Does the high unemployment rate impact plaintiffs' win rates in employment cases?

The jobs recession likely impacts plaintiffs' win rates, but more certain is that a juror's decision is based on gender, racial/ethnic, or demographic biases

BY SONIA CHOPRA

One of the most frequent questions I've heard from plaintiff's attorneys in employment cases the last few years is whether the recession and increased jobless rate is beneficial or detrimental to their clients. There is certainly reasonable speculation on both sides – some say jurors will be more sympathetic to workers because they or someone close to them is more likely to have been treated unfairly at work in recent years.[1] Another possibility, however, is that jurors who have been adversely affected by the recession and high unemployment rates will have less capacity for empathy, will be more willing to put up with mistreatment at work, and more forgiving of businesses trying to protect the bottom line.

Employment cases have also become a target of the tort reform machine in recent years.[2] The recession has made the climate ripe for allegations that lawsuits against employers results in even fewer jobs and that small businesses are among the hardest hit.[3] So, are plaintiffs faring better or worse today? The short answer is that we don't yet officially know. There have, however, been two verdict research studies in California, one looking at 1998 and 1999 employment cases,[4] and the other examining employment cases spanning 2007 through 2008.[5] These studies suggest plaintiff win rates have remained consistent over time, hovering around 50

percent. The more disconcerting news is that certain types of cases – and certain classes of plaintiffs – fare significantly worse in both time frames.

David Oppenheimer, a professor at U.C. Berkeley Law School, examined all the reported employment discrimination and wrongful discharge cases in California between 1998 and 1999. He found that in this time period, plaintiffs prevailed in 53 percent of the cases, but women and minority plaintiffs were disadvantaged. While women fared well in opposite sex, sex harassment cases, winning 68 percent of the time, in sex discrimination cases (*excluding* harassment or pregnancy discrimination claims) female plaintiffs prevailed just 38 percent of the time.[6] In the racial discrimination and harassment cases brought by non-Whites of both genders, plaintiffs had a win rate of just 36 percent. When race harassment claims were removed, the win rate dropped to 33 percent.[7]

There was also an interaction between race and gender. Non-White females won just 25 percent of their race and/or sex discrimination cases and African-American women who brought claims of sex discrimination and/or race discrimination won just 17 percent of the time.

There were two groups of plaintiffs who did considerably better in the 1998-1999 database: men who claimed same sex harassment, and White plaintiffs

asserting reverse discrimination claims. These plaintiffs won 100 percent of their cases. Oppenheimer concluded that the disparities in verdict outcomes were most likely the result of juror and judicial bias.

Gary Blasi and Joseph Doherty at UCLA Law School not only examined recent employment cases heard in 2007 and 2008, they also compared their findings to those of Oppenheimer.[8] Blasi and Doherty reported an overall plaintiff win rate of 50 percent, down slightly from 53 percent in 1998-1999. They also reported a decrease in the win rates for African-American plaintiffs from 33 percent to 24 percent. An even more striking difference between the 1998-1999 and the 2007-2008 verdicts was the decrease in successful sexual harassment claims brought by female plaintiffs. Recall [that] Oppenheimer reported a 68 percent win rate for this type of case.[9] In Blasi and Doherty's report the win rate plummeted to just five percent.

Blasi and Doherty combined their data with Oppenheimer's to look at trends over time. They found that when the plaintiff was African-American, the win rate was just 29 percent, as compared to the win rate of all other groups at 52 percent. They also found that men won significantly more "reverse" sex discrimination cases at 69 percent when compared to women's success rate of 52 percent. Verdict outcomes from both of these datasets suggest that the toughest

cases for plaintiff attorneys to try are those involving a woman of color claiming sex and/or race discrimination.

So why the disparities in win rates? Again, the answer in part, appears to be bias. Unfortunately, prejudice against minorities and women remains a part of our society. And, in particular, stereotypes about the work habits and work ethics of both women and different racial and ethnic minorities are pervasive, even as they move underground and become less overt. Then, there is the issue of tort reform and the numerous media and pop culture attacks on the civil justice system in general and against employment discrimination cases and their purported impact on small business and the economy specifically. Media commentators portray employers as having their "hands tied" by pro-worker legislation and government regulations on what employers can and cannot do. The belief in an "at will" employment system (and misperceptions of what that actually means) is widespread.

