



YOU'RE CANCELLED

A Litigation Primer on Cancel Culture and Jury Bias

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The old adage “all publicity is good publicity” is no longer good cannon. In today’s technology driven world, social media reigns supreme wielding an almost omnipotent power to control the fate and success of people, organizations, institutions, businesses, and the like. One click of a button, tweet, or social media post containing any sort of negative publicity can easily cascade into a larger movement calling for an individual or company to be boycotted or “canceled.” Such cancel culture—where social media is used to create widespread withdrawal of support for a person or entity—has recently become a prevalent part of modern society.

Any person or business, regardless of size or prestige, can easily become the subject of concerted public angst. Often, a person or company becomes a victim of cancel culture based on their views or actions. This was none the more evident than in 2020,

which saw a considerable increase in the amount of people and businesses subjected to cancel culture. For example, last year Goodyear Tires became a victim of cancel culture after President Trump demanded (via Twitter) a boycott of the tire manufacturer for the company’s alleged policy that banned employees from wearing clothing at work that displayed certain political messages. Similarly, the food manufacturer, Goya Foods, Inc., was subjected to a boycott campaign after its CEO expressed support for President Trump.

Although common, political ideology is not the only reason why an individual or business may be targeted by a cancel culture campaign. For example, also in 2020, the food brands Aunt Jemima, Uncle Ben’s, and Eskimo Pies were each boycotted en masse for utilizing racial stereotypes to sell their products. As a result of the public backlash, the aforementioned brands were

rebranded by their respective parent companies. Additionally, the clothing retailer, Lululemon, was publicly derided for a hypocritical “anti-capitalism” marketing ploy. Even much beloved public figures were victims of cancel culture last year, including Ellen DeGeneres for the alleged hostile work environment at her daytime television show, and J.K. Rowling for transphobic beliefs.

Cancel culture is rapidly changing society and its sudden rise has strong implications not only for its victims but also for the microcosm of the legal world. Defense lawyers have a duty to be aware of instances of cancel culture with regard to their specific clients, and they must be prepared to address it when necessary. It is particularly important that attorneys adopt new strategies to account for cancel culture and the negative impact it can have on litigation, especially jury perception. Given that social

media is a prolific part of life today, most jurors have at least one social media account. In turn, this means that before jurors enter the courtroom most will likely have some knowledge about cancel culture and some jurors may have even directly participated in it by demanding a boycott or, alternatively, showing support for the “canceled” entity’s position.

It is important to remember that even small businesses and ordinary people can be “canceled” – for example, TIME magazine recently reported on local social media campaigns to boycott small businesses or professionals who allegedly participated in the January 6 insurrection at the United States Capitol building. Although the idea is to send a message to the business or professional by refusing to patronize their business or utilize their services, it is certainly possible the sentiments of a cancel culture campaign could bleed over into litigation, leading jurors to want to send a message with their verdict. Because cancel culture can cause juror bias, it is important to appropriately tackle the issue in the context of litigation.

At the outset of litigation, lawyers should research whether their client has been the subject of cancel culture. If your client has been a victim of cancel culture, it is important to tailor pre-trial themes and strategies accordingly. If your client has not yet publicly addressed the offense, lawyers may want to advise their client to issue a statement in advance of trial in an effort to quash the negative publicity. Additionally, depending on the pervasiveness of and reason for the public backlash, lawyers may want to advise their client to express regret for the societal offense and its impact on the community during their deposition. Alternatively, in conservative venues, the better strategy might be to emphasize the client’s right to free speech and that their ideological beliefs have no bearing on the issues involved in the case. However, when combatting cancel culture via a public statement or explanation in a deposition, it is important to understand how it will likely resonate with potential jurors in the applicable venue. In order to do so, conducting a focus group in advance of trial may be a worthwhile investment.

During the trial phase, it is especially important to use voir dire as a strategic method to counteract the negative effects of cancel culture and the subconscious bias it can cause in jurors. Emphasis should be placed on identifying jurors who have likely heard about or participated in cancel culture regardless of whether it pertained to your client or not. For instance, it may be helpful to ask jurors “Who here gets much of their news from social media sites like

Facebook and Twitter?” Asking jurors what social media platforms they use, and how often they use them, may also be helpful. Jurors who are “off the social media grid” may be less aware of negative publicity spread through such platforms. On the other hand, jurors who have participated in a boycott of another company may likely have similar values and expectations for corporate conduct in general, including that of your client. Such jurors can be identified by asking, “Have you ever boycotted a company before? For what reasons?” or “Have you ever made a decision not to buy a certain product because you disagreed with something the company did or said?” or “Have you ever posted on social media to encourage others to do the same?”

If your client has ever been the subject of negative publicity, it is exceedingly important to identify which jurors are aware of such publicity and whether they have formed an impression of your client as a result. However, lawyers should be mindful not to “poison the panel” by having a juror blurt out the negative publicity about your client in front of the entire venire. In these instances, it is recommended to ask questions similar to the following: “Without saying what you have read or heard, has anyone seen or heard anything negative about my client?; “Has anyone seen any references to my client in the news or on social media?;” and “Has anyone ever posted anything on social media about my client?” If any jurors answer the aforementioned questions in the positive, then ideally an attorney should seek permission from the Court to individually follow-up with each juror to obtain additional information. However, if such request is refused, use follow-up questions such as, “Without saying what you heard or read, did that lead you to form a negative impression of my client?” or “Do you think what you heard about my client might influence how you view them in this case, or how you weigh the credibility of their witnesses?” Affirmative responses to these questions should be sufficient to strike such jurors from the panel for cause. For any jurors who remain, an instruction should be given by the Court that the information they have learned should not be shared with other jurors or play any role in deliberations.

It is important to remember that during voir dire some jurors may be reluctant to admit they have a negative impression of your client. Therefore, during voir dire research should be conducted into the social media activities of the potential jurors. If any negative publicity about your client “went viral,” special attention should be paid to a juror’s social media history during that time period, as it may be possible to

have a juror excused who posted about your client yet denied doing so during voir dire. Once trial has started, an effort should be made to reiterate the notion that jurors are there only to decide “This plaintiff, This case.” Remind jurors they are not being asked to determine whether your client is a good or bad company, or whether your client has caused harm to other people.

Cancel culture may have considerable implications for its victims in the context of litigation; potentially leading to subconscious bias in jurors and distorted verdicts with no rational relationship to the merits of the case. However, being “canceled” on social media does not have to adversely impact litigation. Due to the increased risks it poses, attorneys should develop strategies and techniques to proactively combat cancel culture during the various phases of litigation, especially at trial. Careful consideration should be paid to identifying whether a client has been the victim of cancel culture, and if so, mitigating its damaging effects during both the pre-trial stage and at trial.



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