

**TRYING THE COVERAGE/BAD FAITH CASE TO  
THE GENERATION X AND GENERATION Y JURY**

**20<sup>TH</sup> ANNUAL INSURANCE SYMPOSIUM**

**APRIL 5, 2013**

**DALLAS, TEXAS**

**R. BRENT COOPER  
COOPER & SCULLY, P.C.  
900 JACKSON STREET  
SUITE 100  
DALLAS, TX 75202  
T – 214-712-9501  
F – 214-712-9540**

**EMAIL: BRENT.COOPER@COOPERSULLY.COM**

## Table of Contents

	Page
I. Introduction.....	1
II. Who Are the Generation X and Generation Y? .....	1
III. What Are Their Characteristics?.....	2
A. Me Generations.....	2
B. Tolerance .....	2
C. Sense Of Entitlement.....	2
D. Confidence.....	2
E. Delay .....	3
F. Religion And Meaningful Philosophy Of Life .....	3
G. Wealth .....	3
H. Politics.....	3
I. Competitiveness .....	3
J. Technology .....	4
K. Miscellaneous.....	4
L. Education.....	5
IV. What Motivates Them?.....	5
V. What Messages Will Resonate With Them? .....	6
A. Generation X Jurors .....	6
B. Generation Y Jurors .....	8
C. Application To Coverage/Bad Faith Cases.....	10
VI. What Is The Medium To Deliver The Message.....	12

## **I. Introduction**

It has been said that as the juries change the lawyers must change with them. The lawyers must change not only in their message, but in the medium that they deliver their message. This has been especially true in the last 10-15 years. Our juries are changing more quickly than we can adapt. Moreover, with the changing of the juries, both the message and the medium have likewise been altered. For the next twenty to thirty years, coverage and bad faith cases will be tried primarily to Generation X and Generation Y (or Millennial) juries. This paper will focus on

- Who they are,
- What are their characteristics?
- What motivates them?
- What messages will resonate with them, and
- What is the medium to deliver the message?

## **II. Who Are the Generation X and Generation Y?**

The first question that must be addressed is who are they? We must first learn to identify them in order to understand their characteristics and what motivates them. The following is a list or breakdown of generations of the last century by demographers. It is generally accepted though some demographers use slightly different names and slightly different years:

- 2000/2001-Present - New Silent Generation or Generation Z
- 1980-2000 - Millennials or Generation Y
- 1965-1979 - Generation X
- 1946-1964 - Baby Boom
- 1928-1945 Silent Generation
- before 1928 - Greatest Generation

From the date listings, one can see that the G.I. Generation (or Greatest Generation according to Tom Brokaw) are advanced in years and generally exempt from jury service in most states. The Silent Generation will have a few years left but most have reached the age where they, too are exempt from jury service. The Baby Boomers are still on juries, but in diminishing numbers. They, too will start becoming exempt from jury service and will diminish in numbers in the venire panel. Over the next 20 years, it will be the Generation X and Generation Y who will comprise the largest segment of our juries. They will be the audience. They will be the ones meting out “justice” in the near future.

The term "Generation X" was coined by the Magnum photographer Robert Capa in the early 1950s. Originally, it was used as a title for a photo-essay about young men and women growing up immediately after the Second World War. The project first appeared in "Picture Post" (UK) and "Holiday" (US) in 1953. Describing his intention, Capa said 'We named this unknown generation, The Generation X, and even in our first enthusiasm we realised that we had something far bigger than our talents and pockets could cope with. GenXegesis: essays on alternative youth (sub)culture By John McAllister Ulrich, Andrea L. Harris p. 5.

The term gained its current meaning from Canadian author Douglas Coupland's 1991 novel, Generation X: Tales for an Accelerated Culture, concerning young adults during the late 1980s and their lifestyles. Coupland described in a radio interview Generation X as the last child born to the large families that grew directly out of the Second World War. Coupland in a 1989 magazine article erroneously attributed the term to English musician Billy Idol. Coupland, Doug. "Generation X." Vista, 1989 In fact, Idol had been a member of the punk band Generation X from 1976–1981, which was named after Deverson and Hamblett's 1965 sociology book Generation X—a copy of which was owned by Idol's mother.

The phrase Generation Y owes its existence to the advertising industry. The term first appeared

in an August 1993 Ad Age editorial to describe teenagers of the day, which they described as different from Generation X. Francese, Peter (2003-09-01). "Trend Ticker: Ahead of the Next Wave". AdvertisingAge. Retrieved 2011-03-31. "Today's 21-year-olds, who were born in 1983 and are part of the leading edge of Generation Y, are among the most-studied group of young adults ever." Ad Age defined the group as those aged 12 or younger at that time as well as those teenagers for the upcoming 10 years. The term Millennials is credited to authors William Strauss and Neil Howe who wrote about the Millennials in *Generations: The History of America's Future, 1584 to 2069*. This work was written in 1991. They devoted an entire book to this generation in 2000 when they released *Millennials Rising: The Next Great Generation*. In their work they use 1982 as the starting year and 2004 as the last year.

