



The Jury

from MAY 2014  
Volume 26, Issue 2

**EXPERT**

*The Art and Science of Litigation Advocacy*

A publication of the American Society of Trial Consultants



## **Women as Expert Witnesses**

by Michelle A. Jones and Tess M.S. Neal

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*by Michelle A. Jones, M.A., J.D. and Tess M.S. Neal, Ph.D.*



***Don't miss our consultant responses from [George Kich](#), [Lisa Decaro](#), and [Katherine James](#) at the end of this article.***

*The power I exert on the court depends on the power of my arguments, not on my gender.*

*-Justice Sandra Day O'Connor*

Historically women have been excluded from the courtroom and subjected to prejudicial treatment on the rare occasions when they did take part in legal proceedings (Price, Recupero,

Strong, & Gutheil, 2004; Walters, 1994). Luckily times have changed, and women are increasingly found in court—as lawyers, judges, trial consultants, and expert witnesses. There remains, however, concern that women might be perceived differently from men when they enter court. Our focus in this article is the potential challenges facing women experts, and how biases can be reduced so triers of fact look at the power of experts' data and opinions rather than their gender.

One of the co-authors recently undertook a comprehensive review of the psychological and empirical legal literature to answer one very important question: does a man or a woman make a better expert witness (Neal, 2014)? The answer is complicated, and this article will discuss important findings from research conducted in this area. We first provide an overview of important theories on gender, then describe findings of the research on gender in the courtroom, then discuss the implications of that research and remaining questions, and end with practical advice for lawyers, trial consultants, and experts.

## **Stereotypes and Roles**

It is important to discuss major theories on gender at the outset of this article, because they provide a framework in which to analyze the specific research findings on women as expert witnesses.

One key concept is gender role stereotypes. Gender role stereotypes, which are prevalent in our culture, are our expectations for what men and women should be like. For example, one study found that words such as competence, assertion, and rationality were commonly associated with men (Broverman, Clarkson, & Rosenkrantz, 1972). Accordingly, men were viewed as being logical, able to make decisions easily, and often acting as leaders. In contrast, warmth and expressiveness were characteristics commonly associated with women, and corresponding feminine features included being illogical, having difficulty making decisions, and rarely acting as a leader (Broverman et al., 1972; Helgeson, 2009). Not surprisingly, masculine features were often deemed more desirable than feminine features (Broverman et al., 1972; Helgeson, 2009).

Researchers used these findings to develop comprehensive theories about gender. One example is social role theory, which is based on the idea that people have different expectations for how men and women should behave (Eagly, 1987). According to social role theory, men and women will be perceived negatively if they behave contrary to those expectations. Indeed, research has shown that prejudice results when stereotypes about a person's group do not match beliefs about what is needed to succeed in a given social role (e.g., Eagly, 2004; Eagly & Karau, 2002). In other words, when members of a group—women, for example—enter roles that are stereotypically mismatched to characteristics ascribed to their group, those members may be subjected to prejudice. This is true even if the individual in question is viewed favorably. For instance, although a female corporate executive may be viewed positively, she will not be viewed as positively as an equivalent male executive (Eagly & Koenig, 2008). This occurs because there is a conflict between the stereotypes associated with women (warm, caring) and the more aggressive and competitive stereotypes associated with the masculine role this female

corporate executive occupiers.

Some studies have shown that men may be more influential and persuasive than women, particularly when they occupy traditionally masculine roles (Eagly, Makhijani, & Klonsky, 1992). And, unfortunately, women may face a catch-22 when they occupy roles that are traditionally seen as more masculine. If a woman occupies such a role, the conflict that creates will negatively affect perceptions of her, but acting in a more masculine way by using more assertive language or adopting a more directive interpersonal style may also lead to negative perceptions (Eagly et al., 1992). As you can imagine, this may have significant implications for women who occupy roles in our legal system, roles traditionally associated with masculine characteristics.

