Jurors’ Perceptions of Ethnic Minority
Attorneys: Are We in a Post-Racial Era?

BY MARK R. PHILLIPS PH.D.

On November 4, 2008, after being elected the 44th President of the United States, Barack Obama said in his victory speech in Chicago, “If there is anyone out there who still doubts that America is a place where all things are possible, who still wonders if the dream of our founders is alive in our time, who still questions the power of our democracy, tonight is your answer.” For many people in our country and abroad, President Obama’s election symbolized the nation’s transition into a post-racial era in which race is no longer a significant factor in determining how people are judged. Indeed, the New York Times described his victory as “sweeping away the last racial barrier in American politics” and “a strikingly symbolic moment in the evolution of the nation’s fraught racial history.”

But when we look beyond the White House, are we really transitioning into a post-racial era? Nowhere is that question more relevant or more important than in America’s courtrooms, and nowhere within America’s courtrooms is that question more intriguing than when looking at ethnic minority attorneys who try cases before juries and ethnic minority witnesses who tell their stories to juries. Their fate (and the fates of their clients) frequently depends on how ordinary citizens perceive them, so the effects of racial bias or prejudice can have a very real—and very dramatic—impact on minority attorneys and their clients. What follows is an examination of jurors’ perceptions of ethnic minority attorneys and a discussion of how jurors’ attitudes and opinions toward minority attorneys may (or may not) be evolving.

Survey of Prejudice Against Minority Attorneys

In February and March 2010, we conducted a survey of 136 jury-eligible citizens near Baton Rouge, Louisiana (n = 32); Los Angeles, California (n = 22); New Brunswick, New Jersey (n = 28); Orange County, California (n = 25); and

Social Media and Our Judicial System

BY DENISE ZAMORE

The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

— Oliver Wendell Holmes

Barri ng a gag order, what’s to stop a savvy defendant corporation from creating a Facebook page dedicated to proving its innocence at trial? What’s to stop a juror at that trial from accessing and posting to the corporation’s Facebook page during a break or in a court if cell phones and PDAs are allowed?

Facebook boasts more than 400 million users. More than 50 million tweets are sent every day. Tens of millions of Americans have become accustomed to accessing and sharing information in real time via online media. From sports to politics to entertainment, Americans are eager to engage with one another through the Internet and social media outlets. But, what happens when this eagerness impacts the outcomes of trials?

Juror Use of Social Media

Within the past few years, trials throughout the country have been affected by jurors’ use of technology to research and communicate via the Internet while impaneled. This practice often affects the rights of the parties to have their cases decided based only on evidence admitted by the court and allows the deliberative process to go beyond its authorized limits. In addition to conducting Internet research, jurors now blog, tweet, and post to Facebook and MySpace about their trials. This conduct can compromise the integrity of the jury process and has recently led to the exclusion of jurors, the imposition of fines, and even mistrials.

In what has been infamously dubbed the “Google mistrial,” in 2009, the New York Times

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Our Mission and How You Can Help

BY JENNIFER BORUM BECHET, JULIE SNEED, AND RAYMOND B. KIM

In a provocative 2004 study entitled “Are Emily and Greg More Employable than Lakisha and Jamal?,” economists Marianne Bertrand and Sendhil Mullainathan drafted 5,000 fictitious résumés and placed archetypical African-American names (e.g., Tyrone, Latoya) on half of them and “white” sounding names (e.g., Emily, Brendan) on the other half. The researchers then categorized them into high-quality and low-quality résumés and sent them out to potential employers. The results were stunning. The fictitious candidates with African-American names were 50 percent less likely to be invited for an interview than the “white” candidates. The study also found that while high-quality “white” candidates were more successful at landing interviews than low-quality “white” candidates, the relative quality of the African-American candidates did not seem to play as significant a factor in their success rates.

Bertrand and Mullainathan’s study highlights the perception gap that minority lawyers continue to face in their daily lives even as we enter the second decade of the twenty-first century. Some may come across stereotypical attitudes in their place of employment. Others may confront them during trials. Regardless of the context, however, there is little doubt that those differences in perception can have a major impact on people’s lives and careers. Bertrand and Mullainathan’s study shows that the very concept of a level playing field in society may still be more fiction than reality, despite the tremendous strides that have taken place in recent times. However, as noted in the ABA’s recently released study, “Diversity in the Legal Profession: The Next Step,” the recent economic slowdown and recessionary concerns are undermining efforts to achieve greater diversity in the legal profession as diversity initiatives and other programs are being subject to cost-cutting austerity measures.

The Minority Trial Lawyer Committee hopes to help fill that gap by providing members with a forum to actively participate in ABA events and programs, network with other lawyers and legal professionals throughout the country, and generate opportunities for members to write articles, propose programs, and achieve leadership positions within the ABA. During the recent Section of Litigation’s Annual Conference in New York City, the Minority Trial Lawyer Committee hosted a lively and wide-ranging discussion and networking luncheon with a theme of “Are We There Yet? Making the Case to Diversity’s Detractors.”

