Trial Evidence
FROM THE SECTION OF LITIGATION TRIAL EVIDENCE COMMITTEE
Special Issue on Diversity 2011, Vol. 19 No. 5

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The Advantages of a Diverse Trial Team

By Allison A. Jacobsen – July 18, 2011

During one of my first trials, I cross-examined an expert witness regarding a damage model. I asked him direct, straightforward questions that did not involve complicated mathematical calculations or valuation theories. The expert, who was a white man, reacted very similarly to the way he did in his deposition—with evasive, long-winded answers that went off topic, were condescending, and didn't answer the question. After asking the same question several times and then politely asking if I could rephrase the question to help him give a direct answer, he still answered in the same fashion. The point was clear: The expert had no real answer to the direct question because he had not considered an important part of the damage model evidence.

At the end of the day, we discussed as a trial team whether the jury got the point or whether I should have gotten angry and taken the expert to task about failing to answer the questions. Perhaps I should have objected and asked the judge to make the witness answer the questions—just to drive the point home to the jury. But this was not my style either inside or outside of the courtroom. I do not find anger and drama to be effective persuasion tactics. Fortunately, we were using a shadow jury during the trial and got a report with comments. The jurors noted that the expert was clearly trying to hide something, that his refusal to answer a simple question was rude, and that he was so stubborn that he was never going to give the simple information requested. Ultimately, the jury did not trust the expert's knowledge or damage calculation.

I was very fortunate to have this trial experience early in my career because it taught me that there are different, and often equally effective, ways to approach a trial and persuade a jury. For this reason, a diverse trial team is a tactical advantage. By "brainstorming" and offering different perspectives and techniques to trial strategy, the trial team often can affect the rhythm of the trial and catch the opposing side off guard. This strategy also keeps the jury interested in even dry subject matter like expert testimony.

Perhaps most importantly, an attorney who adopts a different style that is unique to his or her personality, culture, or upbringing lends credibility to the evidence presented. The attorney communicates in a relaxed, genuine way rather than appearing forced or as if putting on a show. Presenting evidence in a way that is unique to the client or attorney background is also effective because it is not predictable and robotic. While juries do not always appreciate the complexity of every nuance of the evidence as do the attorneys and clients who have lived with the case before trial, they do understand the confidence and authenticity that comes with a diverse trial team. They also appreciate a varied trial approach.

I was fortunate to try a case with a black, woman partner. We were defending a difficult, music-related intellectual property case, and she was conducting the opening statement. She started

with what seemed to be an off-topic discussion of her family. This was not the high-tech music prowess I expected, and I became concerned. Then she explained that her first real appreciation of music as an art came from listening to jazz with her grandfather. Immediately, I was brought to remember my own experience and the point was crystal clear—the ideas in controversy were universal and not property. We did not have the luxury of a shadow jury, but we were given the opportunity to question the jury after we won the trial. The majority of jurors made a reference to an experience and understanding sparked by my partner's story. We realized that we should never underestimate the power of diverse background to evoke a common emotion—that of an authentic experience and voice in the courtroom.

While you cannot completely control the exact composition of the jury you choose, there is one certainty: The jurors will be diverse. They will likely relate better to different types of people based on their own background and experience. One of the variables you can completely control is the composition of your trial team, including the gender, race, and ethnicity of its members. A diverse trial team increases the odds of effectively presenting evidence to a jury by bringing diverse perspectives to the team. A diverse team also is better able to "read" the jury and pick up on important nonverbal cues.

Many articles about diversity in the courtroom overlook the benefits of personal experience and the values that diversity brings as they discuss how diversity is a good tactical advantage. Although these articles make a good point, they overlook the obvious. Diversity in the courtroom is effective because it mirrors life and lends honesty and heart to a case—elements of persuasion far more difficult to include in a case than facts and evidence alone. Regardless of the zealous and slanted perspective of the advocacy a trial team is likely to present, a diverse trial team is likely to appear more balanced. Indirectly, the team is communicating the value of accepting differences, providing opportunities, and including others.

Honestly describing the diverse background of a client is also a benefit at trial. I had a client who was Egyptian. He came to America as an immigrant and built his way up. In defending his company, we had consultants advise that a jury would not like or trust people from Egypt. After practice in a mock trial, however, we learned that the opposite was true. He told of how the world was like a pyramid and he built his way, with great effort, from the bottom to the top and held strong beliefs in the principles of equality and talent all the way. Ultimately, he was our most effective witness.

