



Diversity in the Courtroom: Putting the Odds in Your Favor

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Does Race Still Matter?



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If Race Matters In Life...

...Why Wouldn't It Matter In the Courtroom?



Diversity in the Courtroom

1. The effective use of diversity requires the input of diverse attorneys from the outset of the case.
2. Don't forget the advantages of diversity in fact investigation.
3. A minority attorney may communicate more effectively with minority opposing counsel.
4. A diverse legal team has the potential to effectively connect with a broader array of witnesses.



Diversity in the Courtroom

5. In certain cases, a minority attorney will bring unique advantages to counsel's table as the face of the company.
6. A diverse legal team has a greater ability to eliminate distractions at trial.
7. But remember that diversity is a double-edged sword.
8. And do not ghettoize minority attorneys.



Diversity Resources

1. Minority Corporate Counsel Association
<http://www.mcca.com>
2. Leadership Council on Legal Diversity
<http://www.lclcdnet.org>
3. DRI's Diversity Committee
<http://www.dri.org/Committee?code=0440>
4. The National Bar Association's Commercial Law Section
<http://www.nbacls.com>
5. American Bar Association's Commission on Racial and Ethnic Diversity in the Profession
http://www.americanbar.org/groups/diversity/racial_ethnic_diversity.html
6. American Bar Association's Minority Trial Lawyer Committee
<http://apps.americanbar.org/litigation/committees/minority/about.html>

Diversity as a Competitive Advantage

Kevin Clark

INTRODUCTION:

Anyone in the legal profession who has kept his eyes and ears open during the last ten to fifteen years knows that the diversity movement is alive and well in the practice of law. For the most part, it is no longer necessary to make the rudimentary business case for diversity among America's civil defense law firms. Most law firms recognize to some degree that they need to do a better job of recruiting and retaining minority and women defense lawyers. Those law firms with web sites give a nod to diversity with a statement of the firms' commitment to a diverse and inclusive workplace. Many defense firms tout their support or sponsorship of diversity conferences, seminars, lunches or banquets. Several firms also actively seek minority and women candidates among the schools at which they traditionally recruit and participate in minority job fairs to expand their pool of minority law student talent. All of these developments represent much needed progress.

Notwithstanding these gains, we as a profession have by no means "arrived" with respect to diversity. We are still tinkering with the right ways to identify and attract diverse legal talent. We continue to work through some difficult issues of retention, promotion and development in regard to minority and women lawyers. We are still wrestling with the best way to create and sustain an inclusive environment that welcomes people of color and women without alienating the white males who occupy many of the leadership positions within our profession. We even struggle with the best way to characterize how much or how little progress we have made, depending upon our vantage point on what has been accomplished and the amount of work left to do.

Another area where very little consensus has been reached is diversity as a tool for business development. All of us have heard from in-house attorneys or leaders within our respective bars that Corporate America is placing a premium on diversity in selecting its outside counsel. All of us have heard that companies make decisions about which law firms to hire and fire based in part on the diversity of those law firms. However, notwithstanding these widespread cues for diversity, many law firms are not quite sure how best to translate these corporate preferences and values into opportunities to develop new business or expand or strengthen existing client relationships.

Some of that uncertainty may stem from some well-founded skepticism about just how important diversity is to some of our corporate clients. In discussions with many minority and female defense counsel across the nation, I have noticed a growing frustration with many companies that are perceived to be "talking the talk," but not "walking the walk" when it comes to the value of diversity in the selection of outside counsel. There may be something to this concern. I recall hearing a panel discussion on diversity during which in-house counsel of several corporations provided some feedback on what their respective organizations are seeking from outside counsel. When asked whether her company punishes its outside counsel that fail to show significant progress in diversity among their ranks, one in-house attorney said that she certainly does in those cases over which she has control. However, she also candidly conceded that others within the same company and in the same or similar position had continued to use the same defense law firms despite those firms' lack of demonstrated progress in the area of diversity. Such mixed signals from some in Corporate America make it difficult for law firms to develop concrete, comprehensive plans for using diversity as a marketing tool, especially when the extent to which firms should use race and gender to solicit business is not a subject without controversy.