Clearly there is no exact cut off for one generation and the start of another. For the purposes of this paper we will refer to Generation X as running from 1965-1979. We will refer to Generation Y as starting in 1980 and running to 2000.

### **III. What Are Their Characteristics?**

The traits and characteristics of Generation X and Generation Y is a stereotype. It does not or cannot apply to each person. But, with many stereotypes, it applies to many. The stereotypes attributable to certain types of occupations or generations generally are there for a reason. For example, the stereotype for those in the engineering occupation are that they analytical, conservative and typically make good defense jurors in civil cases. This stereotype was not born out of thin air, but out of years and years of sampling and observation. Those who have employment by the church are generally described as willing to forgive and wanting to help where possible. As a general rule, they are good for plaintiffs in civil cases and not good for defendants. The discussion of the traits and characteristics of Generation X and Generation Y are from studies and observations of these individuals, as students, workers, jurors, etc.

While they do not apply to everyone, these traits must be kept in mind when selecting a juror where the attorneys do not have the luxury of detailed interviews or analysis of each juror.

#### **A. Me Generations**

Jean Twenge, the author of the 2006 book *Generation Me*, considers Millennials along with younger Gen Xers to be part of a generation called Generation Me. Twenge, Ph.D., Jean (2006). *Generation Me*. New York, NY: Free Press (Simon & Schuster). This is based on personality surveys that showed increasing narcissism among Millennials compared to preceding generations when they were teens and in their twenties. She questions the predictions of Strauss & Howe that this generation will come out civic-minded. She cites in support of her thesis the fact that when the War on Iraq began military enlistments went down instead. William Strauss, Neil Howe (2000). *Millennials Rising: The Next Great Generation*. New York, NY: Vintage. pp. 213–237.

#### **B. Tolerance**

Twenge attributes an attitude of tolerance toward the Millennials. They are non-judgmental. Why not—we can have it all and everyone should be able to have it all. Generation X has a lower threshold for tolerance as a result of a more realistic view of the world.

#### **C. Sense Of Entitlement**

Twenge attributes a sense of entitlement to the Millennials. Whereas Generation X tended to be more independent growing up (Latchkey Kids), the opposite is true of Generation Y. They tended to be more sheltered by their parents without attending responsibility. As a result, Generation Y has developed a sense of entitlement. Things have always been there for them. Somehow, someday, it should all work out. They are entitled to have it all work out.

#### **D. Confidence**

Generation Y believe it should all work out in the end. They are entitled to it. With this attitude

they have a confidence that was not seen in the Baby Boomers nor the Generation X. Generation X tends to be more reality driven.

**E. Delay**

With Generation Y, we have seen a tremendous delay in moving forward with the typical stages of life. They are entering the work force later in life, getting married later in life and having children much later in life than the Gen-X'ers and especially the Boomers. There was some delay with the Gen-X'ers but not nearly the extent of the delay with Generation Y.

**F. Religion And Meaningful Philosophy Of Life**

"Developing a meaningful philosophy of life" decreased the most, across generations, from 73% for Boomers to 45% for Millennials. This is evident in participation in organized religion which has dropped from the Baby Boomers to the Generation X to the Generation Y. In the United States, members of Generation Y are less likely to practice organized religion than older generations, and they are more likely to be skeptical of religious institutions. Gibbs, Nancy (2010-03-11). "How Millennials Perceive a New Generation Gap". TIME. Generation Y has led a trend towards irreligion that has been growing since the 1990s. 32 percent of Americans born between 1983 and 1994 are irreligious, as opposed to 21 percent born between 1963 and 1982, 15 percent born between 1948 and 1962 and only 7 percent born before 1948. A 2005 study looked at 1,385 people aged 18 to 25 and found that more than half of those in the study said that they pray regularly before a meal. One-third said that they discussed religion with friends, attended religious services, and read religious material weekly. 23% of those studied did not identify themselves as religious practitioners. Generation Y embraces choice, redefines religion". Washington Times. 2005-04-12 This lack of involvement extends beyond just religion. For example, "[b]ecoming involved in programs to clean up the environment" dropped from 33% for Boomers to 21% for Millennials. Healy, Michelle (2012-03-15).

"Millennials might not be so special after all, study finds". USA Today. We will see later on that the same holds true for political participation.

**G. Wealth**

Surveys by the University of Michigan's Monitoring the Future study of high school seniors (conducted continuously since 1975) and the American Freshman survey, conducted by UCLA's Higher Education Research Institute of entering college students since 1966 showed the proportion of students who said being wealthy was very important to them increased from 45% for Baby Boomers (surveyed between 1966 and 1982) to 70% for Gen X and 75% for Millennials.

