

The Effects of Race and Gender of Attorneys on Trial Outcomes

BY ALEXIS A. ROBINSON

Alexis A. Robinson is working on her Ph.D. in Experimental Forensic Psychology with a concentration in statistics at John Jay College of Criminal Justice in New York, New York. Her research interests focus on jury decision-making and the manifestations of biases against racial, gender, and sexual minorities in the courtroom. She is training for a career in litigation consulting yet thoroughly enjoys the research process.

Editor's Note: The Jury Expert often brings you the most recent research findings with applicability to litigation advocacy. This time we are bringing you research in process. The relationship between attorney race and attorney gender and juror decision-making is one we don't talk aloud about – very often anyway. And we should. New research-in-process looks at the literature and questions how jurors make decisions and how they weigh the race and gender of the attorneys for either side in that decision-making process. Read through the literature summary that follows and then weigh in with your own observations and perspectives. This is research designed for practice.

The Issue of Attorney Race and Gender

Regardless of color or creed, it is every citizen's right to receive due process as proscribed by the 6th Amendment. Unfortunately, the trial process is not immune to race related biases that disparately disadvantage minority members of our society¹.

In criminal cases, the effects of jurors' biases about the defendant's race can be diluted by making racial bias salient². However, jurors' racial biases about other trial participants (i.e., defense attorney) may be left unaddressed. Defendants who are represented by either a Black³ or female⁴ attorney may be at risk for being convicted more often than defendants who employ a White male attorney. This risk of conviction may be especially prominent when the attorney is a "double minority," for example, a Black female⁵. Surprisingly, no previous research has compared the differences in trial outcomes between defendants who have White male attorneys to the outcomes to the defendants who have Black female attorneys. With all other factors being equal, clients of female attorneys and female attorneys of color may be at a distinct disadvantage with White and/or male jurors before any evidence is actually presented.

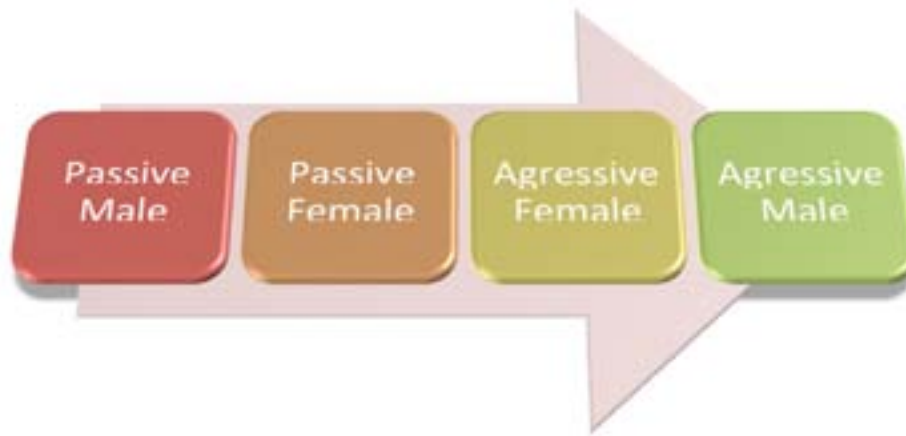
Characteristics such as race, gender, and sexual orientation of the attorney can influence the juror's decision-making process, as well as their emotions or feelings through which they filter the message⁶. In the courtroom, defense attorneys are the source of defendants' messages and the jurors are that attorney's target. During the trial, defense attorneys typically use persuasion strategies that focus on the evidence but that also account for the defendant's characteristics. Unfortunately, the attorney's gender⁷, and race⁸ can influence jurors' decisions regarding the defendant's fate but is rarely addressed.

Research on minority-group attorneys

Mock jury research has uncovered inconsistent evidence of attorney race- and attorney gender-related disadvantages⁹. The evidence supporting these effects is limited¹⁰ and arguably, outdated¹¹. Thirty years ago, mock juror research using a high school sample uncovered that Black male defense attorneys’ clients receive guilty verdicts more frequently than the clients of White male defense attorneys¹². The utility of this data is disputable for two reasons; first, as we all know, a sample of 11th graders is not representative of the jury pool. Second, in the thirty years since the publication of these findings, minority-group attorneys have achieved some success in reversing systematic discrimination in the workplace, and marked progress in increasing the presence of female attorneys and judges¹³. This data is interesting, but we still are no closer to determining what happens in the courtroom when jurors encounter a Black and/or female attorney.

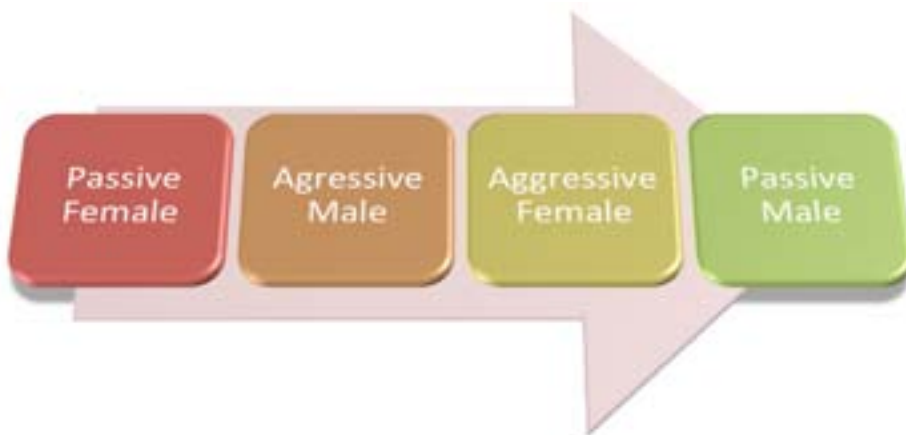
Male Jurors’ Verdicts

Increase in Likelihood of Acquittal as a Function of Defense Attorney Gender and Presentation Style¹⁴



Female Jurors’ Verdicts

Increase in Likelihood of Acquittal as a Function of Defense Attorney Gender and Presentation Style¹⁵



As mentioned above, very little research has examined verdict outcomes as a function of attorney race. However, the robust body of persuasion literature may allow us to draw inferences about how White juror biases may affect Black attorneys and their clients. Defense attorneys are their clients’ advocates; and, as advocates, they attempt to persuade jurors to evaluate the evidence in a

way that favors the defendant. Individuals are more critical of information from stigmatized sources than information from non-stigmatized sources¹⁶. For example, the strength of the argument was more likely to be factored into listeners' decisions when the source of the message was Black than when the source of the message was White¹⁷. Following, in a case where the evidence favors neither the defense nor the prosecution, a White male defense attorney (as a non-stigmatized source) should be more successful at persuading the jurors of his client's innocence than would a stigmatized source such as a Black male, a White female, or a Black female. More simply, when the attorneys' cases are evenly matched, the White male attorney is more likely to win than the Black and/or female attorney. Arguably, if stigmatized attorneys can devise strategies or techniques to eliminate the advantage that White male attorneys have, then the justice system may be that much closer to insuring the protection of defendants' 6th Amendment right. Given the success of racial bias salience in the reduction of White jurors' biases against Black defendants, we believe it is appropriate to extend tests of the bias salience effect to jurors' perceptions of Black attorneys and White attorneys.

The same biases that disadvantage women and Blacks, may have a unique effect on women of color¹⁸. As "double minorities," Black women experience discrimination that corresponds to both their race and their gender. The "double minority" empirical research is beginning to surface in other disciplines but there is still a need for research that investigates the factors that affect Black women or Latinas as legal professionals¹⁹. Racially relevant legal factors such as perceived credibility, perceived competence, and attractiveness influence jurors and manifest differently for female attorneys than for male attorneys²⁰.