A poor economy and high unemployment can exacerbate the problem. A large number of people in the jury pool will have put up with mistreatment at work out of fear of losing their jobs and not quit or pursued litigation. Or they will have been laid off or had hours reduced, and will have less empathy for what plaintiffs have gone through. When times are tough is often when racial and gender prejudices become most pronounced, as people look to blame others for negative outcomes in their own lives.

Given that there are clearly anti-plaintiff biases out there, how can you identify them and determine which are most predictive in terms of how potential jurors are going to decide on your case? In an attempt to answer these questions and to assist our clients in case strategy, theme development, and most of all, jury selection, we have started an ongoing, in-house research project using our mock trial data from employment cases.

NJP Study

Academic empirical research on jury decision making is important and can be informative, but historically the focus has been on criminal matters. In recent years more has been done regarding civil litigation, but the majority of studies focus on aspects of the decision-making process (i.e., evaluation of expert testimony, determining damages) as opposed to looking at which juror characteristics are associated with a pro-plaintiff or pro-defense leaning. There has been some research done specifically on employment cases, but for the most part these studies don't go beyond examining the relationship between jurors' demographic characteristics and verdict preferences.

Moreover, these studies often lack external validity in that they are done in less than realistic situations with college students as mock jurors, written trial summaries, and no deliberations. In contrast, our mock trial participants are community members, the format includes live presentations by trial attorneys, there are often videos of witnesses, there are exhibits and graphics, the mock jurors are given jury instructions and a verdict form, and they participate in deliberations.

When we do trial simulation research, we have the mock jurors complete background questionnaires which provide us with demographic data, information about jurors' experiences, and their attitudes towards case-relevant issues. These questionnaires contain information similar to what you'd solicit in jury selection.
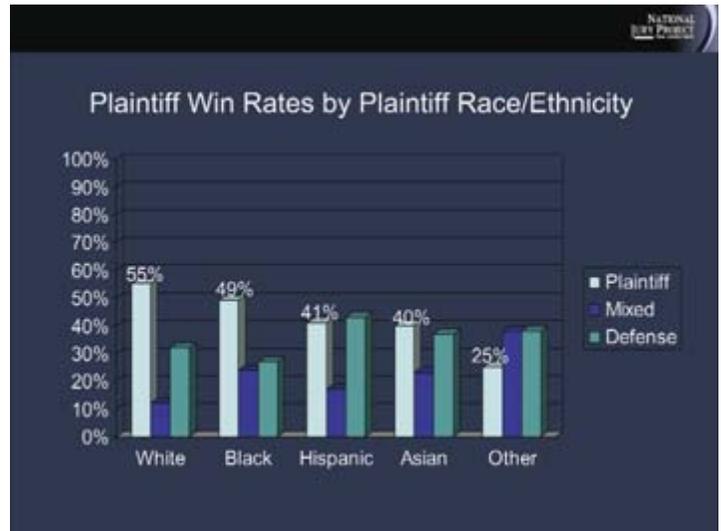

Chart 1

Following the trial and deliberations, the mock jurors are classified as pro-plaintiff, pro-defense, or "mixed" depending on their individual verdicts.

Case and juror characteristics

Currently, our employment litigation database is comprised of 37 different cases[10] ranging in date from 1993 to just a few months ago. Data was entered from 647 mock jurors. They were all jury-eligible community members drawn from the community in which the trial was venued and demographically matched to the venire.[11] Half of the sample were pro-plaintiff, 15 percent were mixed, and 35 percent were pro-defense.

Plaintiff win rates by plaintiff race/ethnicity

In the interest of seeing whether our data matched the verdict data collected by Openheimer, Blasi and Doherty, I first looked at whether the racial/ethnic characteristics of our plaintiffs resulted in differing percentages of plaintiff v. defense votes.