**H. Politics**

Surveys by the University of Michigan's Monitoring the Future study of high school seniors (conducted continuously since 1975) and the American Freshman survey, conducted by UCLA's Higher Education Research Institute of entering college students since 1966 showed the proportion of students who said it was important to keep up to date with political affairs fell, from 50% for Boomers to 39% for Gen X and 35% for Millennials

**I. Competitiveness**

Numerous commentators have raised issues about the competitiveness of the Millennials. In 2008 author Ron Alsop called Millennials "Trophy Kids," a term that reflects the trend in competitive sports, as well as many other aspects of life, where mere participation is frequently enough for a reward. It has been reported that this is an issue in corporate environments. Alsop, Ron (October 13, 2008). The Trophy Kids Grow Up: How the Millennial Generation is Shaking Up the Workplace. Jossey-Bass. Some employers are concerned that Millennials have too great expectations from the workplace. Alsop, Ron (2008-10-21). "The Trophy Kids Go to Work". The Wall Street Journal. Studies predict that Generation Y will switch jobs frequently, holding far more than

Generation X due to their great expectations. Kunreuther, Frances; Kim, Helen & Rodriguez, Robby (2009). Working Across Generations, San Francisco, CA The problem with competitiveness is not so great with Generation X though they are less competitive than the Baby Boomers.

**J. Technology**

One of the most important characteristics of Generation X and Generation Y is their use and reliance on technology. In their 2007 book, authors Junco and Mastrodicasa published their research-based information about the personality profiles of Millennials, especially as it relates to higher education. They conducted a large-sample (7,705) research study of college students. They found that Next Generation college students, born between 1983–1992, were frequently in touch with their parents and they used technology at higher rates than people from other generations. In their survey, they found that 97% of these students owned a computer, 94% owned a cell phone, and 56% owned an MP3 player. Junco, Reynol; Mastrodicasa, Jeanna (2007). Connecting to the Net.Generation: What Higher Education Professionals Need to Know About Today's Students. National Association of Student Personnel Administrators. Their survey found that students spoke with their parents an average of 1.5 times a day about a wide range of topics. Other findings in the Junco and Mastrodicasa survey revealed 76% of students used instant messaging, 92% of those reported multitasking while instant messaging, 40% of them used television to get most of their news, and 34% of students surveyed used the Internet as their primary news source.

Gen Xers and Millennials were the first to grow up with computers in their homes. In a 1999 speech at the New York Institute of Technology, Microsoft Chairman and CEO Bill Gates encouraged America's teachers to use technology to serve the needs of the first generation of kids to grow up with the Internet. "The Challenge and Promise of "Generation I"" (Press release). Microsoft. 28 October 1999.

<http://www.microsoft.com/presspass/features/1999/10-28geni.msp> Many Millennials enjoyed a 250+-channel home cable TV universe. In June 2009, Nielsen released the report, "How Teens Use Media" which discussed the latest data on media usage by generation. In this report, Nielsen set out to redefine the dialogue around media usage by the youngest of Generation Y, extending through working age Generation Y and compared to Generation X and Baby Boomers. Nielsen. "How Teens Use Media - A Nielsen report on the myths and realities of teen media trends (2009)" One of the more popular forms of media use in Generation Y is social networking. In 2010, research was published in the Elon Journal of Undergraduate Research which claimed to demonstrate that students who used social media and decided to quit showed the same withdrawal symptoms of a drug addict who quit their stimulant. Cabral, J. (2010). Is Generation Y Addicted to Social Media. The Elon Journal of Undergraduate Research in Communication, 2(1), 5-13. Mark Prensky coined the term "digital native" to describe Generation Y "K through college" students in 2001, explaining they "represent the first generations to grow up with this new technology."

**K. Miscellaneous**

One paper has attempted to study the traits and characteristics of Generation X and Generation Y. It listed the characteristics of Generation X as follows:

- Eclectic
- Resourceful
- Self-reliant
- Distrustful of institutions
- highly adaptive to change & technology
- Slogan: "Work to Life"

It listed the characteristics of Generation Y as follows:

- Globally concerned
- Realistic

- Cyber-savvy
- Suffer “ADD”
- Remote control kids
- Slogan: “It’s all about me”

Cathy A. Trower, Ph.D. “Traditionalists, Boomers, Xers, and Millennials: Giving and Getting the mentoring You Want” 2009, Brown University

#### **L. Education**

It was predicted early on that Millennials would likely be the most educated generation in history (Howe and Strauss, 2000). This has not entirely come to pass. While Millennials are entering college in record numbers (more than 50%), they are doing so with a lower level of the general knowledge previous generations possessed (Deal, Altman and Rogelberg, 2010). There are questions as to what educational levels they will ultimately achieve as well as a sense that, even with college degrees, Millennials enter the workforce with 'holes' in their knowledge base.

