Cross-Examination of Experts
Discovery and Rules for a Successful Cross-Examination

VERONICA SMITH LEWIS
LAURA J. O’ROURKE

Cross-examination of an expert witness can be complex and thorny. This discussion explains the pretrial discovery you should obtain and the rules you need to understand in order to do an effective expert cross-examination.

The Key Objectives
The overall goal during cross-examination of an expert—whether he is an endearing “good guy” or a not-so-endearing well-trained hired gun—is to convince the jury (and the court) that the expert’s opinions should be disregarded. There are a number of techniques that you can use to achieve that goal. Generally, you will succeed if you can persuade the fact-finders to reach one of the following conclusions:

● The expert is not qualified;
● The expert is biased and/or will testify to anything for anybody;
● The expert has been manipulated by your opponent or its counsel;
● The expert failed to consider key factors and/or is relying upon false premises;
● The expert has previously made statements and/or provided testimony that is inconsistent with her current testimony;
● Learned treatises demonstrate that the expert’s opinions are invalid; or

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CHAIRS’ COLUMN

Houston, San Francisco, and Beyond
The Work of the Committee

BRETT J. HART AND BURNADETTE NORRIS-WEEKS

The Section of Litigation recently held its annual conference in Houston, Texas. The conference was a huge success! And, the Minority Trial Lawyer Committee played an active role in several of the key programs and events.

The Celebrating Diversity Luncheon featured keynote speaker ABA President-Elect Dennis Archer, the first African-American to serve in this position. (See our cover article in this issue to find out more about one of President-Elect Archer’s major platforms for his ABA presidential year.)

Also at the Houston meeting, the Minority Trial Lawyer Committee co-sponsored the program “How to Get There From Here,” which focused on how lawyers can distinguish themselves from their competitors. Thanks to our Committee members who helped with outreach to local minority bars—namely Oscar Villarreal of San Antonio and Cisselon Nichols of Houston.

We want to thank all of you who responded to our articles and e-mails soliciting your involvement in the Committee. We invite you to visit the Committee’s Website and take a minute to complete the short profile under the Diversity Development Database www.abanet.org/litigation/committee/minority/home.html. This database will assist us in learning more about the Committee’s members and help us get our members more involved throughout the Section. From our Committee’s homepage you can also view the online edition of Minority Trial Lawyer newsletter.

In keeping with our goal to enhance the subcommittee structure—including communications (newsletter and Website), membership, and programs—we wanted to recognize some members who are working diligently to ensure that the Committee has a strong presence within the Section of Litigation. Some of the hardworking Committee members include the Minority Trial Lawyer editorial board (see masthead listing on the left). We extend special thanks to the co-editors, Monique Branscomb and Von Du Bose.

Mark your calendars for the ABA’s Annual Meeting in San Francisco, August 7-12, 2003. The Minority Trial Lawyer Committee is sponsoring a luncheon panel entitled “The Aftermath: Affirmative Action in the U.S. Supreme Court; and International Human Rights Award Luncheon.” Both the topic and guest panelist will keep you on the edge of your seat throughout the luncheon planned for 12:15–1:45pm on August 8, 2003. Purchase your tickets early. This will be a sold-out event. You can purchase online at www.abanet.org/litigation/2003/home.html.

In March, the Committee hosted an annual Conference in San Francisco, highlighting the diversity of the legal profession with sessions surrounding the theme of “Expanding Opportunities for Minorities in the Legal Profession.” Some of the speakers included Dean R. Davis, President of the Hastings College of the Law; Judge Edward Thomas, Judge of the U.S. Court of Appeals for the Ninth Circuit; and Vinson & Elkins’ Carrie Okinaga.

With the committee’s annual conference in San Francisco, we also celebrated the Minority Trial Lawyer Committee’s 10th anniversary. The luncheon featured Michael V. Lombardo, Chair of the ABA Section of Labor & Employment Law, and Loretta Ross, Chair of the ABA Section of Individual Rights & Responsibilities. A luncheon panel also featured special guest speaker Judge Robert Bork, who spoke on the topic of the “Separation of Church and State.”

We extend special thanks to the co-editors, Monique Branscomb and Von Du Bose. We also encourage you to become involved in the Committee (see article on page 17). The Committee can be only as strong as its members. Together we can make a difference!
An International Perspective on How Minority Firms Can Create Joint Ventures with Majority Firms

CARLOS F. CONCEPCION, TERESA J. URDA AND ZACHARY A. EMMANOUIL

Miami is a vibrant multi-ethnic and multi-cultural city. From a business-development standpoint, minority firms in Miami potentially have several factors working in their favor. They can and should capitalize on their geographic location, foreign-language speaking abilities, and specialized international litigation practice to create joint ventures with majority firms throughout the United States.

But Miami does not hold a monopoly on these advantageous attributes. These characteristics can apply to many large coastal cities and other metropolitan areas with large ethnic populations. For example, minority law firms in Los Angeles, with its sizeable Asian population, or New York City, with its many residents who speak European languages, are particularly situated to develop joint ventures with majority firms. For the sake of illustration, however, let us consider Miami.

Although its residents hail from all corners of the world, Miami residents are predominately from Latin American countries (Central America, South America, and the Caribbean). Businesses and individuals from these Latin countries transact business throughout the United States. It seems, however, that their U.S. headquarters are usually located in Miami. There are three reasons underlying this choice.

The first reason is based upon Miami’s geographic location. A prominent law professor at the University of Miami once told his students that “one of the advantages of practicing law in Miami is its close proximity to the United States.”

Miami is located on the southernmost part of the U.S. eastern seaboard. As such, Miami is very close to many Latin countries. A cursory review of a map reveals that Miami is virtually the halfway point between the United States and many Latin countries.

As a result, regardless of whether Latin clients have their headquarters in Miami, they, as well as U.S.-based clients, compromise on settling disputes in Miami. Specifically, contracts and other agreements involving these clients often contain forum selection clauses that identify Miami as the forum within which to resolve matters either by litigation or by alternative dispute resolution.

Although it is not mandatory that a forum selection clause and choice-of-law clause be the same, most contracts—in the interest of convenience and efficiency—choose to apply the law of the state within which the forum is selected. Hence, if a contract requires that all disputes be resolved in Miami, then most contracts will also require that the contract be interpreted under the laws of the State of Florida.

Importance of Geography

The following practical example illustrates why Miami’s geographic location is important. A Brazilian manufacturer has a factory in Brazil and an office in Miami. The Brazilian company enters into a contract to sell its products to a New York retailer. Because Miami is virtually the halfway point between New York and Brazil and the Brazilian company has an office in Miami, the parties agree to include a forum selection clause in their contract that provides that all disputes be resolved in Miami. They also include a choice-of-law clause that provides that the contract will be interpreted under Florida Law. In this manner, if a dispute or litigation ensues, then it would be convenient for both parties to have it resolved in Miami.

The second reason why it seems that many Latin clients choose to have an office in Miami is based on the city’s large number of Spanish-speaking individuals. Although many Latin clients speak English fluently, some do not. Even if Latin clients are able to speak English, many prefer to speak in Spanish, not only because it is their native language but also because certain Spanish words and phrases are simply impossible to accurately translate into English. As such, a Spanish-speaking lawyer can more fully understand and address the concerns and needs of her Spanish-speaking client.