At this point, the lack of research suggests that law and social science researchers are unaware of the climate that Black and/or female attorneys face in the courtroom. It is difficult to offer remedies to counter biases when researchers and practitioners are unaware of the current landscape of jurors' biases against attorneys. The New York State Judicial Committee on Women in the Courts (2002) surveyed many court administrators, attorneys, and judges to evaluate progress for women in the 15 years between 1986 and 2001. Information about women in the courts indicates that female attorneys have experienced progress but what the information fails to tell us is whether the progress for White women has improved more or less than progress for Black women²¹.

Fortunately, recent experimental research aimed at reducing the manifestations of White juror bias against Black defendants has met with reasonable success²². Researchers have achieved this success by manipulating the salience of jurors' potentially racist attitudes²³. Sommers (2006) made racial bias salient to mock jurors by asking them open-ended questions about their ability to judge a Black defendant fairly. White mock jurors who were prompted to consider their own racial biases were less likely to convict a Black defendant than were White jurors not exposed to racially relevant questions²⁴. Bucolo and Cohn (2010) also observed an increased likelihood for jurors to acquit Black defendants when the defense attorney referenced the inter-racial nature of the crime (i.e., Black defendant/White victim) in their opening and closing statements than when attorneys did not mention the inter-racial element of the crime. Further research in the effects of bias salience can help defense attorneys to prevent the persistent influence of defendant characteristics, such as race, on White jurors' decision-making process.

Research about the attorney prototype

In addition to defendant characteristics, defense attorney characteristics and demographics may also influence jurors' verdicts²⁵. Cohen and Peterson (1981) uncovered no effects of attorney gender on mock juror decisions. However, in other mock juror research, defendants with male attorneys had more positive trial outcomes than did defendants with female attorneys²⁶. The most effective methods of attorney-related bias reduction require that the attorneys adapt presentation styles that conform to

commonly held gender roles. For example, Hahn and Clayton, (1996) reported a three-way interaction between attorney gender, speech style, and juror gender. Male jurors acquitted defendants with aggressive male attorneys more often than they acquitted defendants with passive male or female attorneys. A more specific manifestation of gender role stereotypes surfaced with female jurors. Defendants with aggressive female attorneys were more likely to be convicted than were defendants with passive female attorneys. In contrast, male attorneys with an aggressive style were more successful than were male attorneys with a passive speech style²⁷. This research demonstrates one example of how jurors' attitudes toward a defense attorney's characteristics have adversely affected defendants in mock trials.

Stereotypes about women's gender roles and demeanor can affect the way that jurors perceive, and ultimately, judge female attorneys and their clients²⁸. Mock jurors indicated their disdain for the aggressive female attorneys by convicting their client more frequently than the assertive or passive female attorneys. Additionally, jurors were more receptive to the aggressive behavior when the attorney was male than when the attorney was female. Researchers believe that jurors' punishment of women attorneys and their clients is the result of the jurors' belief that aggressive behavior is counterstereotypical for women. It is also possible that jurors believe that females (regardless of presentation style) do not represent the juror's prototype of an attorney. In an experimental setting, when researchers withheld information about the attorney's gender, mock jurors were more likely to assume that the attorney was male than female²⁹. This illustrates that jurors may not consider that women possess the qualities that are prototypical of an attorney. There are no experimental data that confirm that White is the default ethnicity for individuals' attorney prototype. However, with the White male dominated landscape illustrated by labor statistics³⁰, it would be logical to assume that White is the default race of the prototypical attorney.

When the two worlds collide... Black males are the most disadvantaged

The most prominent research on the intersection of racial and ethnic discrimination originates from two distinct theories: Subordinate Male Target Hypothesis (SMTH)³¹ and the Double Jeopardy Hypothesis (DJH)³². Subordinate Male Target Hypothesis suggests that Black men are more likely to be the targets of discrimination from White men than are Black women³³. Sidanius and colleagues contend that statistics from the criminal justice system and statistics related to academic achievement demonstrate strong support for Subordinate Male Target Hypothesis. For example, Black men experience incarceration at a rate higher than women or White men do and they experience poorer academic outcomes than Black women³⁴. In these situations, Black men, as members of a single subordinate group, suffer more than Black women who are members of two distinct subordinate groups. SMTH argues against the premise that Black women, as double minorities, suffer more than Black men suffer. Instead, proponents of the SMTH believe that systematic discrimination disparately disadvantages Black men.

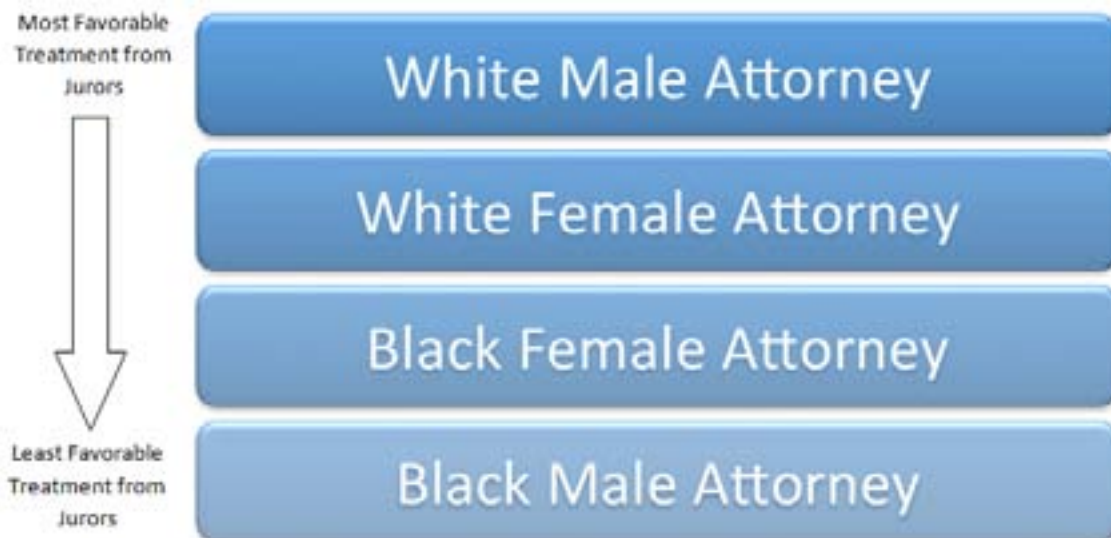
Unfortunately, much of the empirical research on SMTH has been restricted to paradigms that compare disparities in treatment or status between Black and White men to the disparities in treatment or status between Black and White women³⁵. We can describe what happens with Blacks versus Whites and describe what happens with males versus females. However, by not analyzing the differences in privilege between the four combinations of race and gender, researchers cannot, with certainty, advise on what race and gender combination will experience the most difficulty when trying to persuade the jury. Additional research should take care to clarify the types of conditions under which SMTH can predict that Black females will have better overall outcomes than Black males.

When the two worlds collide... Black women are the most disadvantaged

Much of the research that investigates the position of Black females in relation to Black men originated from the Double Jeopardy Hypothesis (DJH). DJH theorizes that Black women (or any person who belongs to more than one minority group) experience negative outcomes more frequently than both White women and Black men³⁶. As a “double minority,” Black women may experience either, a unique effect of bias that is specific to their race/gender identity, or an additive effect when gender related bias mix with race related bias³⁷. An important concept within DJH is that the bias that women of color experience may only occur under specific circumstances. Black women may not always experience negative outcomes more frequently than Black men. Each individual’s experience of privilege may be contingent upon the social influences that are relevant to the intersection of race and gender in that specific situation³⁸.

Mock jurors’ responses to Black male attorneys and White and Black female attorneys can inform legal researchers on which strategy will be most effective in eliminating jurors’ race- and/or gender- related biases. By suggesting a compound effect, the Double Jeopardy Hypothesis is in direct opposition to the Subordinate Male Target Hypothesis. Both theories suggest that White men are more likely to experience positive outcomes than are White women, Black men, or Black women. However, the point of contention relates to the question, “Which individual is more likely to end up on the bottom rung of the social ladder?” DJH suggests that Black women are at the bottom, while SMTH suggests, it is the Black man who is on the bottom rung. Understanding which hypothesis, DJH or SMTH, is most likely to prevail in the courtroom can allow attorneys develop strategies to prevent their client from experiencing negative outcomes simply because they hired or were appointed a Black and/or female attorney. In the proposed study, we will investigate the additive effect as outlined by DJH to evaluate how membership to two stigmatized groups may influence White males’ biases against Black female attorneys.

