

Racial Diversity at the Counsel Table

DIVERSITY MAY BE A BUZZWORD, BUT IT IS ALSO A HOT topic in the legal community, as the need to expand opportunities for lawyers of color remains acute. This need is particularly great in high-profile situations such as courtroom litigation.

In a “bet the company” case, the most vital decision may not be which evidence to present, but which lawyer should present it. Being selected as trial counsel is the ultimate expression of trust and confidence in a lawyer’s ability to serve effectively as the client’s representative.

But racial diversity is often overlooked in this process. As long as minority lawyers are not equally embraced in this manner, the legal profession will continue to have a color line when it comes to the most challenging and rewarding cases.

Minority lawyers often hear familiar excuses, such as, “We would be happy to work with all qualified lawyers, but our hiring decisions are largely driven by personal relationships.” The real question is, what drives the creation and maintenance of personal relationships? The responses are often peppered with phrases such as “comfort level” and “referrals from friends and associates.” However, a meaningful analysis requires attorneys to ask if these motivations stem from the unconscious bias and divisions that permeate society in general. Stated differently, when so many lawyers live highly segregated lives in terms of where they reside, worship, and socialize outside the office, are they willing to use their “personal relationships” as the benchmark for how they allocate professional opportunities? Hopefully, the answer is no, and

attorneys will take broader steps to be more inclusive and expand the talent pool in selecting trial counsel.

Another excuse is, “We don’t know where to find diverse trial counsel.” To break through this misguided perception, firms should make sure lawyers of

color attend the “beauty contests” and meetings where people make decisions about the selection of trial counsel and related staffing.

For those who have difficulty finding the right person, several organizations will be happy to assist. Options include consulting with the various legal-diversity organizations such as the California Minority Counsel Program, the Minority Trial Lawyer Committee of the American Bar Association, the Minority Corporate Counsel Association, the National Bar Association, the Hispanic National Bar Association, and the National Asian Pacific American Bar Association. These organizations, and others like them, will gladly

Continued on page 60

PROMOTING TRIAL LAWYERS OF COLOR

Here are a few ways to satisfy in-house counsel’s need to feel comfortable with an attorney’s trial skills, short of seeing the candidate actually try a case.

- **Conduct Mock Trial Exercises.** Many companies find it advantageous to have someone other than current trial counsel play the role of opposing counsel. The mock trial can involve a targeted, select role that does not involve modification of the existing trial team. It’s a great way to get a look at a lawyer’s potential to be the client’s advocate. Short of a full mock trial, think about utilizing a minority lawyer to conduct mock direct or cross-examinations of key witnesses or to present a mock opening statement or closing argument. This type of work is done all the time, as clients evaluate (and rank) trial strategies. An excellent way to observe the skills of a trial lawyer is to ask him or her to perform a variation of the mock trial role by examining the themes and key documents in the case. Then have the lawyer lay out a strategy for defeating the company’s case from opposing counsel’s perspective.
- **Identify Discrete Tasks within the Overall Trial.** The larger the trial, the greater the number of tasks. One way to give clients exposure to a lawyer of color is to identify a discrete yet meaningful task for him or her to perform. Examples include developing and testing trial themes; outlining direct and cross-examinations of certain witnesses; and allocating responsibility for a particular claim or defense in a complex case that has both claims and counterclaims at issue.
- **Increase Participation in Client Presentations.** Corporate clients can gain exposure to trial lawyers of color if those lawyers are invited to conduct in-house continuing legal education or other presentations that demonstrate trial skills. These presentations can be tailored to the client’s unique needs or interests for maximum benefit. Such presentations can also serve as valuable trial-skills training for in-house counsel, who sometimes need to monitor and contribute to the formulation of trial strategies. —MM

help in identifying and enlisting minority trial lawyers.

Networking is one of the best techniques to find diverse trial counsel. Colleagues should be able to refer trial lawyers of color as candidates for lead trial counsel or co-counsel positions. And if colleagues claim they are unable to do so, someone should tell them to try harder. Every acquaintance can be a partner in diversity efforts.

Detractors may say something like, “We must make sure that our pursuit of diversity does not compromise our criteria for selecting counsel.” Believe it or not, in the 21st century some people still believe that greater diversity results in lower standards. If there is any hope for progress in this area, organizations cannot afford to allow people with such distorted views to have any influence over who their advocate will be.

Another common excuse for not hiring a minority advocate is: “We have never seen you in trial and are therefore not comfortable with selecting you for the engagement.” This criterion is rarely applied equally to all trial counsel and is a sure way to perpetuate the status quo and deny clients access to the best talent. Restricting the search to a fraction of the total talent pool destroys a client’s opportunity to retain some truly gifted trial lawyers.

Of course, the effort to retain a diverse trial team reaches far beyond the courtroom. As lawyers know, most cases settle before trial, and it usually takes years to make it to jury selection (or court trial). So if minority lawyers are “saved” for the courtroom, their chances of being retained drop to slim to none. They need to be brought onboard early and remain onboard as the case evolves.

Restricting lawyers of color to narrow practice areas is also a dreadful mistake, which brings up another old saw from attorneys who make staffing decisions: “We could probably use you when we have some discrimination cases going to trial.” That attitude is an insult, and likely to stunt professional growth. Good lawyers have the ability

to try a wide variety of cases. The only way to truly integrate the legal profession is to make sure that African American, Latino, Native American, and Asian American attorneys have opportunities to try cases that do not have racial or ethnic components. The fact that lawyers of color may have certain insights into race-sensitive cases or credibility before juries with certain demographics simply means that they bring an ability to excel in this dimension *as well as* in others. In short, minority lawyers’ versatility should expand rather than contract their universe of opportunity.

To ensure that lawyers of color have meaningful opportunities to compete for trial work, everyone involved in building a trial team must be held accountable. Corporations hiring trial counsel must insist that law firms and others comply with requests to identify, meet with, and utilize trial lawyers of color. Law firms must respond to these requests and actively seek ways to include a diversity of trial lawyers within their firms, on trial teams, and in client presentations for significant engagements.

If a client is truly committed to inclusion and diversity, then the people making the hiring decisions need a variety of resources to gain exposure to lawyers who would not typically receive an opportunity to compete for (let alone win) their trial business. Genuine opportunities to participate in the selection process will inexorably lead to the selection of more lawyers of color as trial counsel.

More and more corporations and law firms claim that diversity is a priority. Trial lawyers of color appreciate the sentiment, but what they really want is to try cases. The best way for a corporate client (or a law firm that serves one) to begin formulating trial strategy is to visit the local jury assembly room on any Monday morning, look around, and then consider: “Who would be the best advocate to convince those prospective jurors of the justness of our cause?” 

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