

Today's GENERAL COUNSEL

FRESH PERSPECTIVE ON EXPERT SELECTION

By Miriam L. Fisher, Ann Gittleman and Marisa Abernethy

An expert can make or break a company's case and is often a critical component in effective advocacy and implicit storytelling in pre-litigation disputes and at trial. Thus, choosing the right storyteller is of vital strategic importance.

Recently, a law firm with control over a client's multibillion-dollar litigation set out to hire a team of consulting and testifying experts with eight distinct areas of expertise. Not only was the firm looking for the right mix of credibility and know-how but also for professionals who could persuasively help convey the client's story in court.

Having reached out to multiple consulting firms for recommendations, the firm interviewed approximately 40 potential testifying experts. The lead litigator was female. To her dismay, every one of the recommended experts across all specialties

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was a middle-aged (or older) white male. The client's general counsel, whose case was pending before a female judge in a diverse district, pushed back. The general counsel was concerned that, while the recommended experts might have the requisite qualifications, their uniformity was not reflective of the available talent pool, nor were they people the ultimate fact

finders would relate to well.

The experience of being presented with a pool of homogenous expert witnesses is not unique. As in many fields, seasoned litigators will recognize that older white men typically far outnumber younger professionals, women and more ethnically diverse persons as courtroom experts. This is perhaps less true than in past decades — more diversity

is found among experts in such areas as psychiatry, psychology and nursing — but it is still a prevailing phenomenon.

HISTORICAL MALE BIAS

One could explore the host of reasons why expert pools remain mostly homogenous. One simple answer may be that lead litigators still tend to be predominantly male;



and, as strategic decision makers, they may be more likely to identify with and want to use men as experts. Another answer might be that there are simply more experienced men than women, given the history of the various professions from which these experts are drawn.

Nevertheless, if a lawyer's goal is to get the best result possible for the client, it is critical to ensure that the expert is not only the best credentialed available but also able to effectively communicate and connect with the intended audience. This may include an agency, arbitrator, judge or jury — and could also include secondary influencers, such as the judge's clerk and other agency or courtroom personnel.

The old movie trope of the city slicker lawyer's tactics failing to translate to the rural jury has a grain of truth. In a diverse world, the ultimate decision makers in dispute resolution and litigation represent a wide variety of backgrounds. Generally speaking, a decision maker may simply connect better with someone who shares certain of his or her own characteristics (e.g., age, gender, ethnicity, geography, history, and so forth), assuming the expert is otherwise credible, qualified and persuasive. Thus, a younger, female or other minority expert enhances the diversity of the entire legal team, possibly making the presentation of the company's story more relatable to a decision-making audience that is likely to have a similar makeup.

One of an expert's critical contributions is to illuminate the strengths and weaknesses of a case, leading to more effective strategic thinking by the legal team. Expert diversity may lend an edge here as well, as research indicates that there are clear benefits associated with diversity of thought; that is, more diverse teams often produce better, more creative (and more profitable) results. Individuals from different backgrounds think about issues differently. A diversity expert could resonate with the decision makers and bolster the case's strategic development, as well as the quality of the legal team's analysis and presentation.

Thus, for all the reasons general counsel increasingly demand more diverse staffing from their law firms and other professionals, they should make sure that their outside counsel and expert selection consultants provide a more

diverse pool from which to choose. Expert candidates may be drawn from a variety of areas, including academia, industry and consulting. Each of these fields has a diverse population of highly qualified persons to survey for appropriate expertise; and general counsel should push their teams to broaden the usual search for expert candidates.

Many businesses, professional firms and academic institutions have undertaken implicit bias training in recent years, in an effort to make professionals more aware of how subtle but measurable bias enters into their unconscious thinking. These ongoing educational efforts and similar diversity-focused programs should lead to greater opportunities for more diverse experts — in the development and promotion of such experts in their fields, in their ultimate selection to provide expert opinions in legal disputes, and in broader acceptance of their credibility as experts.

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STRATEGIC BENEFITS

Although many factors contribute to an effective expert presentation, a more diverse perspective could provide strategic benefits. In such cases, a non-traditional expert, even one who is slightly less experienced, may still be highly credible and appropriate, providing a better choice for

communicating complex opinions to the particular audience.

While age is frequently associated with wisdom and credibility, issues such as new technology, new software applications, social media, electronic gaming, cyber security and cryptocurrency may present opportunities for a new generation of experts. A woman, for example, might address issues more sensitively and persuasively in cases involving workplace harassment or

discrimination. An expert from outside the United States might more effectively opine on issues of foreign policy, business practices or culture. The point is simple — finding the right expert to communicate opinions in today's world requires a more holistic approach than traditional selection methods.

In any given case, it is impossible to predict precisely how an expert may resonate with the ultimate decision makers. Even highly paid jury consultants sometimes get it wrong. However, legal professionals can enhance their chances of success by considering a variety of persuasive expert voices to effectively communicate their opinions in legal disputes, rather than defaulting to the same old expert search pool. Value is added when the expert enhances the legal team's relatability with the key decision makers and when the expert brings diversity of thought to the strategic effort. Taking a fresh look at how you select your experts may be the difference between winning or losing your next case. ■



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