

## **Emerging from the Dumpster Fire: Opportunities for Jury Selection**

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As the nation continues to emerge from the dumpster fire of 2020, what emerges is an opportunity for trial lawyers to conduct deeper, more value-based jury selection. While exploring a juror's beliefs has always been a primary objective in jury selection, 2020 introduced mutual life experiences that provide fertile ground for voir dire and created a more engaged and activist jury pool whose views and levels of engagement are worthy of consideration.

For some, life slowed down as the pandemic forced us into quarantine, while others struggled financially, emotionally, and physically as jobs and businesses were shuttered, connections were broken, parents were burdened, and lives were lost. Meanwhile, healthcare and other frontline workers were thrust into overdrive.

No matter which end of the spectrum on which they fall, all prospective jurors have one thing in common—the experiences of 2020. In the beginning, we all watched in disbelief as flights were grounded, stores were closed, and streets emptied. Business struggled, unemployment rates skyrocketed, household goods became scarce, and we all became isolated. This disbelief later focused on a street in Minneapolis where then-police officer, Derek Chauvin, put his knee on George Floyd's neck for nine minutes and twenty-nine seconds, killing the 46-year-old black man. For the first time since stay-at-home orders were issued, Americans collectively left their homes to flood the streets in support of George Floyd and the Black Lives Matter movement.

These events shaped the year. For prospective jurors, the specific experiences with and views about these events provide a new lens through which they see the world and your case. Trial lawyers now should consider how the significant events of 2020, particularly COVID-19 and the murder of George Floyd, altered the perceptions of Americans as potential jurors. In doing so, it is important to examine how COVID-19 affects individuals' views of other people, personal issues, healthcare, and businesses and corporations. Voir dire can help uncover how prospective jurors were impacted by COVID, how they felt and engaged following the murder of George Floyd on national television, their reactions to mask wearing, and how they were impacted by financial strife. Although Americans all experienced the same events in 2020, each person's dumpster fire burned differently. How does that affect our jury pool, and how can we explore and learn about prospective jurors' personal experiences and views on these issues through a more effective voir dire?

### **Impact of COVID**

The most significant event of the past year was, no doubt, COVID. Each generation is marked by shared experiences such as the Great Depression, World Wars, Civil Rights, 9-11. COVID is one of these shared life experiences. Everyone was impacted, but some were more greatly impacted and victimized.

In most civil cases today, plaintiffs are claiming to be victims of some type of unfairness or wrongdoing. In jury selection, defense lawyers use strikes most effectively on prospective jurors who portray themselves and view the world as victims. This includes jurors who have

recently suffered significant losses, like a close family death, or an economic hardship such as the loss of a home or a job. It also includes those who are underemployed, or who describe tough life experiences by blaming powerful others (*e.g.*, people, entities, or events outside of their control).

COVID is a new experience with varying levels of victimization. Taylor Trial Consulting has been examining the relationship between a host of juror attitudes and the extent to which jurors feel they have been impacted by COVID. Not surprisingly, those who report experiencing the most significant impact of COVID also hold the most anti-defense attitudes. For example, of those surveyed who indicated being impacted “a lot” or “completely” by COVID-19, 52% agreed that “Most companies have put profits over safety during the coronavirus pandemic” while those who reported they were “Not at all Impacted” or “Not Very Much Impacted” by COVID showed only 29% agreement with that sentiment. *Voir dire* questions should include questions about the impact COVID has had on prospective jurors’ lives.

In addition to the experience and impact of COVID-19, beliefs and attitudes around COVID-19, including views on the exposure and health risks, wearing masks, and vaccinations provide lawyers with a window into potential jurors’ beliefs and value systems. To what extent do jurors believe in science or trust medical professionals? Simple questions can reveal a great deal about jurors’ COVID attitudes and provide significant insight into their value systems. For example, asking jurors the extent to which they wore or continue to wear masks, the extent to which they are concerned about contracting COVID-19, and if they are not concerned, why not?

These COVID attitudinal differences relate significantly to other issues that are relevant to civil litigation. In a recent small sample survey conducted by Taylor Trial Consulting in New Jersey and Pennsylvania, juror attitudes differed significantly depending on whether they were or were not vaccinated. For example, nearly a third (32%) of vaccinated jurors, but only 13% of unvaccinated jurors, agreed with the proposition that “Medical professionals should not be sued for malpractice for any deaths related to COVID-19.”