Currently, female Millennials are achieving more educationally than males—perpetuating a trend that first began with Generation X (Pew Research, 2010). Millennials also seem to have a 'looser' definition of what constitutes 'cheating' than previous generations. They see standards for what constitutes cheating on tests as more stringent than those for homework or written papers (Science Daily, 2010)

#### **IV. What Motivates Them?**

One of the most pressing matters that has been facing employers is what motivates Gen-X'ers and Gen-Y'ers? In presenting a case, it is critical for the lawyers to know what are the pressure points of their jurors—what will motivate them? What will cause them to react? One author, addressing motivating Generation X and Generation Y employees, posited the following:

##### **Motivating Gen Xers**

- Room to grow. Offer Gen X employees clear statements of goals, but allow them reasonable latitude on how to achieve those goals. Build on their interest in gaining new skills and knowledge by providing opportunities to grow on the job. Gen Xers tend to have a "work hard, play hard" mentality.
- Opportunities to make choices. Since this generation has become accustomed to "fending for themselves," provide options—options for task selection, options for challenges, options to formulate new processes, and options to develop creative yet appropriate conclusions. You also want to allow them the freedom to use their own resourcefulness and creativity to achieve success.
- Mentoring. Strong, relationship-oriented mentorships are a great value for young employees. Be careful not to micro-manage them or suggest rigid guidelines for completing projects. Spend time with them and offer clear and frequent feedback on their progress.

##### **Motivating Gen Yers**

- Multitasking. Provide more than one task to accomplish at a time, but without overwhelming them. They are accustomed to multitasking and can most likely sort out what has to be done and when. What's more, they look forward to the challenges of having several tasks to perform at once.
- Collaboration. Create work teams or partners to work with, where appropriate. They are accustomed to working in tandem with others.
- Structure. Provide structure and clear guidelines, and at times, specific processes or approaches for achieving goals. While they appear confident, they still need input from management.

- Technology. Encourage and allow them to use the latest technology in the work setting.
- Challenges. Positively challenge their interests, abilities and achievements.
- Relationship building. Create a bonding relationship with them so that they feel comfortable asking for input and direction and know they can rely on you as the authority figure when the need arises.
- Positive reinforcement. Reward them frequently with positive feedback and citations for successful accomplishments and milestones on the road to longer-term achievements.
- Engaged leadership. Set up specific and regular times to meet with and supervise them. Demonstrate your sincere interest in their professional growth and success.
- Communication. Understand that they prefer using electronic means to communicate with you as opposed to face-to-face meetings. This generation is far more fluent and comfortable with technology than any other group.

Dr. David G. Javitch, *Motivating Gen X, gen Y Workers*, May 10, 2010: <http://www.entrepreneur.com/article/206502#ixzz2P9j1Y1Pv>

## V. What Messages Will Resonate With Them?

### A. Generation X Jurors

One of the first issues that must be kept in mind when presenting a case to a Generation X juror are the defining moments in their lives. These are the events that changed their lives and events they will remember forever. For the Generation X jurors the defining events are the social changes: Divorce, latchkey kids, increased violence in society and 9/11. Any reference to the events will resonate with this generation.

As to the presentation and messages to Gen Xers in general, one trial consultant recommends the following:

Make the trial visual (colored charts, graphs, photos, cartoons, computer simulations, CD-ROM slide shows, music, narration and videotaped demonstrations).

Gen Xers are visual learners. These aids will help you capture and keep their attention by accessing multiple sensory organs and allowing interactive learning. Keep the videos short and, if appropriate, with some entertainment value. Use real life examples, but try to make them relate to the pop culture of Xers and other jurors.

Stay concrete and practical. Be "cool" but not "slick"

Gen Xers may be more captivated by image and style than generations before them, but they are also very savvy. They want an honest, straight-forward approach not embellished by 'spin'. Gen Xers are masters at seeing through deceptive communication. If you are trying to deceive them, they will tend to know that and they won't like it and they won't like your client.

Focus on issues of what is 'right' and what is 'wrong'

What society defines as 'right' and 'wrong' has little import for many Gen X jurors – use a subjective rationale for defining 'right' and 'wrong' from your client's point of view. If a Gen X juror is shown why a crime is 'wrong' and why it deserves punishment, s/he may be 'tough on crime'.

Consider case narratives focusing on relationships, family and friends

Gen Xers valued friendships and connection when they were young and have maintained that focus into middle



age. When there are legitimate themes of relationships and connection, use them. But don't stretch the evidence to make them fit. Gen Xers cynicism and wariness will kick in and they will see you as attempting to manipulate.

Understand the impact of growing up digital

Gen Xers were the early adopters of digital tools, and many (if not most) have been emailing and text editing since they were in school. They understand it. And they understand the limits of the tools. 'Smoking gun' emails and text messages from one young manager to another are less likely to gain traction with these people, because they understand the sorts of impulsive wisecracks and unfounded theories they themselves (along with their peers) have shared from time to time.