Subordinate-Male Target Hypothesis (SMTH)



Double Jeopardy Hypothesis (DJH)



General Plan of Work

We have recently submitted a grant to the National Science Foundation that plans to evaluate which theoretical framework, either SMTH or DJH, is most appropriate for describing the experiences of minority-group attorneys. To accomplish this, a 4-way comparison will be made between Black males, White males, Black females, and White female attorneys. Specifically, we will assess how differences in trial outcomes (e.g., verdict, attorney persuasiveness, and ratings of competence) vary as a function of attorney race and/or gender. Bias-reduction strategies will be implemented to attempt to eliminate any disparities resulting from the racial and gender groups. Bias salience techniques that were successful in reducing White juror bias against Black defendants should reduce White juror bias against minority-group attorneys and, subsequently, their clients. Minority-group attorneys, including “double minorities,” who represent criminal defendants, may be able to eliminate biases that are inherent to the process of persuasion by making the mock jurors aware of their potential biases. In the proposed research, we will adapt these simple bias salience techniques to eliminate yet another extralegal influence on jurors’ decisions.

Study 1 will test two competing hypotheses: SMTH and DJH. Consistent with first hypothesis, SMTH, outcomes for Black male attorneys and their clients will be significantly less favorable than outcomes for White male attorneys and their clients. Alternatively, consistent with the second hypothesis, DJH, outcomes for female attorneys and their clients should not differ as a function of the attorneys’ race such that, Black female attorneys should have significantly more negative outcomes than Black males, White females, and White males.

Study 2 will replicate the Study 1 results and evaluate methods for reducing bias against minority-group attorneys. Participants will either be asked to consider their own gender, race, or a combination of these biases so that we can evaluate if the compound effect that is suggested by DJH can be eliminated for Black women by priming participants with both, racial, and gender bias salience. SMTH suggests that the Black males are punished because they are perceived as being members of the subordinate male group that is competing for resources. According to logic, it is the Black male’s race, as well as his gender, that causes unfavorable treatment from White males. If Study 1 reveals that the SMTH is the most appropriate framework for attorney-related biases, then bias against the Black male attorney may not be eliminated unless mock jurors are primed with both racial and gender salience.

* * *

As part of the preparation for this project, we would like feedback from those in the field – what do you see in your day-to-day work in the courtroom, in mock trials, in deposition or preparation for trial?

For all of the following questions, please feel free to compare and contrast the differences between civil versus criminal trials and plaintiffs’ versus defense’s attorneys.

- How do consultants advise their Black and/or female clients in terms of style, tone, approach?
- Do consultants feel that their clients are uncomfortable with using a Black and/or female attorney lead? What about their use of non-lead Black and/or female attorneys?
- Do clients adapt their use of Black and/or female attorneys to the topic of the case or to the demographics of jurors in the trial setting (i.e., Black female lead in Atlanta or Black male attorney in Title VII race employment discrimination)?
- Can you tell us about any memorable experience when the client used a Black and/or female attorney or consultant? Or, conversely, can you tell us about any memorable experiences when the client refused to use a Black and/or female attorney or consultant?
- Do you feel that clients are assuming that Black and/or female attorneys are less successful or are there certain styles that clients encourage their Black and/or female attorneys to use?

Don't miss the four responses to this piece after the references!!

References

- ¹ Sommers, S.R., & Ellsworth, P.C. (2009). “Race salience” in juror decision-making: Misconceptions, clarifications, and unanswered questions. *Behavioral Sciences and the Law*, 27, 599-609.
- ² Ibid.
- ³ Cohen, D.L., & Peterson, J.L. (1981). Bias in the courtroom: Race and sex effects of attorneys on juror verdicts. *Social Behavior and Personality*, 9, 81-87.
- ⁴ Hahn, P.W., & Clayton, S.D. (1996). The effects of attorney presentation style, attorney gender, and juror gender on juror decisions. *Law and Human Behavior*, 20, 533-554.; Rieger, S., Foster-Fishman, P., Nelson-Kuna, J., & Curran, B. (1995). Gender bias in courtroom dynamics. *Law and Human Behavior*, 19, 465-480.
- ⁵ American Bar Association, Commission on Women in the Profession. (2006b). *Visible Invisibility: Women of Color in Law Firms*. Retrieved from <http://www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf>
- ⁶ Fleming, M.A., Petty, R.E., & White, P.H. (2005). Stigmatized targets and evaluation: Prejudice as a determinant of attribute scrutiny and polarization. *Personality and Social Psychology Bulletin*, 31, 496-507. ; Petty, R.E., Fleming, M.A., & White, P.H. (1999). Stigmatized sources and persuasion: Prejudice as a determinant of argument scrutiny. *Journal of Personality and Social Psychology*, 76, 19-34.

- ⁷ See Rieger et al., 1995; See Hahn & Clayton, 1996
- ⁸ See Cohen & Peterson, 1981
- ⁹ Ibid.; See Hahn & Clayton, 1996; See Rieger et al., 1996
- ¹⁰ See Hahn & Clayton, 1996
- ¹¹ See Cohen & Peterson 1981
- ¹² Ibid.
- ¹³ American Bar Association, Commission on Women in the Profession. (2006a). Charting Our Progress: The Status of Women in the Profession Today. Retrieved from <http://new.abanet.org/marketresearch/PublicDocuments/ChartingOurProgress.pdf>; See American Bar Association, Commission on Women in the Profession, 2006b
- ¹⁴ See Hahn & Clayton, 1996
- ¹⁵ Ibid.
- ¹⁶ See Fleming, Petty, & White, 2005; See Petty, Fleming, & White, 1999
- ¹⁷ White, P.H., & Harkins, S.G. (1994). Race of source effects in the elaboration likelihood model. *Journal of Personality and Social Psychology*, 67, 790-807.
- ¹⁸ Beale, F. (1969). Double Jeopardy: To Be Black and Female. In Morgan, R. (Ed.), *Sisterhood is Powerful: An Anthology of Writings from the Women's Liberation*. (p. 344). New York: Random House. ;Browne, I., & Misra, J. (2003). The intersection of gender and race in the labor market. *Annual Review of Sociology*, 29, 487-513. 10.1146/annurev.soc. doi:29.010202.100016
- ¹⁹ Crenshaw, K.W. (1989). Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics. *University of Chicago Legal Forum*, 1989, 139-167.
- ²⁰ See Hahn & Clayton, 1996; See Rieger et al., 1995
- ²¹ New York State Judicial Committee on *Women in the Courts*. (2002). *Women in the Courts: A work in progress*. Retrieved from http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts_report.pdf
- ²² Bucolo, D.O., & Cohn, E.S. (2010). Playing the race card: Making race salient in defence opening and closing statements. *Legal and Criminological Psychology*, 15, 293-303. doi: 10.1348/135532508X400824; Sommers, S.R. (2006). On racial diversity and group decision making: Identifying multiple effects of racial composition on jury deliberations. *Journal of Personality and Social Psychology*, 90, 597-612.; Sommers, S.R., & Ellsworth, P.C. (2001). White juror bias: An investigation of the prejudice against Black defendants in the American courtroom. *Psychology, Public Policy, and Law*, 7, 201-229.
- ²³ See Sommers & Ellsworth, 2009
- ²⁴ See Sommers, 2006
- ²⁵ See Cohen & Peterson, 1981; See Hahn & Clayton, 1996
- ²⁶ See Hahn & Clayton, 1996
- ²⁷ Ibid.
- ²⁸ Ibid.
- ²⁹ See Hahn & Clayton, 1996

³⁰ Bureau of Labor Statistics, 2008

³¹(Sidanius & Pratto, 1999)

³² (Beale, 1969)

³³ Sidanius, J., & Pratto, F. (1999). Social dominance. New York, NY: Cambridge University; Sidanius, J., & Venigas, R.C. (2000). *Gender and race discrimination: The interactive nature of disadvantage*. In S. Oskamp (Ed.), *Reducing Prejudice and Discrimination: The Claremont Symposium on Applied Social Psychology* (pp. 47-69). Mahwah, New Jersey: Lawrence Erlbaum Associates.