For all of these reasons, those who compose a trial team without regard to the diversity of the team overlook a powerful opportunity to be effective in the courtroom.

Keywords: litigation, trial evidence, diversity, trial teams

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For Legal Teams, Perception Is Reality

By Christina L. Dixon – July 18, 2011

As an impressionable eighth grader, I had dreams of becoming an attorney, making new law, and helping people. These are the altruistic reasons for entering law that some of us harbored. Far from my young mind was conscious thought about the triumphs or struggles an African American, female attorney would experience. The remote concept was there, in the thought that the law could be used to advance the Civil Rights Movement, and it would continue to be when I was all grown up.

While the rose-colored glasses I once wore have lost a bit of their luster, the mantra "it takes all kinds of people" to make up a team has not been lost. Whether we represent individuals, organizations, or corporate clients, attorneys are in a unique position. It is best to represent a client with an effective team that includes individuals with varying backgrounds. The diversity of a legal team is tantamount to success in the courtroom. Attorneys and clients alike can only imagine a juror's appreciation for an inclusive team.

During the brief 15 years of my practice, I have experienced the unspoken acknowledgment of jurors. In a state where the African American population is five percent, it is common to be the only person of color in the courtroom. It is even more uncommon to be a person of color trying a civil case for corporate and insurance company clients. A few years ago, I came to a profound realization—jurors understand the wherewithal it takes for any diverse attorney to "rise above" or to compete.

It is seen in a juror's eyes during the entry of attorney appearances, when a diverse attorney confidently and loudly states, "I represent Corporation A." As the trial unfolds, so does a juror's confidence or lack of confidence in the attorney's credibility. All that attorneys learn through trial advocacy programs is true. The lessons learned are even more important for the diverse attorney. Tell the truth; put your warts out there, deal with them, and gain the respect and confidence of the jurors. Most importantly, do not waste their time.

Only experience can teach a diverse attorney to watch for the signs. For example, even though jurors do not traditionally like insurance companies, perhaps they will listen to what you have to say if you are sincere, honest, and forthright in your theme. Perhaps your client is not so bad if the team includes a group of attorneys with myriad backgrounds—visible and invisible, but evident.

We cannot lose sight of the fact that the layperson understands the hurdles diverse attorneys overcome to even make it to the courtroom to present a case. It can be seen in a juror's eyes—the surprise that the attorney is well prepared, uses the law to the client's advantage, and respectfully and zealously goes head to head with the "best of the best." It is not a discriminatory surprise; if the client has entrusted representation in court to the attorney, then the attorney must be good.

The surprise centers on the idea that the juror really understands what the attorney is presenting to him or her.

The unsung heroes of the past culminate into every theme, opening, witness examination, and closing argument. Jurors understand the history of this great country. The plight of various ethnic and other groups is well known and part of the national fabric. There is an inherent appreciation for knowing that women fought to have the right to vote, as did African Americans. Even just 45 years ago, only one African American woman sat at the presidential table with other civil rights leaders and attorneys. The same struggles occur today as did then.

Today's struggles for women and others are carried out in the boardrooms, law firms, courtrooms, etc. Not only do we deal with known prejudices, but we also deal with our own prejudices against each other. In the beginning of the struggle, diverse attorneys struggled to be present at the table. Today, the struggle is more vicious, with decreasing economic resources and client skepticism. The proverbial gray hair, as a result of the Enron and other corporate scandals, is still required. Surely, the inclusive message of the day must include attorneys of all backgrounds. The uncommonality of team members can cause the team to rise above commonality. As an individual, diverse or not, the key is to not take anything personally, especially in the business of law. This grand profession requires attorneys, diverse or otherwise, to know themselves and to remain true to themselves without compromising the client or the team.

Keywords: litigation, trial evidence, diversity, legal teams

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Diversity Provides a Kaleidoscope of Perceptions

By Lori L. Lorenzo – July 18, 2011

All society is negatively impacted when a homogenous legal profession is unable to deal, as effectively as it might, with an increasingly smaller, more diverse world.