It is this last point that may be the key to why many firms are not fully leveraging the diversity within their respective organizations. Notwithstanding the market value of diversity in the practice of law, some within our profession struggle to reconcile our professed ideals of equality and equal opportunity with an emphasis on race, ethnicity and gender in the promotion of our law firms. Contrary to common belief, that is not a concern shared only by the white males within our profession. Rather some minorities and women themselves have concerns and questions about what role their race or gender should have in their business development efforts. Accordingly, there may not be a "one size fits all" approach to marketing diversity in the legal profession. Rather, like many things, the best overall approach may depend upon the particular firm, the specific market, the client whose business is sought and the particular attorney(s) involved in the business pitch.

It is against the foregoing backdrop that I would like to share some thoughts and general principles on how best to transform the diversity of our law firms into a competitive advantage in the legal marketplace. I truly believe that diverse legal organizations offer tremendous value to our corporate clients and enhance

our services to them. I also believe that in the long run, diverse organizations provide qualitatively better legal services than their non-diverse competitors. More importantly, more and more companies appear to have reached that conclusion as well. Thus, irrespective of one's philosophical stance on the propriety of using race and gender in a law firm's attempt to grow its books of business, the practical realities of the marketplace mean that our law firms need to hire and retain more women and people of color and provide them with meaningful opportunities to develop and assume positions of influence and power within those firms (that is not to say that a moral case for these marketplace realities cannot be made). Any firm that ignores these realities will do so at its own economic peril.

Of course, when one undertakes to write on a subject of this nature, the reader is fully justified in asking why the author is qualified to speak to the issue with any degree of credibility. While I do not claim to be an expert in this area or to have all of the answers, I have had the benefit of countless discussions about diversity with attorneys all across this nation, primarily through my involvement in the DRI Diversity for Success Seminar, DRI's Diversity Committee and the Litigation Counsel of America. I also have been interested in and fascinated by issues of racial diversity for most of my life, ranging from the contexts of high school and collegiate education to Corporate America, politics and religion. While interest in a subject does not necessarily imbue one's thoughts on that subject with any authoritativeness, I am hoping that this paper will at least offer some helpful thoughts on the question of how to capitalize on diversity in the legal profession.

The last disclaimer I feel compelled to offer before we dive into the subject at hand is my slight unease with writing about the experiences of women and people of color other than African-Americans, which is the demographic and cultural group into which I fall. I feel very comfortable in writing about the range of views and experiences of African-American attorneys in business development initiatives due to my own experiences and the many African-American attorneys who have shared their experiences with me. While I certainly have had similar discussions with other minorities and women and have seen firsthand some of the experiences of those attorneys, I know that I am not fully conversant with all of the complexities and nuances associated with marketing women and other people of color in the legal profession. Nevertheless, I sense that there are commonalities and similarities among the experiences

of women and all people of color in the legal profession. Accordingly, it is my hope and aim that my thoughts will have applicability beyond African-American lawyers to the broader subject of diversity in general as a marketing tool in the legal profession.

LEARN TO TALK OPENLY AND CANDIDLY ABOUT RACE AND GENDER WITH CLIENTS AND POTENTIAL CLIENTS.

We will never fully harness the benefits of diversity as a competitive advantage in the legal marketplace unless we learn how to talk about race and gender with our clients and potential clients. As is the case when these subjects arise in almost any facet of life, many lawyers are not comfortable with open dialogue about race and gender and their impact on the practice of law (more so with race than gender, in my experience). As a result, we make trial team staffing assignments, settle on decisions concerning the selection of witnesses and craft trial themes often times without acknowledging the elephant in the room -- the impact of race or gender on this litigation.

