DIVERSITY IN DEFENSE LITIGATION: PUTTING THE ODDS IN YOUR FAVOR

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I. Introduction: Making the Case for Diversity.

Do race and gender still matter in the courtroom? If the odes to diversity that are sung so frequently and loudly by Corporate America are to be believed, these two demographic factors, along with others, are critically important to optimal outcomes in civil defense litigation. After all, defense counsel hear over and over again that our corporate clients are committed to diversity as a core value, so much so that decisions about hiring and retaining law firms turn in part on whether outside counsel can consistently deliver diverse legal teams to work on these clients’ matters.

Of course, there is a moral case to be made for the pursuit of diversity and equal opportunity in the provision of legal services, as in any other endeavor. Immutable characteristics like race and gender that have nothing to do with a person’s ability to provide high quality legal services should not be used to prevent anyone from fully realizing her potential as a legal professional. Notwithstanding this obvious truth, it is the sad history of our profession that people of color and women were systematically denied opportunities to fulfill their dreams in the pursuit of legal careers. Accordingly, it is only right that we tear down the explicit and implicit barriers to entry and promotion that exist for minorities and women in the practice of law. However, the message from Corporate America goes beyond an appeal to our better angels when it comes to diversity. Rather, our corporate clients are saying that the best outcomes in litigation can only be achieved by diverse legal teams that reflect the truly diverse country in which we live. In other words, diversity impacts the bottom line of civil litigation.

In 2018, the defense bar has heard statements like these so often that they have become almost axiomatic. However, not everyone subscribes to these beliefs. From my discussions with other defense counsel and my review of editorial articles, it is equally clear that there is a strong current of skepticism about the true value of diversity in winning cases. In fact, it may be the increasing emphasis on the importance of diversity that has created a backlash among some, causing them to demand proof that a minority or female lawyer can provide anything qualitatively different in legal services than what their white male counterparts have offered for years.

It is against this backdrop that I feel compelled to make the case that it does constitute good lawyering to be aware of diversity considerations in civil cases and to leverage those considerations in ways that maximize the chances that our clients’ stories will be heard and believed by judges and juries. I have never quite understood the argument for ignoring one of the most salient and powerful factors in modern American life – race – in any context, but especially in the persuasion business. If we did live in a utopian society in which race were truly irrelevant and played no role in earning trust, forging relationships, and developing worldviews, I would be far more receptive to the appeal that we adopt a color-blind approach to the practice of law. However, as even a cursory review of the latest news headlines or an afternoon listening to talk radio will reveal, we are far from that utopian society. We need look no further than the Black Lives Matter movement and the pervasive divisive rhetoric in national politics that seems to have
become more strident since the 2016 presidential election, not to mention the continuing nationwide controversy over certain African-American athletes’ refusal to stand for the national anthem, to understand that race and its role in shaping our perceptions of reality are alive and well in America. It seems to me that effective advocacy requires a clear-eyed understanding of the world as it truly is, not as we wish it to be.

Having said that, I do need to clarify the nature of the burden I am undertaking in this paper and my anticipated presentation. I am not undertaking the burden to empirically demonstrate that considerations of race and gender in the courtroom fundamentally and unquestionably alter or dictate the outcomes of civil litigation. I also am not undertaking the burden to objectively show that having a minority lawyer in certain cases will automatically result in outcomes radically different than what would have been achieved by a non-minority lawyer. Nor am I setting out to prove that having a female first chair trial lawyer will generate a different result for our clients than what would have been achieved by a male first chair trial lawyer. No, what I am trying to show is far more modest in scope than any such grandiose aspirations. I am contending that we, as lawyers representing corporations and companies in civil litigation, ought to consider what impact, if any, diversity considerations are likely to have upon our cases from the cradle of determining how best to respond to the complaint to the grave of closing argument at trial. I also am contending that we should use our awareness of those considerations in staffing and assignment decisions throughout the life cycle of each case to minimize the distractions from our clients’ stories and maximize the chances that those stories will be heard and received by the judges and juries to whom we present them.