— Eric H. Holder

Diversity in the legal profession encompasses the education, recruitment, inclusion, and advancement of persons that have traditionally been excluded or underrepresented in the practice of law. It extends beyond the mere numerical or statistical representation of certain classes of minorities to the development of a profession inclusive of and responsive to the barriers to entry and impediments to professional development faced by those who have been excluded and underrepresented. The effort to improve diversity is more than just a moral imperative, more than an attempt to balance numbers, and more than a recruiting and marketing campaign. Instead, diversity should be viewed as an integral component in the provision of effective representation

of counsel and absolutely essential to preserving the integrity of the profession. In addition to legitimacy, the tangible benefits of diversity include innovation, profits, and improved client relationships. For all these reasons, diversity in the legal profession should continue to command our attention and our resources.

Diverse groups of individuals consistently outperform like-minded experts. Conventional wisdom holds that the best, most specialized, intelligent individuals can be relied upon to consistently make the best decisions. However, sociologists suggest and research, such as James Surowiecki's *The Wisdom of Crowds* (2004), supports the opposite conclusion—that heterogeneous groups, even those composed of individuals of varying intelligence, consistently make collectively wise decisions. Although, in any given instance, the opinion of an expert may be better than the decision of a group, no single expert ever consistently outperforms the group, Surowiecki says. To maximize the benefits of diversity within a random group of individuals, Surowiecki indicates that only four elements are required:

- Diversity of opinion. Each member must have access to his or her own private information, such as conceptual and cognitive diversity.
- Independence. Each person is able to form an opinion independent of the opinions of those around them and free from undue influence from others in the group.
- Decentralization. Each individual can and is encouraged to use his or her own local knowledge, specific knowledge, or expertise.
- Aggregation. A mechanism for polling and pooling the group's information.

In the legal profession, one additional element is necessary: a critical mass of diverse individuals. According to Carrie Menkel-Meadow's "Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law," 42 *U. Miami L. Rev.*, 29, 44 (1987–1988), the more visible an individual's minority status, the more necessary it is to achieve a critical mass of individuals sharing that minority status to achieve the benefits of diversity. Although critical mass is different for various employers, in studies on the effect of diversity on jury deliberations, critical mass required only that two of the 12 jurors shared a diverse identity. Samuel R. Sommers, "On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations," *J. of Personality and Social Psychology*, Vol 90(4), 597, 600 (Apr. 2006). In the presence of these elements, groups are made smarter by the input of the various, diverse members. Surowiecki, *supra*.

Diversity adds fresh perspectives and limits the influence of "groupthink," the practice of thinking or making decisions as a group in a way that discourages creativity. In fact, grouping smart people (however "smart" may be defined within an organization) together may actually be counterproductive because people that meet the same, generally narrow, definition of smartness within a given industry tend to resemble one another in experience and are thus more likely to succumb to groupthink mentality. Surowiecki, *supra*.

Certainly, anyone that has graduated from law school and passed the bar is smart by the standard definition of the word. Each lawyer is also somewhat uniform in having gone through a substantially similar form of rigorous academic training, and each has learned essentially the same foundational legal principles, thought processes, and problem-solving skills. In the legal context, achieving diversity requires the inclusion of individuals with varied life experiences, thereby maximizing the benefits of diversity—specifically a broader collective ability to evaluate a client's position and a more varied ability to interpret trial evidence, evaluate witnesses, consider or anticipate opposing arguments, develop innovative strategies, and contribute to more robust information sharing. A 2005 study of the impact of diversity on jury deliberations found that each of these results is obtained in diverse, but not in nondiverse, juries. Specifically, ethnically diverse juries made better decisions because they discussed more case facts, included fewer inaccurate statements, spent more time deliberating, corrected inaccuracies more frequently, entertained more discussion on missing evidence (it is interesting to note that much of the discussion on missing evidence was driven by white members of the jury, but only when white jurors sat on racially diverse juries), and were more open to and actually discussed more race-related topics (as they related to the case under consideration). Sommers, *supra*. By bringing diverse individuals into the box, groups become better at thinking outside the box. Cedric Herring, "Does Diversity Pay?: Race, Gender, and the Business Case for Diversity," *Am. Sociological Rev.*, 208, 220 (2009). Thus, diversity drives innovation.

Diversity is linked to increased revenue, profit, number of clients, and market share. In 2009, in the largest study of this kind to date, researchers analyzed more than 500 companies, using data collected in the National Organizations Survey and found that racial diversity "is associated with increased sales revenue, more customers, greater market share, and greater relative profit, [while] gender diversity is associated with increased sales revenue, more customers and greater relative profits." *Id.* at 208. Industries included in the sample included financial services, real estate, business services, and professional services, among others. Most notably, the study found that a one-unit increase in racial diversity increased sales revenue by 9 percent, while a one-unit increase in gender diversity increased sales revenue by 3 percent. Diversity was the greatest predictor of profitability, having more of an impact on revenue than company size, establishment size, and organizational age.