## Gender in the Courtroom

We focus on two specific issues relating to women in the courtroom: (1) how often women report gender discrimination and (2) how women experts are perceived by judges and juries. Research on these issues reveals bias may be at work.

Regarding the first issue, surveys continue to find that women working in the court system—including women experts—often report gender discrimination (Price et al., 2004; Riger, Foster-Fishman, Nelson-Kuna, & Curran, 1995). In the past, women were retained as experts less frequently than men, although this trend may be slowing (Walters, 1994). Additionally, studies commissioned by federal and state courts have found that women believe they are perceived negatively in the courtroom. For example, a Minnesota task force found that more than half of the female attorneys surveyed believed judges assigned more credibility to male experts than to female experts (Minnesota Supreme Court Task Force for Gender Fairness in the Courts, 1989). The Ninth Circuit and the Texas Supreme Court had similar findings (Coughenour et al., 1994; Texas Supreme Court Gender Bias Task Force, 2004). These surveys suggest women themselves believe gender bias is present in the courtroom.

Researchers have studied various aspects of the second issue but have not found a clear-cut answer yet as to whether judges and juries perceive women experts in a more negative manner than men. Some studies have shown that an expert witness's gender affects the perception of their credibility, and some studies have shown that gender does not have an effect. A closer look at this literature indicates that context may be an important factor.

Neal (2014) points to three studies that found expert gender does not affect credibility. For example, Titcomb-Parrott, Neal, Wilson, and Brodsky (in press) examined how an expert's gender might affect sentencing in a capital case, where the expert testified about the defendant's likelihood of reoffending. Their mock jury study indicated gender had no effect on perceptions of the expert's credibility or on sentencing decisions.

Other studies, however, have found that gender does affect juror decision-making. In one recent study, mock jurors were exposed to a criminal murder trial with cross-examination testimony from a forensic psychologist (Larson & Brodsky, 2010). The mock jurors rated male experts as more likeable, believable, trustworthy, confident, and credible than female experts.



In a different study, mock jurors were presented with a civil case and found that testimony from a female automotive engineer expert witness elicited higher compensatory damages than testimony from a male expert (Couch & Sigler, 2002)

What should we make of these seemingly conflicting results? The answer may lie in the specific context of the case. That is, women experts may outperform men in certain kinds of cases or situations, and vice versa. For example, in one study male and female experts testified in an antitrust case involving a “masculine” field like construction or a “feminine” field like women’s clothing (Schuller, Terry, & McKimmie, 2001). The researchers found that male experts were more persuasive when the case involved a masculine field. Similarly, other studies have found that women experts may outperform men when the case involves a more feminine area such as cosmetics sales (e.g., McKimmie, Newton, Terry, & Schuller, 2004; Schuller & Cripps, 1998). In other words, the degree to which the expert’s gender and the type of case agree (what researchers call “gender congruency”) may be important in determining whether a male or female expert will be more credible and persuasive.

The complexity of the case also may be important. A study using the same antitrust case mentioned before found that male experts were more persuasive—they elicited higher damage awards—than female experts when the testimony was complex (Schuller, Terry, & McKimmie, 2005). Interestingly, they also found female experts were more persuasive when the testimony was not complex.

Another factor to consider is whether the timing of the testimony makes a difference. This was examined in a mock juror study involving a battered woman who had killed her abuser and claimed self-defense (Schuller & Cripps, 1998). The researchers wondered whether presenting expert testimony about battered woman syndrome *before* the defendant’s testimony would provide jurors with a framework for understanding the battered woman’s thoughts and actions. Findings revealed that jurors did impose more lenient sentences when the expert was a woman and testified early, but gender did not matter when expert testimony was presented later in the trial.