As you can see in Chart 1, there is a step-down pattern where White plaintiffs had the highest win rate at 55 percent,
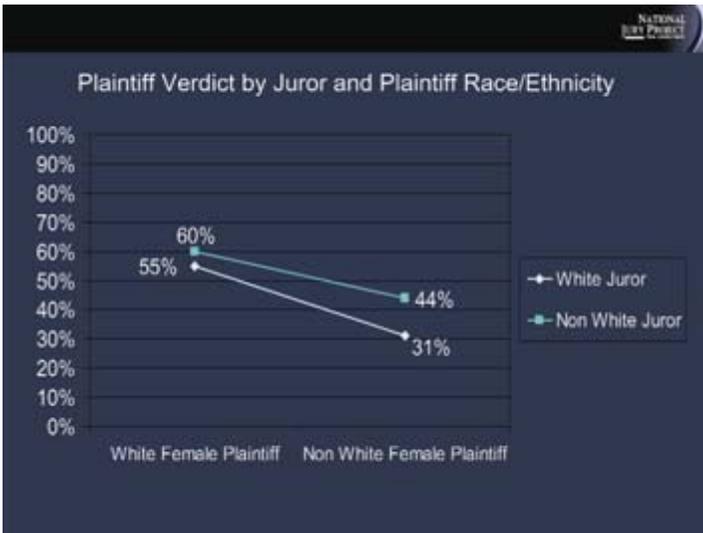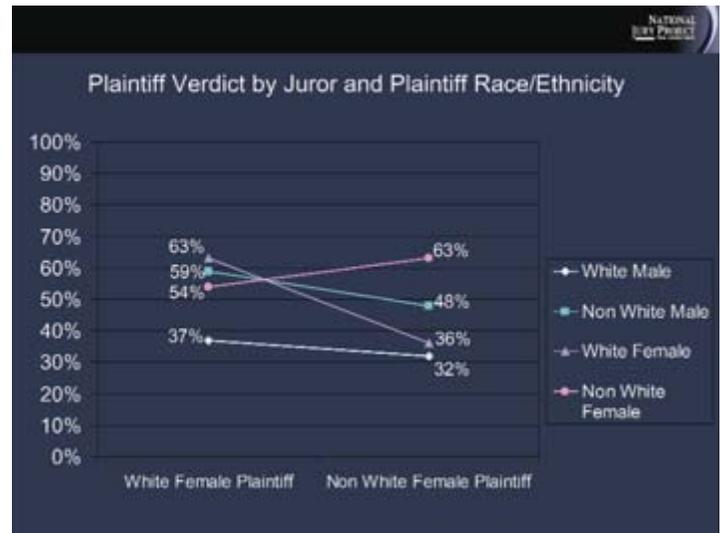
Chart 2

Chart 3

followed by African-American plaintiffs at 49 percent, Hispanic plaintiffs with 41 percent, Asian- American plaintiffs at 40 percent and "other" race plaintiffs – which was Middle Eastern – with 25 percent. It is not depicted on this chart, but when I looked just at the cases involving White males, the percentage of plaintiff verdicts was the highest, at 58 percent.

Juror demographics and verdicts

Although I don't recommend relying solely on demographics when evaluating potential jurors (and to do so could land you in trouble on *Batson/Wheeler* grounds), the nature of many employment cases, as well as previous research, suggests that some juror demographic characteristics could play a role in how the individual perceives the evidence and creates the narrative story of your case. Indeed, we found that women mock jurors were significantly more pro-plaintiff: 56 percent of women sided with the plaintiff compared to just 43 percent of men. When you remove the "mixed" verdict category, which was about 50/50 men and women, the percentage of female mock jurors who voted plaintiff rises to 67 percent.

Support for plaintiffs also varied by juror race and/or ethnicity. The majority of defense jurors, 63 percent, were White. In comparison, 56 percent of pro-plaintiff mock jurors were non-White. Among African-American mock jurors, 77 percent sided with plaintiffs, as did 64 percent of Hispanic respondents. White and Asian-American mock jurors voted similarly, with 44 percent and 43 percent supporting plaintiffs respectively.

Female plaintiff win rates

To isolate the effects of plaintiff race/ ethnicity and to examine the possibility of race of juror/race of plaintiff interaction without the confines of plaintiff gender, I looked at a subsample of cases containing only female, non-class action cases.