Build Connections: Make witnesses and parties 'like' the jurors

If you don't have themes that resonate with connection and friendship, you can still make your client and any important witnesses 'like' the jurors. Whether jurors are Gen Xers or not, we all respond to core values and beliefs. The connection may simply be stronger with Gen Xers. Emphasize your client's connections, relationships, community involvement, volunteer work and so on. The goal is to humanize your client and help jurors see how s/he is 'like' them.

Review jury instructions and questions, and explain what they mean and how to complete them accurately

This is important for Gen Xers but also for any other generation. The courtroom is a strange and often confusing environment. Explaining the jury charge and how to complete them accurately gives jurors focus and

clarity on the questions before them. While you're at it, you may also want to teach them how to deliberate. The more they understand, the more predictable the process of deliberations.

Consider how to use 'balance'

Balance is something Gen Xers have worked for since they were young adults. They watched their Boomer parents having jobs but no life and vowed they would somehow have both – and make room for children too by planning for them in their lives. There are times when one's personal life can negatively affect the professional life. If your client has done 'bad things' but part of the reason was a desire for work/life balance – you might propose that while still taking responsibility for the bad acts. The goal is to make the bad acts due to situations rather than bad character.

Demonstrate the 'meaning' in your case, and how it personally affects the GenX juror

Focus on the outcome, what happens is very important to Gen Xers. Gen Xers search for meaning and for being able to make a difference on an individual level. They want their participation to have practical benefits or it loses purpose.<sup>3</sup> Gen Xers will invest if they are personally affected by a problem. An issue that 'benefits me' or 'relates to me' is often a precursor to action. Remember, Gen Xers act locally. You want them to see their actions will make a difference.

Be aware of the "mean world syndrome"

Use this phenomenon to bolster your case (i.e., by reinforcing that the world is unsafe and juror decisions can 'right that wrong'). A variety of studies show that people who watch relatively large

amounts of television are more likely than others to see the world as dangerous, violent and crime-ridden. Television, according to the 'mean world syndrome' theory, distorts the way people view the condition of the society around them. Gen Xers have probably viewed more television than most of us, and are likely in possession of 'mean world syndrome' beliefs.

Move around and vary your position and speech style

Gen Xers are used to the changes inherent in multimedia presentations. Even standing and talking for 10 minutes is a very long time. Break up your presentation with visual aids and other activities. If the court permits, unshackle yourself from the podium. If the court doesn't permit that, move from one side of the podium to the other, use postural changes and gestures, and avoid appearing wooden. Find ways to let jurors interact with the information.<sup>51</sup>

Highlight digitized material or short bits of information that outline key points or concepts

Gen Xers are multimedia connoisseurs who like scanning and surfing through information. Highlight what is important for them to remember. Keep the information highlighted relevant to your case narrative and be sure it is consistent with the facts you are presenting. Gen Xers will notice inconsistencies and be suspicious.

It is very common in mock trials for jurors to focus on non-highlighted materials around the place we want them looking. They discuss what they read in the deliberation room! And often, if they believe the information that was not highlighted casts a different light on what was highlighted – you lose credibility. Be careful. Be

honest. Or, to borrow a phrase, "don't be evil".

Douglas L. Keen, Ph.D and Rita R Handrich, Ph.D, Generation X members are “active, balanced and happy.” Seriously?, [www.thejuryexpert.com/2011/11/gen-x-members](http://www.thejuryexpert.com/2011/11/gen-x-members) -are-active-balanced-and-happy/

## **B. Generation Y Jurors**

What are the defining moments for Generation Y? or the Millennials? They would include terrorist attacks on US soil, 9/11; the Iraq War, the Dot-com bust and corporate corruption like Enron. These are events that changes their lives and are indelibly ingrained in their memories. One trial consultant recommends the following generally when trying cases to a Generation Y jury:

### **1. Challenge your assumptions and beliefs.**

a. Millennials are not necessarily narcissistic or uninterested in people. They care about making a difference. Don't write them off as jurors when your case is about how others have been harmed (whether through injury, contract breach, patent infringement, or corporate malfeasance).

b. If you connect with a Millennial juror—who typically feels disrespected by authority—you have a vocal and determined advocate in the jury room.

c. Not all Millennials are internet wizards. And while Hispanic Millennials lag behind on internet use—they aren't the only ones! Do not assume competence with all things technology.

d. Tattoos and hair colors not found in nature are signs neither of loose morality nor intellectual failings. Think of them as the bell-bottoms and long hair of the 2000's. They are simply a form of self-expression.