As the title of this paper suggests, I deem the strategic deployment of diversity considerations as an approach that puts the odds in our clients’ favor. As trial lawyers, we spend a tremendous amount of time analyzing how the smallest details can impact our credibility as storytellers and representatives of the company. We go out of our way to wear conservative ties, shirts, and suits (or dresses) so that the jury will not be distracted by our sartorial flair (or lack thereof). We worry about the kind of cars we drive to the courthouse lest jurors see those cars and develop an impression about us that may hinder our effectiveness as the company’s spokespersons at trial. We are careful to hide or forego water bottles at counsel’s table lest we irritate or annoy the jurors who may not have the same opportunity to refresh themselves at a moment’s notice. If we demanded the same empirical proof of the relevance of such details as some do of diversity considerations, I would venture a guess that we would be compelled to jettison such concerns as well. But I am not arguing that trial lawyers should get over our obsession with details in the demanding endeavor of persuasion. Quite to the contrary, I think the kind of considerations I raise above by way of example are worthy of analysis and deliberation, irrespective of how a particular trial team comes down in response to those questions. Those concerns are valid not because we know that they will necessarily impact the outcome of our trials, but because they might affect a particular juror’s reception of our client’s story. That possibility alone is enough to justify a
thorough analysis of any detail that can influence a jury’s willingness to hear what we have to say in defense of our clients.

If such a detail-oriented approach to persuasion is eminently defensible, it should go without saying that the same trial lawyers who worry about attire, cars, and water bottles should also be concerned about how diversity considerations could impact a jury’s openness to our clients’ stories at trial. Race is still a powerful organizing principle in our modern society. Gender still matters in America. We still have conscious and unconscious biases about race and gender and often form initial impressions of others based in part upon such biases. Against that backdrop, it only makes sense to always consider what impact, if any, diversity considerations could have on the efficacy of our efforts to defend our corporate clients in litigation. Doing so is nothing less than putting the odds in our clients’ favor.

In addition to the foregoing, I would suggest that there is another reason why good defense lawyers must factor issues of diversity into their analysis of their cases – those issues matter to many of our clients and opponents. Not terribly long ago, I was having dinner with a client and sharing my thoughts about the strategic use of diversity in civil litigation. After she made it clear that I was preaching to the choir, she went on to say that she deemed it malpractice for any lawyer representing her company to fail to consider issues of diversity in the staffing, development, and trial of civil lawsuits. From my observations and experiences, I can assure you that she is not alone in holding that opinion. If some of our clients think it is malpractice to ignore the role of diversity in litigation, that dynamic alone should be more than enough impetus for us to start taking diversity seriously in the defense of our cases, irrespective of whether we personally believe that diversity is or should be relevant.

Similarly, I know there are plaintiff’s lawyers out there who not only think diversity is a relevant factor in civil litigation, but a critical component of a case’s worth. I recall having a recent discussion with an African-American plaintiff’s lawyer who told me that the value he places on his cases goes down substantially if the corporate defendant is represented by a personable African-American lawyer. He candidly confessed that such defense lawyers “scare him.” Of course, that comment was made in the context of representing African-American plaintiffs in jurisdictions with a venire having a sizeable African-American population. Putting aside for a moment whether that plaintiff’s attorney should feel that way, the fact of the matter is that, for him, diversity drives the value of his cases. If so, how can we not make our clients aware that at least some of our brethren on the other side of the aisle will discount the value of their cases to the extent that we successfully leverage diversity in the defense of our cases? Anecdotes like this one lend credence to my aforementioned client’s belief that it is malpractice not to include diversity considerations in the defense of her company.

A few years ago, my law firm defended a company in a wrongful death trial in a majority-minority jurisdiction that was known to be an extremely dangerous venue for corporate defendants in civil litigation. Based on its appreciation of the demographics of this venue, my firm deployed
one of its African-American lawyers to serve as the face of the company at trial. That lawyer handled opening and closing and took a number of witnesses on cross-examination. The trial ended in a hung jury, a result that even surprised the trial judge, who could not remember the last time that had happened in that venue and had assumed that the plaintiff would ultimately prevail. After word of that result had circulated in the local legal community, I heard that one minority plaintiff’s lawyer responded that the defense bar is starting to “wake up” to what we have been doing all along. Such statements suggest that we are doing our clients a disservice if we continue to bury our heads in the sand when it comes to the question of what role diversity should play in the defense of our cases.

