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Combating anti-gay sentiment in the courtroom

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Strategies for Combating Anti-Gay Sentiment in the Courtroom

by Sean Overland, Ph.D.

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California voters' recent passage of Proposition 8, which "re-banned" same-sex marriage in the state, and the success of similar anti-gay marriage laws across the country, has prompted some observers to comment that "gay is the new black." In other words, while overt, anti-black sentiment has been largely relegated to the fringes of American society, homophobic attitudes remain common and socially-acceptable in large segments of the population. In the courtroom, jurors' attitudes toward homosexuality may affect their views on a wide range of cases, including discrimination and employment lawsuits or trials involving a gay or lesbian litigant.

This article describes the extent and nature of anti-gay sentiment, how it differs from racial bias, and how attorneys and jury consultants concerned about homophobia can combat anti-gay bias in the courtroom.

How Widespread is Anti-Gay Sentiment?

In the January 2009 edition of *The Jury Expert*, Naveen Khan and Dennis Elias offer strategies for addressing anti-Muslim bias in the courtroom. In their articles, Khan and Elias cite national polls showing that 39% of Americans admit that they “feel some prejudice” toward Muslims. How does that figure compare to current attitudes toward homosexuality?

Since 1996, I’ve helped conduct an on-going research project on popular attitudes toward homosexuality undertaken by the jury research firm of Mattson & Sherrod, Inc. As part of this project, questions about homosexuality, gay rights, and same-sex marriage have been piggy-backed on questionnaires used in mock trials across the country. With the cooperation of Mattson & Sherrod, I have assembled data from over 100 mock trials conducted between 2002 and 2008. These data include responses from over 7,800 mock jurors. Looking at the numbers from year to year reveals some consistent patterns in jurors’ attitudes toward homosexuality. For example:

- Approximately 55% of people think that gays and lesbians should not be able to have officially recognized marriages.
- Approximately 45% of people think that homosexuality is not an acceptable lifestyle.
- Approximately 40% of people believe that gays and lesbians could change their sexual orientation and become heterosexuals if they really wanted to.
- Approximately 33% of people think that sexual orientation should not be a civil right that is protected by the government.
- On average, between 15 and 20% of people report that it would bother them if a gay or lesbian couple moved in next door to them.
- Similar percentages (15 to 20%) of people think that employers should be able to refuse to hire someone because of his or her sexual orientation.
- Between 10 and 15% of people report that it would bother them if they had to work closely with someone who is gay or lesbian.

Anti-gay attitudes are more prevalent in the South than in the rest of the country¹. Almost 60% of Southern jurors believe that homosexuality is not an acceptable lifestyle, 50% believe homosexuals could change their sexual orientation if they really wanted to, and nearly 25% would be bothered if a gay or lesbian couple moved in next door to them.

How do Anti-Gay Attitudes differ from Racism?

While homophobia and racism have some features in common, they also have important differences. For the purposes of courtroom strategy, the key difference is the comparative social stigmas attached to each. Overt racism carries a powerful negative social stigma, as racism is widely considered to violate the egalitarian norms embraced by the vast majority of Americans. As was discussed in the most recent edition of *The Jury Expert*, this negative social stigma presents an opportunity to inoculate jurors against even subtle race-based arguments.

¹By “the South,” I mean the states of Texas, Oklahoma, Louisiana, Arkansas, Tennessee, Mississippi, Alabama, Kentucky, Virginia, North Carolina, South Carolina, Georgia, and Florida.

Anti-gay sentiments, on the other hand, do not carry the same negative social stigma. As the numbers above suggest, anti-gay attitudes remain socially-acceptable and even desirable among large segments of the population. Many people believe that homosexuality is deviant, morally wrong, and a threat to traditional family structures. This important difference between racism and homophobia means that combating anti-gay bias in the courtroom requires a different strategy than you might use to confront race-based appeals.

How Can Attorneys and Consultants Combat Anti-Gay Attitudes in the Courtroom?

Because homophobia does not have the negative social stigma associated with overt racism, opportunities for inoculating jurors against anti-gay appeals or for overcoming anti-gay bias during trial may be limited. Depending on the type of case, witness preparation and a persuasive case story may help some jurors look past their bias, but eliminating the most homophobic jurors from the panel during jury selection is a critical part of an effective trial strategy. Thus, I focus primarily on jury selection strategies and identifying jurors with the strongest anti-gay biases.