The most significant study of diversity on business performance prior to the one previously cited took an in-depth look at four companies, one of which was a financial services firm that is the most similar to legal employers of the four. For the financial services firm, racial diversity was positively associated with growth in branch business portfolios and "racial diversity had a positive effect on overall performance in braches that used the diversity as a resource for innovation and learning." Thomas Kochan et al., "The Effects of Diversity on Business Performance: Report of the Diversity Research Network," *Human Resources Management*, Vol. 42, No. 1, 3, 12 (Spring 2003). Furthermore, where ethnic diversity was positively correlated with branch performance, the results were maximized where diverse branches were part of larger organizations that were also diverse. Employers that demonstrate sustained benefits from

diversity use these diverse resources to reevaluate organizational practices, methods, products, strategies, and procedures to continually improve organizational outcomes. Thus, diversity drives profits.

Diversity has the ability to influence the behavior of consumers. Arguably, nowhere is this more evident than in the practice of law, where, in the current legal market, clients are demanding diversity in the firms they hire. Corporate consumers of legal services are increasingly and unabashedly requiring their outside counsel to comply with diversity requirements set by the corporate consumer. For some corporations, these requirements include only the collection and reporting of general statistics, but for some, the requirements are more arduous, seeking to move past the mere statistical representation of minorities and women within law firms and aiming instead to compel firms to both include minorities in matters of the greatest importance to the firm and provide for the advancement of those minorities within the firm. Some of these requirements include detailed breakdowns of exactly who is assigned to each client matter, how many hours each attorney is billing on the matter, and an indication of which attorneys receive origination credit for the work. Diversity must be represented in each instance to the satisfaction of the client.

And, while the trend may be growing more pervasive and robust, it is not new. As early as 1987, General Motors announced to outside counsel its expectations with respect to minority staffing on its matters. In 1992, DuPont considered diversity in its law-firm hiring decisions; American Airlines followed in 1995 and Bell South in 1999, to name a few. Numerous others followed in the years since then. Dale J. Giali, *Diversity in the Legal Profession*. Several hundred corporations are signatories to national and/or local diversity initiatives or calls to action. The most significant example is Wal-Mart, which, in 2005, put teeth to its diversity requirements and terminated two of its top-100 firms for failing to meet the requirements of the company's diversity expectations and changed 40 of its significant relationship partners at firms in which Wal-Mart already had considerable existing relationships. *Wal-Mart Requires Diversity in its Law Firms*, (December 9, 2005). In just the last year at various conferences, representatives of the legal departments of corporations such as Starbucks, Microsoft, Hewlett Packard, American Airlines, Office Depot, Google, and Halliburton have expressed their dedication to diversity and the resulting expectations for the law firms they hire. At least for as long as law firms value the work these large corporate entities have to offer and the income that work generates, the corporations can be anticipated to continue to push diversity initiatives. Thus, diversity drives client relationships.

It is not enough, however, for diversity to be motivated by the desire for innovation, profits, or client relationships; diversity is imperative to the continued legitimacy of the profession. "The legal professional, however dedicated to pro bono service, will always lack some of the credibility integral to forging strong attorney-client relationships so long as it bears little resemblance to the clientele it purports to represent." Eric H. Holder Jr., "Fifty-Third Cardozo Memorial Lecture, The Importance of Diversity in the Legal Profession," 23 *Cardozo L. Rev.*,

2241, 2247 (2001–2002). In 2000, the ABA Commission on Race and Ethnic Diversity described the legal profession as "the least integrated profession in the country." Giali, *supra*.