It is no accident that I devoted several pages of this paper to making the case for the use of diversity in defending our corporate clients. My aim is to simply put this subject on everyone’s radar screen and encourage us all to bring as many different voices to the table to discuss diversity and its potential impact on our cases. With the hope that I have at least piqued your interest in the subject, I want to devote the balance of the paper to anecdotes and examples that will illustrate some of the many ways that diversity can be leveraged to put the odds in our clients’ favor. I will confess at the outset that nearly all of the examples I use will focus on racial diversity as they arise out of my personal experience. Nevertheless, similar stories can be told regarding the use of gender in civil litigation. I offer the examples below both to win over the skeptics and to encourage us all to think of better, more effective, and more creative ways to unleash the full potential of a diverse legal team in civil litigation.

I offer one last word of clarification before we plunge into illustrations of diversity at work. When the word “diversity” is used, our minds almost reflexively drift to minorities and women. While I certainly applaud any effort to be more inclusive of groups who have been excluded and marginalized historically, I want to be clear that my concept of diversity means that the voices and perspectives of everyone, including older, white males, are welcome at the table and need to be heard. In fact, it would be the greatest irony if, in the proclaimed pursuit of diversity, we excluded a demographic group that still constitutes the majority of lawyers, general counsel, judges, and jurors in this country. When it comes to diversity and its use in civil litigation, we truly need “all hands on deck.”

II. Leverage the Use of Diversity in Factual Investigation.

When I started my legal career with a law firm, it did not take long for me to see how diversity could be used to the advantage of Corporate America in civil litigation. Upon joining the firm, I was immediately assigned to major toxic tort litigation involving a chemical company and plaintiffs’ allegations that the company had polluted a certain community for decades. The community which housed one of the chemical company’s facilities was very concerned about the discovery that chemicals from the company’s plant had been found in the soil and elsewhere throughout the community. Activists within the affected community had reached out to certain federal governmental agencies and persuaded them to take a harder look at what was going on in
their community. As a result, several public meetings with representatives of those governmental agencies, local professors with expertise in toxicology and related fields, and plaintiffs’ lawyers were scheduled to further discuss what had been found and what to do about it. 

Because the chemical company was defending several civil lawsuits about its alleged contamination of the aforementioned community, it certainly would have been to its advantage to have sent its own representative to these meetings to get a sense for what was being said and the mood of the community. However, the problem with doing so was that any such representative, including the members of the defense teams who had been defending the company in litigation, would be conspicuous and inevitably draw unwanted attention at meetings where the perceived villains were the company and anyone defending it. 

What was the solution to this problem? In a word, me, or someone like me. Although I also had been working on the legal defense of the chemical company when these meetings started to occur, all of my work had been done behind the scenes. I had not attended any hearings, docket calls, depositions, or any other proceedings with plaintiffs’ counsel. None of the plaintiffs’ lawyers or community activists had ever met or seen me. 

More importantly for purposes of this paper, my attendance of the meeting made sense because the community at issue was predominantly African-American. As a young African-American, I was far less likely to draw unwanted attention than any of my white colleagues. Thus, I dressed very casually and attended several of these meetings without incident. I was able to provide the client with detailed reports of what was said and decided during these community meetings. Moreover, as a lawyer on the chemical company’s defense team, I had a better, more informed framework to determine what was relevant for inclusion in my reports to the client. 

There are two takeaways from this anecdote that I would like to highlight. One, it was a group of white men who first recognized the significance of race in this situation and brought the proposal to me for an open and frank discussion about the advantages of having me attend these meetings. As I wrote earlier, the issue of diversity is an issue for us all and everyone should be welcome to discuss how diversity can impact civil litigation. However, these kinds of discussions cannot take place if racial diversity and its implications are treated as a taboo subject, especially among groups of lawyers with differing ethnic backgrounds. We must rise above the discomfort and awkwardness that are so often an inherent part of any such discussions if we want to truly benefit our clients in this area. 