During the luncheon, committee members debated the state of affairs for minority lawyers during the “Age of Obama.” What was highly evident during these discussions was that the wonderful diversity of our members extends not only to backgrounds but also to beliefs and attitudes. The Minority Trial Lawyer Committee also continued its tradition of hosting a Dutch Treat dinner at Victor’s Café. The combination of authentic Cuban food coupled with the outstanding company of fellow committee members made the event a memorable one.

We hope you will join us at the ABA Annual Meeting in San Francisco, August 5–10, 2010. During that meeting, the

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Lessons Learned from the First Amendment and Media Law Diversity Moot Court Competition

BY JEANETTE MELENDEZ BEAD

For two years, the American Bar Association Forum on Communications Law has hosted a First Amendment and Media Law Diversity Moot Court Competition. The competition’s primary focus is to expose minority law students to the practice of media law. Two-person teams from schools across the country submit appellate briefs on novel issues involving first amendment and media law, and finalists participate in oral arguments before a mock appellate panel consisting of practicing and retired appellate judges. As chair of the committee that administers the competition on the Forum’s behalf, I have interacted with countless law students and organized the appellate practice tips discussion following the final oral argument, during which practicing judges share their thoughts on the dos and don’ts of appellate argument. What follows are some thoughts on what I’ve learned along the way.

Advice to Law Students and New Lawyers

Many law students and new lawyers wisely participate in bar-related activities in an effort to learn about new areas of law, build a professional network, and enhance their resumes. Unfortunately, these budding and new lawyers often forget (or perhaps don’t know) that each interaction with a member of the bar presents an opportunity to build their professional reputation, and, as such, should be approached with a few points in mind.

Act in a way that forces others to take you seriously. I’m not sure exactly when it happens, but at some point in a seasoned lawyer’s professional life, he or she begins to view law students and new lawyers (especially young lawyers) as “kids” who shouldn’t be taken seriously. I’ll be the first to admit that such a blanket characterization isn’t fair, but law students and young lawyers sometimes act in ways that cause seasoned lawyers to discount their potential for making a significant impact as members of the bar. A new lawyer who sets goals, expresses a willingness to learn, and follows through on commitments will almost always be taken seriously by others. Strive to be that person.

Remember to proofread. This seems like a no-brainer, but a gentle reminder is in order here. You should proofread every written communication, whether it’s a letter to a potential employer or an email to a colleague. If you send a written communication containing poor grammar and typographical errors, the person receiving it may conclude that you lack the capacity to pay attention to detail, a critical trait for any successful lawyer. Mistakes are bound to be made, but you should try to build a professional reputation such that if you make a mistake, it is perceived as the exception rather than the rule.

Treat every person as a potential employer or personal reference. Seasoned lawyers often tell great stories about amazing opportunities that arose from their participation in bar-related activities. The stories often share a common theme—the opportunity arose because someone was impressed with the seasoned lawyer’s performance, contributions, responsiveness and the like. When you interact with members of the bar, ask yourself whether you would interact with a potential employer or personal reference in such a manner. Are you responding to questions promptly and thoroughly? Are you meeting deadlines? Are you completing tasks you agreed to take on? All of these questions should be answered in the affirmative. If they are, you will have come a long way in building your professional reputation.

Tips for Practitioners

After the final round of oral argument, the competition participants, judges, and spectators engage in a lively discussion about appellate advocacy. The judges share their thoughts about successful oral advocacy and describe some of their pet peeves. This information represents the composite wisdom of six appellate judges, including a justice of the Arizona Supreme Court, the former chief judge of the United States Court of Appeals for the Eleventh Circuit, and a current judge of the Third Circuit Court of Appeals. Although these tips were made in the context of a discussion about appellate advocacy, they also apply to oral advocacy at any level.

Know the facts of your case. One judge observed that practitioners often focus on issues of law but forget that the facts of the case are just as important. Sometimes the factual record is unclear and a judge comes to oral argument with one goal in mind—to clarify the record. Don’t get caught off guard. Know the facts of your case and be prepared to recite them.

Know the facts of the cases on which you rely. Knowing the proposition for which a case stands is not enough. Judges usually know the law applicable to the questions presented or have trusty law clerks who can summarize it for them. You are more likely to be asked about distinctions between the facts of your case and the facts of the cases on which you rely. If you don’t know the latter, you will be unable to respond meaningfully to questions from the court regarding those distinctions.

Don’t write your entire argument. According to one judge, if you write your entire argument, you are sure to miss the opportunity to learn the issues the judges really care about. Writing the entire argument tends to make you inflexible. You feel compelled to get through it even when it isn’t necessary. If you are interrupted, you may become flustered or lose your place. You lose the opportunity to have eye contact with the judges because you’re looking down at what you’ve written. Instead of committing the entire argument to paper, draft an outline of the points you’d like to make, and be prepared to set it aside if the judges have something else in mind.
Strive to have a conversation with the court. One judge observed that the best arguments are ones in which the lawyer and the judges engage in discussion about the issues. In other words, the oral argument becomes a conversation. This doesn’t mean that you disregard any formalities. Rather, you talk with the judges about the issues instead of talking to them. This requires you to look away from your papers, listen to the judges’ questions, respond to those questions, and move the discussion along when the judges are satisfied with your response.