A juror’s expectations about appropriate gender roles also may be important. Neal (2014) described a series of studies showing that expert gender may matter, but only when the expert violates the jury’s expectations for the expert’s behavior. For example, one recent study found that unlikable male experts were viewed more positively than unlikable female experts (Neal, Guadagno, Eno, & Brodsky, 2012). This suggests likability—a characteristic often expected of women—is particularly important if the testifying expert is female. That is, women experts may fare poorly if they are not viewed as both likable and competent, and this may be because such women are perceived as violating gender expectations. Another study demonstrated that jurors perceived male experts to be more credible when they maintained a high (assertive) level of eye contact, but the credibility of female experts was not affected by the amount of eye contact they made (Neal & Brodsky, 2008). This again suggests gender expectations are at work.

One last consideration is whether jury deliberations impact these gender effects. At least one study (an extension of the antitrust cases described above) examined this issue (McKimmie et al., 2004). It found that experts were more persuasive when the expert’s gender and the case

type agreed (i.e., both were “feminine” or both were “masculine”), and this effect was magnified when the jurors were asked to deliberate together before reaching a verdict.

## **Explaining the Research**

What do we make of all these findings, some of which appear to conflict with each other? Theories based on gender congruency may hold part of the answer (Eagly, 2004; Eagly & Karau, 2002). A woman is more likely to face prejudice when she is playing a more masculine occupational role. This may explain why the type of case seems to matter in determining whether an expert is perceived as credible or persuasive. Indeed, it also may shed light on a study finding that women accounted for 75% of the experts involved in education controversies but only 4% of corporate cases and 0% of contract cases (Walters, 1994). Likewise, it may help explain why attorneys often seek female experts for cases involving sexual harassment or rape (Price et al., 2004).

## **Lingering Problems and Questions**

Unfortunately women experts may face a trade-off between their professional role and these gender role expectations. On the one hand, if they fulfill society’s expectations that women are warm, caring, and non-assertive, they may be perceived as a less competent expert. On the other hand, if they adhere to their professional role expectations—often associated with masculine characteristics such as assertiveness—they may violate society’s expectations for their gender and be perceived negatively as a woman (Cuddy, Fiske, & Glick, 2004; Eagly et al., 1992). Some of the studies described above lend support to this hypothesis and suggest that gender stereotypes may affect an expert’s credibility or even the ultimate outcome in a case.

In presenting this research, we do not intend to paint a hopeless picture. Many questions remain, and times appear to be changing as more and more women enter the legal field as lawyers and experts. All of the studies discussed above have limitations, and more research is needed to determine precisely when and how an expert’s gender may affect triers of fact. For example, more research is needed to determine what effect jury deliberations may have on the perceptions of male and female experts. Nor do we have a clear picture of how a juror’s own gender might affect his/her perceptions of male and female experts. Likewise, additional studies could shed light on whether altering speech, behavior, or appearance to fit gender stereotypes affects a woman’s credibility as an expert. And we found no studies that examined how expert gender might impact settlements or plea bargains.

Equally important, researchers may be able to shed light on how gender biases can be corrected. For example, future studies could examine whether jurors will correct for potential bias when they are made aware of that possibility (e.g., Wegener & Petty, 1997).

## **Practical Advice**

So what are lawyers, trial consultants, and experts to do while they wait for societal norms to

change and gender bias to be eliminated from the legal process? In choosing and working with experts, attorneys and trial consultants may want to consider the context of the case. Does it involve a “masculine” field like construction or taxes? If so, a male expert may have a slight advantage. In contrast, female experts may be perceived as more credible and persuasive if the case involves a more “feminine” issue such as child custody or sexual assault. The complexity of the testimony is another factor to consider: men may have an advantage in presenting complex testimony but women may have an advantage when the data is not complex.

