

# Gender and Racial Bias in the Courtroom

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Recent statistics shows that although law school graduation rates for males and females are nearly equal, fewer than 19% of law firm partners are women, fewer than 6% are racial minorities, and fewer than 2% are female minorities (“Law Firm Diversity Demographics Slow to Change — Minority Women Remain Particularly Scarce in Law Firm Partnership Ranks,” *The National Association for Legal Professionals*, press release on October 10, 2008). The scarcity of women and minorities in law firm partner positions is one outcome of gender and racial bias in the legal profession that could perpetuate bias and create additional problems for women, racial/ethnic minorities, and the overall perception of our legal system. A DRI survey found that 70.4% of women attorneys who were surveyed have experienced gender bias in the courtroom (“A Career in the Courtroom: A Different Model for the Success of Women Who Try Cases,” *DRI—The Voice of the Defense Bar*, 2004). The purpose of this article is to address how gender and racial/ethnic bias, exhibited in its many forms within the courtroom, affect decision-making and could ultimately compromise the integrity of the court system. Before we begin, we need to clarify that there is no simple answer to the question of how gender and/or racial bias affect decision-making; in this article we will discuss previous studies that have addressed certain aspects of this topic as well as our own experience in the field of jury research and trial consulting.

## **EVALUATING THE CONTEXT**

The bulk of research in the field of psychology and law involves surrogate jurors and examines how they make decisions as triers of fact. For example, in a typical laboratory study, an experimenter can isolate two variables (such as attorney gender and race) from all other variables in a controlled setting and observe the effects that they have, both individually and in combination with each other, on certain measures (such as juror decision-making). While this may appear to be a simple process for learning about the world, researchers always struggle with the issue of applying laboratory findings to real world settings. Unlike a laboratory, the courtroom is one real-world setting that involves a very low level of control and predictability. Consequently, there is no easy way to assess the potential impact of important “extralegal” factors, such as attorney gender and race, on triers of fact, mainly because the courtroom contains many other elements that also affect decision-making. The key to understanding how decisions are made in the courtroom is to evaluate the *context* in which factors such as gender and racial/ethnic bias are considered. The context includes, but is not limited to: the demographics, experiences and expectations of the decision-maker(s); the type of case being tried and the evidence involved in the case; and the behaviors and characteristics of the trial team.

## **BE CAUTIOUS WHEN MAKING GENERALIZATIONS**

Let’s start by looking at attorneys through the eyes of jurors. Trial counsel must be aware that in some contexts, minority attorneys, considered to be a minority when viewed against the national population, are not in the minority at all. For example, a Hispanic attorney in Hildalgo County, Texas, reflects the majority within the local population. Thus, it is usually inappropriate to make sweeping generalizations about how juries will see “minority” attorneys and judges. Second, in the context of our television culture, potential jurors see women attorneys taking on big cases and running the courtroom as judges in shows such as, “Boston Legal” and the variations of “Law and Order.” Even Judge Wapner has been replaced by the Judge Marilyn Milian (a Latina of Cuban descent) on daytime court television. As such, modern day “TV-watching” jurors are not likely to perceive women and minority attorneys as non-traditional in the courtroom. Instead, jurors may *expect* to see women in positions of power in the courtroom—as judges and lead counsel, rather than clerks and reporters.

Attorneys also need to be careful when making generalizations about juror characteristics and behavior they observe during *voir dire* and throughout the trial. We always caution attorneys who attempt to analyze nonverbal behavior in the jury box. People in positions of lower social status, including women and racial/ethnic minorities may not make consistent eye contact with a white male attorney, but this does not mean that they disagree with his message. Similarly, jurors who smile and nod may be polite people or they may have learned to smile and nod to most people, but this does not mean they agree with what they are hearing. Not only is body language not predictive of trial outcome, but it is also not a good indicator of juror receptivity to your message. There are many factors that influence a person’s body language, including an uncomfortable chair, lack of sleep or caffeine, a need to use the restroom, a generally agreeable personality, over-expressive eyebrows, social status differences, racial backgrounds and ethnic customs, as well as overall level of comfort in a formal courtroom setting.

## **TRIAL PARALLELS LIFE**

Trial counsel must also recognize that a parallel process exists between the way the attorneys behave at trial and the way that their client treated the other party, particularly when that party is an individual. This behavior is particularly salient in rape, medical malpractice, and discrimination or harassment cases. For example, in a sexual harassment case, jurors may be sensitive to the way that a female associate is being treated at trial, and may be offended by the fact that the lead counsel is condescending toward her. They

are looking for cues as to how this client (represented by its attorneys) treats its “employees.” Or, jurors may observe that a minority attorney is seated at counsel table during a race discrimination case, but has no apparent role at trial. Jurors may assume that the corporation is just using this attorney as a token, a superficial sign that they are racially aware. If he or she is not given a chance to be a real contributor, this may anger the jury. This potential for misinterpretation of motive is more apparent in the above types of cases because salient issues in the case (race or gender) interact with the trial process (how the attorneys behave).

## UNDERSTANDING COGNITIVE FILTERS AND BIASES

One of the most fundamental tenets of juror psychology is the understanding that jurors’ personal experiences color their perceptions of a case, and the evidence in any case must be able to pass through these predispositions, or “cognitive filters.” This process suggests that cases involving more emotion, personalization or identification with the parties or the facts (for example, medical malpractice, product liability, personal injury, or employment cases) can set the stage for more awareness of the gender and race of the attorneys, litigants, and other key players in the courtroom than cases without these emotional dimensions.