Don’t shuffle your papers. This was a major source of disturbance for some judges. A litigant who gets to the podium with a stack of documents three inches high and begins shuffling them before and during oral argument drives judges crazy. I suspect it’s because the paper shuffling means that the litigant doesn’t know the facts of the case, has committed his or her argument to paper, isn’t prepared to have a conversation with the court, and is letting nerves take over. A pad of paper and a few pages of notes should suffice to get you through the argument.

If a judge asks questions, answer them. The judges all agreed that a major frustration of oral argument is a litigant’s inability or unwillingness to answer specific questions. The point is simple: If a judge asks a question, respond to it. If for some reason you can’t, say so, and, if appropriate, offer to provide the information requested if the court is inclined to accept it.

Be prepared for moments of silence. This one comes from practitioners, not judges. Benches can be overactive, underactive, or just right. An underactive bench can be just as disconcerting as an overactive one if you haven’t prepared for it. While it isn’t wise to prepare every minute of your argument, it’s just as unwise to expect the judges to have questions and to not have anything to say if they don’t. If there are moments of silence, fill them with a description of the relief you seek and an explanation of why you are entitled to it.

Don’t interrupt a judge. If a judge is speaking, stop talking and listen. It’s a hard rule to follow, but it’s an important one, and the practitioner who fails to adhere it risks a very public verbal thrashing. This is a pet peeve for many judges and not just those who served on the panels for the moot court competition. Some judges take it in stride, recognizing that the lawyer isn’t trying to be rude; others are not as forgiving. If it happens, the best thing to do, of course, is to apologize and move on.

As you can see, I’ve learned a lot as part of the process of running the moot court competition. More than anything, I’ve learned that bar activities can be the source of some of your most rewarding professional experiences. Get involved and don’t be afraid to make your mark.

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The End of Expert Practice as Usual: Proposed Changes to Rule 26

BY CALVIN CHENG

On September 15, 2009, the Judicial Conference of the United States, the principal policy-making body concerned with administration of the U.S. courts, met and approved the recommendations of the Committee on Rules of Practice and Procedure, including the proposed amendments to Federal Rule of Civil Procedure 26 concerning expert witnesses. If approved by the Supreme Court, these amendments will dramatically alter expert witness practice.

The proposed amendments to Rule 26 would impose two reforms. First, they would extend work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, to communications between those witnesses and retaining counsel. Second, they would require an attorney relying on a testifying expert who is not required to provide a Rule 26(a)(2)(B) report to disclose the subject matter and summarize the facts and opinions that the expert witness is expected to offer. Each of these proposals is discussed below in more detail.

Work-Product Immunity Extended to Drafts and Communications

Rule 26(a)(2)(B) currently requires that an expert witness report should disclose “the data or other information considered by the witness in forming the opinions.” The accompanying 1993 Committee Notes read:

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—which or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

This passage of the Committee Notes resulted in the widespread practice of permitting discovery of all communications between attorney and expert witnesses and of all drafts of expert reports. The rationale for this broad discovery is that the fact finder needs to know the extent to which the expert’s opinion has been shaped by attorney influence.

The practical effect of the current rule, however, is that lawyers and experts often take elaborate steps to avoid creating any discoverable record. These steps often include hiring two sets of experts—one for consultation and one for testimony—to avoid creating a discoverable record of the collaborative interaction with experts. These steps also may include prohibiting the expert from taking any notes, making any record of preliminary analyses or opinions, or producing any drafts of the report. Instead, the only record is a final report. These steps hamper efficiency, adding to the costs and burdens of discovery, preventing proper use of the experts, needlessly lengthening depositions, detracting from cross-examination into the merits of the expert’s opinions, reducing the pool of qualified individuals willing to serve as experts, and reducing the overall quality of expert work product.

In addition, attorneys frequently take elaborate steps to attempt to discover the other side’s drafts and communications. For example, attorneys devote large chunks of time during depositions, trying to discern information about the development of the expert’s opinions, attempting (and often failing) to show that the expert’s opinions were shaped by the attorney retaining the expert’s services. Testimony and statements presented to the Advisory Committee before and during the public comment period showed that such questioning during depositions is rarely successful and ends up unnecessarily prolonging the questioning. Spending time asking questions about the retaining lawyer’s involvement in the expert’s opinions, instead of focusing on the strengths or weaknesses of the expert’s opinions, does little to expose substantive problems with those opinions. Instead, the most successful means of discrediting an expert’s opinions are by cross-examining the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The inefficiencies of the current practice has led to calls for reform from various quarters. The American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and to limit discovery of attorney-expert communications, without hindering discovery into the expert’s opinions and the facts or data used to derive or support them. The State of New Jersey enacted such a rule and, according to the information obtained by the Advisory Committee, the practicing attorneys reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated with no decline in the quality of information about expert opinions. In fact, many attorneys now regularly stipulate at the outset of a case that they will not seek to discover such communications and expert report drafts.