That is not to say that the outcome in every case is driven by race or gender or that those issues are critical in every case. Sometimes they clearly are not. A friend of mine who is a plaintiff's attorney recently told me about a favorable wrongful death verdict that he won in a rural county. After the trial, my friend, who is African-American, was curious as to whether his race was a factor considered by the all-white jury in its deliberations. Accordingly, he asked some of the jurors about how they had reacted to the fact that he was an African-American attorney before an all-white jury in a county in which few African-Americans lived. I thought my friend's inquiry was a good one as conventional wisdom would have suggested that he was not the best choice to present a case to an all-white jury in a rural county. Nevertheless, the jurors with whom he spoke said that the issue of my friend's race never came up. In fact, they were dismissive of the notion that it would ever be a concern or an issue with a jury there (in the interest of full disclosure, my friend tried the case with a middle-aged white lawyer who is a partner in my friend's firm). Thus, at least on the surface, race did not appear to play a role in my friend's trial -- a conclusion bolstered by the fact that my friend won his case and recovered a sizeable verdict for his client.

However, the problems with using this anecdote to extrapolate that race and gender usually or never are relevant to jury decision-making are at least three-fold:

(1) unless we have set up a very representative mock trial in advance, the question of how race or gender will factor into a trial is always made without the benefit of knowing what my friend gleaned from his post-verdict interviews of some jurors; (2) it is doubtful whether we will ever know with certainty whether race or gender played a role in any verdict as society has advanced sufficiently in these areas that few people would feel comfortable admitting that race or gender had such an effect even if it did; and (3) we may not be able to fully determine the impact of race or gender on a juror's vote or a collective jury's decision because some or all of the jurors themselves may not be aware of the unconscious biases and prejudices that influenced their evaluation of the relevant law and evidence in the case.

I say all of this to suggest that the decision about whether race or gender should influence the staffing of the trial team is not an easy one. That decision is made all the more difficult by the anecdotes we all have, whether in the legal context or elsewhere, where race most certainly did impact the relevant decision-making. For example, I recently had the privilege of trying a wrongful death case in a rural, predominantly African-American county of Alabama. It was a tough case to defend because the accident at issue in the case had claimed the lives of two parents and severely injured the orphaned child. All of the sympathy clearly lay on the plaintiffs' side of the case. We tried the case for almost two weeks and it ended in a hung jury. After the judge gave all parties permission to discuss the case with any jurors willing to do so, we talked to a few jurors on the courthouse steps. All of these jurors opined that race was the driving factor behind the votes of several jurors for the plaintiffs, who were African-American. While I realize that it may be unfair to draw hard and fast conclusions as to the motivations of an individual based on the characterizations of others, I heard too many local residents say that race is the driving factor for many things in this particular town to dismiss the jurors' assessments. As much as we may hate to admit it in the age of President Barack Obama, sometimes race still matters.

If race and gender do still matter, we, as defense lawyers, would be remiss in our duties of zealous advocacy for our clients not to at least consider the impact of race or gender on a case where the demographics of the parties involved would suggest that such factors may prove germane to the jury. After all, if we devote as much time as we do to relatively small matters such as the kind of ties or shoes we wear during trial, whether

we use cell phones in the presence of the jury, whether we have water bottles at counsel's table and how we interact with opposing counsel before the jury, how much more should we think about matters about which many people have deep-seated, visceral views that tend to shape one's worldview and may be hard to shake even after years of education to the contrary.

That reality brings me to the title of this subsection of the paper: we need to learn how to openly discuss with our clients how the issues of race and/or gender should affect our trial strategy in those cases where those factors could come into play in the jury's decision-making process. The ironic aspect of this observation is that it should not be that hard to do with our clientele. Our clients are sophisticated consumers of legal services from all across the nation. If they have been doing business for any length of time, they have been involved in much litigation and several trials. Moreover, many of our corporate clients are far more advanced in their diversity awareness and diversity initiatives than the law firms that represent them, meaning that they are no strangers to the significance of race and gender in litigation and elsewhere.