## 2. Case Themes

a. Millennials led very structured and protected early lives. Themes of how investors/plaintiffs/trainees were not protected, trained or supported may resonate with them. Betrayal of trust is a serious violation. The trial theme trifecta of T-L-C (training, leadership and communication) can be especially powerful.

b. Connection is important to the Millennials. They value family, friends and coworkers. Case themes that speak to the value of relational connection will likely resonate with them as well.

c. Tolerance is a strong suit of many of the Millennials. When your case benefits from tolerance of differences—Millennials may be a good bet.

d. Millennials want 'fulfilling work', not merely a job. They want to 'make a difference'. Themes of 'meaning', 'righting wrongs' and 'fairness' will resonate with them. They are idealists.

e. Millennials are much more concerned about privacy than we think. Case themes that emphasize privacy violations will resonate with many of them.

## 3. Considerations for pretrial research and voir dire

a. Liberality: Millennials are politically and socially more liberal than previous generations. This is true even among personally conservative people. Consider how this may (or may not) mesh with your story.

i. Consider the odd correlation between tattoos and liberality and political affiliation. If you know what orientation is better for your case and have limited voir dire—tattoos may be a good "Millennial demographic" for you to consider.

b. Religiosity: Millennials are less religiously affiliated than previous generations were at the same age with one-quarter variously describing themselves as atheist, agnostic, or 'nothing in particular'. This may have implications for your case as well although it is important to bear in mind that Millennials religious affiliation may modify with age.

c. Connecting the dots: Millennials are good at connecting the dots in testimony but not so good at identifying source validity. Help them learn how to determine which source is likely more trustworthy through effective presentation of expert witnesses.

d. Corporate defendants: Millennials are not much different than prior generations in their attitudes toward business but they have a different (more nuanced, less black and white) attitude toward cheating. They may require a higher standard of proof to find a corporate defendant guilty of wrongful behavior.

e. Tolerance: Millennials are more racially diverse and more tolerant than previous generations. When "differentness" (religious, racial, ethnic origin, immigrant status, or language spoken) plays a role in your case, the Millennials may serve as the voice of tolerance in deliberations.

f. 1/3 of all incoming college freshman have blogs. While this is a useful tool for juror research (in terms of identifying attitudes and life experiences), it is also a potential threat to trial confidentiality. Find out who has a blog and monitor them before, during, and perhaps even after trial.

**4. Case presentation:**

- a. Multimedia: Millennials are used to multi-tasking and want a variety of sensory input. Do not lecture. Use graphic evidence. Be succinct. Be amusing. Incorporate video, graphics, and physical evidence. Keep them engaged.
- b. Remind them about the rules (and explain why the rules are important): Millennials want to do the right thing but their smart-phones are virtual appendages. They are so used to checking facts and learning more via the internet that they will do it without a second thought. They text as they breathe: automatically. Educate, repeat. Educate, repeat. And then, do it again.

Douglas L Keene, Ph.D. and Rita Handrich Ph.D., Tattoos, Tolerance, Technology and TMI: Welcome to the Land of the Millennials (aka Generation Y) July 1, 2010,

**C. Application To Coverage/Bad Faith Cases**

The foregoing have involved a lot of generalities. In some way that begs the question. The real issue is how does a lawyer representing an insured or insurer try a coverage/bad faith case to a Gen X/Gen Y jury. How is it practically done? For the purposes of this discussion, the analysis will be broken down into two parts. Part 1 will address techniques when the lawyer is representing the insured. Part 2 will address techniques when the lawyer is representing the insurer.

**1. *Representing the Insured***

If you are representing an insured in coverage/bad faith litigation, there are several strategies that can be employed to appeal to the Generation X/Generation Y juror.

- a) **Appeal to right and wrong** -- Gen X'ers and Gen Y'ers have a deep seated sense of right and wrong. Those

representing insureds must tap into these inherent feelings. These themes include the insurer honoring its obligation, living up to the bargain. This is especially appealing where the coverage position taken by the insurer results in illusory coverage. The lawyer must tap into the basic inequities in such a situation. The insurer sold a product. They took money for the premium. Only under their view of coverage, there is possibility of a claim. The Gen X/Gen Y jurors will respond strongly to this type of argument.

**b) Workload of adjuster** -- Gen X/Gen Y'ers are very big into quality of life. The quality of life is more important than the job itself. One point of attack that is appealing is to develop a case showing that the adjuster has a certain number of cases and that it is impossible to respond to each of those cases even once a month. This approach makes the adjuster the victim of the failure of the insurance company to hire enough staff to adequately address all of the claims being made against the company. The adjusters work load can be contrasted with the work load of upper management in order to attempt to show that one set of rules applies to the lower level employees and another set of rules applies to upper management.

**c) On-line policies and procedures** -- Gen X and Gen Y jurors have a difficult time accepting that companies have a set of policies and procedures but do not follow them. Technology can be brought into the equation by showing that the policies and procedures were on line and could be accessed at the hitting of a button. Despite the fact the policies and procedures are on line and despite the fact that they can be access by pushing

a button, the adjuster failed to access them. The technology was there to make this information available to the adjuster and the adjuster failed to utilize the technology.