Both male and female experts should think about gender role expectations as they prepare for trial. This also may be important for trial consultants who work with experts prior to trial. For example, men may want to maintain high levels of eye contact to enhance their credibility and appear assertive (Neal & Brodsky, 2008). In contrast, women may want to focus on appearing likable by using informal speech, minimizing technical jargon, smiling when appropriate, and using inclusive language (Brodsky, Neal, Cramer, & Zeimke, 2009; Neal et al., 2012; Nagle, Brodsky, & Weeter, 2014). Finally, women may want to consider how they will be perceived if they adopt masculine characteristics while also serving in the expert witness role, which has traditionally been seen as a masculine social role. Some of the research suggests that women adopting a masculine professional role should demonstrate feminine traits (e.g., Carli, LaFleur, & Loeber, 1995; Eagly et al., 1992; Reid, Keerie, & Palomares, 2003).

We hope there will soon come a day when research on expert witness gender is moot—a day when the power of one’s argument is the only influence on the trier of fact, as Justice O’Connor so eloquently stated. Until then, however, professionals operating in the legal system should be mindful of potential gender biases and how those biases might affect an expert’s credibility and/or the ultimate outcome in the case. While there is no “one size fits all” answer, professionals should continue to monitor the psychological literature, and apply relevant findings to the specific case and individual expert involved.

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### George Kich Responds:

[George Kitahara Kich, PhD.](#), is a **Litigation & Jury Consultant at George Kich Consulting where he provides focus group research, jury selection assistance and works in preparing witnesses. Along with more recent writing and presentations on jury dynamics, questionnaire development and persuasion, he has written book chapters and articles on race and gender (e.g., “In the margins of sex and race: Difference, marginality, and flexibility”; “ Being different together in the university classroom: Multiracial identity as transgressive education”) and, most recently, when the weather is good, he has been developing his stone carving techniques.**

**Women as Expert Witnesses** by Michelle Jones and Tess Neal was both difficult and troubling to read (everything they report about the impacts of gender bias and expectations is true!), but also encouraging in its attempts to touch on how to manage these biasing factors in the courtroom. As any trial consultant can tell you, we are often asked how gender plays a role in jury selection. How well do the judge, the experts, the attorneys and/or the consultants fit into gender norms that will resonate with the specific jurors? Although this area of research and practice varies by case type, venue and the personalities involved, their basic response at the end is to stay aware of relevant gender and bias research, know what gender bias might be triggered by the case itself, and then use common sense and witness prep to help make sure the message of the witness gets across.

They start this interesting paper with Justice Sandra Day O’Connor’s quote (“The power I exert on the court depends on the power of my arguments, not on my gender.”), which they agree at the end of the paper is an expression of aspiration and courageous intent against overt and implicit biases and stereotypes about gender. The truth is that no one’s gender can be removed from one’s statements. This is true for the men on the Supreme Court as well. The intersectionality problem is that the men’s arguments are considered just “argument” where the women’s statements are labeled and considered as arguments coming from women, and

therefore both suspect and burdened by their gender. Men believe, in concert with others, that their arguments are objective, come from rationality and not embedded in their sex.

I had an initial problem with the research question itself, since the framing of the question itself is complicated. Who's standard is being used to evaluate this question? Who's perspective does this question come from? How do you parse out what embedded mind-set a person has, who is trying to "answer" this question? I was relieved and glad that they set the stage with the Broverman research from the 60s and 70s, since it still has meaning for us today.

I was intrigued by the "eye contact," the case type mismatch with gender expectations about who should be an expert, and the "use of informal speech" research they cited, and wondered about follow-up studies with different kinds of cases. Also, do different research juries respond differently to experts after they have modified their speech, appearance and demeanor? How much does a person have to conform, before they are heard "just on the power" of the expert testimony?

The relational drama of the courtroom stage has also been impacted by the following that I have seen:

- male attorneys who act condescendingly toward their own female experts;
- women being brought in to a case without any direct authority, and only as the result of an obvious pandering to attorneys' own gendered biases, and more.