According to U.S. Census data, the U.S. population in 2000 was 75.1 percent white, 12.5 percent Hispanic, 12.3 percent black, and 3.6 percent Asian. *All Across the U.S.A.: Population Distribution and Composition, 2000*, Population Profile of the United States: 2000 (Internet Release) U.S. Census Bureau. In the legal profession in 2000, whites represented 91.52 percent of attorneys, and only 8.48 percent of attorneys were persons of color (in 2000, the National Association of Law Placement combined into the "People of Color" category all persons that identified as black, Hispanic, Asian, and Native American/Alaskan native). Press Release, Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly (Nov. 15, 2000). In 2010, the U.S. population was 72.4 percent white, 16.3 percent Hispanic, 12.6 percent black, and 4.8 percent Asian. Karen R. Humes et al., *Overview of Race and Hispanic Origin: 2010*, U.S. Department of Commerce Economics and Statistics Administration U.S. Census Bureau (March 2011). In the legal profession in 2010, whites made up 88.5 percent of lawyers, blacks represented 3 percent, Hispanics 2.73 percent, and Asians 5.77 percent. *A Closer Look at NALP Findings on Women and Minorities in Law Firms by Race and Ethnicity*, NALP Bulletin, January 2011. The May 2009 ABA *Lawyer Demographics Report*, Market Research Department (2009), cited similar numbers. The conclusion is clear; minorities are grossly underrepresented in the profession, and the profession is, at best, intensely struggling to keep from falling even further behind.

To add insult to injury, in 2010, the National Association of Law Placement published its annual associate attrition survey results, finding that for the first time in the 17 years since the organization began keeping statistics on attrition, the number of minority and women lawyers declined. Tammy Patterson, "Associate Attrition in 2009: Looking Back in Order to Move Ahead," *NALP Bulletin*, June 2010. Attrition for lateral minority attorneys in 2009 was 51 percent, 48 percent for entry-level minorities, compared to nonminorities laterals at 42 percent and nonminority entry-level associates at 34 percent. Minority representation dropped overall from 12.59 percent in 2009 to 12.4 percent in 2010 (Press Release, Law Firm Diversity Among Associates Erodes in 2010 (Nov. 4, 2011)), which seems insignificant but is indicative of a problem retaining diverse attorneys and is a severe blow to the very modest gains in diversity the profession has struggled to achieve to date.

Critics of diversity argue that diversity leads to conflicted interpersonal relationships, strained employee communication, and increased turnover. Research shows, however, that these negative attributes of diversity are not found in groups that demonstrate both high levels of professional development training and diversity management training (Kochan, *supra*), elements already in place in most law-firm diversity initiative programs and easily replicable in organizations without them. Additionally, although group cohesiveness may be more difficult to obtain in heterogeneous groups of people, the conflict of heterogeneous groups is exactly what contributes

to increased discussion of a more varied range of topics. Surowiecki, *supra*. In time, even heterogeneous groups become more at ease in their interpersonal communications.

Ultimately, any interpersonal discomfort pales in comparison to the benefits diversity brings to the profession. “Each time we let in a new excluded group, each time we listen to a new way of knowing, we learn more about the limits of our current way of seeing. Rather than being threatened by new entrants to the legal profession and the law, we should be grateful for the opportunity to learn that perhaps there are new and other ways to do things.” Menkel-Meadow, *supra*. The diversity of our great nation is an untapped fountain of skills, perspectives, and experiences that, if properly utilized, holds limitless possibilities for innovation and growth serving only to enhance the distinguished reputation of this most noble profession.

Practical Tips for Building Diversity in Your Workplace

- Invest in pipeline programs. Take a long-term view of your investment. Choose to invest in initiatives that not only benefit your organization immediately, but also open the pipeline for young people who may not believe they have access to a career in the law.
- Engage in a mentorship program through your local affinity bar or through the minority student organizations at your local law school.
- Provide diversity training on issues affecting ethnic minorities; women; and lesbian, gay, bisexual, and transsexual (LGBT) attorneys in the legal workforce, such as micro-inequities, unconscious bias, and cultural sensitivity.
- Advocate for inclusive benefits packages for LGBT attorneys.
- Work to ensure that attorneys that participate in alternative work schedule arrangements are not penalized in their professional advancement.
- Move past mentoring and sponsor an attorney. Advocate for this person at every possible opportunity and introduce him or her to your most valuable network connections. Take the success of this person personally.
- Put yourself in situations where you are uncomfortable.
- Know you will make mistakes; persevere through the mistakes.
- Understand that each person has at least one majority identity, whether it be race, religion, sexual orientation, or something else. Work to understand how that identity provides you with opportunities you may take for granted and how others that don’t share that identity may be impacted.
- Evaluate your recruiting strategies and explore alternative recruiting options, including behavioral or competency interviewing techniques. Target diverse candidates in recruiting campaigns.
- Support and be involved in affinity groups within your organizations and affinity bar associations in your community and nationally.

