TABLE OF CONTENTS

Articles »
A Call to Arms to Minority Attorneys: If Diversity Dies, We Are to Blame
By R. David Ware
Experienced first-chair trial attorney offers sage advice for ensuring the success of the diversity and inclusion movement.

From Nigeria to the California Department of Justice: The Story of Joy Utomi
By Brittny R. Dobbins
The deputy attorney general shares the story of her journey.

Juror Strikes in Capital Murder Case Were Based on Race, SCOTUS Rules
By Mark Walsh
In August, the ABA Journal reported on Foster v. Chatman.

Q&A with In-House Counsel John Son of Union Supply Group
By Amanda Villalobos
With the private law firm life in his rearview, a new general counsel shares his insights as a corporate counsel.
By R. David Ware

For years now, we have been engaged in the steady slog of trying to convince corporations and other entities of the need to engage minority counsel and convince firms to hire minority lawyers. While those herculean efforts have met with some success, we are still very far behind. I’m frankly worried about it. My fear is not that the commitment is not there from those giving out the work or hiring lawyers—we know that. My fear is that minority lawyers are becoming weary in pursuing the business and insisting on diversity in hiring. Everybody I talk to is “tired” and disappointed. We need to refocus. My appeal is that we get back in the “gym” and become relentless about the pursuit of the work we all rightly deserve. We cannot afford to grow weary; the stakes are too high. This admonition reminds me of a Bible verse: “For consider him that endured such contradiction of sinners against himself, lest ye be wearied and faint in your minds.” (Hebrews 12:3). Think hard about the phrase in italics, “lest ye be wearied and faint in your minds.” Has that happened to us? Are we so discouraged about the lack of progress that we spend more time lamenting than implementing and, in the process, are allowing the commitment to diversity in the selection of counsel to die a slow, agonizing death? Are we so angry by the seeming lack of sensitivity to the need for diversity in counsel that we have opted out of trying? I encourage you to shake off past disappointments and jump back in there.

Twenty-first-century marketing is obviously different from the way marketing used to be done. Minority counsel must come up with new, innovative ways to showcase their talents. It is not a bad idea to pool resources in order to hire a marketing firm, social media consultants, issue experts, and the like. The Lone Ranger approach has not worked and will not work. We need to sometimes pitch a team that includes not only lawyers in our firms but lawyers in other firms as bench strength. We have to do a much better job courting and following up with general counsels about the need for diversity and why it is good business. I know we’ve tried. Let’s try again. We must strive to become as politically savvy as possible to ensure that we are strategically positioned in areas of interest so that our names are on the forefront of consideration when it comes to selecting attorneys. It’s time for us to get back on our game.

What do we need to do, given that we cannot afford to get tired? Consider:

- Everybody’s success is your success. Every time you hear about a minority attorney or firm getting work, talk it up. Congratulate them, even if they got work you wanted. Offer to help.
- Lose the urge to remain silent when you encounter resistance to diversity. Tell the shareholders about it; tell the board about it; tell their customers about it. Tell everybody about it. It’s not acceptable.
- Be sharp, all the time. You know the rules: You have to perfect. Yes, it’s unfair. Yes, it’s ridiculous. Yes, it’s discouraging. But it is reality. The rules didn’t change because the
president changed, and the rules may never change. So you decide, right now, to be at your best every single day. No time to cry. No time to cast blame. Just be the best. You always have been anyway. No need to stop now. Being the best is in your DNA. So recall what you know about those who’ve gone before and blaze your own trail of perfection. You wouldn’t be doing this if you weren’t the best. So be you. All the time.

- Aim high. While the popular term “low-hanging fruit” may be a cool marketing strategy, it’s much better to try to get the whole tree. When you only go after small matters to get your foot in the door, you give the impression that that is all you want and that you cannot handle more complex matters. That is not to say you should ignore or turn down matters that allow you to become better known to a new client. But don’t stop there. Go for it all. I don’t think Ricky Bobby’s philosopher father was right when he said, “If you ain’t first, you’re last!” But I do agree that if you don’t want to be first, you will likely end up last. There is no reason for you to limit yourself when it comes to work you seek. You’re good at this, so go for the gold.

- Maintain a good set of advisors who do what you want to do. Most successful people love to share strategies and insights. Align yourself with them. Yes, they’re busy. Yes, they have a lot on their plates. But if they are truly successful in the holistic sense, they will want to share their “secrets” and open doors for others. Somebody held the ladder while they climbed it. Reciprocity is required.