In fact, I have had several clients who took the lead on initiating the dialogue about race and gender in trial staffing and trial assignments. These clients understand the importance of having a minority spokesperson in jurisdictions where a significant number of jurors are likely to be of that same minority group. Likewise, one thing that all of my clients expect to see in my initial assessment of new litigation is a report on the racial demographics of the potential jury pool for that case. One client had what amounted to a standing rule that every trial team in mass torts cases would have a woman lawyer and a lawyer of color. That client fully understood the benefit of having diverse lawyers representing its interests before increasingly diverse jury pools across the country.

This kind of emphasis on diversity opens up doors of opportunity for those firms that have invested the time, money and effort into developing experienced minority and women trial lawyers. Of course, the key word in the foregoing is "experienced." You will not get far with any client if you resort to tokenism by just throwing out a diverse attorney who has not had any prior significant trial or litigation experience based on the mistaken notion that people of similar background will see the case the same way simply because of their shared life experiences. Why should a client gamble its money and future litigation interests on an untested

and untried lawyer when it can hire several other law firms with experienced minority or female trial lawyers? The firm with such skilled and experienced lawyers will be the one to capitalize on Corporate America's greater sensitivity to the need for diversity on its trial teams.

Not only can a more diverse law firm win beauty contests for individual cases, it also has an opportunity to assume a larger role in the client's litigation based on that diversity. One pitch that I have made to my national clients is that they use diverse attorneys like me, not just in my home state of Alabama, but anywhere across the nation where the jury pool is likely to have a significant number of African-Americans. I know from prior discussions with in-house counsel that corporations are always looking for minority defense attorneys with trial experience to use to defend their interests at trial, especially in majority minority venues. In such venues, having a minority defense attorney may neutralize or mitigate the impact of race on the trial and help focus the jury's attention on the only two things that should matter in the courtroom: the law and the evidence. Of course, the best time to propose such an expansion of business is right after a great result achieved in a recent case for that client.

Thus, the moral of the story is that outside counsel should always assess what impact, if any, gender and race can have on its cases and use that knowledge to suggest lawyer staffing to the client that capitalizes on the potential impact of these considerations on the outcome of the case. We need to affirmatively raise these issues with our corporate clients to show them that we are aware that race and gender still matter in some venues in certain types of cases and to demonstrate that we have assessed their cases from that vantage point, as well as from several others. Of course, to make this pitch work, your law firm must be diverse and have minority and women attorneys who have been given the professional opportunities to develop the skill set needed to represent companies in high stakes litigation and trials.

MAKE SURE THAT MINORITY AND WOMEN LAWYERS CAPITALIZE ON TRADITIONAL AND NON-TRADITIONAL BUSINESS DEVELOPMENT OPPORTUNITIES.

With the increasing emphasis on diversity in today's legal environment, the minority or woman lawyer has many unique business development opportunities available to him/her. Just about any legal organization that provides educational legal seminars offers special conferences, seminars or functions for minority and women attorneys to network with each other,

keep up with the latest developments in the law and interact with corporate counsel seeking to diversify their outside counsel. Some organizations go even further and provide more direct business development opportunities by setting up interviews whereby outside counsel can introduce themselves to Fortune 500 companies that are committed to diversity in their selection of outside counsel. DRI's annual Diversity for Success Seminar and the National Bar Association's annual Corporate Counsel Conference provide such excellent opportunities to spend some quality time with in-house counsel from major corporations. While these interviews may not lead to immediate new legal work for your firm, it may plant the seed for future opportunities to do business with those companies.

The starting point for taking advantage of these opportunities is to identify what is out there. Many such opportunities are advertised in brochures that are routinely mailed to defense law firms. Not only should minority and female attorneys look for and review such brochures, but managing partners and those partners assigned to oversee business development should also be on the lookout for such offerings as well. Do not make the mistake of tossing anything not case-related into the trash receptacle. If you do so, you just might miss out on some great diversity-oriented business development events.

