. Shuttled between parents, and all too often pawns or spoils of bitter divorce struggles, this instability and lack of certainty affects Generation X’s outlook. They will not be overly sympathetic to plaintiffs who exaggerate the disruptive effect of an injury on earning capacity or the need to change vocations. Also, an expert’s academic credentials mean less to Generation X than the expert’s achievements and work experiences. Make sure you highlight those attributes of an expert to connect with Generation X.

Generation Y’s life experiences include high school violence and shootings; toxic scares; numerous personal scandals (*e.g.*, Madoff, Spitzer, Weiner, Woods, Schwarzenegger); terrorism activities and U.S. response (9/11); the proliferation of smartphones, iPads, iPods, and information/entertainment technology; social media (*e.g.*, Facebook, Twitter); the death of videos and landline phones; and most importantly, the transformation of the economy from flat to recessive. Generation Y, ages 18 through 29, tends to be naïve (optimistic), hyper-educated, fast multi-

taskers, and resourceful (whiny Peter Pans, nurtured by helicopter parents), underemployed, demanding (self-confident, everyone was a winner and got a trophy), poor communicators (socially digitally connected, distractible, and short attention spans).

Generation Y quickly processes information in snippets while multi-tasking. A trial attorney must be concise and to the point and avoid boring or wasting Generation Y’s time; otherwise, you will lose them. As students of Internet research, Wikipedia, and blogs, Generation Y rarely challenges the reliability and source of information. This can be a challenge for a defense attorney who has to attack the credentials of a plaintiff’s expert, the foundation of an opinion or the soundness of plaintiff’s science (junk science). Also, Generation Y is suffering the most of any generation from the latest economic crisis. Consider that we have the most educated generation graduating into a job market that has the lowest number of new jobs requiring a college degree or above. They played by the rules (*i.e.*, went to school, worked hard, graduated) but did not obtain the reward of a job in their field of studies. They will have little sympathy for most plaintiffs, and only the truly severely injured or damaged will get their attention. However, despite their career disappointments, Generation Y believes they are an entitled generation (doted on by helicopter parents and the products of the “everyone gets a trophy” mentality). The entitlement character, juxtaposed with their underemployed and unemployed status, creates a Jekyll and Hyde dynamic. They are the least religious, most accepting of the “new family unit,” accepting of government intrusion/dominance versus personal choice and self-responsibility, and most comfortable with the government redistributing “OPM”—other people’s money.

The chart at left highlights core generational values.

Understanding these generational profiles can dramatically improve your ability to connect with these jurors. It should guide you in tailoring your message so that it resonates with jurors’ pre-existing beliefs and attitudes. Credibility is essential for being effective in front of a jury. One’s credibility is greatly enhanced when

### Generational Values

Baby Boomers	Generation X	Generation Y
Hard work	Personal responsibility	Entitlement
Prestige	Entrepreneurship	Resourceful
Challenge authority	Distrust of authority	No authority
Corporate loyalty	Corporate scandal	Corporate transparency
Waning confidence in government	Suspicious of government	High expectatiions of government
Self-made	Self-sufficiency	Self-confidence
Teamwork	Independence	Teamwork
Perseverance	Accountability	Fairness

jurors feel they can identify with you and your theme. When the jurors believe you know them, they will open up and be ready to receive your message. Generations X and Y are receptive to short, concise, and simple messages that are reinforced with demonstrative exhibits (e.g., animations, photos, videos, illustrations, graphs). To communicate effectively with Generations X and Y, counsel needs to be concise and to the point; infuse an element of entertainment; deliver a technologically savvy message; have no downtime; and reinforce their points with examples and analogies that resonate with jurors. Think how relatively short the *Apple v. Samsung* trial was and that jury's result.

### A Study to Test the Literature on Generational Bias

In April of 2012, we conducted a mock trial and jury focus group to test whether or not the literature held true on generational findings. In testing the literature, we:

- Developed a personal injury fact pattern that would highlight key generational differences;
- Presented that fact pattern in a mock trial/jury focus setting;
- Conducted individual voir dire with typical and supplemental jury voir dire questions that would expose feelings on generational value differences as defined by the literature. Reduced the panel from 20 jurors to 12 (with four jurors each for "Boomers," X, and Y);
- Presented *openings*, then three issues (*warnings/product defect, causation and damages*);
- Divided jurors into generational groups (unbeknownst to them) and asked them to deliberate on each issue and answer several key questions, e.g., Was the product defective? Was the warning defective?;
- Presented closings and asked them to deliberate as a group (all generations together) to see how group dynamics effected generational biases, if at all (amazingly the jurors never realized how they were segregated); and
- Closed with a jury focus group question-and-answer session.