**d) Analogies with tech** -- to the extent that the insured can analogize insurance principles and procedures to technology, it will help the jurors comprehend what is involved and to embrace and adopt the principle or procedure that the lawyer is attempting to get across.

**e) Compliance with insurance code and regulations** -- in many cases, the insured will be suing for the failure of the insurer to comply with applicable state insurance code and regulations. Many times the answer from the adjuster will take the position that he or she was unaware of the provision. Almost every state has their insurance codes and regulation on line. It is effective to show how easy it is using technology to access this information and whether the adjuster even tried to access this information.

**f) Applying different standards** -- in many cases where there has been an excess liability verdict, suit will be filed by the insured against the insurer for the excess amount. Gen X/Gen Y'ers have a huge sense of equality and sense of fair play. An effective tactic to tap into this sense of fairness is to show what rates and fees were paid to defend their insured versus what rates and fees were paid to defend the company in the coverage/bad faith suit. Usually the standards are much more relaxed and higher rates are paid to attorneys to represent the company when it is being sued. The lack of equality and fairness touches a nerve in the Gen X/Gen Y juror.

**g) Contrary coverage positions** -- Technology has made the world much smaller. Used to be an insurer could take one coverage position in one state and a totally different one in another state and no one would know. This is no longer true. With technology, if the insurer has taken a contrary position or has paid a similar claim, it is much easier to find this information. The argument that the insurer is taking inconsistent coverage positions is especially appealing to the sense of honesty possessed by the Gen X and Gen Y jurors.

**2) Representing the Insurer** -- If you are representing an insurer, likewise there are several strategies that can be used to appeal to the Gen X/Gen Y jurors. Some of the strategies are the same, but with a different spin. The others are totally different.

**a) Appeal to right and wrong** -- this strategy applies also to the insurer. If the insured is attempting to get something they did not purchase, this will offend the basic sense of fairness of the Gen X/Gen Y jurors. The argument is that the parties made a bargain, they put their bargain in writing, the insurer is willing to live up to that bargain but the insured is not willing to live up to the bargain. They want to renegotiate to a bargain that was never agreed to.

**b) Availability of documents** -- many times an insurer will ask for documents to make its claims decision only to have the insured fail to respond or respond in an inadequate fashion. Then after suit is filed, the insured will finally come up with the necessary documentation. Technology can be merged into this inquiry by showing how simple it would have been on the insured's own computer system to have generated the information and the issue then is why the insured did not produce the information is it was so

easy to produce. This can be argued similar to a spoliation instruction. The insured had the information all along but failed to produce it because it would show the lack of a claim.

**c) Other coverage available** -- another argument that strikes a nerve with the Gen X and Gen Y'ers is the availability of the coverage sought. In many circumstances the insured will sue for a claim that is not covered but would have been covered under a particular coverage, had it been purchased. When combined with technology the insurer can show that information about this coverage was readily available on the internet but that the insured simply chose not to purchase it. This argument strikes at the Gen X/Gen Y'ers sense of fairness and can be a devastating argument.

**d) Analogies with tech** -- to the extent that the insurer can analogize insurance principles and procedures to technology, it will help the jurors comprehend what is involved and to embrace and adopt the principle or procedure that the lawyer is attempting to get across.

**e) Condensation of the coverage argument** -- too often the coverage argument is somewhat difficult because it requires that the reader go back and forth in the insurance policy. They must go from the insuring agreement to the exclusions back to the definition section of the policy in order for the coverage argument to be constructed. This is an opportunity to do several things at one time. The insurer can use a multi-media presentation that will gather the interest of the Millennials as well as help the Millennials connect the dots. Millennials sometimes have difficulty connecting the dots validating the source of the arguments and this

exercise will provide them with the validity they need.

**f) Insured did not read policy** -- one of the more common defenses of insureds is that they did not read the policy and did not know what it said. They were unaware of the coverage. There are several ways to counter this. First on the Web there are numerous sources that will describe what is being covered by the standard policies and with the insured on the stand, the insurer's lawyer can use technology to demonstrate how easy it would have been to have found these sites. Second, if the issue involves a keyword that bears on coverage, it is relatively easy to obtain searchable policies and a search can be done to pull up the key word and show that it is clearly not covered.

**g) Levels of sophistication** -- in many cases there will an argument about the different levels of sophistication. The insurer has all of the knowledge and the insured has none and the insured is at the mercy of the insurer. The Web has leveled the playing field regarding information availability. The Gen X'ers and Gen Y'ers on the jury know this. They have been using the Web to level the playing field on the levels of knowledge and sophistication all of their lives. To be able to show what is available through a simple search will resonate with these jurors.