³⁴ for a review, see Sidanius & Pratto, 1999

³⁵ Browne, I., & Misra, J. (2003). The intersection of gender and race in the labor market. *Annual Review of Sociology*, 29, 487-513. 10.1146/annurev.soc. doi:29.010202.100016

³⁶ See Beale 1969

³⁷ See Browne & Misra, 2003

³⁸ Ibid.

We asked for responses to this article from two trial consultants, one trial lawyer and one academic specializing in research on race and racism. On the following pages, we have their responses.

Attorneys in Context

by Kathy Kellermann, Ph.D.

Kathy Kellermann, Ph.D. is President of [ComCon Kathy Kellermann Communication Consulting](#), a trial and jury consulting firm based in Los Angeles, California. ComCon works on civil and criminal cases in both federal and state courts, and supports the free [Online Jury Research Update](#) blawg.

I work primarily with White male attorneys, not because I choose White and male attorneys over minority and female attorneys, but because the legal profession generally, and trial attorneys specifically, are predominantly male and overwhelmingly White. The American Bar Association reports that only 31% of attorneys are female and fewer than 10% of attorneys are minorities, with African Americans at 3.9%, Hispanics at 3.3%, and Asian Americans at less than 1% (Chambliss, 2004; Commission on Women in the Profession, 2011). Further, the rate of entry into the legal profession for African Americans has slowed, and Asians are now the fastest growing minority in the legal profession (Chambliss, 2004).

Over a period of 18 years, I have worked with a number of female attorneys, although they only rarely have been the lead attorney on a case. I have worked with three African American attorneys (one female), a few Hispanic attorneys (all male), and one Asian American attorney (a female). In my experience, an attorney's gender has been a much larger part of the dynamics of the courtroom landscape than an attorney's race, and my encounters with the dynamic of female and minority attorneys has been especially rare.

Have female and/or minority attorneys been disadvantaged by jurors? At times, I suspect so by prospective jurors, although hopefully less so by jurors seated on the jury. In a murder case in which I worked, we exercised a peremptory of a juror who was an older, first generation Eastern European immigrant. The female African American attorney felt this juror was biased against her; I felt this juror disliked criminal defendants generally, and younger defendants such as ours specifically; this juror offered not very complimentary comments about defense attorneys when asked her feelings about them, and seemed offended by the charge of murder. Was it bias due to the attorney's race or gender? I do not know. Was it bias because this was a murder case? I do not know. Was it bias because the defendants could be categorized as "these young people today"? I do not know. Was it bias at all? I do not know. I do know we had agreement that this juror would be hard for us to persuade.

I believe that the effects of attorney race and gender on verdicts are difficult to pinpoint because they are attenuated, accentuated and obviated by other characteristics of the defense attorney(s), opposing attorney(s), defendant(s), witnesses, judges, seated jurors, evidence, and nature of the case. I believe the effects of attorney race and gender occur in complicated, higher-order interactions involving shifting patterns of effects for different combinations of cases, evidence strength and characteristics of jurors, opposing attorneys, defendants, witnesses and judges. It is my belief that some of the inconsistency in the research findings related to understanding the effects of attorney race and gender on verdicts is because of this complicated interplay of cases, evidence, jurors, witnesses, defendants, judges and attorneys that most often is addressed only partially in any given research project (for understandable reasons of the difficulty in addressing this interplay).

The Importance of the Case

Studies of attorney gender and race are undertaken within contexts of particular cases, yet, curiously, these cases rarely receive attention when inconsistencies in research findings are encountered.

In my experience, sexual assault cases are noticeably different from, for example, robbery or white collar crime cases, and attorney gender has been reported to have different effects for at least some of these different case types. Hahn and Clayton (1996) found that male attorneys are more successful at obtaining an acquittal for their clients than female attorneys in an assault and robbery case, while other researchers report the reverse result for rape cases: When a defendant in a rape case is represented by a female attorney as compared to a male attorney, the rate of acquittal increases from 50% to 70% (Villemur & Hyde, 1983; Yanchar, 1982/1983). Does my experience accord with this research? Yes, for certain rape cases (though perhaps not at quite those rates of acquittal). In my experience, rape cases prime jurors to consider the issue of gender, and activate biases related to gender and gender-based conduct, not only of attorneys, but also of defendants, complainants, witnesses and judges.

I believe that the nature of a case affects the likelihood of the gender and/or race of an attorney to influence verdicts, and understanding the complex interactions between attorney gender and race, other attorney characteristics, opposing attorney characteristics, jurors, defendants, witnesses, judges, cases and evidence is critical to my work as a jury consultant.

I also believe that attorney race and gender are unlikely to produce consistent direct effects on jurors' verdicts within a particular type of case, even where attorney race and/or gender might often have influential effects (e.g., sexual assault cases). Cases differ in evidentiary strength, attorneys have different skill and presentation styles, defendants are differentially sympathetic, jurors differ in how punitive they are, and the interrelationships of these and other factors can easily overshadow the importance (or any effect) of attorney race and gender on jurors' verdicts. These interrelationships also have the potential to highlight the importance of attorney race and gender on verdicts.

I have more than once been asked the question "Should we have a female attorney on the trial team?" or "Should a female attorney cross-examine this witness?", and my answer initially is almost always "It depends", and I begin asking questions about the case, judge, defendant, witnesses, opposing attorney, evidence and the like. Once I have some idea of these other matters, I formulate a response which I find impossible without the larger context, and often difficult even with that context because of the complexity of the situation, the lack of solid research examining these complexities, and the need to provide one simple and direct answer to the question.

The Importance of Other Attorney Characteristics

Attorneys differ in presentation style (e.g., assertiveness, passion, etc.), physical attractiveness, speech style, and a host of characteristics in addition to those of race and gender, and these other attorney characteristics can interact with and influence verdicts, augmenting or diminishing the importance of attorney race and gender on verdicts in complex ways.

For example, in one study, when a male and female prosecutor both used a dominant communication style, the male prosecutor received more guilty verdicts from male jurors than the female prosecutor, although female jurors returned the same number of guilty verdicts regardless of the prosecutor's gender (Pfeifer, 1988). Similarly, male attorneys were more successful at obtaining an acquittal for their clients than female attorneys, particularly when presenting their case to male jurors using an aggressive presentation style; by contrast, female attorneys were most successful when presenting their case to female jurors regardless of presentation style (Hahn & Clayton, 1996).

These patterns of inter-relationship between attorney gender, attorney presentation style and juror gender also are affected by other factors. For example:

The effects of attorney gender and presentation style on verdicts are not consistent across studies, cases, and attorneys of varying levels of physical attractiveness. Sigal (1985) reports that aggressive and assertive attorney presentation styles resulted in significantly more not guilty verdicts than did a passive communication style for both male and female defense attorneys. Trafalis (1985) reports that while female jurors were more open to influence by a female attorney regardless of her attractiveness, male jurors were influenced more by a female attorney's attractiveness and did not respond favorably to a high power style used by an unattractive female attorney.

The effects of attorney gender on verdicts also are affected by characteristics of the opposing attorney. Taylor (2006) looked at two types of medical malpractice cases (mastectomy, orchiectomy), the defense attorney's gender, the plaintiff attorney's gender, and the plaintiff attorney's attractiveness, reporting that attorney characteristics did relate at times to verdicts and awards, but most often in complex and higher order interactions, and not always as expected.