The study was conducted at Courtroom Sciences, Inc. (CSI)'s facility in Dallas, Texas. Briefly, the fictional fact pattern

considered by the mock jury included the following.

- **Plaintiff:** John Murphy ("Murph"), 33 years old, union highway construction heavy laborer.
- **Product:** Sun-Safe construction wear. Sun-Safe shirts and construction clothing are the perfect products to shield construction workers from the sun's cancerous rays. They are perfect for people who work outdoors, have fair skin, and susceptibility to skin cancers. There are no warning labels that the product contains nanosilver, the key performance component of the product. However, there is a warning that the shirt should not be worn in conjunction with sunscreens. The company is aware that sunscreens cause nanosilver to leach out of the product. Murph used a sunscreen product prior to putting on his shirt. Other construction workers on the project wore Sun-Safe shirts without incident.
- **EPA Conditional Approval:** On January 26, 2011, the EPA gave Sun-Safe conditional approval to use nanosilver in its textile products, (Sun-Safe sought approval although there was no requirement that the manufacturer register the product or obtain EPA approval).
- **Plaintiff Injuries:** On January 15, 2012, the plaintiff, after wearing his Sun-Safe shirts for three months, reported the following complaints to his doctor: a slight skin discoloration, followed by burning, peeling, and itchiness in his skin and eventually leading to a degloving of his upper hand and forearm. Also, the skin on his neck, shoulders and back started to peel and he experienced relentless itchiness. Plaintiff's condition has plateaued; however, he is left with scarring, permanent loss of function of his left arm (his dominant arm), inability to ambulate, sun sensitivity, and extreme itchiness on his arms, back, and chest area. Plaintiff can no longer work in the construction trade and has limited transferrable job skills. He has a past and future lost wage claim of \$1.5 to \$2.2 million, past medical costs of \$525,000 and future medical care of \$6.8 million, predominantly for plastic surgery (skin grafts), nerve, and tendon surgeries, potential amputations of his feet, left hand, and forearm (six different

procedures), and assisted living/life care cost, counseling, and prescriptions. His compensatory damages were in excess of \$9.5 million.

- **Alternative Causation:** Plaintiff had pre-existing sun sensitivity and precancerous and cancerous skin cancer spots removed from his hand and forearms in the past three years. Also, several con-

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struction workers on the project had developed skin strep infections (flesh eating bacteria), which resulted in skin damage, but which ultimately were cured with a battery of high-dose antibiotic cocktails. Defendant contends that the plaintiff's conditions are the result of the flesh eating bacteria not nanosilver.

- **The Scientific and Medical Literature:** There are no governmental or industry standards or regulations that apply to nanosilver exposure. There are no documented, peer-reviewed articles that nanosilver can degrade and damage human skin, muscle, nerves, and tendons. However, there are numerous animal studies that nanosilver can migrate and deposit over time in sub-dermal areas and cause destruction and degradation of skin, muscle, tendons, and nerves, and translocate to an animal's extremities (similar to neuropathy). There are also anecdotal case reports that nanosilver prevents and protects various flesh-eating strep bacteria from responding to antibiotics.
- **Jury Must Find:**
  - Was the product warning defective and the product defective?
  - Was the product defect the cause of plaintiff's injuries?
  - What amount of damages, if any, would fairly compensate Mr. Murphy?



### Voir Dire

We posed pre-selected voir dire questions to all 20 potential jurors to determine whether or not generational biases held true. The voir dire focused on the jurors' values on personal accountability, social media use, legitimacy of medical studies, product warnings, corporate bias, governmental regulations, lawsuits, entitlements, and numerous other issues a toxic tort attorney typically confronts. We then eliminated eight of the jurors and retained four jurors from each generational group (Baby Boomers, Generation X and Generation Y).