The third reason why it seems that Latin clients choose to have an office in Miami is based upon the relatively large pool of Spanish-speaking minority lawyers that practice law in Miami. Yet, speaking Spanish is not the sole advantage to being a minority lawyer. Of significant importance to any trial lawyer is knowledge of the applicable laws on litigation-related issues—such as service of process, pre-judgment remedies, evidence, and enforcement of foreign judgments—in the forum in which the lawyer practices and the forum in which his client resides. The laws of Latin countries are constantly changing and, thus, it is important for a U.S. trial lawyer with foreign clients to stay current on the latest changes in the laws of his clients’ country.

Of perhaps equal importance to a U.S. trial lawyer representing a foreign client is an understanding of the language and political climate of her client’s country. Although the Spanish language is the same in all Latin countries, each country has regional language distinctions. When taking depositions, conducting document production, preparing responses to interrogatories, or being involved in other discovery-related matters, it is imperative that a
U.S. lawyer understands the respective country’s manner of speech. As to Latin America’s political climate, it is always shifting and changes in governments are very often drastic. A recent example of this is the government of Venezuela. With its change in presidency, Venezuela also had a change in government from a democracy to a populist system. In a situation like this, a U.S. lawyer not only needs to be aware of the country’s political climate, but also needs to have contacts within the country to ensure that bureaucracy does not overly delay certain matters.

Based on the foregoing, a minority litigation firm in Miami with Spanish-speaking attorneys who are well-versed in each country’s regional language distinctions and political climates will have a significant advantage over its majority firm counterparts. This advantage for minority firms in Miami does not necessarily mean a disadvantage for majority firms. By creating joint ventures with minority firms on a co-counsel basis, majority firms can reap comparable benefits.

**Joint Ventures**

There are essentially two ways that minority firms can create joint ventures with majority firms. The first approach is the *traditional* approach. Under this approach, minority lawyers market their services to majority firms through seminars, conferences, or other networking events. If a minority firm is aggressive, it can sponsor these events. Also aligning with the traditional approach, a minority firm can focus its attention on being retained by private companies or government agencies that have a history of, or place an emphasis on, hiring minority lawyers.

The other option is the *non-traditional approach*. There are two types of non-traditional approaches: outbound and inbound.

In an outbound approach, a minority firm, located in Miami, selects a majority firm, located outside the state of Florida, with which to create a joint venture as co-counsel. The following example illustrates the outbound approach: A Colombian company enters into a contract to sell its products to a California company. Neither party has an office in Miami, but the parties nonetheless agree to include a forum-selection clause in the contract that provides that all disputes between them be resolved in Miami. A dispute arises and the California company decides to bring a legal action against the Venezuelan company. The California company instructs its law firm in California (that happens to be a majority firm) to bring an action against the Venezuelan company. The California firm, however, does not maintain an office in Miami.

As a result, the California firm selects a firm in Miami as co-counsel on the case. In part, due to the fact that the defendant is a Venezuelan company with all its offices located in Venezuela, the California firm realizes that litigation-related issues—such as service of process, prejudgment remedies, evidence, and enforcement of foreign judgments—would certainly arise. As such, the California firm realizes that it must select a firm in Miami that has significant experience in such international litigation matters. As a result, the California firm retains a minority firm as its co-counsel.

In the outbound approach, a minority firm does not realize immediate financial returns. Under this approach, however, a minority firm opens the door to a new, and hopefully continued, relationship with a majority firm. As a result, when the majority firm again seeks co-counsel in Miami, the possibility of retaining the same minority firm is much more likely.

In conclusion, Miami offers an international perspective on how minority firms can create joint ventures with majority firms located in other states. Due to the city’s geographic location, sizeable number of Spanish-speaking individuals, and large pool of minority lawyers, many U.S. and Latin companies choose to resolve their disputes in Miami. This is of great benefit to both minority firms located in Miami and majority firms located outside the state of Florida. Under the non-traditional approach, minority firms and majority firms both are more likely to create joint ventures with each other on a co-counsel basis.

**Not Just Miami**

Although the non-traditional approach in this article is regional as applicable to Miami, it can, and should, be applied to other United States cities as well. Most notably, as Los Angeles has a large Asian population and is the closest mainland U.S. city to many Asian countries, minority firms in Los Angeles that have an emphasis on international litigation with Asian countries have a similar regional opportunity to create joint ventures with majority firms located outside of Los Angeles.

Likewise, New York City has a large number of individuals who speak various European languages and is the closest U.S. city to many European countries. Minority firms in New York City that focus on international litigation with European countries have a regional opportunity to create joint ventures with majority firms located outside the state of New York.

Regardless of whether a minority firm is located in Miami, New York City, Los Angeles, or any other city in the United States, minority firms must take advantage of the benefits afforded to them by reason of their geographic location, use of a particular foreign language, and specialized international litigation practice.

Carlos F. Concepcion is a founding partner with Concepcion Rojas & Santos, LLP, in Miami. Teresa J. Urda is an associate and Zachary A. Emmanouil is of counsel with Concepcion Rojas & Santos, LLP.

**Endnotes**

1. This statement was made by Keith Rosen, Professor of Law at the University of Miami on or about the Spring of 1999, in a course titled “Doing Business in Latin America.”

2. Although some contracts generally identify “Miami” as the forum, most contracts more properly identify a specific court and county as the forum, such as the United States District Court for the Southern District of Florida, located in Miami-Dade County.
Ideal General Counsel: Top Ten Characteristics

1. Demonstrated leadership qualities
2. Business judgment
3. Corporate law expertise
4. Communication skills
5. Management experience
6. A combination of law firm training and in-house experience
7. Ability to exercise independent thinking while communicating a collaborative attitude
8. Ability to give common-sense answers without delay
9. Board presence
10. Ability to manage outside counsel and control costs

Other Characteristics Often Cited
(see page 7)

1. Industry-specific experience
2. Industry-relevant relationships (the “Rolodex factor”)
3. Corporate governance/Compliance
4. Regional experience

view evaluations, we often see comments such as “Don’t think he has what it takes to lead our team.” Or, “She really strikes me as someone who could take charge immediately of the department, make the necessary changes, instill new energy without shaking the confidence of the troops, and set forth a game plan about how we’re going to reach the next level.” Or, “I have questions whether he’s strong enough for our thoroughbred lawyers. Aren’t they going to wonder why we hired him instead of promoting our strong second-in-command?”

2. Business judgment.

This is a difficult one to define and assess in candidates. We have interviewed literally hundreds of candidates for general counsel positions, and we have yet to come across a single individual who confesses, “You know, I am a great lawyer but the one thing I lack is business judgment.” Every candidate seeking a GC role knows that business judgment is a key criterion for selection and is armed and ready in interviews to demonstrate their competency in this regard. Are all of them equipped with this hard-to-define quality? Assuredly not. So, what is it?

Business judgment, most simply defined, is the ability of a lawyer to understand the company’s business plan and goals, its cost pressures, capitalization issues, competitive realities, and customer wishes. While the CEO is charged with orchestrating a company’s business plan, each management team member must understand that vision and coordinate that vision with his own particular expertise: the CFO on finance, the Controller on costs, the V.P. Sales on getting product to market and controlling inventory, the GC on legal, and so on. Every candidate for a GC job understands this basic concept.