Jurors also do not use identical criteria to evaluate opposing attorneys, and frequently perceive identical behaviors of opposing attorneys in contrary ways. Trahan (2010) analyzed post-trial interviews of 916 capital jurors for how they perceived prosecution and defense attorneys. Eight themes emerged in jurors' comments about defense attorneys: theatrics, personal characteristics, aggressiveness, competence, defendant testimony, defense arguments, forfeiting guilt, and relationship with the defendant. Jurors' comments about prosecutors included theatrics, personal characteristics, aggressiveness and competence, but also presentation style. Importantly, in several of the common themes, prosecutors garnered praise and defense attorneys were chastised for exhibiting the exact same type of behavior.

These complexities are why I believe it is immensely difficult, and yet critically important, to study simultaneously the effect of attorney race and gender within a context permitting complicated, higher order interactions of other attorney characteristics, cases, evidence, opposing attorneys, jurors, defendants, witnesses and judges.

The Importance of the Defendant

Over the years, as I have talked to attorneys about jurors they prefer and "disprefer" for cases, I have noticed a tendency for attorneys to use themselves as their point of reference in jury selection, rather than their client, preferring jurors like themselves and excusing jurors unlike themselves. In my mock trial and community attitude survey research, I have found that the ability of jurors to adopt (or not) the perspective of the criminal defendant, civil plaintiff or civil defendant has usually been more predictive of juror leaning than perceived similarity with the attorney trying the case (though not always!).

Characteristics of a defendant on trial can overwhelm and/or interact with characteristics of the defendant's attorney in juror decision-making. For example, Espinoza (2005) studied jurors' treatment of Mexican American defendants when they were represented by either a Mexican American or a European American attorney. Juror bias against the Mexican American defendant occurred only when the defendant was of a low socio-economic status and the defendant was represented by the Mexican American attorney. Similarly, juries convict African American defendants more often than White defendants for many crimes (Poulson, 1990), although the nature of the case can reverse this tendency: African American defendants are treated less harshly by juries than White defendants when pleading insanity or accused of crimes jurors typically associate with White defendants (Gordon, 1990; Gordon et al., 1988; Rickman, 1989).

As with other issues I've discussed in this commentary, I want now to "hedge" what I just wrote by stating that the characteristics of defendants are likely to matter only sometimes, depending on complex interactions of shifting patterns of effects due to the nature of the case, evidence, jurors, witnesses, attorneys and judge.

The Importance of the Judge

In jury trials, jurors take their cues from the judge, and judges are not without bias. In post-trial interviews, hardly ever do I encounter a juror who dislikes the judge or thinks a judge was biased (even when both parties agree that the judge evidenced biases). Jurors tend to be attentive to a judge's nonverbal behavior (Burnett & Badzinski, 2005) and return verdicts in accord with a judge's leaning in a case, which research finds they are able to glean from something as mundane as how a judge reads standard jury instructions (Blanck et al., 1985; Hart, 1995).

In bench trials, the race of a judge can influence verdicts. In a study of federal racial harassment cases, plaintiffs lost just 54% of the time when the judge handling the case was an African American, but 81% of the time when the judge was Hispanic, 79% of the time when the judge was White, and 67% of the time when the judge was Asian (Chew & Kelley, 2009). Across 556 federal appellate cases involving allegations of sexual harassment or sex discrimination, plaintiffs were at least twice as likely to win if a female judge was on the appellate panel (Peresie, 2005).

A judge's gender and race, however, do not consistently affect case outcomes. Case type can matter. In 367 federal race discrimination cases, no differences in decisions occurred based on the gender of the judicial panels: the plaintiff win rate was similar for all male panels and for panels with at least one female judge (Peresie, 2005). My hypothesis is that gender was not primed as an issue in the racial harassment cases, and so had no influence. The ethnicity of a judge can also be irrelevant, while the ethnicity of a defendant important: Both African American and White judges in Detroit sentenced violent African American felons more harshly than violent White defendants (Spohn, 2008), although this finding is also variable across studies (see, for review, Chew & Kelley, 2009).

A judge's race and gender can have a dramatic effect on the outcomes of jury, bench and appellate cases, but again it depends on interactions of other characteristics of the trial situation. I suspect it also depends on other characteristics of the judge.

The Importance of Jurors

Several research studies report that a defendant represented by a minority attorney is found guilty more often than when represented by a White attorney. For example, studies find that jurors are more likely to find a male defendant guilty of murder when represented by an African-American attorney than by a White attorney (Cohen & Peterson, 1981), and a Mexican-American defendant guilty when the defense attorney was also Mexican-American rather than White (Espinoza & Willis-Esqueda, 2008). As I read this research, my first question usually is: Which jurors are more likely to base their verdicts on attorney race and gender, and which are not? Which jurors will be biased against a minority attorney and which in favor? I cannot often change the reality of the complexity of circumstances I face in the courtroom, but I constantly seek ways to contend with that reality.

When issues of race and gender are activated, I believe studying the jurors and the attorneys simultaneously is often helpful, and sometimes critical.

Boliver (1999) examined the interrelationship between attorney race (African American or White), juror race (African American or White) and juror authoritarianism (obedience to authority versus a willingness to question authority) in a case where the "race card" was played. Participants read materials about an alleged child abuse/neglect case and then viewed a videotape of the closing arguments of the defense and prosecuting attorney. The verdicts of authoritarian White jurors were

most influenced by White attorneys. The verdicts of authoritarian African-American jurors were most influenced by African-American attorneys. Non-authoritarian jurors of both races were equally persuaded by White and African-American attorneys. Said differently, for authoritarian jurors only, an “in-group bias” existed where attorneys of the same race as individual jurors were most persuasive.

I believe that jurors, as one of two potential decision makers in a trial, need always to be considered when questions of the impact of attorney race and gender on verdicts are raised, even though this consideration may not ultimately matter. As with everything else, the courtroom situation is complex and juror characteristics may be irrelevant on certain occasions, and augmented or diminished on others in complex ways.

The Importance of the Evidence

One of the most enduring takeaways for me from mock trial research and post-verdict interviews of jurors is that jurors follow the evidence. While interest is high in biases related to race and gender of attorneys, defendants, jurors, judges and witnesses, if the evidence is strong, jurors overwhelmingly follow the evidence regardless of these “extralegal” factors.

Social science research differs from what is experienced in actual trials in ways that I believe lead to extralegal factors such as race and gender being highlighted in research results, and overshadowed by evidence in trials.

In many studies, jurors read case materials, rather than see presentations of the case. The case materials are summaries of evidence that often minimize evidentiary issues. The written case materials often are presented without visual material and respondents have only a sense of “paper people” for the defendants, attorneys and witnesses. If a visual sense of key individuals is provided, it is often via photographs rather than video. If visual presentations are used, they usually are videotaped for reasons of experimental control that, unfortunately, sometimes sacrifice the generalizability of the results to the complexity of actual courtroom situations. Live presentations are extremely rare and typically restricted to mock trial research conducted by jury consultants for paying clients (because the costs are significant), and this research is more often conducted as case study research that makes examination and identification of complicated, higher order and shifting patterns of effects of attorney race and gender on verdicts difficult to do. I believe that extralegal factors, including those of attorney race and gender, increase in importance against impoverished information environments in which evidence is not accentuated and participants are asked to make verdict decisions.