The second takeaway is so obvious that I am embarrassed to highlight it, but I will do so nonetheless (I am reminded of an old friend’s saying that “comprehension of the obvious is a valuable and, too often, rare thing”). If my law firm did not have any African-American lawyers and, in this case, African-American associates, then it would not have been able to offer its client the optimal solution to the question of how to attend these public meetings without drawing undue attention to the company’s representative. You cannot leverage that which you do not possess.
The more we appreciate this reality, the more time and effort we will devote to recruiting, training, developing, and promoting minorities and women in our law firms. In light of the potential role of diversity in persuasion, perceived and real, a firm that has little diversity among its ranks is necessarily handicapped in the quality of services it provides to its clients. As more and more companies begin to appreciate the value of diverse representation, the winners in legal circles will be those firms that have deep and wide benches of diverse legal talent.

III. Leverage the Use of Diversity in Depositions.

Diversity can also be effectively leveraged in the context of taking depositions. I can recall several occasions during my legal career when my legal team had candid and frank discussions about the potential racial dynamics of a deposition and the attorney assigned to take that deposition.

In some of my employment discrimination defense work, I have had more than one plaintiff’s lawyer comment about the rapport I was able to develop with his African-American client during a deposition taken as part of racial discrimination lawsuit. My opinion is that some of that rapport, especially at the outset of the deposition, resulted from the racial background I shared with the deponent. Whether we like this reality or not, it is true that we are often more comfortable with those that we perceive to be like us, especially in new and different scenarios with people whom we have never met. A shared racial background can be one of those factors that can make a previously unknown person more familiar to us and therefore more comfortable to be around than someone similarly situated who does not share that racial background. That is especially true for racial minorities because there is an assumption that a shared racial background equates to a shared cultural and experiential background as well. For example, I assume that nearly all African-Americans have some sympathy for victims of racial discrimination because they, like me, have probably experienced racial discrimination at some point in their lives. While that assumption is not always true and is hopefully becoming less true as we evolve into a more tolerant society, I have found that, in law and elsewhere, that assumption is far more frequently true than it is false.

So how can a shared racial background help in a deposition? Well, it may make the deponent more relaxed and more comfortable in what is admittedly a strange and stressful forum. To the extent the witness is more comfortable, he is more likely to fully reveal what is on his mind and forthrightly answer the deposing attorney’s questions. I believe that dynamic is especially true in employment discrimination cases involving allegations of racial harassment or discrimination because this shared racial background is directly relevant to the heart of the case. See Samantha D. Holmes and Rick R. Fuentes, Diversity in the Courtroom: Navigating the Land of Stereotypes, Claptrap, Myths, and Missed Opportunities, Course Materials for 2008 DRI Diversity for Success Seminar.

Notwithstanding the aforementioned use of diversity, I also have leveraged diversity in depositions in far less obvious and intuitive ways. One of the most interesting depositions I have
ever taken occurred in one of the few cases in which I have represented the plaintiffs. I had the privilege of partnering with the Lawyers’ Committee for Civil Rights Under Law to represent several African-American plaintiffs who alleged that they had been subjected to racial discrimination and harassment at their place of employment. During that case, the plaintiffs had an opportunity to depose a white male supervisor who was responsible for much of the racial harassment my clients sought to redress. He had frequently used racial slurs in the presence of the plaintiffs. The deposition represented my clients’ opportunity to formally document the supervisor’s contributions to the racially hostile work environment to which they had been subjected for years.

I was selected to take this deposition and I must confess that I cannot remember if there was any more thought given to that selection other than the fact that I happened to be handling the lion’s share of the deposition discovery in the case. However, upon arriving at the deposition, it quickly became apparent to me that my racial background might prove to be an asset to my client, as counterintuitive as that conclusion might seem initially.