Keywords: litigation, trial evidence, diversity, legal profession

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Diversity and the Legal Marketplace

By David Coale and Margarita Coale – July 18, 2011

Diversity matters in all aspects of modern law practice. It has special significance in the area of client development, where a law firm's internal environment meets clients and their expectations in the marketplace for legal services. A vibrant, diverse team can help attract clients and encourage the development of relationships with clients over time in several ways.

Most basically, diversity has a purely practical aspect. A legal team with fluency in languages besides English that is sensitive to cultural differences is simply in a better position in the global market than a less-sophisticated team. Clients like to be understood and treated as they expect to be treated, and a team that lacks the ability to do so gives its competitors an advantage.

Additionally, many large and sophisticated companies, as a business matter, have strong commitments to diversity in their hiring and contracting practices. As a result, those companies actively search for diversity when they look for legal counsel, and they appreciate a firm that helps them advance their own goals for diversity. Frequently, such companies appreciate an honest and open discussion about diversity in the context of deciding who will work on an initial matter for the company from a firm.

Beyond those practical matters, diversity raises the chances of repeat business from a good client. Nothing encourages a continued business relationship like a continuing personal relationship of admiration and respect. In-house counsel are increasingly diverse, and the opportunities grow for those counsel and firm lawyers to "click" personally if the team offers a diverse range of backgrounds and life experiences.

Those opportunities may arise in a purely professional context, where a corporate legal department interacts with a team of lawyers over time on a matter or series of matters. They can also develop from a mix of professional and social contacts; for example, one lawyer on the team may know an in-house counsel from a case, while his or her partner may know that same counsel from a bar organization. The more diverse a firm's people are, the more likely it becomes that they will have a broad web of contacts and connections in the relevant legal community.

At the same time, involvement by a firm's lawyers in bar and business groups that focus on diversity issues creates networking opportunities within those groups. If the lawyers in a particular community that share a particular background or perspective become close, the network that results is a great way to share information about job opportunities, potential business, and the like. With that information, a lawyer may be able to do a favor for a friend, such as an interview for an exciting new position, that he or she would not be able to do otherwise.

As with any business development initiative, the client-development benefits of diversity to a law firm do not "just happen." The firm should actively promote diversity, internally and externally, and encourage its lawyers to acknowledge and consider diversity as they craft their individual business development plans. For example, a large firm's marketing professionals can keep track of bar organizations to which its attorneys belong and share information with the firm's lawyers about who potentially shares interests and connections. Lawyers who are attuned to the importance of diversity issues can discuss them in the context of assigning lawyers to particular matters.

The process of working together to share information and contacts should not become a chore. Lawyers are people, and they will choose to do things they enjoy over things they do not. A strong team, made up of interesting people with diverse backgrounds, interests, and experiences, sets the foundation for good communication among the team members simply because they like it. As a result, lawyers can communicate openly and honestly about diversity issues, including such practical matters as how to best staff cases. With that base in place, the team will naturally work together well in building relationships with clients—and doing great legal work for those clients.

Keywords: litigation, trial evidence, diversity, client development

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A Trial Lawyers Guide to LGBT Issues in the Courtroom

By James A. Reeder Jr. – July 18, 2011

The composition of juries has changed over time, either as a result of changes in the law or as a reflection of changes in the composition of society. As such, jurors have gone from being all white and all men to both men and women, and then to men and women of all races. Perhaps surprisingly, one change that has not occurred is in regard to the service of lesbian, gay, bisexual, and transgender (LGBT) individuals on juries—as far as we know, there were gay men on juries 70 years ago. What has changed in regard to LGBT jurors—and for LGBT lawyers, judges, witnesses, and courtroom personnel, for that matter—is the degree to which they are open about their sexual orientation and the extent to which, at the very least, they are comfortable with and confident in who they are.

Few people could argue that these developments have produced anything but positive results in the judicial system. More representative juries do not merely honor a civil right or a constitutional ideal but provide an effective tool for achieving more thorough and competent jury deliberations. Studies show that diverse juries reason better, not just as groups but as individuals; everyone on the jury benefits, and justice, it appears, is better served. Moreover, increased gender, racial, and ethnic group representation, especially in a system where those groups sit in

judgment of others, contributes to the elimination of real and perceived inequality in justice administration. The equal, fair, and respectful treatment of all is the touchstone of the American judicial system and the foundation of our society.