## **VI. What Is The Medium To Deliver The Message**

In his iconic 1964 book, *Understanding Media: The Extensions of Man*, Marshall McLuhan stated that "the medium is the message." This statement has had application through all generations. However, it has particular application to Generation X and especially Generation Y. In their minds, the medium is the message. In a Pulitzer finalist book, *The Shallows: What the Internet is doing*

to Our Brains, Nicholas Carr attempts to quantify what the internet has done to the way in which Gen X'ers and Gen Y'ers receive and process information.

Carr provides anecdotal evidence of how the minds of the Gen X'ers and Gen Y'ers have changed. He gives three examples:

Bruce Friedman, who blogs about the use of computers in medicine, has also described how the internet is altering his mental habits. 'I now have almost lost the ability to read and absorb a longish article on the web or in print,' he says....

Philip Davis, a doctoral student in communication at Cornell who contributes to the Society for Scholarly Publishing's blog, recalls a time back in the 1990's when he showed a friend how to use a Web browser. He says he was "astonished" and "even irritated" when the woman paused to read the text on the sites she stumbled upon. 'You're not supposed to read web pages, just click on the hypertexted words!' he scolded her. Now, Davis writes, 'I read a lot—or at least I should be reading a lot—only I don't. I skim. I scroll. I have very little patience for long, drawn-out, nuanced arguments, even though I accuse others of painting the world too simply.'...

For some people, the very idea of reading a book has come to seem old-fashioned, maybe even a little silly—like sewing your own shirts or butchering your own meat. "I don't read books," says Joe O'Shea, a former president of the student body at Florida State University and a 2008 recipient of a Rhodes Scholarship. "I go to Google, and I can absorb relevant information quickly." O'Shea, a philosophy major, doesn't see any reason to plow through chapters of text when it takes but a minute or two to cherry-pick the pertinent passages using Google Book Search. "Sitting down and going through a book from cover to cover doesn't make sense." He says. "It's not a good use of my time, as I can get all the information I need faster through the Web." As soon as you learn to be "a skilled hunter" online, he argues, books become superfluous.

Carr claims that the manner in which Generation X and Y receive and process information is different from the Boomers and the Greatest Generation. They have been brought up with the Web. They only see information in finite bits. They believe the extraneous can and should be filtered out. Books with story lines, character development and foundations are a thing of the past.

Carr was not the first to notice this and put it to use. One of the first to recognize this concept and implement on a wide basis was USA Today. Peter Prichard in *The Making of McPaper: The Inside Story of How USA Today Made It*, talks about the changes made by the founders of USA Today. All articles were on the same page. There were no carry-overs. There was extensive use of charts and graphs. Factoids were made popular by this paper. All other papers scoffed and said that it would not work. The New York Times ridiculed the format. However, since the founding of USA Today, its circulation has grown and the circulation of the New York Times continues to fall.

The presentation of evidence in a trial to Gen X'ers and Gen Y'ers is as much or more about the medium as it is about the message. The way they absorb information and process it is different from prior generation.

1. Multi-tasking-Gen X and Gen Y are multi-taskers. Standing still and talking to them for 10 minutes may seem like an eternity to them. Break up your visual presentation and don't keep doing the same thing
2. Change in your presentation-do not be static. Move around. Walk around the courtroom if permitted. Their attention span is limited and movement will keep their interest peaked.
3. Multi-media-Gen X and Gen Y'ers are multimedia connoisseurs. That is how they receive most of their information. Your opening and closing should be very visual. The presentation of evidence should also be very visual with charts and graphs that succinctly summarize what you are trying to prove.

4. If possible, use technology to generate your evidence. Use technology to compress your arguments and put them in a simple, visual form.

5. Keep your presentation precise. Narrow it down to the essentials. The days of witnesses being on the stand 2-3 days are gone. There is a window in which you must make your point and if you do not make it within that window, you will lose your jury.

6. Find ways to let the jury interact with the information. Allow them to hold it and peruse it.

7. Highlight the relevant information. Aid or assist the jury by highlighting the relevant information. However, be honest in your highlighting. Mock jurors from the generations will look at the evidence surrounding to see if you are being honest.

8. Be self-effacing. These two generations are naturally skeptics.

They are skeptical of everything, including you. Do not take yourself too seriously. Be open and honest and straightforward.

9. Be selective on what you wear. Gen X and Gen Y are a more informal generation. While attorneys must wear suits in the courtroom, they should be selective in the style. The attorney must be himself or herself. The jurors can spot a phony in a minute. The rule used to be that if an attorney had a tattoo, he or she would have to cover it up. There still may be many older jurors who may be offended. However, for the Gen X/Gen Y jurors it may gain extra credibility.

10. The web levels the playing field on accessibility of knowledge for both insureds and insurers. It is difficult to argue anymore that one side has exclusive access to information that the other side does not. When this fits your argument, perform a search on Google to show how easy it is to find the information. This demonstration will resonate with the Gen X'ers and Gen Y'ers on your jury.