Although my clients’ allegations about the supervisor’s repeated use of racial slurs were vindicated by the supervisor’s deposition testimony, I realized that his use of such language was motivated not so much by racial hatred or animus, but by a profound ignorance and lack of appreciation for the impropriety of such language in the modern age. As a result, I was able to encourage the supervisor to freely share with me under oath the racial slurs and other derogatory racial comments he routinely used in the workplace. I did so by suppressing any natural outrage and disgust I would have otherwise felt through a controlled use of tone and body language during my questioning. In essence, I encouraged the supervisor to make his case for why such language was not used with any malicious intent and should not have been offensive to his African-American employees. Although I certainly am not a mind reader, I received the impression that the supervisor thought he had found in me a sympathetic African-American who understood what his African-American employees did not. Part of the reason for that impression was how shockingly candid and open the supervisor was about the very language that constituted the heart of the lawsuit against the supervisor’s employer.

Now, am I saying that these exchanges only occurred because the supervisor was questioned by an African-American attorney? Certainly not. I have no empirical data or evidence to prove such a thesis. On the other hand, I am not willing to concede that my race had nothing to do with the success of that deposition. First, I am not sure that all white attorneys would have been as comfortable as I was in drawing out the supervisor’s racially offensive language (as an African-American, I was unburdened by any concerns about what others in the room might have thought about me due to my questions and my use of racially offensive language in those questions), especially in light of the fact that the supervisor’s deposition was being defended by an African-American lawyer. Second, I am convinced that part of the supervisor’s candor resulted from the fact that a black man, one of the individuals most likely to take offense at the racial slurs
the supervisor had used, was listening to his tales of racial jokes and comments without any apparent offense and was asking him to divulge even more jokes and comments of this nature.

However, you do not have to agree with my impressions of the supervisor’s deposition to appreciate the larger takeaway – diversity can make a difference in depositions. Leveraging such potential advantages requires a diverse legal team with a good understanding of the facts, the relevant law, and the social milieu from which the relevant actors arise. Using such advantages also requires a legal team that is able to openly, candidly, and comfortably talk about the nuances of race and gender in their case.

IV. Leverage the Use of Diversity in Settlement.

You will recall that in this paper’s introduction, I shared a vignette that illustrated how some plaintiff’s lawyers use diversity considerations as a factor in valuing their cases. If so, it should not take much imagination to see how diversity can be leveraged in settlement discussions.

In my experiences, it has been the plaintiff’s bar that has been fairly open and obvious about their use of diversity considerations to enhance the value of their cases. I cannot recall all of the times I have had plaintiff’s lawyers explain to me why their cases have a high settlement value simply because of their “venue premium.” More often than not, the so-called venue premium amounts to little more than the observation that the jurisdiction in question is a majority-minority jurisdiction. Of course, undergirding this analysis is the stereotypical assumption that African-Americans are always more likely to side with plaintiffs and award large jury verdicts against corporate defendants in civil litigation. Not only do I know from personal and professional experience that this assumption is wrong, studies have likewise shown that there is little or no correlation between the percentage of African-Americans on a jury and the success rate of plaintiffs in general tort cases (although there may be some correlation in employment discrimination cases). See Samantha D. Holmes and Rick R. Fuentes, Diversity in the Courtroom: Navigating the Land of Stereotypes, Claptrap, Myths, and Missed Opportunities, Course Materials for 2008 DRI Diversity for Success Seminar.