And yet, LGBT individuals are subjected to, at a minimum, micro-inequities in courtrooms all over the United States today. At worst, they are the victims of unequal, unfair, and disrespectful treatment. Often, such treatment is not out of malice, but out of unawareness, misinformation, or lack of exposure to LGBT people. Although any potentially marginalized group may be the subject of such treatment, it is particularly likely with regard to LGBT people because their distinguishing characteristic is not obvious. Whereas a lawyer might refrain from asking a question on voir dire if he or she knows it might offend one of the Hispanic members of the venire, it will likely not be apparent if you even have an LGBT person on the venire, as a witness, or even as a judge.

As a consequence, I have prepared the following list of things trial lawyers should consider to avoid the inadvertent unfair or disrespectful treatment of LGBT judges, jurors, witnesses or others in the courtroom. Hopefully, keeping these things in mind will ensure that your case is decided fairly on the merits and that your client receives the full benefits recognized as inuring from a diverse jury.

1. First, you must recognize that someone sitting in judgment of your client—whether a judge or juror—is LGBT. This is also true for key witnesses. This is just a matter of odds.

2. You are likely not going to know who your LGBT jurors, judges, or witnesses are. Even if they are “out” to friends, family, or colleagues, they may feel it is easier to not be open to others in the courtroom because they would rather avoid having to deal with awkwardness or discrimination when their service may only last a day or two. Being open in that situation is just not worth it to them. Moreover, many may not be out at all, in which case they are also facing the fear that some question they are asked will require deciding between revealing their secret and lying.

3. This raises the question: Do you want to know if a judge, juror, or witness is LGBT? Think long and hard before asking a jury panelist about his or her sexual orientation. First, you may not get a truthful answer. Second, the mere question may be looked upon as an accusation by others. Finally, rarely, if ever, will a judge’s or a juror’s sexual orientation be relevant to the ability to fairly consider the law or the evidence in your case. Take the most recent example of Judge Vaughan Walker. Judge Walker presided over the California Proposition 8 litigation. Judge Walker revealed publicly that he had a long-term relationship with a man after he left the bench. The judge considering whether Judge Walker should recuse himself reminded us that the fact that a federal judge shares a fundamental characteristic with a litigant does not mean he or she has an interest in the outcome of the litigation, and this has been consistently rejected as a basis for requiring recusal.

4. Just because an LGBT person is not open in the courtroom doesn't mean that he or she won't feel and react to overt or implicit prejudice—he or she will! Don't make the mistake and assume that because someone has, for a variety of reasons, made the personal choice not to be publicly out that they are shrinking violets who are uncomfortable or ashamed of who they are. Virtually every LGBT person, out or not, will react strongly and adversely to disrespectful or unequal treatment.

5. If you generate resentment in or offend the judge or even one juror, you have just given one person sitting in judgment of your client a single reason to view the facts of your case in a manner that is unfavorable. That becomes very hard to overcome.

6. Assuming you want to avoid offending or even making uncomfortable the LGBT judge or juror, education and experience increases understanding and decreases inappropriate behavior. Start by honestly examining your own stereotypes and learning about what it is like to be LGBT. Maybe start with *A Straight Guide to LGBT Americans*.

7. Even though you probably won't have an occasion where you have to express a viewpoint on the topic, and even though you may have a personal opinion that differs, it is beyond doubt that sexual orientation and gender identity are not choices, any more than one's eye color, handedness, race, etc. If you are straight, did you choose to be?

8. Learn the language. There are certain terms and ideas that LGBT people are particularly sensitive to. As mentioned above, being LGBT is not a choice, so don't use the term "sexual preference." Don't refer to being LGBT as a "gay lifestyle"; the term trivializes LGBT people. It is not a lifestyle; it is their life. In most states, two men or two women cannot marry, so two gay men may be in a committed relationship, but they are not spouses. Learn to use the phrase "spouse, partner, or significant other." Instead of asking people if they are married, ask them to tell you about their family.

9. Don't assume. Don't assume an LGBT person does not have children. There are more than 1 million children in the United States being raised by same-sex parents. Don't assume an LGBT person has never been married or is not currently in a committed relationship. Don't assume that all white men don't know what it is like to be in a minority or to be the subject of discrimination. Much of LGBT discrimination is sanctioned by law and affects people of all genders and races.

10. Make sure your witnesses and co-counsel have the same sensitivity to LGBT personal issues as you do. A flippant or thoughtless remark in or out of the courtroom is as hurtful as an intentional slur.