Studies of actual trials, where evidence is almost always accentuated, find that jurors’ decisions are dominated by evidentiary issues rather than these extralegal factors (Visher, 1987). The results of these studies consistently show that the most powerful determinant of jurors’ verdicts is the strength of the evidence, and the side that presents the strongest case generally prevails (Feigenson, 2000; Overland, 2008). Data from actual trials show that jurors are considerably less responsive to extralegal characteristics of victims and defendants than they are to the evidence (Visher, 1987). Jurors’ personal characteristics, including their race, gender and socioeconomic status, “have relatively little, if anything, to do with their verdicts in most trials” (Overland, 2008, p. 11), typically accounting for 1% to 2% of the variance in jurors’ verdicts if they influence those verdicts at all, and the pattern of influence of these extralegal factors shifts based on the case, evidence, defendant(s), judge, opposing attorney and a host of other factors. I have reviewed a number of these studies in my blawg, the Online Jury Research Update, and I refer the interested reader to the following issues of the OJRU: [January 2011 Issue 2](#), [March 2007 Issue 2](#) [May 2008 Issue 1](#)

The point I want to make is this: Cases involving weak evidence, or closely contested cases wherein the presented evidence cannot resolve the dispute, require jurors to insert themselves into the case to find a way to resolve the dispute. Because social science research typically chooses cases where

jurors are close to equally split in their verdict leanings prior to doing the research, and the research procedures deemphasize evidentiary disputes, I wonder about the extent to which attorney race and gender will influence verdicts in actual trials as compared to these less rich information environments of the research studies. I believe it is important to assess the relative importance of attorney race and gender in the complicated interplay of informationally rich environments for cases, evidence, jurors, witnesses, defendants, judges and opposing attorneys.

The Importance of Attorney Characteristics

Just as juror demographics have limited influence on verdicts in comparison to the evidence in actual trials, attorney characteristics may also ultimately be found to have limited influence in relation to the evidence.

Diamond and colleagues (1996) studied juror reactions to attorneys in simulations, and counted references jurors made to attorneys during deliberations in 60 juries hearing an antitrust price fixing case and in 34 juries hearing a penalty phase of a death penalty case. In deliberations, jurors made relatively few comments about attorneys, and instead focused overwhelmingly on the evidence. This research suggests that while attorneys are one of the messengers, they may not be the message; and that jurors focus primarily on the message.

Female and minority attorneys may also develop coping strategies that offset biases in decision-making due to their race. Phillips (2010) reports a study of 1,164 jurors who participated in 10 mock trials of real cases in which a White and a minority attorney (either African American or Asian) gave live argumentative presentations. The two attorneys in each mock trial were of the same gender and approximately the same age, skill and experience levels. Four cases involved contract disputes, in which 3 of the 4 mock trials compared jurors' reactions to an Asian and a White attorney. The remaining six cases compared an African American and a White attorney, and involved 3 toxic tort cases, an airplane-crash wrongful death case, a corporate fraud case and an employment dispute. In 8 of the 10 mock trials, jurors rated the minority attorneys higher than the White attorneys. In one mock trial no differences existed between the ratings of the Asian and White attorney. In the remaining mock trial, the White attorney was rated higher than the African American attorney. Jurors, regardless of their own race, rated the minority attorneys as more likeable and honest than the White attorneys, although African American attorneys only received higher ratings of competence than White attorneys from African American jurors. Phillips concludes that "skilled trial attorneys who are ethnic minorities can frequently overcome jurors' biases against them" (p. 11).

From these data and studies, I proceed with caution in my assessment of the effects of attorney race and gender on verdicts. Who an attorney is as a person may only be relevant to verdicts when certain conditions apply related to complex interactions of evidence, cases, and a host of characteristics of various trial participants.

From the point of view of practical application, my question is a plea to help me know which combination of factors matter when. My experience supports some of the suggestions emanating from the research: that these patterns are complicated, higher order interactions related to jurors, judges, defendants, witnesses, attorneys, evidence and case type. Said differently, I believe context is everything, and that social science research could expand my understanding greatly by undertaking the admittedly very difficult task of exploring these complex patterns of effects. The benefit to the academic enterprise is that I believe the inconsistency in the research findings noted by Alexis Robinson will increasingly become resolved. While I understand issues of experimental and statistical control of extraneous variables, the inconsistencies in the pattern of effects is such that applying these controls appropriately is difficult.

Conclusion

The above all said, is it the case that attorney race and gender cannot directly affect juror decision-making? They can have direct effects on jurors' verdicts. A survey of 136 eligible jurors in Baton Rouge (LA), New Brunswick (NJ), Salt Lake (UT), and Los Angeles and Orange County (CA) reports that at least 10-15% of jury-eligible citizens are at least moderately biased against minority attorneys (Phillips, 2010). And I have experienced instances where jurors are noticeably affected by attorney race and gender, sometimes to our advantage, and sometimes to our disadvantage (Phillips, 2010).

Here are the questions I have, that I face in my daily work:

When will jurors focus on attorney race and sex, recognizing that cases, defendants, jurors, witnesses, evidence, the opposing attorney might necessitate identification of complex and higher order patterns of effects.

Which jurors are more likely to base decisions on attorney race and sex in the complex maze of interrelated cases, defendants, jurors, witnesses, evidence, and opposing attorneys?

What are multiple coping strategies attorneys can use to overcome specific biases resulting from specific patterns of effects related to attorney gender and race?

As Alexis Robinson noted, making racial differences salient in voir dire can reduce racial biases that Whites have toward African American defendants (Sommers, 2006). I am hungry for more information. I want to thank Alexis Robinson for affording me the wonderful opportunity to read about this ongoing research project, and I am eager to read more as results become available.

References

Blanck, P. D., Rosenthal, R., & Cordell, L. H. (1985). The appearance of justice: Judges' verbal and nonverbal behavior in criminal jury trials. *Stanford Law Review*, 38, pp. 89-164.

Boliver, S. E. (1999). The effects of attorney race and use of racially relevant arguments on juror decision-making. *Dissertations Abstracts International: Section B: The Sciences and Engineering*, 60, p. 1911.

Burnett, A. & Badzinski, D. M., (2005). Judge Nonverbal Communication on Trial: Do Mock Trial Jurors Notice? *Journal of Communication*, 55, pp. 209-224.

Chambliss, E. (2004). Miles to go: Progress of minorities in the legal profession. Report of the American Bar Association Commission on Racial and Ethnic Diversity in the Profession. http://apps.americanbar.org/abastore/products/books/abstracts/4520014_2005%20execsumm.pdf

Chew, P.K. & Kelley, R.E. (2009). Myth of the color-blind judge: An empirical analysis of racial harassment cases. *Washington University Law Review*, 86, 1117-1166.

Commission on Women in the Profession (2011). *A current glance at women in the law 2011*. <http://www.americanbar.org/groups/women/resources/statistics.html>

Feigenson, N. (2000). *Legal blame: How jurors think and talk about accidents*. Washington, D.C.:

American Psychological Association.

Hahn, P.W., & Clayton, S. D. (1996). The effects of attorney presentation style, attorney gender, and juror gender on juror decisions. *Law and Human Behavior*, 20, 533-554.

Hart, A. J. (1995). Naturally occurring expectation effects. *Journal of Personality and Social Psychology*, 68, pp. 109-115.

Kerr, N. L., Hymes, R. W., Anderson, A. B., & Weathers, J.E. (1995). Defendant-juror similarity and mock juror judgments. *Law and Human Behavior*, 19, 545-567.

Overland, S. G. (2008). *The juror factor: Race and gender in America's civil courts*. El Paso, TX: LFB Scholarly Publishing.

Peresie, J.L. (2005). Female judges matter: Gender and collegial decision making in the federal appellate courts. *The Yale Law Journal*, 114, 1759-1790.

Pfeifer, J.E. (1988). Courtroom prejudice: An application of symbolic sexism. *Contemporary Social Psychology*, 13, 1-8.

Phillips, M. R. (2010). Jurors' perceptions of ethnic minority attorneys: Are we in a post-racial era? *Minority Trial Lawyer*, 8(3), pp. 1, 8-11.

Sigal, J. (1985). The effect of presentation style and sex of lawyer on jury decision-making behavior. *Psychology: A Quarterly Journal of Human Behavior*, 22, 13-19.

Sommers, S.R. (2006). On racial diversity and group decision-making: Identifying multiple effects of racial composition on jury deliberations. *Journal of Personality and Social Psychology*, 90, 597-612.

Taylor, T. (2006). An investigation of the effects of attorney attractiveness and gender on jurors' decision in a medical malpractice trial. *Dissertation Abstracts International: Section B: The Sciences and Engineering*, 67 (4-B), p. 2268.