Nevertheless, if some of our opponents believe strongly that majority-minority jurisdictions significantly enhance the value of their cases, the way to effectively address that belief is not to simply ignore it as we stand on the high moral ground of science and data. Rather, we should do so by acknowledging the prevalence of that belief among the plaintiff’s bar and staff our cases in a way that minimizes the perceived advantage of majority-minority jurisdictions to plaintiffs. In other words, the plaintiff’s lawyer who assumes that the majority-minority jurisdiction will be hostile to our corporate clients is banking on his ability to create an “us vs. them” showdown, where the plaintiff and the jury (and sometimes the plaintiff’s lawyer) are “us” and the corporate defendant constitutes “them.” One way to ameliorate that dynamic, to the extent it is true or perceived to be true, is to select good trial lawyers who also happen to share the same
racial background as the plaintiff and the jury. It is much harder to convince a jury, subtly or otherwise, that the corporate defendant is “them,” when it is apparent that the corporation has selected one of “us” to be its spokesperson at trial and, by so doing, has entrusted its livelihood and economic well-being to “us.” So, the approach of seeking to reflect the demographics of the venue in the staffing of your trial team should help take race off the table and refocus everyone’s attention, including that of the plaintiff’s counsel, on the facts and the law of the case. That way, settlement can be discussed in terms that are more readily and easily quantified than this amorphous, unclear, and often untrue “venue premium.”

Furthermore, to the extent that plaintiff’s lawyers evaluate cases as the one I described in the introduction, a diverse litigation team should go a long way toward undercutting any enhancement of the case’s value on the basis of diversity considerations alone. Showcasing that diverse team early in the life of the case – at docket calls, depositions, inspections, etc. – may send a subtle message to plaintiff’s counsel that this case will have to be valued based on something other than the corporate defendant’s perceived diversity disadvantage at trial.

V. Leverage the Use of Diversity in Witness Selection.

The effective trial lawyer will also consider diversity issues in the selection of company, expert, and fact witnesses to testify in deposition discovery and at trial. In lobbying for diversity considerations at this stage of case development, I am not saying that if a case is to be tried in a jurisdiction where the majority of the venire members are of Latino descent, then the company should only select witnesses who are also of Latino descent. That is a simplistic and unthinking approach to diversity in witness selection.

The other danger in such an approach is the real risk that you will be perceived by the jury as engaging in racial pandering and tokenism. To illustrate that point and simultaneously show how leveraging diversity in witness selection can be done right, I will describe a deposition in one of my cases that took place many years ago. The case was another one dealing with allegations that a chemical company had contaminated the properties of residents living near one of the company’s plants. The deponent, whom I and another lawyer were defending, was the plant manager of the facility made the subject of the lawsuit. The impacted community was predominantly African-American. It just so happened that the plant manager being deposed was also African-American.

Evidently, the plaintiffs’ lawyers in this case thought that the shared racial background of the community and the plant manager was too much of a coincidence to have been anything but contrived. As a result, they brought in an African-American lawyer, who had not been very visible in the prosecution of plaintiffs’ case up to that point in time, to take the deposition of the plant manager. It did not take long to realize why the African-American plaintiffs’ lawyer had been handpicked for the job. After some mundane background questions, the African-American
plaintiffs’ lawyer began to both subtly and overtly suggest that the plant manager had been selected for that position, not because he was qualified to so serve, but solely because he was African-American. In other words, this lawyer suggested that the company had selected him for the plant manager position merely to placate the African-American community that was so concerned and outraged by the plant’s alleged chemical contamination of the surrounding residential properties.

If the company had indeed selected a “token” for this position, the plaintiffs’ lawyer’s attack would have been very effective. Moreover, the plaintiffs’ lawyers had shown their own awareness of and sensitivity to diversity considerations by assigning an African-American lawyer to attack another African-American for racial tokenism. It would have been a far more difficult and delicate undertaking for a white lawyer to have launched the same attack on the plant manager.

Fortunately for the company, it had not resorted to racial tokenism in hiring the African-American plant manager. Quite to the contrary, he was a rising star in the company, having proven himself time and time again in previous assignments. He was eminently qualified to serve as plant manager for the facility in question. Moreover, he was extremely well-liked in the neighboring community, as he was an engaging motivational speaker who often spoke at local churches and a prolific author who had written several books and editorial articles on the challenges facing black communities. As a result, plaintiffs’ lawyers’ strategy backfired on them as the African-American plant manager had all the ammunition he needed to become righteously indignant at the suggestion that he was hired based on anything other than his credentials, education, and abilities. The response of our deponent was so brutally effective that I found myself feeling somewhat sorry for the African-American plaintiffs’ lawyer who had willingly walked into that trap (though it did not take me long to recover from those feelings). We now had record evidence of plaintiffs’ counsel attempting to marginalize a superbly qualified African-American authority figure and suggesting that he received his position only because he was black. I could not wait to defend that accusation in front of a jury that would be composed of a sizeable number of African-Americans.