As can be seen in Chart 2, White female plaintiffs were significantly more likely to win than non-White women – *regardless of mock juror race/ethnicity*. White female plaintiffs received 60 percent of the non-White mock jurors' votes, and 55 percent of the White mock jurors'. In contrast, non-White plaintiffs received 44 percent of the non-White jurors' votes, and just 31 percent of the votes cast by White mock jurors. This pattern appears

to indicate that White mock jurors are more impacted by plaintiff race/ethnicity than non-White participants. There is a 24 point differential between White and non-White plaintiffs (55 percent to 31 percent) when we look at the White jurors, as compared to a 16 point decrease from 60 percent to 44 percent among non-White jurors.

What is going on here? In all honesty, the results might be easier to explain had there been no plaintiff-based differences in how the non-White mock jurors voted. The obvious interpretation would be that minority mock jurors are more likely to have experienced unfair, discriminatory treatment in the workplace and in life, and therefore could be more willing to believe it still happens in today's workforce, regardless of if it is a result of the plaintiff being a female, minority or both. This analysis still holds, as overall non-White jurors returned a greater percentage of plaintiff verdicts, but how to explain the decrease in plaintiff verdicts for non-White female complainants by minority mock jurors?

One of the other reasons non-White female plaintiffs may be less successful is that they often have claims for both race
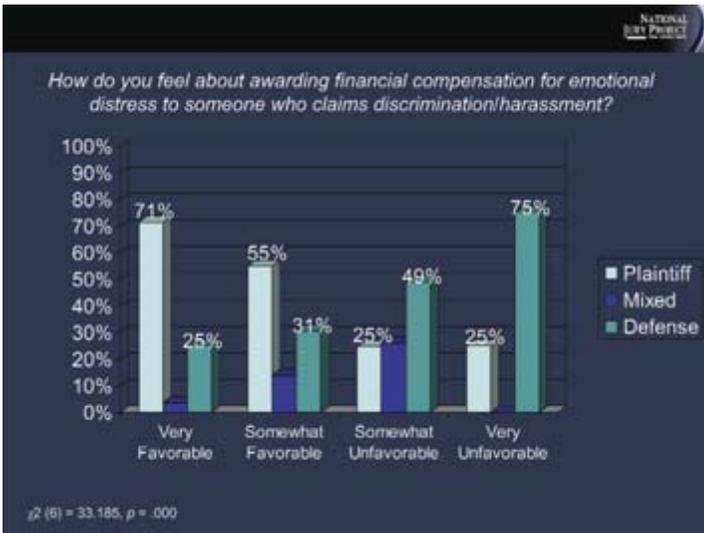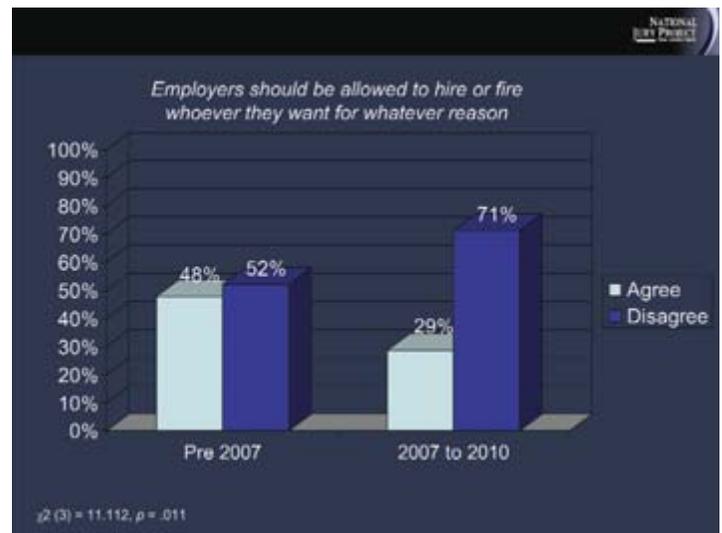
Chart 4

Chart 5

and gender discrimination in their cases. In today's tort reform society where the majority of the public is wary of lawsuits and skeptical of plaintiffs, this could be seen by both White and non-White mock jurors as an attempt at "padding" the claim. Lastly, the differential treatment of White and non-White plaintiffs could be the function of old fashioned, perhaps even unconscious racism. Non-White female plaintiffs could be suffering from prejudicial attitudes and beliefs not only about women in the workplace but also about minority workers.