The proposed amendments to extend work-product immunity address the inefficiencies of the current practice. Under the proposed amendments, any draft of a Rule 26(a)(2) report or disclosure is given work-product protection (regardless of the form in which the draft is recorded). Further, communications between the party’s attorney and any witness required to provide a Rule 26(a)(2)(B) report are also protected by work-product immunity with three exceptions. The amended rule specifically denies work-product protection to communications that (1) relate to compensation for the expert’s study or testimony; (2) identify facts or data that the party’s attorney provided and...
that the expert considered in forming the expressed opinions; and (3) identify assumptions that the party’s attorney provided and that the expert relied upon in forming the expressed opinions.

The main argument against the proposed amendments, raised by a group of legal academics, is that the amendments could prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert’s services. After extensive study, however, the Advisory Committee was satisfied that the most effective method for evaluating the merits of an expert’s opinions is to cross-examine the expert on the substantive strength and weaknesses of the opinions and present evidence bearing on those issues. The Advisory Committee was satisfied that discovery into draft reports and communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert’s opinions, was time-consuming and expensive, and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

The Advisory Committee concluded that establishing work-product protection for draft reports and some categories of attorney-expert communications would not impede effective discovery or examination at trial. The committee recognized that in some cases, a party may be able to make the showings of need and hardship that overcome work-product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Notes, nothing in the Rule 26 amendments affects the court’s gatekeeping responsibilities under Daubert v. Merrell Dow Pharmaceutical, Inc.

Disclosure of “No-Report” Expert Witnesses
Rule 26 currently identifies two types of testifying experts: (1) those that are “retained or specially employed to provide expert testimony in the case or . . . whose duties as the party’s employee regularly involve giving expert testimony”; and (2) those that fall outside the former category (e.g., a treating physician or a government accident investigator).

Those in the former category are required by Rule 26(a)(2)(B) to provide an expert report while those in the latter category are not. According to the Committee Notes, the purpose of the expert report is to clarify the “substance” of the expert testimony. Ideally, the thought was that the expert report would remove the need to depose the expert or, alternatively, would improve the conduct of the deposition. In keeping with this purpose, Rule 26(b)(4)(A) requires that an expert cannot be deposed “until after the report is provided.”

Some courts have so admired the advantages gained from requiring expert reports, however, that they have gone beyond Rule 26(a)(2)(B) and required all testifying experts to provide reports—not just those that were “retained or specially employed to provide expert testimony in the case.” The problem with this approach is that testifying experts not covered by Rule 26(a)(2)(B) (including hybrid witnesses, i.e., non-retained witnesses who also qualify as experts) may find it difficult or impossible to draft the reports because their careers are devoted to causes other than giving expert testimony. Despite this, courts still recognize the usefulness of having advance notice of an expert’s testimony.

Proposed Rule 26(a)(2)(C) strikes a compromise between these two considerations. If an expert witness is not required to provide a written report under 26(a)(2)(B), proposed Rule 26(a)(2)(C) would require the (a)(2)(A) disclosure to state the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705, and to provide “a summary of the facts and opinions to which the witness is expected to testify.” The summary of facts should include only the facts that support the expert’s opinions and not the facts a hybrid witness would testify to. As stated above, drafts of the summary of facts would be protected by the work-product provisions of proposed Rule 26(b)(4)(B).

Conclusion
Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section of Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly the American Trial Lawyers Association), the Federal Magistrate Judges’ Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the U. S. Department of Justice.

The proposed amendments will be transmitted to the Supreme Court with a recommendation that they be approved. If the Supreme Court adopts the recommendation, it will prescribe the amendments and transmit them to Congress by May 1, 2010. Absent any congressional action to reject, modify, or defer the proposed amendments, the amendments will become law on December 1, 2010.

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THE BENEFITS OF MEMBERSHIP

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Dear Ask a Mentor,
I am a third-year associate at a mid-size law firm in the Pacific Northwest and have been offered a position with a firm in a different part of the country. How do I determine whether the salary that is being offered is competitive with salaries in the area? Compensation aside, what aspects of a law firm should I consider before accepting the offer?

R.T., Portland, Oregon

Dear R.T.,
Congratulations on the job offer. A quick peek at Google will lead you to a dozen or more websites that will give you an idea of the pay you can expect in legal markets throughout the country. There is, however, a quick and dirty formula for determining your annual salary—it is one-third of the amount of revenue you are expected to generate each year. The amount of expected revenue is a function of your annual billing target and your hourly billing rate. The remaining two-thirds of expected revenue are traditionally allocated equally between overhead (such as lease payments, library costs, errors and omissions, insurance, and staff salaries) and profit to the firm. For example, if you are expected to bill 1,950 hours each year at $325 per hour, the expected annual revenue is $633,750 and salary expectations would be roughly $211,250, less payroll taxes and benefits paid by the firm. Alternatively, if your billing target is 2,000 hours and your billing rate is $225, expected revenue would be $450,000 per year, and salary expectations would be roughly $150,000. This formula works even for plaintiff-side law firms, which typically impose an annual billing target and set hourly billing rates for each attorney to comply with fee-shifting statutes or prevailing party attorney fee provisions.