While this anecdote illustrates the right way to leverage diversity in witness selection, it also highlights the dangers of just finding anybody who looks like the jurors to take advantage of diversity considerations. There have been many times when I have discovered that a client did not have any minority witnesses who could credibly and effectively address the areas of testimony needed in a case to be tried in a majority-minority jurisdiction. When we made that discovery, the trial team always rejected any suggestion that we “stretch” or “reach” beyond a minority employee’s expertise or relevance just to satisfy our desire for a more diverse presentation of witnesses. That is not only the right call to make. It is the smart play as well.

Accordingly, my message on this point is that trial lawyers should include diversity considerations in their analysis of who should present certain testimony to advance their corporate clients’ cause. However, in that search, do not ever resort to tokenism or anything that remotely resembles tokenism as such a move can quickly convert a potential strength into a very real
weakness. If the jury senses that the corporate client has engaged in racial pandering to win a case, the result could be far worse than if the company had gone to trial without any minority witnesses.

VI. Leverage the Use of Diversity at Trial.

Nowhere is the strategic use of diversity more important than at trial. It is at trial that the jurors will hear the company’s story and all of the testimony and evidence supporting it. It is at trial that the jurors will decide if they like and trust the company. Those determinations will be made by observing and listening to the witnesses brought to testify on behalf of the company. Those determinations also will be made by observing and listening to the trial lawyers who speak on behalf of the company. With so much riding on the outcome of the trial, it is critical that we select the right spokespersons for our clients at trial.

One of the goals I have for every trial is to eliminate or minimize any distractions from my client’s story. I want the jury to focus on and think about my client’s take on what happened and the testimony and evidence supporting that take. I do not want the jury thinking about extraneous things that do nothing to advance the ball in terms of selling my client’s story. This effort to avoid distractions is one of many reasons to have a diverse trial team.

I recall trying a case in which we had an opportunity to interview the jurors after the verdict, which, I am happy to say, was in favor of my corporate client. In one of these post-verdict interviews, an alternate juror took note of the fact that our client’s trial team had both racial and gender diversity while the plaintiffs’ trial team consisted of several white males. This juror went on to commend the defense team for what he perceived to be the strategic use of diversity in witness assignments, both on direct examination and cross-examination.

I think this anecdote is very telling in light of my above-stated goal to avoid distractions. While this juror may not be representative of all jurors, it is fair to assume that in the increasingly multicultural world in which we live, it is simply strange to see nothing but a bunch of white males do anything performance-related, including trying cases. In other words, the optics of not having racial and gender diversity on our trial teams will increasingly become a distraction from the stories we are attempting to tell on behalf of our clients. We do not want jurors questioning why there are no women or people of color on our trial teams. Rather, we want them thinking about why our clients should prevail in their fights with plaintiffs’ counsel.

I will share a trial experience that will illustrate another way in which diversity can be leveraged at trial. In that trial, the defense team was charged with cross-examining a plaintiff’s treating physician. Our defense trial team included an experienced litigator of Palestinian background. During the trial team’s preparation for the cross-examination of the treating physician, the lawyer of Palestinian descent suggested that she should be the one to cross-examine the treating physician. She made that suggestion because she shared a cultural background with the treating physician and went on to explain that, due to certain norms of that shared cultural background, the treating physician was likely to lose his composure while being forcefully cross-
examined by a woman. The trial team deferred to that lawyer’s suggestion and assigned her the task of cross-examining the treating physician.

It was the right decision to make. As predicted, the treating physician became increasingly agitated and hostile as the female trial lawyer proceeded deeper and deeper into her cross-examination. It was not long before this witness completely fell apart, losing all credibility with the jury (as our authorized post-verdict interviews revealed).