Because the GC must also play something of a police role—in that she must be watchful of the company’s obligations to conform to legal requirements—there is often a tension between what company employees wish to do and what a vigilant GC permits them to do. This tension is frequently defined in terms of “risk assessment”: balancing the benefits of a course of action against the liability that might flow from that action. The murkiness of the law often disguises the line between what is lawful and what is not. In addition to being able to understand fully the CEO’s game plan, the GC must be adept at risk management. A good GC must be resourceful: Often there is more than one way to achieve management’s goals. This may require changing tack from the original plan, to keep both the regulators and the business line happy. The GC has to play a police role without appearing to be a cop. It’s easier to conceptualize this balance than to achieve it on a daily basis. The best GCs accomplish the task; less successful ones do not.

There is also the issue of focus. GCs with great business judgment keep their eyes on the business plan’s main objec-
3. Corporate law expertise.

Although there are always exceptions, virtually all of the general counsel searches we have handled (and there have been dozens and dozens) have called for corporate law expertise. This often frustrates litigators and practitioners in other fields who aspire to the GC role, but the fact remains that companies want corporate lawyers at the helm. The exceptions often are those situations where an outside counsel (e.g., a litigation partner) has handled a matter for a client in such an exemplary fashion, demonstrating judgment and legal/business acumen, that a CEO wants that lawyer as her general counsel regardless of particular practice expertise.

Why do employers prefer corporate lawyers? The simple explanation is that corporate lawyers tend to do the daily “stuff” of a company’s business: contracts, joint ventures, some merger and acquisition work, distribution agreements, licensing deals, and the daily advising that is so integral to in-house practice (e.g., fielding the odd question about propriety of an advertising claim). Increasingly, CEOs are concerned about their exposure under the new corporate governance laws and securities regulations (if a reporting company). CEOs are well aware of the recent news footage of executives being led away by police in handcuffs. They want corporate lawyers who know where the lines of the law are crossed and when those lines change. In a period when those lines are less bright than in the past, CEOs have an elevated perception that they need highly skilled specialists in corporate governance and securities. As one CEO told us, “I need a lawyer who can handle the legal work that we churn out. The product of this company isn’t litigation. The product of this company is [widgets]. But I also want a lawyer who can keep me and the rest of the team out of trouble.”

4. Communication skills.

This is one of the oft-cited characteristics of a GC search: the ability to communicate to non-lawyers in clear, concise, non-pedantic, non-legalese lan-

5. Management experience.

Management experience is always among the desired traits. Has the lawyer had hire-and-fire experience? Has the lawyer reorganized a department? Cleary, this characteristic becomes more relevant when managing a larger legal team, but even in a regional role, where there may be a very small legal department, with a dotted line reporting to group head office in another country, effective management skills are essential.

Unless a newly hired GC is the company’s sole attorney, he “inherits” a department hired by his predecessor. Although new GCs invariably take time to assess the lawyers in their department before making any modifications, changes naturally may have to occur. Sometimes change is driven by perceptions of competence; other times it is driven by stylistic differences between the GC and subordinate lawyers. We have seen companies where the CEO and management team encourage their new GC to make substantial changes in• Q: Why do employers prefer corporate lawyers?

A: Corporate lawyers tend to do the daily “stuff” of a company’s business.
Ideal General Counsel: Other Key Characteristics

Industry-Specific Experience

Companies facing an expanded GC candidate pool have the luxury of adding more and more characteristics to their wish list when profiling their ideal GC. With ever-increasing frequency, the lists include a requirement that their GCs have experience in their specific industry. We see it frequently with technology industry clients: Software companies don’t want “chip” types. Chip companies don’t want Internet vets. Biotech companies almost invariably require people from the life sciences sector. One can make the argument that GCs from another industry sector bring new perspective (and we have made that argument), but that argument rarely prevails.

Balanced against this, sensitivities of competition can arise. For example, we have recruited for leading multinationals, which have specified that their new GC have industry-specific knowledge, but at the same time, have given us a “carve out” list of companies NOT to approach. To recruit from an immediate competitor can run the risk of potential lawsuits, alleging breach of fiduciary duty or theft of trade secrets. Or, it may be a desire by the company not to start a poaching frenzy that could ultimately lead to the company itself becoming a target for the competitor’s hiring needs.

Industry-Relevant Relationships

This is related to industry-specific experience, but because it becomes so important in some GC searches we handle, we address it separately. In some highly regulated companies, for example, a client may wish a GC with extensive knowledge of the individuals who regulate the company’s business. For example, a pharmaceutical company might wish for a GC who enjoys rapport with key personnel with the Food and Drug Administration.

Another example is those companies embarking on an extensive course of joint ventures and strategic alliances with companies in their field. Here, the “Rolodex factor” can play a pivotal role in identifying and courting future partners. Again, this factor is increasingly important in our Asia-focused searches, where a knowledge of the benefits and pitfalls with particular JV partners, as well a track record of overcoming bureaucratic stumbling blocks in particular territories, will boost a candidate’s chances of being selected.

Corporate Governance/Compliance

In 2002, the sensitivity to the issues of corporate governance, embodied in such legislation as the Sarbanes-Oxley Act, has risen to new heights. CEOs are increasingly turning to their GCs for direction in the (for now) murky waters of corporate governance. International rating agencies are now giving investors scorecards on corporate behavior, ranging from the quality and pedigree of its directors, to a detailed picture of a company’s corporate governance structure. The recently appointed GC of Tyco in the United States, William Lytton, had a decorated background for years as one of the country’s top federal prosecutors, as well as holding other senior in-house positions. This is a clear sign of a company’s desire to recruit a GC with integrity, commercial know-how, and a clear understanding of the consequences of commercial wrongdoing.

Lawyers who are up-to-date on requirements in this area will have a decided advantage over those less familiar with this rapidly evolving area of the law. We have yet to interview a lawyer who will not say that he is mindful of corporate governance issues. We need evidence of this expertise, however, because our clients require it. Again, specific industries will require specific experience. It is one thing to be aware of these obligations; it is quite another to have the wherewithal and skill to instill a culture of corporate governance into a company. The effective GC must play an integral role in ensuring that the key decision makers and their teams are mindful of these issues in their every action.

It takes a particular type of individual to have the strength of character and personality to convey the importance of corporate governance and compliance, without being perceived as the internal police. If the GC is viewed as collaborative and helpful, she will be sought out and used by the company’s employees, from the CEO on down. At the other end of the spectrum are those GCs viewed as obstructionist or—worse—incompetent. Such a GC will lose her constituency and the company will lose an opportunity to have an effective member of the management team.

Corporate governance can have different weighting in different jurisdictions. Some territories impose less onerous reporting standards on their directors and the head lawyers. The Sarbanes-Oxley Act will only bear direct relevance to U.S.-listed companies, wherever they are located in the world. While the Act’s underlying spirit may make sound business sense to all companies, the specific provisions will not legally bind the directors and officers of a company listed only in Hong Kong, for example.

Regional Experience

We have handled GC searches in the United States, Europe, and Asia-Pacific. In Europe and Asia-Pacific, more companies are turning to us to recruit an effective regional or company-wide GC. China’s accession to the WTO is one of the several obvious examples of a globalizing economy, leading to growth and sophistication of the senior in-house market in the Asia-Pacific. Different regions, by definition, require different skills in a lawyer.