### Case Presentation

After the voir dire was completed and the jury selected, we made a case presentation using a combination of factual and fictional evidence, including real video trial testimony of experts; actual animal studies regarding potential toxicity of nanoparticles; real government regulations and standards; the voluntary EPA approval of a nanoparticle; an actual product containing nanoparticles; real studies regarding the effectiveness of antibiotics and symptoms, injuries, and treatments for flesh eating bacteria; and a real plaintiff family, injuries, and treating physician testimony. After each presentation was made, the jurors deliberated by generational groups. At this point, they were not aware how they had been divided. We then presented the plaintiff's and defendant's positions on damages and their closing arguments. After the jury came to a conclusion regarding the ultimate outcome, we then posed a series of questions to elicit individual and group responses on key issues regarding the case that would give us a deeper understanding of whether or not generational studies were consistent with juror beliefs.

### The Results: Was the Generational Bias Literature Accurate?

Generally speaking, the generational literature proved fairly accurate. A trial

attorney's "power themes" and method of delivery should follow the literature on Generations X and Y's core values and how they learn. The jury rendered a defense verdict. However, Generation X leaned heavily in favor of plaintiff, and only after great pressure from Baby Boomers and Generation Y did they finally find for the defendant. We then instructed the jury as a group that the judge had found for the plaintiff and asked them to answer three questions on damages. The chart below left reflects the average award for each generation on the following three questions:

- Column one: What would you wish to award?
- Column two: What is the lowest you would award?
- Column three: What is the highest you would award?

*Beware the X* if you have a plaintiff's verdict. Also, on liability, Generations X and Y had strong anti-corporate biases and a strong sense of entitlement (*i.e.*, if someone is hurt regardless of fault, he or she should be compensated). Moreover, the plaintiff's personal responsibility and accountability was a minimal to non-factor in their decision making.

### Common Threads with All Generations

There are common threads that are true with most jurors: countless studies have revealed that a great percentage of jurors have a preconceived bias that you are unlikely to change, regardless of the oath the jurors just took. Our study validated that concept—those who lean far one way or the other do not adjust and balance the scales of justice before they decide. Your battle is for the hearts and minds of the undecided, neutral, and "I don't know" jurors. They are your swing vote. Think of the wife who believes that her husband will change after they get married. It almost never happens. Likewise, staunch Republicans or Democrats are not going to change their party vote on Election Day, regardless

of the issues. Elections are won by capturing the moderates and the undecided. Juries are won by providing defense-biased jurors with evidence they can utilize to sway the neutral jurors during deliberations, and by

neutralizing plaintiff-biased jurors so they do not want to jump into the fight.

As defense counsel, you need to understand each juror's preconceived impressions of your client, its product or service, and its industry and then develop a theme accordingly. Obviously, you are not going to center the theme of your case around your client if you represent a slumlord in a childhood lead poisoning case. Your theme and attack in that instance should be all about the science (*i.e.*, focus on dose, diagnosis, alternative causation, and measure of damages). Defining and focusing the issue is key in developing effective themes. Also attacking a plaintiff for not finding work post-accident in a personal injury case or post-termination in an employment case will not be effective with Generation Y, which is the most unemployed and underemployed generation in the United States.

A majority of jurors decide their case preliminarily during opening statements; your theme needs to be clear and persuasive from the start. This is true regardless of one's generational group. In fact, it should be delivered before words are spoken, during voir dire and with every opportunity thereafter. After your opening, a juror may see the evidence with an altered vision crafted by counsel's opening. A great example of this filter through which we view data is how dramatically different CNN presents the news compared to Fox. Their goal is to shape how you see current events. They want you to adopt their perception of reality. Make sure your opening statement influences the hearts and minds of Generations X and Y so they will analyze the evidence as you desire. They are more ready to believe and accept evidence that validates their preliminary intuition and willing to reject or not even hear evidence that contradicts it. Knowing generational characteristics helps you understand your jurors' mindset and how your theme will be filtered.

Remember that simple, concise, highly visual, and powerful facts that coincide with the jurors' core values and gut sense of fairness wins the day. Common sense analogies that strike a chord with their own life experiences are readily accepted as being true. Your theme needs to hit those chords: the Generation Y and X chords and the inter-generational chords.

### Average Award for Each Generation

	Wish to Award	Lowest	Highest
Baby Boomers	\$12 million	\$7.5 million	\$14 million
Generation X	\$16 million	\$11 million	\$30 million
Generation Y	\$14 million	\$7.3 million	\$16.75 million

## Seismic Core Value, Institutional, and Foundation Shifts in the United States

There has been a seismic shift, over the past decade, of some of the basic foundations, institutions, demographics, economy, education, and core values in the United States. Knowing and understanding why these shifts have occurred is important for a trial attorney to be effective. Understanding generational differences and group dynamics is just one of many components that a good trial attorney must grasp. Remember, these shifts will influence Generation Y the most and X secondarily. Consider the following cross generational changes in society relative to Generations X and Y.