Trafalis, S. (2006). The effects of physical attractiveness and influence style on juror perceptions of likeability and effectiveness of a White female attorney. *Dissertations Abstracts International: Section B: The Sciences and Engineering*, 66(12-B), p. 6973.

Trahan, A. (2010). Don't shoot the messenger: Capital jurors' perceptions of attorneys. *Dissertation Abstracts International: Section A: Humanities and Social Sciences*, 70(12-A), p. 2010.

Spohn, C. (2008). *How do judges decide? The search for fairness and justice in punishment*. Thousand Oaks, CA: Sage Publications.

Villemur, N. K., & Hyde, J. S. (1983). Effects of sex of defense attorney, sex of juror, and age and attractiveness of victim on mock juror decision-making in a rape case. *Sex Roles*, 9, 879-889.

Visher, C. A. (1987). Juror decision-making: The importance of evidence. *Law and Human Behavior*, 11, 1-17.

Yanchar, N.V. (1983). subject-juror decision-making in rape cases. Effects of status of the complainant and gender of the defense attorney, the prosecuting attorney, and the subject-juror. *Dissertation Abstracts International*, 43, 2364B.

Thoughts on Robinson's "Effects of Attorney Race and Gender on Trial Outcomes"

by Sean Overland, PhD

Sean Overland is a trial strategy and jury consultant based in Seattle. His company, the [Overland Consulting Group](#) specializes in assisting clients facing complex civil litigation.

Alexis Robinson has proposed an ambitious research program to measure the effects of attorney race and gender on criminal trial outcomes. It's an interesting and important research question and I look forward to reading about her findings.

Before I comment on her proposal, I should offer a disclaimer. I have never worked on a criminal trial. My practice so far has focused exclusively on civil matters, and typically fairly large ones. So while I have no experience with the particular types of trials that will be the focus of this research, and my experience is with a skewed sample of legal cases, I have some thoughts on the proposal and on the questions Robinson poses at the end of her article.

The article raises questions about the effectiveness of different attorney styles, and whether it is better for attorneys to be aggressive or passive. This question seems to assume that there is one best "style" or "approach" to a trial. However, in my experience, the very best trial attorneys do not have a single style for presenting evidence or questioning witnesses. Instead, they adapt their style to fit the circumstances of the trial. For example, a defense attorney may need to aggressively cross-examine a plaintiff's expert witness. The defense may want to vigorously challenge the expert's methods, assumptions and conclusions, and try to get the expert to admit to the limitation of her testimony. On the other hand, the cross-examination of an injured and emotional plaintiff might need to be handled quite differently, with the attorney taking a more conversational and even deferential approach to the witness.

In terms of civil defendants' selection of trial attorneys, my experience has been that over the past fifteen years, there has been a concerted effort by many large corporations to make their trial teams more diverse, and most of the large law firms have reacted accordingly. In fact, I know that some businesses make diversity a requirement of any law firm hoping to represent them. And the reason for this is straight-forward: large businesses believe that it is important for their legal teams to look like the juries they hope to persuade. Accordingly, in my experience, trial teams working in the Deep South almost always have an African-American attorney. Similarly, teams with trials pending in the Southwest almost always have Latino attorneys. And regardless of race or gender, you will not be entrusted with important matters unless you are extremely good at what you do. So almost all of these minority attorneys, while often relatively young, are not only very effective, but are also willing to learn and become even better. In terms of gender, a look through my attorney contact list revealed that over half of the attorneys I know are female. So again, if anything, the civil defense segment of the legal profession may be slightly ahead of the curve in terms of recognizing capable professionals, regardless of race or gender.

But as I noted in the beginning, my experience is probably not representative. I know attorneys who have abandoned "Big Law" in favor of careers as Public Defenders and District Attorneys, and their day-to-day experiences in the trenches of the criminal justice system are radically different from what they were before. PDs and DAs often have hundreds of cases pending at the same time, requiring almost daily court appearances. And the subtle effects of racism and sexism may be more pronounced in this environment than in other areas of law. And it is on the criminal justice system that Robinson should and probably will focus her attention, and again, I look forward to seeing the results.

Rich Hailey, JD responds to Alexis Robinson's article

Rich Hailey, JD is a trial lawyer with more than three decades of experience. He is past President of AAJ and partner in the firm [Ramey & Hailey](#).

INTRODUCTION

Amazing! Amazing best describes my initial reaction to the focus-attitude research disclosed in the material forwarded to me dealing with the issue of attorney race and gender. However, upon reflection, I concluded that I should not be "amazed" or surprised. One only needs to go back to the election of 2008 and move forward to realize there is a hard core group of individuals in the United States who are willing to believe virtually anything that supports or proves their deeply held personal convictions which often border on bigotry. Approximately 15% of eligible voters still believe that Iraq contributed to or planned 911. Approximately 25% of eligible voters believe that the president was not born in the United States. And yes, let's not forget the 20+ percent that still believe President Barack Obama is a Muslim. Thus, upon reflection, I have resigned myself to the fact that ideological utopia will never be realized here on earth.

In order to assist you in analyzing the modest comments that I have to contribute, I wish to make certain disclosures. Please be advised that I am an African American attorney having enjoyed an active trial practice for over 35 years. Due to my geographical location most of the trials that I have tried over my career have been to all white jurors that are located in small rural communities in Central and Northern Indiana. Approximately 75% of my civil clients have been Caucasian. With the exception of a few cases recently, all of my major trials have been tried with my partner who is a white female. Until the late 1980s our office tried both civil and criminal cases.

GENERAL COMMENTS ON RACE AND GENDER

While my partner and I have always felt the data on race and gender issues and their effect upon the trial process was scant at best, we concluded early in our careers that it was not necessary to bring these issues up with the jury in voir dire. In our first medical malpractice trial in 1978 our plaintiff was a Latino who had suffered an unnecessary amputation. This Latino migrant worker did not speak much English and we knew we would have to go to trial with an interpreter. Although we had been trying cases since 1974, we felt that the Domingo Samora trial was the first in which we felt we had to voir dire the jury extensively over the fact of the plaintiff's ethnicity and his ability to speak good English. Most jurors responded in a manner that was politically appropriate for the times. Our goal then, as our goal is now, was to not be so hopeful as to rule out or change attitudes. By raising the ethnic language issues we only hope to neutralize or desensitize and ultimately minimize these issues upon jury deliberation.

In the Domingo Samora case we only questioned jurors about their attitude about the plaintiff. We later found that we needed to explore attitudes about white female and black male attorneys. In many of the small, rural communities in Indiana, jurors have never seen female or black attorneys. We have used both direct questioning and humor to explore the race gender issue vis a vis the attorneys. Currently we cover the fact that our team has a black male and a white female in approximately one-third of the cases that we try. We tend not to deal directly with general race issues when trying cases in

Metropolitan areas like Indianapolis or in the northern part of the state (namely Lake County) which borders on the City of Chicago.

During trial preparation we do in fact spend a great deal of time with female and minority clients on style and demeanor. Essentially, we prepare our clients along the same lines that we prepare ourselves, i.e. with a goal of not playing into or reaffirming stereotypes that surround gender and race. Most important is our effort to instruct our clients their demeanor must be casual and friendly and their dress must be formal. Women and minority clients have to be guarded with showing any aggressive or hostile attitude surrounding what has happened to them. We ask them to carry their demeanor considerations into not only their time on the stand but also in hallways, the men's and ladies room and other common areas in the courthouse. We do tell all clients the jury is watching them at all times. While much of this advice is also given to Caucasian clients we candidly can say that more time is spent with women and minorities.

In recent years we have been involved in a series of employment litigation, most notably, Federal Court litigation involving major corporations. In race cases there is no doubt that major corporations hire law firms that specifically include minority attorneys on their litigation team in an effort to "add color to the case". Likewise, we have noticed that females are added to the corporate defense teams when the employment allegation is based upon sexual discrimination or Title 9 issues. As a former President of the American Association of Justice (formerly known as the American Trial Lawyers Association of America) I can assure you that I have heard the latter from other attorneys in all four corners of this nation. There are actually minority law firms that have been organized with one of their express purposes being getting Fortune 500 work promising they can deliver minority partners and associates to litigation where it is needed.