- Mentor every law student you can. Get them ready for the interviews. Help them with their resumes. Help them with their presentation skills. Help them learn the job search ropes. Advise them of every opportunity for a job. Help laterals. Make sure you know who is available and tell everybody you know about them. When they are hired, don’t let them fail. Just don’t.

Finally, remember, we are in this together. We can make this happen. We owe it to ourselves and our progeny. The Jungle Book is a popular film. The author of the original Jungle Book poem, Rudyard Kipling, poignantly captures the point of my reminder to us:

> As the creeper that girdles the tree-trunk  
> the Law runneth forward and back—  
> For the strength of the Pack is the Wolf,  
> and the strength of the Wolf is the Pack.

Remember, we cannot afford to become weary and faint in our minds. Diversity will not die. We will not let it.

**Keywords:** litigation, diversity, inclusion, advice for lawyers, corporate counsel, unity, R. David Ware

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From Nigeria to the California Department of Justice: The Story of Joy Utomi

By Brittney R. Dobbins

Joy Utomi is a deputy attorney general in the California Department of Justice, Office of the Attorney General. She works in the Criminal Appeals, Writs, and Trials unit where she prosecutes felony cases. As a deputy attorney general, Joy has argued before the Ninth Circuit Court of Appeals and all three divisions of the Fourth District of the California Court of Appeal, and has filed briefing in the California Supreme Court. Joy prosecutes both violent and nonviolent felony offenses ranging from theft to murder. In recent years, she has worked with a statewide team of top-notch appellate advocates who prosecute sexually violent predators. Despite the difficult nature of her cases, Joy takes pride in the fact that her work helps to keep the most violent of offenders off the streets and protect victims. Joy loves many aspects of her job, but she said the most important benefit is her ability to influence the law. “Appellate prosecutors are often on the frontlines of interpreting new law and arguing for how it should be applied.” That is when Joy feels she is “truly answering the call to advocacy.” “That is when I get to advocate for the people of California and ensure the law is applied in a just manner.”

Joy’s path to the Department of Justice was somewhat atypical. She was born in Benin, Nigeria, to two loving parents. Joy and her family came to the United States in the late 1980s because, as Joy explained, her parents “wanted to give their children better opportunities, better resources, better education, more stability, and a brighter future.” Joy has exceeded her parents’ dreams by graduating from two fine universities in California—Loyola Marymount University as well as the University of San Diego School of Law. In undergrad, Joy earned degrees in political science and communications. In law school, Joy did everything but sit idly by on the sidelines. Joy was involved in a number of student organizations, such as the Student Bar Association, Appellate Moot Court Board, and the Dean’s Advisory Committee. It is through her participation with Moot Court that Joy discovered her passion for appellate advocacy. In fact, participating in the school’s moot court competitions is her greatest memory of law school.

When not at work, Joy volunteers much of her time to organizations that help disadvantaged youth, such as the Big Brothers Big Sisters program, where she is a “big sister.” As a big sister, Joy has been mentoring a teenage girl for the past four years. Joy says her “little sister” is amazing. “She’s carefree, adventurous, and a very talented artist.” Joy and her little sister have formed what Joy describes as “a lifelong friendship,” thanks to their many adventures together, like swing dancing classes, ice skating, and go-kart racing.

Joy is also the current president of the Earl B. Gilliam Bar Foundation, a nonprofit organization dedicated to promoting diversity in the legal profession. Joy has been involved with the foundation for several years, working to provide scholarships to deserving minority law students in need and to give underrepresented communities greater access to justice. As president of the foundation, Joy strives to improve the San Diego legal community, and she achieves this by
organizing various career development events throughout the year. This past August, the foundation presented a judicial luncheon, “Building a Bridge to the Bench,” which featured a panel of judges who offered concrete tips and advice on what attorneys in every stage of their career should do to prepare for a judicial appointment. Last month, the foundation presented a free career panel and networking event designed to inform law students and new attorneys about the benefits of a career in public service.

Joy has an unparalleled passion for the law and helping youth gain access to the profession. When asked what advice she would offer law students from underrepresented communities, Joy’s response was “[b]e confident and work hard!” “Being the only person that looks like you in a classroom, interview, or internship can be intimidating, but your uniqueness is your best asset!” Joy advises, “Make sure your voice and perspective is heard.” “Striving to blend in may result in a loss of identity and confidence.” Joy says, “Understand the value of your background and experience [and] learn how to show it in a professional manner,” because that is when employers will see your diversity as its gain. Most importantly, Joy advises, “recognize your weaknesses, work hard to improve them, and know when to ask for assistance.”