This formula is not rigid. Many firms, especially smaller ones, have an overhead that is far less than one-third of attorney-generated revenue, but such firms are often constrained by what they can charge per hour for legal services. Similarly, firms have the flexibility to either increase or decrease associate salary by juggling the amount of overhead, partner profits, or both. By the same token, beware of firms, or more likely partners, that regularly cut the hours that you have worked under the guise of “inefficiency.” Your billing rate is intended to reflect your lack of experience as a lawyer, yet too often partners will—without justification and at your expense—write off your time in an attempt to either impress a client or correct some boondoggle. Be mindful of these folks.

Although this formula is a quick way to determine salary, it nonetheless fails to capture important aspects of the legal profession. One aspect that has grown in importance in these tough economic times is the business that you generate. While new lawyers rarely generate their own business, they nonetheless are expected to over time. It is therefore important that you and your new firm come to terms on the amount of compensation you will receive for work performed for clients that you bring to the firm. Again, there is no specific formula, but the agreed terms should be put in writing and signed by an authorized member of the firm. Most firms will offer to pay you 10 percent of all revenue they receive from business you generate. In my opinion, a fairer sum would be at least double this amount. This is because 60 percent or more of the revenue that you generate will be returned to the firm either as a profit or as an offset to overhead.

Compensation, however, is only one factor in the equation. Another is the culture of the firm. Are the values and personalities of the attorneys and staff compatible with yours? Like most businesses, law firms are hierarchical institutions, and a firm’s culture is often determined by the values of those at the top. Is the leadership of your prospective firm comprised of folks who are principled, disciplined, and willing to devote the time, effort, and resources needed to develop the legal skills of new attorneys? Or are the development of clients and the generation of revenue treated by the firm as the Holy Grail of law? Likewise, is the leadership comprised of people who foster an environment that encourages independent thinking, or is the firm run like a fraternity where being a good lawyer is tertiary to getting along?

The type of work you will be doing is another factor to consider. Will you be able to develop your writing skills through a variety of motion work, or will you spend your day churning out motions to dismiss in securities fraud actions? Review the work product of the attorneys at the firm. This can often be done online by examining the pleadings and motions filed by the firm in either federal or state court. You may be surprised at what you discover. Likewise, while the opportunity for trial experience is often used as a recruitment tool, you should ask some basic questions. What types of cases will you take to trial? While personal injury or medical malpractice cases are good ways to develop trial skills, a heavy diet of these cases will not be of much use if your goal is to become a business trial lawyer. Similarly, who are the lawyers under whom you expect to work, and where did they develop their trial skills? Review their biographies. There are many superb trial lawyers who spent years studying their craft either on their own or under others. There is also a cadre of trial lawyers who, while competent, have spent their entire careers trying cases in a narrow field of law. These folks are often easily identified because they speak and write in a lingo that is unique to their specialized field of law. If given the opportunity, work with lawyers who have experience in a broad spectrum of the law. This will provide you with a breadth of experience that will be useful in your career and will help you to develop the speaking and writing skills that are needed to become an effective advocate. The best advocates are teachers. As the Roman African theologian and lawyer Tertullian wrote nearly two millennia ago, “Truth persuades by teaching.”

When selecting a firm, choose one that is filled with teachers.

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Jurors’ Perceptions

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Salt Lake City, Utah (n = 29). To ensure that we had a representative sample of jurors, we selected the respondents using a stratified sampling technique in which we matched the sample to our database of actual trial jurors in these venues in terms of gender, ethnicity, education, age, marital status, employment status, homeownership, and occupation (e.g., government or private business).

The results of the survey fell into three broad categories of findings: (1) juror-eligible citizens believe many others are biased against minority attorneys and witnesses, but (2) they usually don’t admit to being biased themselves, even though (3) when we look at the overall pattern of responses, it appears that at least 10–15 percent of jury eligible citizens (and possibly more) are at least moderately biased against minority attorneys and witnesses.

Relating to the first broad category of findings, 31 percent of the survey respondents indicated that they believed jurors are influenced by the race or ethnicity of an attorney in a trial. Thirty-nine percent indicated that they believed jurors are similarly influenced by a witness’s race or ethnicity. Only 52 percent of respondents agreed that jurors treat all ethnic and racial groups the same as compared to 68 percent who agreed that judges treat all ethnic and racial groups the same.

Clearly, the jury-eligible citizens in our sample believed that many others are biased against ethnic minorities.

When asked about their own potential biases, jurors were less likely to agree that any such bias exists. Nevertheless, when looking at the overall pattern of responses, it was evident that jurors are sometimes biased against minority attorneys and witnesses. For example, 12 percent of all respondents said they believed Asian-American attorneys are either somewhat or very dishonest and untrustworthy (see Figure 1). When asked about African-American and Hispanic attorneys, 15 and 14 percent of the respondents, respectively, indicated that they believed they are either somewhat or very dishonest and untrustworthy (see

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**Figure 1:** How honest and trustworthy do you believe Asian-American lawyers are in general?