Because overall women were more pro-plaintiff than men, and African-American and Hispanic mock jurors were more pro-plaintiff than White partici-pants, I wanted to look at these variables within the subset of cases with just female plaintiffs.

Starting at the bottom of Chart 3 (on previous page), it can be seen that White males were slightly more likely to vote plaintiff when the female plaintiff was White, but overall the White male mock jurors had low support for female plain-tiffs. Next, looking at the non-White males, the darker teal colored line. There you see 59 percent support for White

plaintiffs dropping to 48 percent for non-Whites. So the percentage of plaintiff ver-dicts goes down among both White and non-White men when the plaintiff is a non-White female.

What is perhaps most interesting, though, is the pattern among female mock jurors, represented by the lavender and pink lines. Looking at the lavender line, White females had the highest sup-port for other White females, with a 63 percent win rate among White women when the plaintiff was White. This drops substantially to just 36 percent plaintiff verdicts in cases where plaintiff was a non-White woman, a percentage very similar to that of White men.

Non-White female mock jurors, rep-resented by the pink line, were the only group among which non-White plaintiffs had a higher percentage of success than White plaintiffs. Among non-White fe-male mock jurors 54 percent favored the plaintiff in cases where she was White. When the plaintiff was a non-White woman, non-White mock jurors sided with plaintiff 63 percent of the time.

Again, two competing issues seem to be at play, gender bias and racial/ethic prejudice. Gender bias alone would result

in both White and non-White female mock jurors having comparable percent-ages of plaintiff verdicts regardless of the race/ethnicity of plaintiff. That is not what happened. In fact, White women mock jurors had nearly identical percent-ages of plaintiff votes as White men in cases where the plaintiff was a woman of color. So, for the most part, our in-house data mirrors the verdict data presented by others and suggests that women of color may be particularly disadvantaged when it comes to winning a jury trial.

Implications for jury selection

While these results are depressing, keep in mind that the jurors in our mock trials did not go through a voir dire in that no one was peremptorily challenged for expressing pro-defense or biased views on their background questionnaire. One of the primary reasons we developed this data set is to look at whether or not there were variables – juror characteristics that could be easily ascertained in jury selec-tion – that were associated with the ten-dency to vote plaintiff or defense. The good news is that the answer is yes! The remainder of this article will address what to look for in jury selection.

Demographics

I'll start with demographics with the caveat that demographics are most useful when you have no other information – attitudes and experiences are much more predictive of behavior. Race and gender have already been covered, but there were some additional demographic variables where there were statistically significant differences between plaintiff and defense leaning mock jurors. Defense mock jurors were older and had higher incomes. Of those making less than $15,000 a year, 59 percent voted plaintiff. Among mock jurors with household incomes over $150,000, 67 percent voted defense. Seventy-six percent of pro-plaintiff mock jurors had household incomes less than $75,000.

Not surprisingly, 69 percent of plaintiff mock jurors were Democrat. Military service was also associated with verdicts, with 67 percent of those with military experience voting either pro-defense or mixed.

While it goes without saying that jurors' work experiences influence how they view the evidence in employment cases, what is interesting about our data is what was *not* related to pro-plaintiff or pro-defense verdicts. Contrary to what you might expect: management or supervisory experience, having the authority to hire and fire, having actually fired someone, and being a past or current union member were all not distinguishing.

Attitudes

The one variable I find to be consistently distinguishing between pro-plaintiff and pro-defense jurors is their attitude towards money damages for emotional distress. In fact, I tell the attorneys I work with that if they could only ask one question this is the one to ask, regardless of whether emotional distress damages are a large component of your case.

Mock jurors were asked, "How do you feel about awarding financial compensation for emotional distress to someone who claims discrimination or harassment?"

As can be seen in Chart 4 (on previous page), 71 percent of those with very favorable opinions about emotional distress damages voted plaintiff, and 75 percent of those with very unfavorable opinions sided with the defense. There is a great step down/step up pattern where the percentage of plaintiff jurors goes down and the percentage of defense jurors goes up as the attitude moves from more to less favorable.