### The Family and Gender

The family unit, according to psychologists, sociologists, and political scientists, is the most influential factor in shaping one's core values. It is the foundation from which we morph into our personal adult identity. As the family unit shifts, so do society's and individuals' core values. Also, the family unit impacts poverty levels, incidence of crime, education levels, earning capacity, and life expectancy. Consider the following statistics on how families have changed. In 1960, 68 percent of all people in their 20s were married. In 2011, 23 percent of all people in their 20s were married. In 1960, 82 percent of the adult population was married; in 2011 only 51 percent of the adult population was married. Does the dramatic drop in marriage matter to a trial advocate? Presently, 60 percent of births occur outside of marriage (with the highest percentage being for Generation Y). Ninety-two percent of college women have births while in wedlock. *New York Times*, "Family Dynamics," Jason DiParla and Sabrina Tavernson, February 17, 2012. Presently 65 percent of married women work and women comprise 51 percent of the workplace. Forty percent of women earn more than their husbands, and single women in their 20s with no children out-earn their male counterparts. Women from Generations X and Y have more formal education than their male counterparts. *2012 Statistical Abstract: The National Data Book* (<http://www.census.gov/>) and *The Richer Sex*, Linda Mundy. People are delaying marriage by 9.3 years compared to the average age of marriage in the 1950s. More col-

lege graduates and young adults move back in with their parents than at any time in the past 60 years. This is a dramatic new norm for Generations Y and X. Generations X and Y could not identify with *Leave It to Beaver*, *The Waltons*, *Family Ties*, or even *Eight Is Enough*.

### Religion

Generation Y is the least religious of any generation: 65 percent report never or only rarely attending religious services. In 1950, almost no one reported having no religious affiliation. On June 13, 2012, a Pew Survey reported 32 percent of millennials doubt the existence of God, a dramatic drop in five years. Over 70 percent of Generation Y considers themselves "spiritual" as opposed to having a specific religious affiliation. Also, the percentage of the U.S. population practicing non Judea-Christian based religions continues to grow. Formal religion in the United States created communities where moral standards were defined and practiced. They also became a community/social gathering place, safety net, and support group and moral compass for their congregations. As those institutions diminish, what will fill that vacuum and will it affect how your jurors decide cases? Again, Generation Y is and will continue to be the most influenced by this dynamic. Trial themes need to change accordingly.

### Economics and Education

Unemployment and underemployment are greatest among Generation Y. Only 54 percent of 18 to 24 year olds were employed as 2011 ended. Hourly pay for college graduates is declining, and student debt exceeds \$1 trillion and for the first time exceeds total credit card debt. Long-term unemployment is at its highest rate since the depression; home ownership the lowest in 30 years; more people are on food stamps than ever; and the national debt is at its highest percentage of GDP since WWII.

College and graduate students are in greater debt than Baby Boomers and Generation Xers coming out of college. Generation Y is the first generation that will not do better than their parents economically. Since 2008, only 27 percent of high school graduates have a full time job. Sixty-one percent of college graduates (1.5 million graduates in 2012) who are employed have

a job that does not need a college degree. The *Atlantic Journal* reported on April 23, 2012, that 53 percent of college graduates are jobless or underemployed. Since 2000, the number of Americans under 25 with at least a bachelor's degree has grown by 38 percent. However, only three of the top 30 occupations with projected job openings by 2020 will require a bachelor's degree or

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higher. These new norms certainly affect how Generation Y views future lost wages and other economic-based damages. Their point of reference is very different than the Boomers.

### Conclusion

The aforesaid factors have shaped and been shaped by the rise of Generations X and Y into the political, economic, corporate, and educational arenas. Think how these facts—"the creation of new norms" may affect your jurors. Adjust your theme accordingly so you connect with this dominant force that shapes your jury. Keep your pulse on these trends and how they may continue to influence your jury. Do not have a failure to communicate due to generational differences or societal core value shifts. Now, more than ever, it is critical to conduct individual exploratory questioning during voir dire, as well as social media and Internet searches of prospective jurors. Monitor actual jurors' social media use during trial and employ courtroom profiling and juror assessments. Supplementing your general knowledge of traits and core values of Generations X and Y with specific individual knowledge of jurors is crucial to being successful in the courtroom. "Just Do It." 