- Very dishonest and untrustworthy: 1%
- Somewhat dishonest and untrustworthy: 12%
- Somewhat honest and trustworthy: 60%
- Very honest and trustworthy: 27%

**Figure 2:** How honest and trustworthy do you believe African-American lawyers are in general?

- Very dishonest and untrustworthy: 0%
- Somewhat dishonest and untrustworthy: 15%
- Somewhat honest and trustworthy: 59%
- Very honest and trustworthy: 26%

**Figure 3:** How honest and trustworthy do you believe Hispanic lawyers are in general?

- Very dishonest and untrustworthy: 1%
- Somewhat dishonest and untrustworthy: 14%
- Somewhat honest and trustworthy: 62%
- Very honest and trustworthy: 23%
Figures 2 and 3). Interestingly, the results were similar for Caucasian attorneys (i.e., there was no statistically significant difference), which indicates a general distrust of all attorneys.

However, when we took a closer look at the overall pattern of responses, we discovered that a substantial portion of the respondents indicated a general bias against minorities. For example, about 20 percent said that they would not trust the credibility of witnesses with heavy foreign accents. 47 percent indicated they are more likely to trust the credibility of an English-speaking witness over a non-English-speaking witness, and 20 percent admitted to distrusting witnesses who testified through an interpreter. Thirty percent of the respondents also indicated that they believed ethnic minorities who are plaintiffs in lawsuits “ask for more money than they deserve.” Many of them also indicated that they had a general skepticism toward race discrimination lawsuits, and many also reported that they had personally experienced a “direct negative experience” with a person (or people) belonging to an ethnic or racial minority. Taken together, these data clearly show a cluster of responses consistent with a bias against minority attorneys by some jurors.

Overcoming Anti-Minority Bias
Having confirmed in the first phase of our research that there is indeed a bias among some jurors against minority attorneys (and, at times, against minority witnesses and litigants), in the second phase of our research, we investigated the degree to which minority attorneys can overcome those biases. To help answer this question, we analyzed data from a subset of our comprehensive national database of real and mock jurors. For this portion of the study, we limited our data to mock jurors who participated in trial simulation research in which real attorneys gave live argumentative presentations for real cases. To qualify for inclusion in this analysis, individuals needed to be jury-eligible citizens who evaluated both a minority attorney (in this case, either African-American or Asian-American) and a Caucasian attorney in the same case, and the two attorneys who were
evaluated needed to be the same gender, have approximately the same skill and experience levels, and be approximately the same age. Also, the strength of the evidence and arguments presented by the minority attorney had to be approximately equal to the strength of the evidence and arguments presented by the Caucasian attorney. In other words, the attorneys we compared and their presentations were nearly equal in every meaningful way except for the ethnicities of the attorneys.

A total of 1,164 mock jurors from 10 different cases met these criteria. The cases included four contract disputes. Three of the four contract cases included a comparison of an Asian-American attorney to a Caucasian attorney. The other contract dispute included a comparison of an African-American attorney to a Caucasian attorney. The other six cases, each of which involved a comparison of an African-American attorney to a Caucasian attorney, consisted of three toxic tort matters: an airplane-crash wrongful-death case, a corporate fraud case, and an employment dispute involving allegations of retaliation and hostile work environment. The jurors in the study rated each attorney on the following five characteristics, each on a scale of one (lowest/worst) to four (highest/best): likeability, honesty, organization, competence, and belief in the attorney’s case.

The results of our analysis were both surprising and encouraging. In 8 of the 10 cases we analyzed, jurors actually rated the minority attorneys higher than the Caucasian attorneys overall and in at least two specific areas (e.g., likeability and honesty; see Figure 4). Jurors rated the African-American attorney higher than the Caucasian attorney in five of the seven comparisons between African-American attorneys and Caucasian attorneys (see Figure 5). Similarly, jurors rated the Asian-American attorney higher than the Caucasian attorney for two of the three comparisons between Asian-American attorneys and Caucasian attorneys (see Figure 6). In one of the remaining three cases, the results were mixed such that the minority attorney (an African-American male) received higher ratings for honesty but lower ratings for likeability and belief in his case as compared to the Caucasian attorney. In one case, there were no statistically significant differences at all between the minority (Asian-American) attorney and the Caucasian attorney, and in the only remaining case, jurors rated the Caucasian attorney higher than the minority attorney (an African-American male) in terms of likeability, organization, competence, and belief in his case. Clearly, these data confirm what most of us already know—namely, that minority attorneys can, and do, frequently
overcome many negative biases and prejudices that jurors may have against them. In particular, jurors tended to rate minority attorneys (both African-American and Asian-American) as more likeable and honest than their Caucasian counterparts. These results applied to all jurors regardless of their race. However, as can be seen in Figure 7, when examining organization and competence ratings, we discovered that African-American attorneys only received higher ratings than Caucasian attorneys from African-American jurors. As can be seen in Figure 8, non-African-American jurors rated Caucasian attorneys as more organized and competent than African-American attorneys, thus confirming the aforementioned same-race bias.

Conclusion
We found evidence of biases among jurors against minority attorneys and witnesses and, at times, in favor of attorneys belonging to their own racial or ethnic group. However, our data from real-world settings, outside the artificial confines of a laboratory, suggest that jurors are often unaware of their own biases. One implication of these findings is that, if attempting to identify biased jurors during jury selection, asking directly about prospective jurors’ biases can only be effective with some prospective jurors. For others, it appears that a more effective method of identifying biases is to use a written supplemental juror questionnaire that includes indirect questions to help identify biases.