When looking back on my experience in particular with relationship to perception of race and gender as it effects perception on who is or is not successful, I now offer an interesting twist. As an African American I have experienced several situations in which African Americans sought white counsel when they had matters they considered to be extremely significant, notwithstanding they were comfortable being represented by a minority lawyer on smaller matters. On numerous occasions I have had large dollar personal injury cases taken to white attorneys by African American clients that I have represented on smaller matters. My own explanation for this phenomenon is that their perception is one of power rather than success. In other words, they feel that white attorneys would be more powerful and could best represent their interests. To be sure, this intra race phenomenon was far more prevalent in the beginning of my practice than it is today, leading me to conclude that younger African Americans, especially professionals, seem to be more confident in same race representation.

Taking a momentary departure from the "negative" aspect of race gender-attorney preference, let me concede that there have also been some huge positives. We have noticed in recent years there is a population of clients who specifically seek a female attorney. This is best illustrated in the area of family law and domestic relations litigation. It is not uncommon to find white males of substantial material means employing females to represent them in divorces. This is even more the case where there are child custody issues involved. Likewise, we have several cases of sexual assault and abuse involving children and adults where our potential client indicates to us that they came to our office because they wanted to be in an office where there was a female partner. Frankly, we are reconstructing our web page and creating landing pages featuring Mary Beth Ramey, my female partner, in a prominent way as to attract more cases where we see the female preference described herein. Given that most of our trials are in excess of several days, I have also noticed that when I, as an African American am trying a

case in a basically all white community, the jurors do not get bored and I do not have difficulty keeping their attention. The novelty seems to create a type of curiosity which I believe gives me an advantage in that they tend to focus on me and are attentive to what I am saying.

There is a wealth of research available today that indicates that jurors do in fact base most of their decision on the evidence as they interpret it and place far less weight on the gender or race of the advocates. At the end of the day it is good evidence, exceptional and effective presentation that neutralizes race gender outcomes provided the advocate 1) confronts the race gender issue in voir dire, and 2) adopts a "style" and demeanor that does not reinforce stereotypes.

CONCLUSION

While our experience would indicate that race in general plays a small role in how juries decide cases, we believe that a much bigger outcome determinative attitude is the attitude that a juror has of the U.S. legal system. Over the last 25 years the corporate-insurance information jargon has literally saturated the American public with negative views about trial lawyers, judges and jury verdicts. By their overuse and misuse employing an erroneous rendition of a "McDonald's story," our fellow corporate citizen has convinced a significant portion of our population that our Court system is flawed, that juries are awarding unreasonably high verdicts and that trial lawyers are packing civil litigation like one buying "pooled lottery tickets." Any lawyer who has adequately voir dired a jury in the last 15 years over runaway verdicts and greedy trial lawyers will support our anecdotal observations. In the civil system this has been far more outcome determinative in our view. Juries are reluctant to find for the plaintiff, especially in medical malpractices cases, and when they do they make low jury awards, oftentimes well below what they feel would be adequate for them if they were the injured party. My criminal advocate colleagues likewise complain that in jurisdictions where juries assign sentences, juries are more apt today than ever to sentence at the top end of the sentencing scale. This latter development they feel is premised on the perception that the prosecutors are not fully prosecuting criminals and that judges are just releasing prisoners to return to society and harm them. Termed the revolving door, this perception oftentimes results in excessive sentences that do not match the crime that results in a guilty verdict. The revolving door perception, while invalid, has also led to negative attitudes about judges and has fueled the movement to remove sentencing discretion from both appointed and elected judges. At our office we have concluded that we need to be aware of race gender issues in both civil and criminal cases but realize these issues are only as prominent in our courtrooms as they are in the communities in which we try our cases. In all of our trials we stress not the elimination of bias, because we feel that is impossible, but a promise from each juror that they will leave that bias at the courthouse door and make their decision making evidence-based.

Sam Sommers responds to Alexis Robinson's article on Attorney Race and Gender

Samuel R. Sommers, Ph.D., is associate professor of psychology at Tufts University in Medford, MA. In addition to authoring over two dozen publications on issues related to race and diversity, he has consulted as an expert in multiple criminal cases, including capital trials in California, Massachusetts, New Hampshire, North Carolina, Oregon, and Texas. He blogs on the [science of daily interaction for Psychology Today](#), can be found on [Twitter](#), and his first book, [Situations Matter](#), will be released in December 2011 by Riverhead Books (Penguin).

As a research psychologist, I am well versed in the ways in which expectation and presumption bias daily perceptions. These are basic aspects of human nature. And as a research psychologist who frequently interacts with legal professionals, I find it fascinating when someone suggests that this part of human nature doesn't extend to the courtroom—that somehow these basic tendencies magically disappear when we enter a courtroom.

So the idea to study empirically the effects of attorney race and gender on trial outcomes has appeal to me in its potential to demonstrate yet another way in which assumption and stereotype guide legal judgment. Because at the end of the day, intuition (and my reading of the behavioral science literature) tells me that it is expectation and stereotype that probably underlie many of these proposed effects, as opposed to simple prejudice or outright animus towards attorneys of certain demographics. Sure, there must exist out there jurors who harbor strong enough bigotry to discount what a particular attorney says just because of gender or the color of her skin. But my guess is that attorney race and gender effects are often more nuanced and far more context-dependent.

Despite generalized declines in overtly sexist and racist attitudes, contemporary society is still one in which male and White are more easily and automatically associated with characteristics like competence and intelligence. But I would also predict that juror expectations lead to more positive assessments of female attorneys under some circumstances. Perhaps in cases involving parenting/family issues? Or those involving crimes with female victims? I imagine this is an intuition shared by others as well, from the trial consultant who recommends that the firm's female counsel take the lead for examining a particular witness to the firm itself that seeks to hire attorneys of particular backgrounds to improve surface appeal to a certain demographic of client/case type.

Such case-dependent patterns would be consistent with what we see in the literature on demographics and jury selection. I've often argued that, for example, race-based peremptory challenges are not necessarily evidence of racial bias—at least, not of the intentionally discriminatory type we usually associate with the phrase "racial bias." No, prosecutors disproportionately use their peremptories on Black prospective jurors largely because of expectation: they assume these jurors will be less conviction-prone (and vice versa for defense attorneys and White prospective jurors). Analyses of racially disparate peremptory use that focus primarily on racial prejudice—be it of the modern, implicit, unconscious type or otherwise—miss the boat, I think.

And so I'd predict that similar case- and context-dependence will emerge as an important aspect of the investigation of attorney race and gender effects. While it may be possible to draw some

empirical conclusions along the lines of most male jurors dislike passive male attorneys, my guess is that many conclusions will be less generalized.

Do African-American attorneys face professional obstacles that their White colleagues do not? Absolutely, inside and outside the courtroom. But there may be types of cases (or defendants) for which a Black attorney is viewed by jurors as more competent or credible. Perhaps in defending a White client charged with discrimination? Or in prosecuting a case relying heavily on police testimony? For that matter, to the extent that some jurors have low expectations regarding the proficiency of minority attorneys, the proverbial bar may be low enough such that an above-average performance is viewed as superlative.

In short, the story of how attorney race and gender shape trial outcome is bound to be a complex one. After all, we're not talking about the target of persuasive messages here (that would be the defendant). We're talking about the source of these messages. And we now live in a society where when it comes to, say, certain consumer products or political arguments, it's no longer the White male who is viewed as the most persuasive, credible messenger by default. The biggest challenge facing the study of attorney race and gender effects may very well be the nuanced, context-dependent nature of jurors' assumptions. But that's all the more reason to run the studies.

Editor's Note: After reading the thoughtful comments from these four respondents, Alexis Robinson has offered to write an article on the ways this research can inform day-to-day practice for trial lawyers and trial consultants.