Joy’s story reminds us that (to steal a phrase from President Obama) “in America, it’s the promise of a good education for all that makes it possible for any child to transcend the barriers of race or class or background and achieve their potential.”

**Keywords:** litigation, diversity, inclusion, California Department of Justice, Joy Utomi, advice for lawyers, Earl B. Gilliam Bar Foundation

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Juror Strikes in Capital Murder Case Were Based on Race, SCOTUS rules
By Mark Walsh

The U.S. Supreme Court spoke with a little extra emphasis, if not unanimity, when it ruled late in its term that the state of Georgia had violated the U.S. Constitution by striking two jurors on the basis of race in a capital murder case.

“Two peremptory strikes on the basis of race are two more than the Constitution allows,” Chief Justice John G. Roberts Jr. wrote for the majority in Foster v. Chatman. It was a 7-1 judgment, with Justice Samuel A. Alito Jr. concurring in the outcome and Justice Clarence Thomas dissenting.

The chief justice was sending “the undeniable message that racial discrimination is going on in jury selection and prosecutors are lying about it,” says Stephen B. Bright, who represented defendant Timothy Tyrone Foster before the high court.

“I don’t think anybody would believe that what happened to Tim Foster is limited to that case,” says Bright, the president and senior counsel of the Southern Center for Human Rights in Atlanta. “This is just one of those serendipitous cases in which we were able to get the field notes.”

RACIAL NOTATIONS
Foster, an African-American, was convicted in the Aug. 28, 1986, death of Queen Madge White, a white, 79-year-old widow and retired schoolteacher who was found dead on the floor of her home in Rome, Georgia. She had been beaten, sexually assaulted and strangled. Foster confessed to the killing, and some of the woman’s possessions were recovered from his home.

Foster was charged under Georgia law with malice murder and burglary, and he was convicted and sentenced to death by an all-white jury. During a later state habeas proceeding, his lawyers filed requests under Georgia’s open-records law seeking access to the prosecution’s file from his 1987 trial.

The documents unveiled in the request and admitted into Foster’s habeas proceeding were critical to his victory this spring in the Supreme Court. They include copies of the prosecution’s jury venire list, in which the names of black prospective jurors were highlighted in bright-green marker. Also, the letter “B” was noted next to each of these juror’s names.

Prosecutors also circled the word black under the “race” question on the questionnaires of five members of the jury pool, and identified three black prospective jurors as “B#1,” “B#2” and “B#3.” The office also ranked the black prospects against each other in case, in the words of a prosecution investigator, “it comes down to having to pick one of the black jurors.”
The prosecution would go on to give explanations for its peremptory strikes of the black jurors that were contradicted by its notes. The notes “revealed an obsession with race,” Bright says.

The state of Georgia contended that—contrary to the idea that prosecutors were discriminating based on race—they were attempting to comply with the Supreme Court’s decision in *Batson v. Kentucky*, decided in 1986. *Batson* held, among other things, that a defendant may establish a prima facie case of purposeful discrimination solely on evidence about the prosecutor’s exercise of peremptory challenges at trial.

“These notes that we have, they don’t undermine any of the findings that were given by the prosecutor in his strikes,” said Beth A. Burton, a Georgia deputy attorney general, at oral argument last November. “The reasonable explanation in this case is [that] four months prior to trial, Batson had just come out.”

Because of the then-new ruling, and because of various *Batson* challenges filed by Foster’s lawyers at this early stage, prosecutors were preparing a *Batson* defense, she said. “So I would be more surprised, quite frankly, if there wasn’t some sort of highlighting” based on race, Burton said.

The state habeas court denied relief to Foster. It held that, as a preliminary matter, his *Batson* claim was not reviewable because it had been raised and rejected in his direct appeal to the Georgia Supreme Court. Nevertheless, the state habeas court concluded that Foster’s renewed *Batson* claim was without merit because he had “failed to demonstrate purposeful discrimination.”

The Georgia Supreme Court declined to take up Foster’s habeas case, which led him to petition the U.S. Supreme Court.