The publications of affinity groups for minorities and women in the legal profession also are another good resource for identifying non-traditional business development opportunities for those who historically have been underrepresented in the practice of law. Moreover, there are listservs and websites designed to identify minority lawyers in each state and create on-line networking and business referral opportunities for them. If your firm has a marketing coordinator or a business development partner, a search for an exhaustive list of diversity-tailored business development events and services would be a worthwhile endeavor.

The more minority and women lawyers your firm has, especially at the partner level, the more you will be able to take advantage of these many marketing opportunities. If your firm has not hired and developed a number of minority and women attorneys, one of two things are likely to happen: (1) the few attorneys you do have will not be able to cover all of the various minority and women business development opportunities, even if you try to narrow them down to the larger, more successful events; or (2) the small number of minority and women attorneys you have run the risk of burnout as they strive to attend all of these events while maintaining a busy law practice. Thus,

again we see an opportunity to leverage diversity into increased firm profitability. If your firm has invested the significant amount of time, money and effort it takes to consistently identify, recruit and develop minority and women lawyers, it will be in the best position to take advantage of what appears to be an ever increasing array of non-traditional business development opportunities. Borrowing a Biblical phrase, you reap what you sow.

However, in the excitement of taking advantage of the non-traditional, diversity-related business development initiatives, we must not forget to assist our minority and women attorneys, especially those who are relatively young partners, in accessing the traditional mechanisms for developing business. The opportunities noted above should not replace, but augment the well-established ways that defense attorneys build their books of business. Minority and women associates should be given ample client contact on the cases on which they work so that they can become familiar with the clients and develop the kind of rapport with them that may create an opportunity for those lawyers to inherit the clients later in their professional development (of course, the same can be said about any associate irrespective of race or gender). One of the most frequent complaints I hear from minority and women attorneys is what they perceive to be discriminatory assignments of matters in such a way that white attorneys are given repeated opportunities to work with the same good client(s) while minority attorneys are given discrete projects for several different clients, none of which is likely to lead to a large book of business down the road.

Thus, the message is to encourage and support minority and women lawyers as they pursue business development opportunities specifically designed for them. At the same time, our firms must also mentor and advise minority and women attorneys on the traditional means of generating business as a defense lawyer.

PROMOTE, NOT EXPLOIT, YOUR MINORITY AND WOMEN LAWYERS.

One of the other major criticisms I have heard from minority and women lawyers with respect to business development is the nagging feeling they have that the firm is exploiting their race or gender for the firm's benefit. They believe that the firm only cares about diversity as nothing more than a tool to generate additional business. When this feeling sets in, it can lead the minority or woman lawyer to feel bitter and resentful toward the firm. Moreover, the lawyer may

start declining opportunities to be on future beauty contest teams or make only a half-hearted effort in impressing new clients simply because she feels that she is being used by the law firm only because of her gender or skin color.

However, the important aspect of this phenomenon to note is that the issue is not so much the use of the attorney's gender or race for business development purposes. Women and minority attorneys fully understand the additional value that they bring to the table in the current legal marketplace. Moreover, women and minority attorneys realize that their gender or race sometimes opens doors of opportunities that might be unavailable to them otherwise. Most such attorneys do not take issue with the firm's use of their demographic profile to secure more work for the firm.

The issue is how the firm treats the minority or woman attorney on a day-to-day basis. If that attorney feels underappreciated and underutilized because of the lack of good case assignments and professional development opportunities, he is far more likely to resent the use of his race in the firm's business development efforts. I have heard countless stories of how a certain minority lawyer was taken to the beauty contest and showcased there to demonstrate the relevant firm's commitment to diversity. However, after the matter is landed, the minority attorney who helped secure the work is not given an opportunity to work on the matter or the work assigned is menial in nature and offers very little opportunity for skill development and professional growth. Those sorts of developments will happen to nearly all associates sooner or later. However, if minority or women attorneys experience such treatment on a regular basis, the latitude that those attorneys give to the firm on the use of their race or gender in business development tends to become smaller and smaller over time.