What is a “region”? Region can be defined as broadly or as narrowly as relevant for the situation and can play an important part in recruiting the right lawyer. For example, a Silicon Valley lawyer would have a different skill set and local knowledge base than a Wall Street lawyer. In Asia or Europe, it might be important for the head lawyer to have experience across a range of different countries in which the company operates. Where the head office is outside the region in question, it may be important for the regional counsel to have an understanding of business and legal practice in both jurisdictions. That understanding spans all the characteristics described above: Possibly a new umbrella of “cross-cultural business and management skills,” dual legal qualification and bilingual ability (in the broader sense) can soon be an addition to the list, specific for regional roles.

—Bob Africa and Andrew Pringle
the law department, in the belief that the department may have grown stale, complacent, or less competent than is optimal. GCs who have never faced the challenges inherent in assessing personnel, reorganizing them, or making personnel changes will be viewed as lacking a key skill.

6. Combination of law firm training and in-house experience.

The vast majority of GC searches we handle call for initial training in a law firm of known quality and subsequently, experience in an in-house environment. This frustrates many “old school” law firm practitioners who believe that law firms are home to premier legal practitioners. Around the world, members of established law firms with longstanding reputations for excellence often presume that they exclusively hold a position at the pinnacle of the profession. These lawyers are uniformly disappointed to learn that many companies view them with a bit of disdain. Why?

The perception, right or wrong, among many CEOs is that law firm partners live in a cocoon-like environment, spending their days examining issues of law, insulated from the realities of the business world. The perception continues: These partners operate in an almost cost-free environment (or, at least an environment where deep-pocket clients pay expenses), often in the most lavish office building in town. Further, law firm partners are perceived—again, rightly or wrongly—as having resources at their disposal that are unknown or rare in the in-house world: battalions of associates and paralegals to research and do initial drafts of documents; time to examine the finer points of legal doctrines; and the luxury of writing memos to clients that examine ranges of options. Company managers are almost always in a hurry. They need workable answers immediately. Finally, law firm partners often communicate in “partnersere”—jargon-laden language that works fine for their general counsel clients who understand legal vocabulary. A company’s rank and file, as laypersons, may not understand this language and rarely have the incentive to learn it.

Management commonly perceives that the less advice, the better, because legal advice slows down business at best and, at worst, kills revenue-generating activity.

An important word here: We sympathize with the many law firm lawyers who are losing their jobs, as economic times get tougher. But we often encounter an unsympathetic ear from a CEO who has handled enough bad press from his own company’s layoffs.

7. Ability to exercise independent thinking while communicating a collaborative attitude.

The GC has a different role from other members of management. She must answer to another authority apart from the CEO. That authority is the law itself. There will be times when the GC will have to exercise independent judgment that might run distinctly counter to management directives, including those of the CEO. In addition, extremely important issues of privilege accompany the GC’s role. That said, the GC must be collaborative. No company wants a naysayer or a roadblock. The ideal GC identifies the company’s goal (see “Business Judgment” above) and strives to accomplish that goal in a legally defensible manner. The lessons of Enron, WorldCom, and Arthur Andersen instruct us that legal advice is now scrutinized as never before.

As an adjunct here, whether to include company secretarial responsibilities in the GC portfolio warrants careful consideration. It often makes sound commercial sense to combine the two roles, but case law from around the world has addressed when the claim of privilege can be legitimately made. A corporate secretary advising solely in that role, and not as an attorney, cannot claim privilege. The boundaries run a risk of being blurred if one person performs both jobs.

8. Ability to give common-sense answers without delay.

Companies differ from law firms; their “product” is not legal advice. Legal advice is a necessary part of a company’s goal of delivering products to its customers. Management commonly perceives, however, that the less advice, the better, because legal advice slows down business at best and, at worst, kills revenue-generating activity. Therefore, company managers want their legal advice served up quickly and succinctly, for example:

- Is this advertisement OK?
- Can I fire this employee today?
- Should we seize these counterfeit goods now, or wait for a court ruling?
- What can we say to analysts about profitability forecasts?


One of the most common reasons why companies “go outside” with their GC search, rather than promoting from within, is that the natural successors to the GC role are often perceived as lacking Board “presence.” Strangely enough, this may be a situation of “familiarity breeds contempt.” People are judged by their worst performance over time, not necessarily their best. That’s why incumbents or would-be successors to the GC role might have a disadvantage over outside candidates, who don’t carry the baggage that insiders might have accumulated over time.

Boards need reassurance that their GC possesses competence, wisdom, judgment, and legal expertise. Lawyers who might otherwise be fine technical lawyers often fail to meet the standard of being “Board acceptable.” Sometimes this is a matter of lacking sufficient “gray hair.” More often, it is the inability to prove to a Board that the GC’s advice is the product of many years of experience practicing law, of having made and learned from mistakes, and of having the benefit of real-world experience.

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Bias in the Courts
Continued from page 1

results showed that, yes, lawyers do witness evidence of racial and ethnic bias at work in the system. Lawyers’ views tended to differ, however, based on their racial backgrounds.

More than half of black lawyer members surveyed said there is “very much” bias in the justice system, while only 6 percent of white lawyers agreed—most white lawyers said there was “some,” but not “very much.” Nearly 70 percent of black lawyers said there was the same amount of racial bias in the justice system as in society at large. Among white lawyers, only 40 percent said that the justice system’s bias mirrored society’s. Most said bias in the justice system was less than in society as a whole.

Riddled with Bias

How can this be so? How can so many people in our country, and even our lawyers, believe that the courts—our system of justice, which in ideal and in practice should be blind—can be so riddled with bias and injustice?

More than anything else, a person’s perception of the justice system is shaped by his or her own experiences and observations. It is worth noting that, with statistics showing that 3 out of 10 African-American males born in the United States will serve time in prison, the backdrops against which many people form their perceptions may not themselves be free from bias.

It is worth noting as well, in many cases, a person’s first interaction with the justice system is with their local law enforcement agency. But, with allegations of racial profiling and unfair targeting of minorities by the police all too common, public confidence in the justice system is further eroded.

The situation is made worse still by allegations of unfair or racially skewed plea bargaining and sentencing recommendations by prosecutors—especially when combined with mandatory sentencing laws that in some cases can appear to have a disproportionate impact on minorities.

In these times, with conflict and unrest in Iraq and in Afghanistan and with our Homeland Security forces seeking out terrorists on our own soil, those of Middle Eastern descent are feeling the sting of profiling and stereotyping as well. All around the country—and particularly in areas with a large population of Arab-Americans—immigrants from that part of the world have been held in detention, under suspicion of their activities and their intent. They now know how many people of color have been treated for many years.

Now, of course, racial and ethnic biases are not the sole root of problems that lead to perceptions of bias in the justice system.

I recognize that these are, of course, very complicated issues and would never suggest otherwise. But I would suggest, however, that perceptions of racial bias in the courts can, in part, be explained by people’s relationships and interactions with the justice system.

Perceptions shaped by these problems can only be exacerbated by the failure of us in the legal profession to do our part—specifically, by our failure to diversify our profession. After all, what people see when

DENNIS ARCHER:

ABA’s First African-American President

In August 2002 former Detroit Mayor Dennis W. Archer began a one-year term as president-elect of the American Bar Association, becoming the first African American to hold the position. He will become president at the association’s annual meeting in San Francisco in 2003.

Addressing the House of Delegates, Archer noted the significance of his presence as the first lawyer of color to come before them as president-elect of the American Bar Association:

I am extremely proud to be here. I am also keenly aware of those who came before me—those who were not able to contribute to the great dialogues that we have at the ABA, the great debates on public policy and legal issues. I think of the tremendous contributions these lawyers and others could have made to this association had they been allowed to join.