‘SHIFTING EXPLANATIONS’

Chief Justice Roberts, in his May 23 opinion in *Foster*, offered a reminder of the three-step process from *Batson* for determining when a peremptory strike of a juror is discriminatory. First, the “defendant must make a prima facie showing that the peremptory challenge has been exercised based on race; second, ... the prosecution must offer a race-neutral basis for striking the juror in question; and third, ... the trial court must determine whether the defendant has shown purposeful discrimination.”

Both parties agreed that Foster had made a prima facie case, and that the prosecution had offered race-neutral explanations for excluding prospective black jurors. So Roberts focused on the third step, and in particular on the strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood.
Prosecutors struck Garrett citing a “laundry list” of reasons, Roberts said, including that she had given short and curt answers during voir dire, was too young, was divorced, and had two children and two jobs.

But Garrett was on the prosecution’s list of “definite nos,” and the prosecution decided to strike her only after it learned it would not need to use a peremptory strike on another black prospective juror, who was excused for cause. And the state “willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror,” Roberts said.

For example, the claim that Garrett was too young was based on the prosecution’s desire to have older jurors who would not easily identify with the then-young defendant. “Yet Garrett was 34, and the state declined to strike eight white prospective jurors under the age of 36,” the chief justice said.

When it came to Hood, who was married, had good employment and was in the age range sought by the prosecution (between 40 and 50), he was nonetheless struck by prosecutors. The reasons given included that Hood had a son who was the same age as the defendant and who had previously been convicted of a crime, that Hood was slow in responding to death penalty questions, and that he was a member of the Church of Christ, about which the prosecution had concerns related to its death penalty teachings.

The chief justice said that Hood had repeatedly asserted during voir dire that he could impose the death penalty. And prosecutors acknowledged in a document that the Church of Christ took no stand on capital punishment.

Roberts said that it was not just that prosecutors’ stated reasons for striking black panelists applied similarly to nonblack panelists who were permitted to serve. “There are also the shifting explanations, the misrepresentations of the record and the persistent focus on race in the prosecution’s file,” the chief justice said. “Considering all of the circumstantial evidence that ‘bear[s] upon the issue of racial animosity,’ we are left with the firm conviction that the strikes of Garrett and Hood were ‘motivated in substantial part by discriminatory intent.’”

Justice Alito concurred in the judgment and expressed the view that it would be up to Georgia’s courts to decide whether Foster was entitled to relief, such as a new trial. (Bright believes his client will receive a new trial.)

Justice Thomas’ dissent said Foster’s new evidence did not justify the Supreme Court’s reassessment of who was telling the truth 30 years ago.

“In few other circumstances could I imagine the court spilling so much ink over a fact-bound claim arising from a state post-conviction proceeding,” Thomas wrote. “It was the trial court that observed the [pool of jurors] firsthand and heard them answer the prosecution’s questions, and
its evaluation of the prosecution’s credibility on this point is certainly far better than this court’s nearly 30 years later.”

UNCONSCIOUS BIAS?
Abbe Smith, a professor at Georgetown University Law Center, says that despite 30 years of Batson, racially motivated peremptory challenges occur in cases big and small, in ordinary felonies and capital murder prosecutions. “It really is remarkable that in so many jurisdictions that are racially diverse, you still see all-white juries,” she says. The Foster case is not an anomaly, she adds. It’s simply a case in which the smoking-gun evidence came to the fore. “There is long-standing evidence that prosecutors are trained to be crafty and wily in the exercise of peremptory challenges,” Smith says.

The Georgia attorney general’s office did not respond to a request for comment after the Foster decision.

Maureen A. Howard, a former Washington state prosecutor who is now an associate professor at the University of Washington School of Law, says some discriminatory use of peremptory challenges is the result of unconscious bias by prosecutors, who “may be unaware of their own implicit bias when analyzing their reasons for dismissing a potential juror of color.”

“My hope is that the egregious facts in Foster will provide a wake-up call to state courts and bar associations,” Howard says. She has called for peremptory challenges to be eliminated for prosecutors altogether, but lawyers and judges could work to provide “a more objective standard for reviewing peremptory challenges.”

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Q&A with In-House Counsel John Son of Union Supply Group

By Amanda Villalobos

John Son is vice president of business affairs and general counsel at Union Supply Group, Inc., which is a leading provider of goods and services to state and federal correctional facilities nationwide. Previously, Mr. Son was a litigation attorney at Tucker Ellis LLP, where he focused his practice on products liability and mass tort defense. While at Tucker Ellis, Mr. Son served as national and local trial counsel for clients in a variety of industries, including aviation; vertical transportation; heating, ventilation, and air conditioning; aerospace; and shipbuilding. Mr. Son recently shared his views on the following questions:

What was the most difficult part of your transition from outside counsel to in-house counsel?