The other advice I would offer concerning diversity marketing is that firms need to openly and candidly discuss such efforts in the planning stage with everyone, but especially the minority and women attorneys. Like any other demographic group, minorities and women differ in their views about a lot of things, including the extent to which race and gender should be part of the firm's and those lawyers' business development efforts. Thus, those responsible for business development for the firm should sit down with each minority and woman lawyer and engage in a transparent and open dialogue about the use of each lawyer's background in the firm's marketing efforts. That way, the firm can elicit buy-in

from each individual attorney as to how best to proceed in an area that can be a little awkward and can lead to some costly miscommunication if not handled properly.

In short, to feel good about the firm's efforts to capitalize on the diversity of its lawyers in the legal marketplace, your minority and women lawyers need to feel that the firm is interested in them as persons and lawyers first. The firm can demonstrate those sentiments by how it mentors, trains, develops and promotes its minority and women lawyers. On the other hand, if the minority or woman attorney does not believe that she is being given equitable opportunities to grow and develop as a lawyer, she may perceive the use of diversity as a marketing tool as exploitation of her race or gender. Long-term, that is not a recipe for using diversity as a competitive advantage. To the contrary, such an approach could do more harm than good to the firm's reputation in the long run.

CONCLUSION:

With the increasing demand from Corporate America

that its interests be represented in litigation and ultimately in the courtroom by diverse legal teams, there is an opportunity for defense firms to distinguish themselves by aggressively hiring, developing and promoting minority and women attorneys and effectively communicating their diversity initiatives and efforts to their clients and potential clients. In those communications, firms must demonstrate an appreciation for how race and gender can impact the cases filed against their clients. Where applicable, defense firms should proactively make suggestions to the client on litigation and trial strategy that reflect the company's commitment to diversity among its outside counsel and that capitalize on race and gender in a way that inures to the client's benefit. In the meantime, defense firms have to give their minority and women lawyers quality legal experiences at the firm so that taking advantage of diversity in the legal marketplace does not become characterized as exploitation of race and gender. If done right, diversity marketing can be a win-win situation for all involved: minority and women attorneys, the law firms and their clients.

About Kevin Clark

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Kevin Clark is a partner in the firm. In 1998-1999, he clerked for the Honorable Bernice B. Donald, United States District Judge for the Western District of Tennessee. His practice consists of general civil defense litigation, with an emphasis on toxic torts, product liability, consumer fraud and employment discrimination, including the defense of class action lawsuits. He regularly appears before state and federal courts in Alabama and has tried several jury cases.

Kevin has spoken at several legal seminars, including the DRI Toxic Torts & Environmental Law Seminar, DRI's Best Practices for Law Firm Profitability Seminar and DRI's first annual Diversity for Success Seminar. Kevin also is a member of the American Bar Association, the National Bar Association, the Alabama Defense Lawyers Association, the Alabama Lawyers Association and the Magic City Bar Association. He was appointed to the Birmingham Bar Association's 2007 Task Force on Diversity Initiatives and served on the Alabama State Bar Diversity in the Profession Committee. Kevin is a Fellow in the Litigation Counsel of America and was selected as a Rising Star in the 2010 and 2012 editions of Alabama Super Lawyers.

In addition to these law-related activities, Kevin served on the University of Tennessee Alumni Association's Board of Governors from 2004-2010. He was elected to serve as Treasurer for the University of Tennessee Alumni Association ("UTAA") for the 2006-07 fiscal year. He served on the Executive Committee for the UTAA and the UTAA Strategic Planning Steering Committee.

Kevin earned his Bachelor of Science degree in Marketing from the University of Tennessee, Knoxville. He earned his juris doctorate degree from Vanderbilt University School of Law, where he served as Associate Justice of the Moot Court Board and Research Editor for the Vanderbilt Journal of Transnational Law. Kevin, who was a Wade Scholar at Vanderbilt School of Law, also won Best Oralist Award for the 2L Moot Court Competition and the 1L Appellate Advocacy Program.

Kevin is a proud husband and father of three, including a set of fraternal twins.

Education

- J.D., Vanderbilt University Law School, 1998
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