“But, that is the past and today is a new beginning,” Archer said.

Archer also recognized the contributions of other lawyers of color who came before him. He said, “I am here because of the hard work of others. Others who were denied the opportunities that I have had. People who broke barriers and opened doors, who paved the way for me . . . William Hastie, Damon Keith, Charles Hamilton Houston, Constance Baker Motley, Wade McCree and Mr. Justice Thurgood Marshall.”

Archer served two four-year terms as mayor of Detroit from 1994 to 2001, and during his last year as mayor was also president of the National League of Cities. After leaving the mayor’s office, Archer was elected chairman of Dickinson Wright PLLC, a 200-person Detroit-based law firm with offices in Michigan and Washington, D.C.

In 1985 Michigan Gov. James Blanchard appointed Archer an associate justice of the Michigan Supreme Court. He was elected to an eight-year term the following year. In his final year on the bench, Archer was named the most respected judge in Michigan by Michigan Lawyers Weekly.

Archer has long been active in the organized bar, as president of the Wolverine Bar Association in 1979-80, the National Bar Association in 1983-84, and the State Bar of Michigan in 1984-85. He is a life member of the National Bar Association, a fellow of the International Society of Barristers, and life member of the Sixth Circuit Judicial Conference.

Archer has held numerous leadership positions within the American Bar Association. He was the first chair of the Commission on Racial and Ethnic Diversity in the Profession when it was founded in 1987, and served as past chair of the General Practice, Solo and Small Firm Section. He began serving in the ABA’s policy-making body, the House of Delegates, in 1978 and was a member of the ABA Board of Governors from 1999-2002, where he served as chair of the Finance Committee. He is a life member of the Fellows of the American Bar Foundation.
they step into the courtroom can be at least as important as any public policies intended to address problems in the system.

The face of the courts must reflect the face of the society it seeks to protect. If we are to remove real and perceived biases in the courts, we must diversify. We must recognize that we have not yet reached the point of unity and equality within our own ranks—and that the barriers to the advancement of lawyers of color consciously or unconsciously erected in the past still remain.

Legal Giants

As lawyers, we must look to the legal giants who came before us, who have blazed a trail at the bar and on the bench: William Hastie, Leon Higgenbotham, Charles Hamilton Houston, Congresswoman Patsy Mink, Damon J. Keith, Juanita Kidd Scott, Wade McCree, Judge Cruz Reynoso, and Mr. Justice Thurgood Marshall, to name a few. Their groundbreaking contributions paved the way for us all.

But when we look around us today, we must also realize that we still have a long way to go. We have a significant amount of unfinished business.

We need more lawyers of color. We need them on our courts in all jurisdictions. We need more judicial law clerks for judges and justices; more law professors, general counsels, and partners in large law firms. We need more corporate work assigned to law firms of color.

The American Bar Association estimates that there are 1,050,000 lawyers in the United States. (Fortunately, they don’t all practice.) While there has been improvement in the numbers of lawyers of color since the 1990s, they remain woefully under-represented in the legal profession. While people of color make up 25 percent of the U.S. population, more than 89 percent of the legal profession and 80 percent of enrolled law school students are white. Lawyers of color represent fewer than 4 percent of partners in the nation’s major law firms.

We have failed to promote diversity throughout our profession, and this needs to change. The legal community should be leading the rest of society on the issue of increased diversity in the workplace, greater economic opportunities, and access to justice for people of color. Our professional and moral commitment to justice and fairness demands nothing less.

Based on a presentation by Dennis Archer at the Annual Meeting of the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts, April 2003.

ABA 2003 Annual Meeting

Section of Litigation will present a variety of practical, informative programs at the ABA Annual Meeting in San Francisco, August 7-12. The following programs may be of particular interest to Minority Trial Lawyer readers:

Friday, August 8
- 12:15-1:45pm ~ The Aftermath: Affirmative Action and International Human Rights Award Luncheon
  the U.S. Supreme Court
- 2:00-3:45pm ~ Fixing History in the Courtroom: How the Legal System Responses to Reparations Claims
- 4:00-5:30pm ~ Diversity in the Courtroom: Perspectives from the Jury

Saturday August 9
- 8:45-11:45am ~ Eleventh Annual Bench Bar Conference: Marbury v. Madison Bicentennial

Sunday, August 10
- 9-11:00am ~ Women’s Summit II: Practical Steps for Keeping Women on the Success Track

For Updated Program Information, go online www.abanet.org/litigation/2003home.html
Cross-Examination

Continued from page 1

- The expert’s opinions are irrelevant to the key issues in dispute.

Essential to effective cross-examination is an understanding of the broad expert pretrial disclosure obligations, as well as the expert testimony and cross-examination rules of evidence. We first address pretrial discovery.

The Pretrial Discovery
You Need to Obtain

Federal Rule of Civil Procedure 26(a)(2) was added to the Rules in 1993. This rule mandates that parties disclose the identity of all potential testifying experts and that testifying experts produce a written report “prepared and signed by the witness” setting forth:

- The opinions the expert expects to testify to,
- The bases for such opinions,
- A description of the underlying data used and relied on to form such opinions,
- Exhibits supporting the opinions,
- The expert’s qualifications, including a list of recent (last 10 years) publications,
- The compensation to be paid to the expert, and
- A list of other cases in which the expert has testified (at trial or deposition) in the past four years.

The court sets the timing of such disclosures; but in the absence of court-ordered deadlines, the disclosures should be made at least 90 days before trial.

The Advisory Committee Notes to the amended rule point out that amended Rule 26(a)(2) calls for the production of substantially more information than was previously required. Basically, the expert report is to set out the details of the expert’s direct examination. Indeed, the amended rules added some firepower to the discovery requirement with the addition of Rule 37(c)(1), which provides for the sanction of preclusion from evidence of any witness or information not properly disclosed under Rule 26(a). The bottom line concerning disclosure of expert witness information, reports, and underlying data is that “counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed,” including materials previously thought to be privileged and sought to be withheld from production (such as memoranda prepared by counsel and provided to experts for their consideration).

One additional rule pertains to discovery of expert opinions. Federal Rule of Civil Procedure 26(b)(4) provides that a designating testifying expert may be deposed by a party following production of the required expert report under Rule 26(a)(2)(B). This rule also contemplates broad disclosure of experts’ opinions and of the underlying facts and data for those opinions.

These mandatory disclosure obligations force your opponent to provide basically all the information you need to prepare an effective cross-examination. For example, the expert’s compensation and prior testifying experience may provide ample ammunition to demonstrate that she is biased or willing to adopt any opinion for compensation. Similarly, another expert’s prior testimony or publications may reveal useful prior inconsistent statements. The information he was provided, or not provided, may enable you to show that he has been manipulated or failed to consider key factors. Pretrial disclosures will give you all the information you need to plan an effective cross-examination. To successfully implement your plan, gain a useful understanding of the following rules.

Mandatory disclosure obligations force your opponent to provide basically all the information you need to prepare an effective cross-examination.