We also ask open-ended questions about the various elements of damages. Responses were coded as positive, neutral or negative. The trend continued where pro-plaintiff mock jurors are more likely to have positive or neutral views about emotional distress damages, while pro-defense mock jurors tend to have negative opinions. Sixty-three percent of mock jurors who had positive responses sided with the plaintiff, as did 59 percent of those who answered in a neutral way. In contrast, of those with negative responses, 48 percent voted defense.

One of the reasons questions about emotional distress damages are so helpful is that they have become a more accurate measure of "tort reform" views than the old questions about "too many lawsuits" or the size of verdicts. Nowadays virtually *everyone* – even people who will be good plaintiff jurors – will agree that there are too many lawsuits and that verdicts are too high. In fact, I don't even ask those questions any more because all they do is highlight the few, usually very pro-plaintiff individuals who disagree. I've even seen defense consultants recommending that those questions be included on a jury questionnaire because they know that they only highlight pro-plaintiff people.

Attitudes towards employers and perceptions about employer versus employee rights were also helpful in predicting pro-plaintiff v. pro-defense verdicts. For example, 72 percent of those who strongly disagree and 52 percent of those who disagree that, *"Employers are often taken advantage of by employees who are too quick to sue,"* sided with the plaintiff. Overall, 64 percent of pro-defense mock jurors agreed with this statement somewhat or strongly.

Mock jurors' level of endorsement of the statement, *"Employers should be able to hire and fire whoever they want for whatever reason,"* was also associated with verdict choice.

Half of those who strongly agreed sided with the defense, as did 73 percent of those who agreed somewhat. In contrast, 65 percent of those who disagree somewhat and 56 percent of those who disagree strongly voted in favor of the plaintiff. Overall, 75 percent of pro-plaintiff mock jurors disagreed with this statement, while 68 percent of pro-defense participants agreed.

Looking at the chart, it is important to note that only 8 people "strongly agreed" with this proposition. So while it appears strong agreement is not distinguishing, what is important is that defense mock jurors were more inclined to agree, while pro-plaintiff were more likely to disagree.

Another mock juror characteristic that was distinguishing is what is known as the "belief in a just world." Individuals with strong just world beliefs think that people get what they deserve and deserve what they get. This tendency has been associated with blaming the victim. We measured just world beliefs by asking mock jurors' level of agreement with the statement, *"People who meet with misfortune often have brought it upon themselves."*

Overall, 83 percent of pro-plaintiff mock jurors disagree, while 70 percent of pro-defense participants agree. Pro-defense mock jurors are more likely to hold just world beliefs, which may in turn lead to increased scrutiny of plaintiff and speculation about what she did to deserve the treatment she received.

While questions about discrimination prevalence did not result in statistically significant differences between pro-plaintiff and pro-defense mock jurors, notable patterns did emerge.

People who side with the defense are often less inclined to believe discrimination and harassment in employment remains problematic. Pro-defense mock jurors were more likely to endorse statements like, *"Race discrimination is by and large a thing of the past,"* and less likely to agree with statements like, *"Discrimination and harassment in employment is a serious problem in society."*

Those favoring the defense were also more likely to believe that workers use claims of discrimination or harassment as excuses or to cover up for their own performance issues, while sizable majorities of those who strongly disagree voted plaintiff.

Pre- and post-recession

In analyzing the data I also wanted to take a look at how attitudes differed pre- and post-recession. There were some statistically significant differences that were particularly interesting as shown in Chart 5 (on Page 4).

There was a significant decrease in the belief that *"Employers should be allowed to hire or fire whoever they want for whatever reason,"* from 48 percent pre-recession to 29 percent after the crash. Right now this is a great question for jury selection because it is endorsed by few but those who do agree are pro-defense so you are identifying those you want to get rid of.

There was also a statistically significant decrease in the percentage of people who agree that *"Employers are often taken advantage of by employees who are too quick to sue."* Prior to 2007, 63 percent of people agreed, while just over half or 52 percent agreed in the recession time period. It seems as though the current economy has made people somewhat less concerned about "employer rights" as compared to years past.

Non-distinguishing attitudes

A number of attitudinal questions that one would intuitively think matter were not helpful in identifying those who eventually voted plaintiff or defense because they were held by the majority of people.

First, as I alluded to earlier, general tort reform questions asking about too many lawsuits, verdicts being too high and so on, are no longer distinguishing because they have become so engrained in society that the majority of the public will almost reflexively endorse these attitudes even if they don't feel strongly one way or the other.