I think the researchers would agree that the bottom line in working with any witness is to start from the assumption that jurors want to understand and will appreciate any expert who helps them make sense of the evidence, the justification for the decisions being asked of them and the standards for evaluating things like fault, contracts or patents, for instance. If these basics are not managed or presented well, the gender expectations multiply and truly diminish the expert's impact.

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**Lisa Decaro responds:**

***Lisa DeCaro is a nationally recognized trial consultant, trial advocacy teacher, and keynote speaker. She is the co-founder of Courtroom Performance, Inc., a trial consulting firm specializing in the defense of civil cases, and co-author of *The Lawyer's Winning Edge: Exceptional Courtroom Performance* (Bradford Publishing, 2004).***

Women I work with – whether they are lawyers or witnesses – consistently ask me: "Are jurors judging me differently because I'm a woman? I've heard they are all going to talk about my shoes and my hair, instead of my experience! Will that hurt me?" Male attorneys, on the other hand, ask, "The client wants us to hire a female expert for this case. Do you think that would help?"

For the past 18 years, my answer to both questions has been a very unsatisfying "It depends."

Based on this paper, it looks like my unsatisfying answer is still accurate.

As Jones & Neal point out, gender bias is still alive and well. From the perspective of what we do as trial consultants (helping lawyers and witnesses to navigate the potential minefields of communication under extremely stressful circumstances), the most obvious way in which gender bias interferes with the pursuit of justice in the courtroom is by confusing the issue. Many a successful trial lawyer, who happens to be a woman, is spending an inordinate amount of time deliberating over her choice of shoe or haircut, instead of rehearsing her opening statement. A brilliant engineer has to prove to the jury that she is sufficiently “feminine,” while simultaneously proving that she can hold her own in a traditionally male field.

That this is shocking and unfair is beside the point. Like any bias we face in the courtroom, we are unlikely to eliminate gender role stereotypes or gender bias in our jury during the course of trial. So it becomes our task to use “social role theory” and gender role stereotypes to our advantage. Aside from “being the change we want to see in the world,” what can we do to help these professional women express their very educated arguments or opinions in a way that is persuasive regardless of the bias that likely exists somewhere within the trier(s) of fact?

In my work, I constantly find that a witness is most persuasive when she – or he – is willing to tell her truth honestly – and as her best self. That means *no acting, please*. Much of the time, that also means undoing hours of *bad* witness prep that left the witness feeling like she had to say “the right thing,” color her hair, and generally behave like someone else. Connecting with another human being – particularly when that human being is in a group being told to judge your veracity by your demeanor – is impossible through that veil. The witness must be willing to speak to the group as herself, not as an actor playing a role.

Anyone who has ever been told to “just be yourself,” knows that it is much easier said than done, particularly in a stressful situation. When we add onto that research which shows that certain traits are considered positive for men, and negative for women, and vice versa, it’s enough to turn a good witness into a deer in the headlights.

That said, the perceptions of the trier(s) of fact are not just important – they are vital. And there are certain behaviors that affect those perceptions in a negative way. That is very real, and “just being herself” is not effective if the witness is portraying herself in a way that triggers negative perceptions by the judge or jury, even if those perceptions are not accurate. A knowledgeable, educated, intelligent, woman who presents herself in a way that causes the jury to disregard or misunderstand her opinions is not an effective witness.

It’s up to us – those who prepare the witness to navigate this experience – to wade through the research, determine what it means for the witness in front of us, and help that person express herself effectively, *while* being true to who she is.

The good news for expert witnesses is that there is a traditionally feminine role that they are being asked to fill: The role of *teacher*.

Fifteen years ago, in a small (and not very progressive) Texas town, we prepared a female

doctor to testify as an expert for the first time. She was an impressive woman – the head of cardio-thoracic surgery at one of the top teaching hospitals in the country. She knew her stuff, and she had a strong and clear opinion in this case. She was a youngish woman (mid-forties) in an older man’s role. And, she had a heck-of-a New York accent. Did I mention we were in a small town in Texas?