Having conducted extensive pre-trial surrogate juror research and post-trial interviews with actual jurors in hundreds of venues across the country, we know that jurors think that they have more expertise in cases in which they report to having had some relevant experiences—for example, medical malpractice, employment, and personal injury cases. Cases such as these frequently involve sensitive or emotional aspects, including attitudes toward women, ethnic minorities, or persons with disabilities; therefore, jurors’ cognitive filters relevant to these topics are more likely to influence their decision-making. Jurors’ biases against corporations, feelings about physicians, and attitudes about equality and fair treatment, etc., are very important filters in many cases and are not easily discovered even during an extensive *voir dire* process. Asking jurors to be upfront about their prejudices and personal beliefs in front of a group of strangers rarely produces the intended outcome. Not only are people typically *unwilling* to be so transparent, but most people are *unable* to do so because they are not aware of their own implicit or hidden biases.

Implicit or hidden biases can and do affect the worldviews of more than just jurors. Attorneys, arbitrators, mediators and judges are all prone to exhibiting gender and racial bias. John B. McConahay first coined the term “modern racism,” which describes a more covert type of racism exhibited by people who generally believe that racism no longer exists (“Modern Racism and Modern Discrimination: The Effects of Race, Racial Attitudes, and Context on Simulated Hiring Decisions,” *Personality and Social Psychology Bulletin*, 9, 1983, 551-558). One example of modern racism is the belief that people of certain races have specific, innate abilities that make them better or worse at tasks than people of other races. For example, many people believe that African Americans are far better athletes than Caucasians and Asians are more intelligent than Hispanics. People who hold these beliefs are likely unaware that they qualify as racism and thus unlikely to admit to having any racial bias. But of course, we all have biases, no matter how hard we try to deny them or their influence on our decisions and worldviews. An important tool for learning about one’s own hidden biases is the Implicit Association Test (IAT), created and evaluated by researchers at Harvard University, the University of Virginia, and University of Washington. The IAT is a paired association task that measures implicit attitudes and beliefs that people are either unable or unwilling to admit. The test-taker can choose between tests focusing on gender, race, age, disability, weight, religion, and sexuality, among other things. (For more information or to take the Implicit Association Test, please go to <https://implicit.harvard.edu/implicit/>.) Attorneys should be encouraged to take the IAT, explore the website, and engage in open dialogue about the impact of hidden gender and racial bias in the legal profession with their colleagues. While the majority of research and discussion on courtroom bias has focused on how jurors perceive male versus female and black versus

white litigants and attorneys, everyone involved in the legal profession should become aware of their own prejudices and biases and be motivated to overcome them.

## **JUDGES AS DECISION-MAKERS**

Because many cases are not tried in front of a jury, we are often asked how judges and arbitrators make decisions. Without question, judges (compared to jurors) have a greater amount of knowledge and informational resources available to inform their decision-making and are highly motivated, in that they are not interested in seeing their decisions overturned due to error. But are judges more reliable decision-makers than jurors? Most people are surprised to learn that the process of decision-making for judges, arbitrators, and mediators is not much different from juror decision-making.

Social science research, though limited, does shed light on this question. One study examined the effects of cognitive biases on judicial decision-making using data from 167 federal magistrate judges (C. Guthrie, J. J. Rachlinski, & A. J. Wistrich, "Inside the Judicial Mind," *Cornell Law Review*, 86, 2001, 777-830). The results of this study showed that judges are just as susceptible to certain cognitive errors (including hindsight bias and egocentric bias) as were jurors. In a more recent study involving 133 judges from around the country, researchers used the race IAT and three hypothetical legal scenarios (two in which the race of the defendant was subliminally primed and one in which the defendant's race was explicitly mentioned) to investigate the impact of implicit or unconscious racial bias on judicial outcomes (J. J. Rachlinski, S. L. Johnson, A. J. Wistrich, & C. Guthrie, "Does Unconscious Racial Bias Affect Trial Judges?" *Notre Dame Law Review*, 84, 2009, 1195-1246). They concluded that judges, just like adults in the general population, showed a moderate-to-large degree of implicit racial bias and that without an awareness of the need to avoid racial bias in their decision-making, their decisions can produce racially disparate outcomes. The good news is that these researchers also found that sufficient motivation to suppress racial bias produces fairer and more just outcomes. Biases of all kinds are so pervasive and powerful that it is impossible to eliminate them completely from cognitive processing, but with careful monitoring and accountability, jurors, judges, arbitrators, and mediators can limit the influence they have on the important decisions.

## **CHANGES ABOUND**

The year 2009 marks a major change in the demographic landscape of our nation's most prominent positions of authority. The first African American President (a Senator and former Harvard Law Review Editor) took office in the White House and shortly thereafter made an historical modification to the U.S. Supreme Court. With the Presidential appointment of Sonia Sotomayor to Supreme Court Justice, women and racial/ethnic minorities in the legal profession have a new role model—a tough and powerful Latina from the South Bronx who understands and has overcome the politics of racism and sexism. Many critics feared that Sotomayor's decision-making on the bench would be influenced by her background and life experiences as a woman and Latina, while supporters applauded her appointment for the same reasons. We have little doubt that litigators of color or who are female will be challenging the status quo and the traditions of our court system now more than ever. We are hopeful that future statistics related to women and minorities in the legal profession will reflect these changes and in turn, biases and prejudices regarding gender and race in the courtroom will be attenuated more each year.

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