General opinions about corporations are also unhelpful for plaintiff's counsel. Most people still hold corporations in fairly high regard, even in this economy. In fact, in a recession, corporations can become even more valued for their contributions to the economy and creation of jobs. As with the tort reform questions, asking people their opinions of large corporations will just highlight your pro-plaintiff people.

Beliefs about the value of "personal responsibility" and the idea that there is not enough of this today are almost universally held. In fact, over 90 percent of our sample agreed that *"People today don't take enough responsibility for their own actions."* Asking these types of questions in voir dire will only serve to spotlight the 10 percent who disagree – arguably the most pro-plaintiff people in the venire.

Other considerations for jury selection

In addition to the areas already discussed, which are feelings about non-economic damages, employer versus employee rights, belief in a just world and views about the prevalence and nature of discrimination, there are a few other areas that are important to consider in jury selection. One is work experiences in general, but in particular exposure to, or accusations of discrimination or harassment and how these issues have personally affected them.

The current economy has a big impact on how you try your cases. Remember that people who are downtrodden, who have been mistreated at work, those who are scraping by, who have been fired or laid off or downsized, often have little capacity for empathy for your client.

The cardinal rule for jury selection is that the more similar someone's experiences are to the case, the more dangerous they are. While it is easy to believe that someone similarly situated will sympathize, just as often the reverse can be true and that similar someone will become your biggest danger on the jury as they can take on the role of expert.

Lastly, try to open your mind when it comes to traditional beliefs about managers, supervisors, HR professionals. These people are not always bad plaintiff's jurors, particularly if they do their jobs in a fair and systematic way and the management in your case did not follow the rules.

Sonia Chopra, Ph.D., a senior consultant with NJP Litigation Consulting, has served on the Board of Directors of the American Society of Trial Consultants, and is the Associate Editor of the trial manual Jurywork: Systematic Techniques.

End Notes

[1] Karen Klein, *Four Legal Pitfalls Loom in 2010: Attorneys Identify Employee Lawsuits, Immigration Audits, Improper Insurance and Internet Security as Risks this Year and Offer Their Advice,* Business Week (January 2010) *available* at http://www.businessweek.com/smallbiz/content/jan2010/sb20100111_618606.htm.

[2] Institute for Legal Reform, *Lawsuits Cost Small Businesses $105 Billion, Study Shows: U.S. Chamber Study: Cost of Lawsuits Another Burden for America's Job Creators,* (July 8, 2010) *available* at http://www.instituteforlegalreform.com/component/ilr_media/30/pressrelease/2010/506.html

[3] *Id.*

[4] David Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. Davis Law Review 511 (2003).

[5] Gary Blasi and Joseph Doherty, *California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at 50*. UCLA Rand Center for Law and Public Policy (February 2010) *available* at http://www.dfeh.ca.gov/dfeh/Renaissance/FEHA percent20at percent2050 percent20- percent20UCLA percent20- percent20RAND percent20Report_FINAL.pdf

[6] Oppenheimer, *supra* note 4.

[7] *Id.*

[8] Blasi & Doherty, *supra* note 4.

[9] *Supra* note 4.

[10] In ten of the cases the plaintiff was a non-White female. In another ten the plaintiff was a White female, in four cases there was a non-White male plaintiff and five cases involved a White male plaintiff. There were two non-class action cases that involved multiple plaintiffs of mixed gender and race, and six class actions – three involving claims of gender discrimination and three with claims of race/ethnicity discrimination. At least one of the defendants was a national corporation in 24 of the 37 cases. In four a defendant was a public entity such as a state school, utility, or hospital. In eight cases the defendant was a governmental entity such as a city or county. Local or regional companies were involved in four cases and most of the cases also included individual defendants. The size of the defendants ranged from 89 to 357,000 employees.

[11] The sample is 51 percent female and the mean age is 44.4 with a range from 20 to 72 years old. The participants are racially diverse, and representative of the population in the major metropolitan areas of California: 52 percent of the mock jurors are White, 18 percent are Asian American, 17 percent are Hispanic, 12 percent are African American and 1 percent listed their race as "other."