Finally, I will leave you with a couple of things to think about that may contribute to a more respectful, fair, and equal society. First, never tell a "gay" joke or tolerate the telling of a "gay" joke. Not only is it inherently disrespectful and demeaning, you have no idea who is LGBT in your audience. Second, you often hear people say that they have no problems with or even love

LGBT people, but that they do have a problem with LGBT behavior or same-sex relationships. Although this may be a viewpoint you consider valid, to LGBT people it is nonsensical and disingenuous. LGBT people do not believe that you can love the LGBT person while denouncing LGBT behavior or relationships. The thing that makes one gay, lesbian, or bisexual is the behavior—the relationship. To be gay is to be a man or a woman who is emotionally, romantically, sexually, and relationally attracted to members of the same sex. To say you love lesbians but don't like that two lesbians act out on their attraction for each other is the equivalent of saying you love black people but you don't like the color of their skin.

Keywords: litigation, trial evidence, LGBT

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NEWS & DEVELOPMENTS

Eleventh Circuit Examines Admission of Lay Testimony

On June 14, 2011, the Eleventh Circuit held that an attorney could provide lay testimony regarding fraudulent transactions based on his own personal knowledge pursuant to Rule 701. *United States v. Graham*, ___ F.3d ___ (11th Cir.2011).

At the trial for mortgage fraud, a real-estate attorney, Key, who had participated in some of the transactions purported to be the basis for the fraud was permitted to testify not only about the transactions themselves, but also about whether the transactions were fraudulent. Rejecting arguments that the testimony in question should have been excluded because it was expert testimony that did not meet Rule 702 criteria, the Eleventh Circuit stated:

> We have held that a witness who has particularized knowledge by virtue of his position in a certain company can give an opinion about the manner in which that company conducts its business, even if the witness is not qualified as an expert under Fed. R. Evid. 702. *See* Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co. [PDF], 320 F.3d 1213, 1223 (11th Cir. 2003) ("Tampa Bay's witnesses testified based upon their particularized knowledge garnered from years of experience within the field."). Key provided some testimony about the kind of conduct he engaged in or personally witnessed during fraudulent mortgage transactions, and he testified about his personal knowledge concerning the conduct of other participants in the mortgage fraud scheme. He did so based on his own experience.

Keywords: litigation, trial evidence, lay testimony, Eleventh Circuit

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Trial Evidence
FROM THE SECTION OF LITIGATION TRIAL EVIDENCE COMMITTEE
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Learned Treatises Require Expert's Testimony

Do you need an expert's testimony for the admission of learned treatises? In a case recently decided by the Eastern District of Virginia, the answer was yes.

In *Hogge v. Stephens*, 2011 WL 2161100 (E.D.Va 2011), the plaintiff attempted to submit portions of medical articles in opposition to the defendants' motion for summary judgment. The court found that these documents were inadmissible hearsay, even though the information may have constituted learned treatises under Fed. R. Evid. 803(18), because they had not been authenticated by way of expert testimony. Thus, if you want to throw the book at the opposition, you'd better bring your expert.

Keywords: litigation, trial evidence, learned treatises, expert testimony

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MESSAGE FROM THE CHAIRS

Trial Evidence Committee Issues Special Diversity Newsletter

The Trial Evidence Committee is pleased to present a special issue of its digital newsletter—our first ever issue to focus solely on diversity in the courtroom. The perspectives in this issue are, to say the least, diverse.

Allison Jacobsen's article about real-time trial experiences is very instructive and may make you think a little harder about your own witness's demeanor in trial.

Christina Dixon's "For Legal Teams, Perception Is Reality" will make you stop and think about your next trial. Maybe it should also make you think about other life experiences.

Lori Lorenzo's "Diversity Provides a Kaleidoscope of Perceptions" marries the academic with the intellectual and includes important perspectives on the issues surrounding diversity.

David and Margarita Coale's "Diversity and the Legal Marketplace" is a more holistic view of diversity and the need for diversity in all aspects of modern law practice.

Last, but not least, is Jim Reeder's article, "A Trial Lawyer's Guide to LGBT Issues in the Courtroom." This article is a pointed and particular reminder to us all that stereotyping is not only hurtful, but also, if it involves you and your fact-finder, is a factor that can cost you dearly.

A number of us have preached diversity in the courtroom for some time. This issue can serve as your Rosetta Stone among the logical, emotional, and educational issues involved in justifying and implementing diversity in the courtroom.

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ABA Section of Litigation Trial Evidence Committee
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