COVID-19 affected everyone differently. The virus that touched everyone, whether directly or indirectly, became a polarizing event because it was clear everyone possessed different opinions on the current events and how best to proceed in addressing it. While some supported masks, others felt they were useless. Many Americans took to Facebook and Twitter to encourage their friends and family to stay at home, which was met with resistance from those who perceived the stay-at-home orders to violate their rights. Masks, stay-at-home orders, vaccines, layoffs, and stimulus checks are issues that COVID-19 introduced that can provide insight into a potential juror’s value system.

## **Racial Reckoning**

Whether COVID-19 slowed lives down or thrust others into overdrive, the nation collectively stopped and watched when George Floyd was murdered on national television. Many people quickly lit their torches from the already-burning dumpster fire and marched through the streets to support George Floyd and the Black Lives Matter Movement. Americans picked sides. Do black or blue lives matter more? Were the demonstrations peaceful protests, or were they riots? Was this a racially-motivated murder, or was this a police officer doing his job? Americans drew lines and were once again at an emotional and moral crossroads.

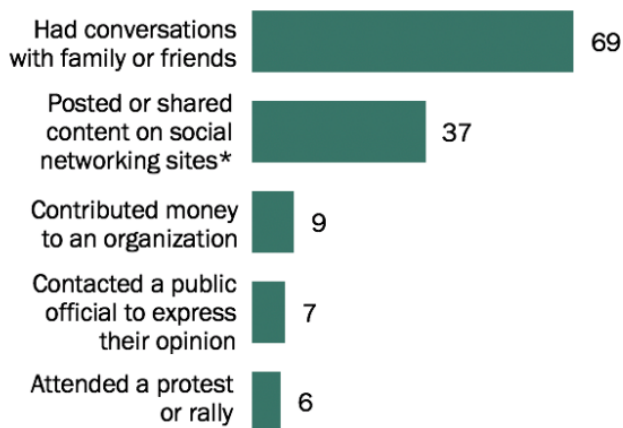
From 2017 to 2020, white Americans’ support for the Black Lives Matter movement only increased by eight points—or 2.6% per year.<sup>2</sup> Yet, it increased by the same eight points in the *two weeks* following George Floyd’s death.<sup>3</sup> Polling data suggests that the perceptions white and black Americans have about George Floyd’s murder could produce meaningful movement (what does that mean?), particularly if jurors have these beliefs. In addition, the differential impact of the pandemic on people of color sheds additional light on racial inequities.

The murder of George Floyd, coupled with highly-publicized differential impact of COVID and healthcare racial disparities, have led to renewed headlines about race relations in our country and are on the minds of most jurors. The Pew Research Center reported that the hashtag #BLM had an unprecedented usage of over 47 million tags in the two-week span between May 26 and June 7.<sup>4</sup> There has been a 1,623% increase in the use of the word “systemic racism” in 2020. It was an Oxford dictionary word of the year. While not a new term, it is a new lens for jurors and one worth exploring in cases that touch on race. The public is engaged on race; they are talking about it; it is on their minds. Another Pew survey, for example, found that nearly 70% of those polled had a conversation about race in the past month.

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### **About seven-in-ten Americans say they’ve had conversations about race in the past month**

*% saying they have \_\_\_ about/focused on race or racial equality in the last month*



\*Based on social media users.

Source: Survey of U.S. adults conducted June 4-10, 2020.

“Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement”

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Plaintiffs' lawyers are capitalizing on this moment. Medical malpractice lawyers, for example, have weblinks dedicated to race-based health claims. Plaintiffs' firms are touting their focus on these new types of claims (See, e.g., <https://www.slawla.com/medical-condition-discrimination> and <https://www.cranwellmoorelaw.com/blog/2018/04/can-discrimination-be-a-form-of-medical-malpractice/>).

In medical malpractice cases, it is important to ask prospective jurors if they have been mistreated by the medical profession based on their income, race, or ethnicity. In addition, lawyers should ask prospective jurors if they would tend to believe in these types of claims, as well as explore the general level of trust of medical professionals. Most people have trust, while those who do not would be of particular concern and may be ripe for a cause challenge or the use of a peremptory strike.

Medical malpractice is not the only type of case for which these issues arise. Any case in which the key players on opposite sides are of different races or ethnicities are ripe for these overt or subtle claims by plaintiffs' counsel. Whether overt racism is at issue in the case, or these racial issues are more implicit in the case, lawyers should inquire in voir dire about jurors' experiences and views and, specifically, about their perceptions of these issues.

Some business owners in cities boarded up windows while others placed Black Lives Matter signs in their window-fronts. How Americans perceived these events varies dramatically. How any individual defendants acted, and how genuinely they acted in light of these events may also be on the jurors' minds. Lawyers have an opportunity to use this event as a tool in the jury selection process to gain knowledge concerning a potential juror's values, beliefs, and biases. This includes their level of activism on racial justice issues.