The Rules You Need To Know
Rules Governing Expert Testimony

All expert testimony starts with Federal Rule of Evidence 702. Certainly all lawyers are familiar with the seminal case of Daubert v. Merrell Dow Pharmaceuticals, Inc. (509 U.S. 579, 592-94 (1993)), the Supreme Court opinion that expanded on and clarified the factors that a court must consider in assessing the reliability, and hence the admissibility, of scientific expert testimony. A few years after Daubert, the Court extended its holding to encompass non-scientific, but otherwise “specialized” knowledge of expert witnesses in Kumho Tire Co. v. Carmichael (526 U.S. 137, 141 (1999)). An expert witness’s qualifications should be carefully scrutinized. You may want to file a Daubert challenge to seek a pretrial ruling on the expert’s qualifications. Or for tactical reasons, you may want to use qualification issues to attempt to discredit or disqualify the expert during trial, before the jury.

Rule 703, concerning the bases of expert opinions, was amended in December 2000. The Advisory Committee’s Note states that the reason for the amendment was to clear up any confusion (and there was some conflict, if not confusion) regarding the treatment of inadmissible information used or relied on by experts in formulating their opinions. Under the revised rule, the (inadmissible) underlying data relied upon by an expert is not admissible simply by virtue of the admission of the expert’s opinion. Instead, the court is directed to perform a classic Rule 403 prejudice versus probative value balancing test as to the inadmissible information. If it is determined that the data would assist the jury in evaluating the expert’s opinion, the data may be admitted, and the court must give the jury a limiting instruction that the information is admitted for clarity’s sake alone, and not as substantive evidence.

Many lawyers use cross-examination about the information an expert relied upon as a favorite technique. Remember, however, that too much focus on this area can have consequences. The Advisory Committee Note to Rule 703 explains that if expert cross-examination delves into the details of what the expert relied upon in forming his opinions, the examiner may very well open the door to the opposing party being able to introduce the underlying data that would have otherwise been inadmissible under Rule 703.

Rule 705 generally allows an expert to testify about her opinions and inferences without first having to testify about all of the underlying facts and data that went into her opinions and inferences. The “central purpose of Rule 705 is to promote efficiency and avoid confusion by eliminating the
so long as the questioning is handled “as if discretion” permit inquiry into other matters. Yet, the court may “in the exercise of discretion when allowing cross-examination that exceeds the scope of direct.”

Rule 803 details 23 exceptions to the hearsay rule. Exception number 18 pertains to “learned treatises.” This exception to the hearsay rule provides that information “called to the attention of an expert” on cross-examination or relied upon by an expert during direct, that is taken from published sources in a discipline that is established as reliable authority during the testimony, or by judicial notice, is excepted from the hearsay rule. If such information is admitted, however, it may be read into evidence but may not go to the jury room as an exhibit.

General Cross-Examination Rules

Although experts are a special breed of witness, the rules that apply to examination of lay witnesses also apply to them.

Federal Rule of Evidence 611(b) provides that the scope of cross-examination should be limited to the subject matter of direct examination and credibility issues. Yet, the court may “in the exercise of discretion” permit inquiry into other matters so long as the questioning is handled “as if on direct.” This provision has been interpreted by at least one circuit to mean that the trial court must exercise some amount of discretion when allowing cross-examination that exceeds the scope of direct.

Rule 611(c) proscribes the use of leading questions on direct examination, except as necessary to develop the witness’s testimony. It states that “[o]rdinarily leading questions should be permitted on cross-examination.” The rule provides, however, that hostile and adverse witnesses can be asked leading questions even on direct. The flip side of this coin is that for a party’s own witnesses or those witnesses who are not hostile, leading questions are not allowed on cross-examination, hence the use of the word “ordinarily.”

Rule 607 states simply that any party may attack (impeach) the credibility of any witness, including a party’s own witness. A word of caution: You may not misuse this rule by calling a witness to the stand for the sole purpose of impeaching that witness in order to elicit testimony or evidence that would otherwise be inadmissible.

Rule 608 sets forth certain methods and restrictions for impeaching a witness’s credibility. Part (a) states that a witness’s credibility may be attacked through the use of opinion or reputation testimony, and such testimony may refer only to truthfulness or lack thereof. Additionally, rehabilitation-type testimony regarding a witness’s truthfulness may be only offered after that witness’s character for truthfulness has been attacked. In other words, you may not bolster your witness’s reputation for truthfulness prior to, or in the absence of, an attack on that aspect of the witness’s character.

Part (b) of Rule 608 prohibits the use of extrinsic evidence to prove specific instances of conduct (except criminal convictions in accordance with Rule 609) to attack a witness’s credibility. Inquiries into such specific instances of conduct that speak to a witness’s character for truthfulness or untruthfulness may, in the court’s discretion, be addressed on cross-examination. However, the witness’s answer must be “taken at face value.” The credibility of the witness at that point is for the fact-finder to decide.

It is important to remember that Rule 608 pertains only to admissibility of evidence relating to a witness’s character for truthfulness and that certain testimony that may be inadmissible under Rule 608 may very well be admissible under another rule.

Rules 613 and 801(d)(1) govern the use of prior consistent and inconsistent statements. Rule 613 states that a prior statement, if written, need not be shown to the witness prior to or simultaneously with the witness’s testimony on that statement, but upon request, must be disclosed to opposing counsel. Part (b) states that extrinsic evidence of a witness’s prior inconsistent statement is not permitted unless the witness is first given a chance to explain the inconsistency and the opposing party is given a chance to ask the witness about the prior statement, “or the interests of justice otherwise require.” Admissions by a party opponent are not included under this provision.

Rule 801(d)(1) explains that a prior statement by a witness is not hearsay if the
witness is subject to cross-examination concerning the statement and:

(1) The statement is inconsistent with the current testimony, and the prior statement was made under penalty of perjury at a trial, hearing, deposition, or other proceeding; or

(2) The statement is consistent with the current testimony and is offered to rebut a charge of recent fabrication, improper influence, or improper motive; or

(3) The statement is one identifying a person after the witness has perceived the person.

Because the three types of prior (out of court) statements set forth in Rule 801(d)(1) are not hearsay, they are by definition substantive evidence. Thus, a distinction must be made between prior statements that fall within the ambit of Rule 801(d)(1) and those that do not and, therefore, are either inadmissible or admissible for the limited purpose of rehabilitation or impeachment, but not to prove the truth of the matter asserted. Notably, in cases where prior consistent statements are not offered as substantive evidence to prove the truth of what was stated, but are offered for the specific and limited purpose of rehabilitation, many courts have held that Rule 801(d)(1)(B) is inapplicable.

Conclusion

While expert cross-examination can be a challenge, the Federal Rules of Civil Procedure force your opponent to provide all the ammunition you need, and the Federal Rules of Evidence outline the techniques you should consider. As long as you keep your eye on the goal—to convince the fact-finders that the expert has offered no information they need to consider—these tools provide all you really need in order to accomplish a highly effective cross-examination.

Veronica Smith Lewis is a partner and Laura J. O’Rourke is an associate with Vinson & Elkins LLP in Dallas, Texas.