Another implication of our findings is that jurors do not always act upon their biases when forming judgments about trial attorneys. Instead, it appears that skilled trial attorneys who are ethnic minorities can frequently overcome jurors’ biases against them. Indeed, when we asked our research participants open-ended questions about what trial attorneys can do to improve their presentation style and persuasiveness, jurors most often told us that being honest, organized, well prepared, and “sticking to the facts” mattered most to them. More anecdotally, this is something that we have personally seen firsthand through many years of interviewing real and mock jurors in literally thousands of cases. It appears that although we may not be in a truly post-racial era in America’s courtrooms, jurors’ judgments of attorneys and witnesses are mostly influenced by the evidence and arguments in a case and by attorney and witness characteristics other than race or ethnicity.

Dr. Mark R. Phillips is vice president and senior trial consultant with Trial Partners, Inc., in Los Angeles, California. He would like to thank Dr. J. Lee Meihls, founder and president of Trial Partners, Inc., for her assistance with the research described in this article, as well as Karoline Brandt-Gourdin, Grace O’Malley, Kally Nelson, and Dr. Lucy Morris.

Endnotes
2. We designed this survey specifically for this article, giving us a limited time for data collection. We will continue to collect data over the course of the coming months to increase the sample size so that we can verify the preliminary results reported in this article.
3. Notably, the approximately 10–15 percent of jurors who exhibited the strongest biases against minority attorneys were most likely to be in the Louisiana sample. However, each venue included some biased jurors.
4. We did not have a sufficient number of cases that met our criteria for Hispanic attorneys.
5. We attribute this, at least in part, to the very conservative, overwhelmingly Caucasian demographic makeup of the jurisdiction for this particular case.

Figure 7: African-American and non-African-American jurors’ ratings of African-American attorneys and non-African-American attorneys on organization (n = 1,056)

Figure 8: African-American and non-African-American jurors’ ratings of African-American attorneys and non-African-American attorneys on competence (n = 1,056)
reported that after eight weeks of trial in a Florida drug case, a juror admitted to the judge that he conducted Internet research. When the judge questioned the other jurors, he found that eight others did the same thing. The judge declared a mistrial.3

While there are many other cases where juror use of the Internet to conduct research has affected the outcome of trials, it is only within the last few years that juror use of social media has also become an issue. For example, in March 2010, a Georgia court revoked the bond of a man accused in a shooting death after he sent a friend request on Facebook to a juror hearing evidence in his trial.4

In the February 2010 political corruption trial of Sam Riddle, Detroit defendant Riddle used Twitter and Facebook status updates during jury deliberations to voice displeasure with his counsel, posting on Twitter “When your fate is in the hands of others, man, that is not a good feeling.” On Facebook, Riddle posted “I never understood the true depth that ineffective counsel could achieve. The 6th Amendment screams for justice.” After his first corruption trial ended in a mistrial, Riddle began directing thousands of followers and friends on Facebook and Twitter to American Riddle, his new online legal defense fund, hoping to raise $50,000 to $150,000 to hire a new attorney for his second corruption trial.4

During a February 2010 criminal trial in New York, a juror sent a key witness a Facebook friend request.5 The judge found that the juror’s communication was “unquestionably a serious breach of her obligations as a juror and a clear violation of the court’s instructions,” and ultimately overturned the conviction on other grounds.

In 2009, an Arkansas judge found that a juror’s tweets, including one that read “I just gave away TWELVE MILLION DOLLARS of somebody else’s money,” did not require a mistrial. Defense counsel subsequently filed an appeal, claiming that the Twitter posts displayed that the juror was “predisposed toward giving a verdict that would impress his audience.”6

Defense lawyers in the 2009 federal corruption trial of former Pennsylvania state senator Vincent J. Fumo unsuccessfully demanded before the verdict that the judge declare a mistrial because a juror posted updates on the case on Twitter and Facebook. The juror had even told his readers that a “big announcement” was coming on Monday.

In 2008, an English juror was uncertain which way to vote on a jury in a child abduction/sex abuse case. She posted details about the case and then held a Facebook poll to help determine her vote. She was dismissed.7

**Counsel should conduct their own Internet research to learn what information exists online about the trial.**

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**Jury Instruction Changes**

The use of social media has become so ubiquitous that courts have been forced to take notice. Earlier this year, Administrative Judge Marcella A. Holland issued an order banning “the use of any device to transmit information on Twitter, Facebook, LinkedIn or any other current or future form of social networking from any of the courthouses within the Circuit Court for Baltimore City.”9

Judge Holland’s decision was made in response to the trial of former Baltimore mayor Sheila Dixon, the first Baltimore case covered en masse on social media sites by journalists, who posted regular tweets from courthouse hallways and courtrooms. Five jurors became Facebook friends during the trial, and some posted public messages about the trial, leading Dixon’s attorneys to call for a new trial.