Now, one could rightly raise the question whether the fact that the treating physician was cross-examined by a female lawyer had anything to do with his meltdown on the stand. I can offer no objective evidence to support my belief concerning what happened that day. All I can say is that this witness was visibly uncomfortable and hostile, not just when confronted with fallacies in his testimony, but even when he was being asked the most mundane of background questions. There really was no compelling reason for a seasoned medical professional to become upset by such questions, unless, of course, the female lawyer was correct about her understanding of their shared cultural background.

Irrespective of: (a) whether you think that the female lawyer’s understanding of her culture was correct; (b) whether you believe her cultural explanation had anything to do with the treating physician’s performance on the witness stand; or (c) whether you think it was the right call to leverage that cultural understanding in favor of the client, we all should agree that the perspective brought to the table by the female lawyer who shared a cultural background with this witness was extremely valuable and needed to be heard. Furthermore, the experience highlights the importance of a diverse trial team. Does anyone really believe that this diversity consideration would have been brought out by a trial team that consisted only of white male lawyers? Experiences such as these illustrate just how critical it is to have as much diversity as possible when making decisions on how best to try a case.

VII. Conclusion:

In addressing a topic as sensitive and delicate as the use of diversity in civil litigation, it is probably just as important to clarify what you are not saying as to clarify what you are saying. The takeaway from this paper should not be that: (a) only black lawyers should question black witnesses at trial; (b) only Latino lawyers should question Latino witnesses; or (c) only female lawyers should question female witnesses. There are no black letter rules here. The decision about which lawyers should examine which witnesses should turn on a variety of factors, including the age and experience of the lawyers in question, their familiarity with the subject matter of the witness testimony, an equitable division of labor, and the lawyers’ skill in examination or cross-examination. I am not saying that diversity considerations should be dispositive in witness selection or witness assignments. Rather, they should be a part of the larger calculus by which trial lawyers decide who should do what at trial. For example, there could be many legitimate reasons why a white male trial team member is selected to handle opening or closing instead of a
minority trial team member, even if the case is in a majority-minority jurisdiction. There could be a variety of defensible reasons why a trial team selects a white female, instead of a black male, to be its corporate representative at trial in a majority-minority venue. The important point here is that the discussion should be had in the first place.

The other point to be made is that there are situations where race and gender truly matter in law, as they do in real life. While that may not be ideal in the minds of some, it is an undeniable reality. If so, we really have no choice but to raise and discuss these issues with our clients.

I should also point out that these considerations do not always weigh in favor of pressing the minority or female lawyer into service. There have been cases where I advised the client or my fellow trial team members that it may be detrimental to the client’s cause to allow me to become the face of the company in a certain jurisdiction. That opinion was not an indictment of everyone who resides in those jurisdictions, but a recognition that there are some places where, in the minds of some, it is likely that my presence would be more of a distraction than a benefit. I offered the advice to remove me from the trial team, not as a surrender to the heckler’s veto, but in recognition that the client has the right to be advised of all diversity considerations, whether those considerations result in inclusion or exclusion. Of course, if the client responds that it wants to use my services, notwithstanding the diversity risks of which it is now aware, I will not hesitate to go to war and attempt to overcome the potential distraction. After all, don’t all trial lawyers have an overblown sense of their ability to persuade? However, that is the client’s call to make, not mine.

Finally, to make sure that the trial team is accurately assessing the diversity considerations and to guard against unfair decisions of exclusion in the name of diversity, we need diverse voices in the rooms where these decisions are being made. The last thing we want is a group of older, white men sitting around the table and paternalistically making staffing decisions in the name of diversity or deciding how minority and women jurors are likely to react to our trial themes or a particular line of questioning. No, we need lawyers from different backgrounds to draw upon those backgrounds to give us some insider’s insight into how people from different walks of life might hear the stories we propose to tell. That means that our law firms are going to have to do a better job of recruiting, retaining, training, developing, and promoting minorities and women. If we do so, we will be better equipped to put the odds in our clients’ favor.