### **Activism**

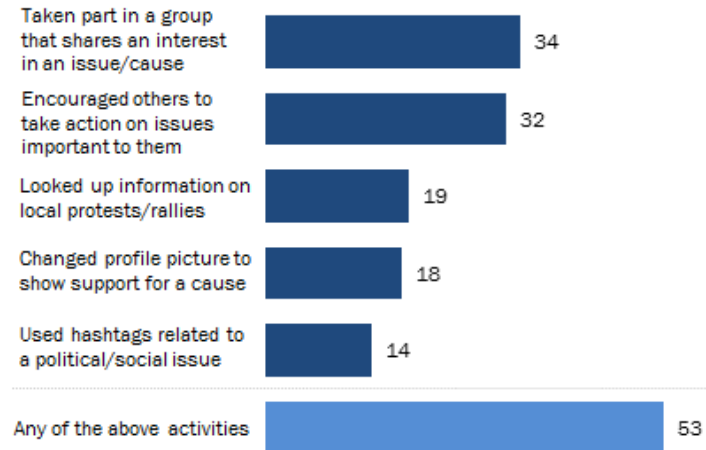
While many took to the streets to protest the murders of George Floyd and others and to demand an end to racial inequities, people also turned to Twitter, Facebook, Instagram and other social media forums to demand change. It was not just BLM that awakened peoples' eagerness for change. There were protests about wearing masks and an armed march to storm the United States Capitol. 2020 activated large segments of the population. More and more people found their voices and are using that voice to express their views.

While it is routine to perform social media and web searches (*i.e.*, "Googling") to explore a prospective juror's social media footprint, it is more important than ever in light of the growing level of activism on social media. Pew researchers found that civic engagement on social media has increased, likely exacerbated by social distancing and isolation, forcing people to increase their screen time.<sup>5</sup>

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## Roughly half of Americans have been civically active on social media in the past year

*% of U.S. adults who say they have done the following activities on social media in the past year*



Note: Respondents who gave other responses or did not give an answer are not shown.  
Source: Survey of U.S. adults conducted May 29-June 11, 2018.  
"Activism in the Social Media Age"

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Researchers at The Pew Research Center also found that in a one-month period, over one-third of social media users have used these platforms to express support for causes or to find and encourage activities in support of causes.<sup>6</sup> They found that Black and Hispanic users, those younger than thirty, and Democrats tend to be the most engaged. Pew notes that "There have also been double-digit increases among younger users when it comes to getting involved with political or social issues and having a venue to express their opinions."<sup>7</sup>

These findings related to young people are particularly noteworthy from a jury selection standpoint for two reasons. First, a juror's age no longer reflects the level of opinions and engagement (or leadership) of a juror. More and more young jurors are landing the role of foreperson. Second, these jurors may be particularly ripe for plaintiffs' lawyer Reptilian arguments about safety, rule following and general efforts to call jurors to action in their cases. Regardless of age, both the content and level of engagement in activism offer great insights into prospective jurors in the jury selection process.

### Wrap Up

Although we are emerging from the COVID pandemic, conversations about racial injustice are likely continue for some time. These provide opportunities to uncover the strong opinions people developed about COVID-19 and the racial reckoning that continues, to learn more about potential jurors than ever before. There are numerous, meaningful opportunities to tailor questions to understand attitudes, values, and ideals of potential jurors that are not superficial, but dig deeper into their moral and ideological belief systems as well as the level of engagement on these issues.

These are new opportunities for trial lawyers that we leverage to ensure our clients receive a trial by a fair and impartial jury, or perhaps a favorable one.

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<sup>1</sup> Karly King, a second year law student at the West Virginia University College of Law, contributed to the research and preparation of this article.

<sup>2</sup> See Nolan McCaskill, *'A Seismic Quake': Floyd Killing Transforms View on Race*, Politico (June 10, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> Anderson, M. Barthel, M, Perrin, A, and Vogels, E., *#BlackLivesMatter surges on Twitter after George Floyd's death*, Pew Research Center (June 10, 2020).

<sup>5</sup> Anderson, M, Toor, S, Rainie, L, and Smith, A., *Activism in the Social Media Age*, Pew Research Center (July 11, 2018).

<sup>6</sup> Auxier, B., *Activism on social media varies by race and ethnicity, age, political party*, Pew Research Center (July 13, 2020).

<sup>7</sup> *Id.*