One of the fundamental challenges of voir dire in any case is asking questions that identify jurors who are least likely to be receptive to your client's case, while not "outing" jurors who are most likely to support you. For example, the questions discussed above about homosexuality could all be used during voir dire to evaluate jurors' views. However, any juror who believes that gays and lesbians should have officially-recognized marriages, or who thinks that sexual orientation should be a civil right, becomes a target for a peremptory challenge by the opposition. The best questions for identifying strong anti-gay bias during voir dire would therefore be:

- Would you feel bothered if a gay or lesbian couple moved in next door to you?
- Do you think employers should be able to refuse to hire someone because of his or her sexual orientation?
- Would you feel bothered if you had to work closely with someone who was gay or lesbian?

In an average jury venire, relatively few people (10 to 20%) will answer "yes" to these questions. A "yes" answer therefore gives valuable information about anti-gay attitudes, while a "no" answer gives the opposition little usable information.

In addition to these direct questions on jurors' attitudes toward homosexuality, several other attitudes and lifestyles are consistently strong predictors of anti-gay sentiment. These factors include:

Religiosity

- Jurors who report that their religious beliefs are "often important" or "always important" in guiding their daily decisions tend to be more homophobic than jurors for whom religious beliefs are only "sometimes important" or "never important" to their daily decisions.
- Jurors who try to attend religious services every week tend to be more homophobic than jurors who do not.



Political Ideology

- Jurors who identify themselves as politically conservative tend to be more homophobic than politically liberal or moderate jurors.
- However, a juror's political party affiliation (Republican, Democrat, or Independent) is not a particularly effective predictor of attitudes toward homosexuality.

Personal Friendships

- Jurors who have a gay friend are far more accepting of homosexuality than jurors who do not.
- While having a gay friend affects people's views on homosexuality, simply knowing someone who is gay, or having a gay relative, does not.
- On average, just under half of jurors report having a gay friend. Although asking jurors this question runs the risk of identifying "pro-gay" jurors, the relatively large proportion of jurors with gay friends makes striking all of them impossible.
- Moreover, attention can be drawn away from the "gay friend" question by also asking about gay acquaintances and family members. For example, ask first whether the juror *knows anyone* who is gay (on average, about 85% will say that they do), then whether they have any gay friends (about 50% will say "yes"), and finally, whether they have any gay relatives (on average, about 35% of jurors report that they do). This sequence creates the impression that the questions are gaining in importance, when in fact only the "gay friend" question has any real bearing on jurors' attitudes toward homosexuality.

Demographics

Recent media coverage of popular attitudes toward homosexuality has focused on the importance of demographics. National polls suggest that factors such as race, gender, education, and age may affect a person's views on homosexuality. However, a careful examination of the data shows that the factors discussed above – particularly religiosity, political ideology, and having gay friends – account for almost all of the observed differences between demographic groups. For example, African-Americans appear to be more homophobic than white people, but this difference is due to the fact that, on average, African-Americans are more religious than whites. In other words, people with the same religious practices tend to have the same views on homosexuality, regardless of their race.

Gender bucks this trend somewhat. On average, women are slightly more accepting of homosexuality than men, even when other factors like religiosity and ideology are taken into account. However, the difference between the genders is relatively small.



Concluding Thoughts

Anti-gay bias presents unique challenges to attorneys and trial consultants. Because homophobia does not hold the same negative social stigma associated with racism, the tactics used to combat racism may not be as effective when dealing with homophobia. Identifying homophobic jurors and removing them from the panel during jury selection is therefore a useful tool for combating anti-gay bias in the courtroom. Asking certain direct questions about jurors' views on homosexuality, as well as questions about jurors' religiosity, political orientation, and personal friendships, can identify jurors with the strongest anti-gay sentiments.

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Welcome to our March issue of *The Jury Expert*!

As spring moves in and brings new life to the world around us, so this issue of *TJE* is packed with new ideas and energy. Some ideas you may find to be things of beauty, others may make you go ‘hmmmm’, and still others may make you wrinkle your face with disgust. Our hope is that every article in *The Jury Expert* elicits some response in you--agreement, disagreement, aha moments, and yes, even disgust!

This issue is filled with contributions from ASTC member trial consultants and from the academics who actually perform the research upon which much of what we, as trial consultants, do is based. Flip through the pages of this pdf file or travel about on-line at our website and view all of *TJE* on the [web](#).

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-- [Rita R. Handrich, PhD](#)
Editor, *The Jury Expert*



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