Endnotes

3. Wright & Miller § 2031.1 (referring to the advisory committee notes).
4. See Fed. R. Evid. 703 Advisory Committee’s Note.
5. Id.
6. Id.
7. See id. For two good examples of cases discussing the admissibility of the otherwise inadmissible underlying data for an expert’s opinion, see Gray v. Mo. Pac. R.R., 65 F.Supp.2d 1202, 1206 (D. Kan. 1999) (stating that Rule 703 “does not authorize a party to prove the trust of hearsay declarations by having an expert echo the deposition testimony of individuals who witnessed the underlying events”) and Engerbretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 728-29 (6th Cir. 1994). Both cases predate the amendment to Rule 703 but accurately state the application of the current rule and its underlying rationale.
9. See id.
10. See id.; see also United States v. Brien, 59 F.3d 274, 277 (1st Cir. 1995) (excluding expert testimony for failure to proffer underlying data as an aid to the court’s ruling on admissibility).
12. See Lis v. Robert Packer Hosp., 579 F.2d 819, 821-23 (3d Cir. 1978); see also United States v. Tomlin, 46 F.3d 1369, 1368-87 (5th Cir. 1995) (stating that the “subject matter of direct examination, for the purpose of cross-examination, is ‘liberally construed to include all inferences and implications arising from such testimony’” (quoting United States v. Arnott, 704 F.2d 322, 324 (6th Cir. 1983)).
14. See BankAtlantic v. Blythe Eastman Paine Webber, Inc., 955 F.2d 1467, 1475 n.6 (11th Cir. 1992) (citing Balogh’s of Coral Gables, Inc. v. Getz, 798 F.2d 1356, 1358 n.2 (11th Cir. 1986)).
15. See, e.g., Adv-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 37 F.3d 1460, 1464-65 (11th Cir. 1994) (reversing and remanding a take-nothing verdict due to the trial court’s failure to employ the appropriate balancing test under Rule 403 to preclude defendant’s “highly prejudicial” cross-examination of plaintiff’s expert witness); see also United States v. Novatson, 271 F.3d 968 (11th Cir. 2001) (noting that “the types of ‘acts probative of untruthfulness under Rule 608(b) include forgery, perjury, and fraud’”) (quoting Adv-Vantage, 37 F.3d at 1464). See generally 28 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6113 (1993) (citing United States v. Abel, 469 U.S. 45, 56 (1984) (noting that “[i]t would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.”)
17. See Udenba v. Nicoli, 237 F.3d 8, 17-18 (1st cir. 2001); Fireman’s Fund Ins. Co. v. Thein, 8 F.3d 1307, 1311-12 (9th Cir. 1993).
18. See Tome v. United States, 513 U.S. 150, 157 (1995) (noting that a prior consistent statement, made before any event giving rise to a possible motivation to lie, is “thus placed in the same category as a declarant’s inconsistent statement made under oath in another proceeding, or prior identification testimony, or admissions by a party opponent”).
19. See, e.g., United States v. Ellis, 121 F.3d 908, 911 (4th Cir. 1997) (noting that in such cases a “more relaxed standard” applies); United States v. Rubin, 609 F.2d 51, 70 (2d Cir. 1979) (stating that use of prior consistent statements for rehabilitation should be generously allowed “since they bear on whether, looking at the whole picture, there was any real inconsistency”).

10. Ability to manage outside counsel and control costs.

As legal budgets escalate, companies are understandably concerned about costs. Legal costs are overheads, starting with the expense of running an internal law department. Lawyers in companies are not revenue generators, as they are in law firms. CFOs, in particular, are sensitive to rising legal costs. A GC’s ability to use outside counsel effectively to manage costs and to install efficiencies will impress senior management and give them comfort that the GC is doing her job. The successful GC will have the foresight of knowing when to outsource and when to handle legal work in-house. Factors affecting this decision may range from budgetary constraints, specialist nature of the advice sought, size/duration of the project, and commercial and legal decisions to transfer the risk to an outside source. These skills go to the core of a GC’s responsibilities. The inability to do any of these things will, ultimately, spell disaster for the GC.

Many of these factors in the Top 10 are inextricably linked. The strength of character of the GC and his ability to command respect will result in the head of the legal team being able to manage his practice between internal and outside lawyers with the Board’s complete justification and confidence. No one characteristic alone will lead to success. Competition is tough, but the rewards are there for the few who show the commitment, determination, and talent to keep on the road all the way.

Bob Major (rmajor@mhaglobal.com) is with the San Francisco, California, office and Andrew Pringle (apringle@mhaglobal.com) is in the Hong Kong office of Major, Hagen & Africa, a legal search firm with eleven offices around the globe. This article was adapted from one that originally appeared in the January/February and March 2003 editions of In-House Briefing, Asia-Pacific, published by Pacific Business Press and is reproduced with the kind permission of the publisher.
"BY THE BOOK"

Tips & Tactics for Your Practice from Section of Litigation Books

As a Woman of Color

BEVERLY NELSON MULDROW

My concern, as I began writing about practicing law as an African-American attorney, was that many of my experiences may just be particular to me. In other words, I have a distinct personal history that undoubtedly affects my perceptions of “my experiences.” If other female attorneys of color who read what I have written can understand how I felt during some of these events, my writing will have meaning beyond myself.

The bulk of my legal experience has been as a trial attorney. I have developed some skill in telling the whole story of the case in such a way as to educate and persuade. I will attempt to do that here. I want those minority female lawyers who are dealing with adversity to know what I have learned: that we can create some light for ourselves at the end of the tunnel. We do have power and opportunity, which may come to us in unidentifiable forms. We have to recognize that power and opportunity, seize it, and use it to spur ourselves on to the next level. We cannot let ourselves become inhibited by the narrow-minded individuals with whom we will come in contact. As my mother would have put it, “You have to become skillful at taking lemons and making lemonade.”

The State Attorney General Office

I started my legal practice at a state attorney general office. I was hired with several other law school graduates to do civil litigation. My colleagues were too liberal to use the discriminatory terminology of the past. Instead, they used buzzwords like “competent” or “incompetent.” As a young lawyer, I was anxious to prove that I was among the competent—a part of the in-group. There were more experienced lawyers there who could have assisted me in developing a more workable understanding of how to analyze legal issues and take charge of legal representation. But I noticed that their help was often replete with a lack of trust in or respect for my capabilities as an attorney. Instead, they used buzzwords like “competent—a part of the in-group. There were more experienced lawyers there who could have assisted me in developing a more workable understanding of how to analyze legal issues and take charge of legal representation. But I noticed that their help was often replete with a lack of trust in or respect for my capabilities as an attorney.
Colleagues to Talk to

As part of my survival in the office, I developed my own group of colleagues to confer with during a trial. They were knowledgeable and encouraging. These friends came from all races and genders. I could be on trial and an unanticipated issue of appellate significance requiring legal research would arise. The judge would give me a few minutes to decide on the next course of action. I could make a phone call to one of them and within minutes I would have an answer. The appellate attorneys were often anxious to assist the guys doing the trials. I found, as I had when I did legal services before, that in the trenches there is no time for prejudice.

Another time I had to do a six-month detail to the Charging Unit where we worked twelve-hour shifts around the clock preparing complaints and authorizing search warrants. My daughter was six years old at the time. The assignment required some juggling of my personal schedule but I managed. However, I did feel some resentment when I discovered that I was the first mother to be given such an assignment.

Within a year of my return to juries, I was called in by the district attorney and asked if I wanted to go to the Domestic Violence Unit. He told me that the head of the unit, whom he failed to identify, but whom I knew to be a white female, did not have the jury trial experience that I had. I declined. This was the only time I was asked about an assignment before it was given to me. It was not unusual in such a political office for supervisors, who often had political connections, to have less legal or trial experience than their staff.