One challenging aspect of my new role, and also one of the most gratifying, is going from a specialist in a single area of law to a “generalist” and having to continually educate myself in new practice areas in a short amount of time. Prior to going in-house, I was a litigator specializing in products liability defense. Now, on any given day, I am asked to address challenges in a number of different legal areas such as corporate law, employment law, intellectual property, and contracts law (to name just a few). I also help the company solve random and challenging issues that, while not legal in nature, implicate important company interests and have the potential to affect the success and reputation of the company. The role of in-house counsel goes beyond the boundaries of the legal department, and you have to think about a variety of factors beyond just the law when deciding on a particular course of action the company should take.

Why do you think you’ve been successful in your new role?

I have held this position for less than a year, so I hesitate to say that I’ve achieved “success” at this point. But a big part of my role in the company is risk management. I help the business grow and manage its day-to-day operations while trying to minimize potential liability, and having a litigation background has been invaluable in that respect. But to really succeed in my new role as general counsel and become a trusted advisor to the company, I also need to understand all aspects of the company’s business operations. That means building close relationships with every business unit and learning what their priorities are and what challenges they face. The key to accomplishing this is trust. All of the things that have earned me the trust of my colleagues throughout my career—such as having a strong work ethic, being a good listener, being analytical, being resourceful, and just exhibiting good judgment—will be the key to my success here as well.

What benefits do you find companies like yours gain from having diversity in the workplace?

Union Supply Group is a leading provider of goods and services to the correctional industry, and I believe a large part of our company’s success is its diverse workforce. Diversity in the
workplace benefits the company in multiple ways. First, employees from diverse backgrounds bring individual talents and experiences that I believe lead to better problem solving. From a retailer standpoint, having a diverse workforce provides us with a more diverse network of potential business partners to tap into, from suppliers to manufacturers. A diverse workforce with varying perspectives, backgrounds, and life experiences also gives a company a competitive advantage when it comes to understanding and anticipating customer demands and trends. Second, diversity in the workplace creates a more positive work environment, and employee satisfaction leads to increased productivity and reduces employee turnover. I personally enjoy coming to work every day and interacting with people from diverse backgrounds, with diverse ways of thinking. People, including myself, want to be in an environment where they work with people they can relate to on many different levels, as well as people they can learn from.

What advice would you give to an attorney who’s considering making the jump to in-house legal work?
The demands and responsibilities of an in-house position will vary greatly depending on the company and the organization of the legal department, so there isn’t one clear path to going in-house. Having a broad skill set in many different legal areas, and learning to be resourceful, will definitely prepare you well for an in-house position. Beyond that, I think developing a good reputation in the legal community and maintaining relationships are important for getting access to in-house opportunities. There is a tremendous amount of competition for in-house positions, and in my experience, having connections or a good recommendation can go a long way toward separating you from the crowd. So my advice is to always conduct yourself as the type of attorney, and person, that you would not hesitate to recommend for an important position. Treat everyone—whether it be a colleague, a client, opposing counsel, or judge—as if they might be in a position to offer you or recommend you for an in-house position down the road.

What advice would you give to firms trying to win your company’s business?
It’s pretty simple for me: Provide excellent client service. Be accessible and respond to phone calls or emails in a timely fashion, listen, follow through on promises, work efficiently, and bill with clarity, accuracy, and based on value. Handle my smaller matters with the same level of care and attention that you would my larger matters. Don’t agree to an alternative fee arrangement and then skimp on the quality of your legal services. I worked at a law firm that emphasized client service and the importance of cultivating long-term relationships, even at the expense of billing, so I thought all of these things were par for the course, but I am learning that this isn’t true for all law firms.

Is there anything you miss from your time working at a firm?
Being the only attorney in the company, I miss having a peer group with whom I can discuss ideas and talk through challenging legal issues. And while I sometimes miss the more fast-paced lifestyle of working at a litigation firm, I couldn’t be happier in my new role, which was an opportunity that came to me at just the right time in my professional and personal life.
Keywords: litigation, diversity, inclusion, Union Supply Group, Inc., John Son, corporate counsel, advice for lawyers

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