At first, she was very concerned with proving to the jurors that she was, indeed, an expert in this field. She had to establish that she knew just as much – in fact, more – than the older male experts on the other side. The result was that she appeared to be trying too hard. She was “acting” like what she thought they wanted to see: Authoritative, tough, aggressive. I asked her to think of her role as that of a teacher: To teach those jurors something that they can then teach to their family at the dinner table.

On the witness stand, she was perfect. She connected with the jurors. Using terms and examples which they could readily understand, she taught them all so much about cardio-thoracic medicine that they couldn’t take their eyes off her. Mid-way through cross-examination, when opposing counsel told her to stop teaching (“That question only requires a yes or no answer, Doctor.”), she told him helpfully, “Actually, that’s a pretty complicated question. I could teach the jury about what you’re asking, if I can just use that white board behind you and draw a few diagrams...”

The case settled very favorably for her client, that afternoon.

Whether to hire a female expert in a man’s field is a complicated question. But if she can use that white board to *teach* us the answer, she might just use those gender stereotypes of “social role theory” to her advantage.

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**Katherine James responds:**

**[Katherine James, MFA](#) is a trial consultant based in Culver City, CA. Her specialization is live communication skills. She specializes in making witnesses "not do that anymore and do this instead" in cases and attorneys to be the best they can be in live and virtual workshops. Read more about her company ACT of Communication at the [website](#).**

I have worked with expert witnesses of both genders in all kinds of subject matters in all kinds of cases for three decades. I think that to imply that women should be relegated to “girls” subjects, like fashion and men to “boys” subjects, like math is not only very dangerous, but also terribly, terribly wrong.

Let’s start with wrong first, because it is easy.

Why wrong? Because the best expert for this case might very well be a woman. I say this because we all know that the bias (and the researchers of this article point this out) leans toward “let’s just go with the guy”. And the best guy for the job might very well be a woman.

Off the top of my head, I can think of two experts with whom I've worked that blow this "girls = fashion, boys = math" theory right out of the water. The best fashion merchandising expert I've ever worked with, bar none, is a man. The best CPA expert – a woman. But – make no mistake – most male lawyers are much more comfortable hiring another man as both their fashion merchandising expert and their CPA. Yep. That's what makes it wrong...bordering on dangerous.

Why dangerous? We could sit around anxiously waiting for the world to catch up to the truth. Or we can just present the truth to the world: "This woman is the best expert and we brought you the best expert." If not now, when? It is funny that trial consulting was at one time almost exclusively made up of women. If you remember those days, you might remember how hard many guys were working to convince lawyers that they had "our" traits and were "as good" in this profession. Nothing wrong with that – all is fine in love and commerce. But let's not lose sight of what we know about women as professionals in the wonderful world of the law from our own experience: WE ARE REALLY GOOD.

Now – a word about those male/female characteristics called out in the article. How do I deal with those? I use the good ones for all experts, and I try to get rid of the bad ones in all experts. It goes like this: NO MATTER WHAT THE SUBJECT MATTER, I work with experts of both genders to make them:

- Warm and caring
- Reasonable (in the article called "logical")
- Expressive
- Able to make great eye contact
- Likeable
- Competent
- Heartfelt love of subject matter (don't think that made the list in the article)

I work to rid EVERY EXPERT REGARDLESS OF GENDER of what the researchers call "masculine" traits, I call it, "let's not do this in front of people" behavior:

- Combative (read "loves to fight")
- Assertive (read "combative with entitlement of brilliance")
- Rational (read "cold and merciless robot")

I find that bringing the "feminine" traits to male experts actually makes them more credible, believable and likeable to jurors. Go figure. And yes, I disabuse female experts of the notion that in order to be successful that they have to embrace all the negative male characteristics that they think they are expected to exhibit. An "Independent" expert didn't come to court to fight with a lawyer. The expert came to teach jurors about a subject that expert is crazy about because that subject is that expert's life's work.