Lying in Wait for Your Foe

Opposing counsel (white males) would underestimate my ability in court. But I perceived their sense of superiority as something I could use against them. I would intentionally try my case in a laid-back but confident fashion. I would be respectful to the victim, the defendant, and everyone else in the courtroom. Then, in closing argument, I would try to put the facts in the case together with a blend of moral and legal philosophy that would compel the jury to convict. I loved the children that I represented, and I found ways to convey this to the jury. This strategy worked well until I developed a reputation for winning.

After three years in the Child Abuse Unit, I was confronted with the glass ceiling that existed at that time for African-American female assistants in the district attorney’s office. I asked to be assigned to the Homicide Unit because I could not do child abuse cases any longer. My supervisor had told me confidentially that I was rated number one in the Child Abuse Unit. From the grapevine I heard that other supervisors, all of them white males, were recommending this move for me. Eventually, I was told by my supervisor’s boss that I would be reassigned in January or February. When April came and I had not yet been moved to Homicide, assistants in the lower units observed what was taking place with my advancement. They, too, left the district attorney’s office, right around the time I did.

Life at a Federal Agency

Life for minority attorneys at the federal agency was no different than what I had experienced at other times in my past employment. At one point, I was assigned an administrative case involving an African-American university. The technical support person assigned to me for this case was also an African-American female. Neither of us had attended this particular university. I had no interests other than making sure the university complied with agency policy and the applicable regulations. Yet when the technical support supervisor learned that the two of us were working on the case, he removed the original technical person and assigned a white male in her place. I settled the case for a small amount but more than my new technical person recommended. The settlement was not approved by the law division until I let my hierarchy know who my technical person was and that he had endorsed the low settlement figure.

Becoming an In-House Counsel

I left this job after three and a half years to take a job with a major corporation as in-house counsel. My current office atmosphere is friendly and my work presents me with many challenges. Part of the TQM training offered by the company includes a discussion of the need for more minority and female hiring. We have endorsed efforts by the local bar association to have corporations such as ours hire law firms that have minority attorneys on staff. This is a significant start because when I attend negotiations on behalf of my client with many attorneys representing various corporations, I may see one minority attorney once in a while.

My first concern, as an in-house counsel, is doing a professional job in servicing my client. By my very actions, I try to educate and persuade my colleagues that our success as a company will be found in the inclusion and involvement of people from all groups. I try to emphasize our common strengths as people when I interact with other employees while giving legal advice or socializing.

In the early years of my legal practice, it often seemed as though, by becoming an attorney, I had entered no man’s land. I had a difficult time establishing meaningful connections with people who could help me enhance my professional growth or increase my sense of acceptance. It took me several years before I learned how to build bridges that go over negativity and around racism and sexism. Admittedly, this is something that requires continual effort. And yes, I do get weary.
Update on the Minority Judicial Internship Program

As of early June, the Section of Litigation’s Minority Judicial Internship Program (MJIP) has successfully placed 70 law students with both federal and state court judges in Chicago, Rockford, Skokie, and Waukegan, IL, as well as Houston, Corpus Christi, Laredo, and McAllen, TX. The students will average from six to eight weeks in judges’ chambers during the summer. Students receive a $1,500 stipend for participating in the program.

Thanks to the generosity of the program partner—Council on Legal Education Opportunity (CLEO)—MJIP will be able to extend more opportunities to law students who are accepted into the program next year.

This is only one of several major initiatives that the Section of Litigation is committed to accomplishing. This important project directly benefits the participating students and judges, as well as helps to enhance diversity in the profession.

One of the 2003 interns, Autumn Dawn Caviness, recently sent the Section the following comment:

I just wanted to inform you and your organization that I am working for the Honorable Felix Recio this summer. So far, I am currently at the end of my first week. I am having a wonderful time! I have had numerous opportunities to watch the courtroom in action, sentencing, and have even managed to attend a naturalization ceremony!

Autumn Dawn Caviness
1L student, Tulane Law School, New Orleans, LA

For more information on the program, go to www.abanet.org/litigation/mjip

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www.abanet.org/litigation/members/home.html.
Be Cautious When Generalizing

Let’s look at attorneys through the eyes of jurors. 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. For example, a Hispanic attorney in Hildalgo County, Texas, reflects the majority of the population. So, it is often difficult to make sweeping generalizations about how jurors will see “minority” attorneys.

In a different regard, what problems are presented by generalizing when analyzing the interactions of race and gender? One can postulate that an African-American female attorney is subject to “double stereotyping,” but it is unclear what this means in any particular case. In addition, gender and race aside, each attorney is an individual with a unique style and some attorneys are just more effective communicators than others. These individual factors cannot be ignored in any potential analysis of the effects of gender and race of the attorney on jurors.

The Trial Parallels Life

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, discrimination, or harassment cases. For example, jurors may be aware 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 race and sex discrimination/harassment cases because the case issues (race or gender) interact with the trial process (how the attorneys behave).

Recommendations

Counsel should consider the following recommendations when developing their trial teams:

- Consideration of the attorney’s race and gender should be seen in the context of the venue, the specific jurors, the case type and the overall trial team.

- Employment cases, and other emotional cases, require added sensitivity to jurors’ stereotypes of empathy, experiences with discrimination, and/or the parallel process between their personal lives and the courtroom.

- Jurors have somewhat superficial and stereotypical views of presentation styles and appearance; while each attorney must maximize his or her own style, consideration must be given to juror reactions.

- Jurors watch the roles women and minority attorneys assume and the treatment they receive, both within and outside of the trial team. Caution must be exercised not to place women or minorities in token or inappropriate roles.

- Judges and courtroom personnel have been shown to have the potential for bias, but definitive effects on jurors are unlikely.

- Pretrial research is an effective way to evaluate how specific attorneys will be viewed in specific venues.

Context and Opportunity

We don’t know all the answers about how minority and women counsel are perceived by jurors, because there are so many interactions between the gender, race, and experiences of jurors; the gender, race, and experiences of attorneys; the type of case; the trial team make-up; and the whole theater of the courtroom. Testing a case through pretrial research such as community attitude surveys, strategy development groups, and trial simulations can be an important means of addressing the unknowns before trial. In general, it appears that the disadvantages to having women and minority counsel on the trial team are insignificant compared with the potential advantages to the case. In addition, consideration must be given to the importance of ensuring the opportunity for every attorney to practice law in front of the jury.

Dr. Ann T. Greeley is a psychologist, jury consultant, and Director of the Pennsylvania office of Bowman DecisionQuest, a litigation support service.
Your Call to Active Duty!

Get Involved in the Minority Trial Lawyer Committee

When you take an active role in the work of the Minority Trial Lawyer Committee, it’s a win-win-win situation.

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The Minority Trial Lawyer Committee benefits from having energetic, effective members who are committed to accomplishing the Committee’s goals. Plus, the more people working, the less work for any one person.

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- Make certain your information is in the Diversity Development Database. Sign up at www.abanet.org/litigation/committee/minority/home.html.
- Become a working member of one of the Minority Trial Lawyer subcommittees: Communications (newsletter and Website), Membership, and Programs.
- Write an article for the print publication or Website (you know the rain-making power of having a byline in a national publication).
- Speak at a Committee or Section CLE conference or program.

Contact the Committee Co-Chairs: Brett J. Hart (hart@sonnenschein.com) and Burnadette Norris-Weeks (lawyer@fdn.com) to get involved in the committee today.
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