Recognizing the increase in social media site usage, on January 28, 2010, the Judicial Conference of the United States’ Committee on Court Administration and Case Management issued model jury instructions “to help deter jurors from using electronic technologies to research or communicate about cases on which they serve.”9

The model instructions, sent to all U.S. district court judges, were drafted to more explicitly address the increasing incidence of juror use of electronic devices to conduct research on the Internet or communicate with others about cases. The instruction states, in part, I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube.10

While there are no nationwide uniform instructions for state courts, some courts, including the Florida Supreme Court, have released a similar set of recommended jury instructions to address the growing trend of jurors’ use of the Internet and accessing social media while on jury duty.11

**Potential Solutions to a Growing Problem**

The evidence jurors are permitted to consider typically consists of the testimony of witnesses, documents, and other items received into the record as exhibits. However, jurors’ use of the Internet and social media to conduct research is only likely to increase. And, many believe that the sanctity of the jury system and the right to a fair trial will continue to be affected by jurors’ use of technology.

Some jurisdictions attempted to address this problem by banning the use of all cell phones and computers from the courtroom. Many are considering adopting the more explicit jury instructions referenced earlier in this article. However, while rules banning devices in courtrooms and the newly proposed jury instructions...
may prevent jurors from researching or communicating via the Internet on electronic devices while in the courthouse, some believe the new instructions will do little to prevent jurors from doing so outside the courthouse.

Unfortunately, trial counsel should assume that, despite judges’ instructions, jurors will engage in online research and communication regarding their trials. Therefore, in the absence of jury sequestration or a court-entered gag order, counsel should consider taking some basic steps to lessen the likelihood of a trial’s derailment resulting from jurors’ use of the Internet.

- During voir dire, counsel should inquire as to jurors’ usage of the Internet generally, and social media specifically. Inquire as to what websites jurors frequent, how often they access those websites, and if they post to those websites. Also ask whether the jurors blog.
- Counsel should request that in the initial instructions to the jury, the judge expressly prohibit research and communications on the Internet at any time during the trial. The instructions should explicitly reference and prohibit the use of social media, including Facebook, Twitter, and MySpace.
- Counsel can also request that the judge remind jurors of the penalties for conducting outside research and require jurors to sign declarations stating that they will not research the case details on the Internet.
- During a trial, counsel should regularly check social media websites to confirm whether jurors are posting or blogging regarding the trial.
- Counsel should take the preemptive step of conducting their own Internet research to learn what information exists online about the trial, including any information regarding the litigants, witnesses, and lawyers.
- Counsel should review their case and consider what questions might arise during the trial that could prompt a juror to look elsewhere for answers. Counsel should take these questions into consideration when putting together the case presentation.
- Where juror misconduct seems apparent, counsel should strongly consider a post verdict motion for voir dire of a juror to determine whether juror misconduct has in fact occurred.

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Endnotes
2. “As Jurors Turn to the Web, Mistrials are Popping Up,” NEW YORK TIMES, March 18, 2009.
5. People v. Rios, No. 1200/06 (Feb. 23, 2010).
7. Juror dismissed over Facebook poll: “I don’t know which way to go, so I’m holding a poll.” www.theregister.co.uk/2008/11/26.
8. In the Circuit Court for Baltimore City Addendum to Administrative Order on Use of Cell Phones and Other Communication Devices, dated Feb. 14, 2006.
11. In the Supreme Court of Florida, In re Standard Jury Instructions (Civil) and (Criminal), Juror’s Use of Electronic Devices, Case No. SC10-51.
Minority Trial Lawyer Committee will sponsor a program titled “A Power Shift: Client Development in the Age of Obama.” The all-star panel for the program includes Joseph West of Wal-Mart, Joan Haratani of Morgan Lewis, Joseph Hanna of Goldberg Segalla, and moderator Jacqueline Becerra of Greenberg Traurig. The committee will also be cosponsoring two other programs with the Woman Advocate Committee and the Appellate Practice Committee. We will also be hosting several networking events, including a collaborative networking dinner with the Health Law Committee and the Antitrust Committee on August 5, a committee and practice area coffee networking hour on August 6 from 5:00 to 6:00 p.m., and a happy hour on the same day at 6:00 p.m. at the Westin Market Street Hotel’s Ducca Lounge. Additional details about these events will be sent by email in the near future.

We are pleased to present you with the latest issue of The Minority Trial Lawyer. This issue contains articles about juror perceptions of ethnic minority attorneys based on original research, the role played by social media in our judicial system, a report on the First Amendment and Media Law Diversity Moot Court Competition, and the “end” of expert practice as usual. It also includes the latest contribution to our popular “Ask a Mentor” series. Please review our webpage for updated information about the Minority Trial Lawyer Committee, and feel free to contact any of the committee cochairs, editor-in-chief Anna Torres (attorese@powersmcnalis.com), website editor Denise Zamore (dvz@avhlaw.com), or programming subcommittee chair D. Michael Lyles (lylesm@osdgc.osd.mil) if you would like to discuss opportunities to contribute articles or news items to our newsletter or webpage, submit program proposals, or otherwise get involved in the excellent work our committee produces. We look forward to working with you.

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