On the Docket: A Case for Diversity in the Courtroom
By Warrington S. Parker, Khai LeQuang, Krystal Anderson, and Lynda K. Bui

Recent events in our country have caused people of all walks of life to take a closer look at issues of race and diversity. It is the right thing to do.

Yet, when it comes to the courtroom and trials, diversity is not merely the right and just thing to do. If fairness and legal precedent prohibiting discrimination are not motive enough, there is a more practical reason for it: Our clients are better served by diversity in the courtroom.

Diverse Juries Make Better Decisions

Every trial lawyer knows jury composition matters. Jury consultants make a living on their professed ability to identify the "right" juror and the "right" mix of attributes for the jury as a whole.

But since the day this country moved away from all male, white jurors, race and gender have often been considered in deciding whether a juror is "not right." While one can argue that, over time, these attributes have become less decisive, the fact remains that lawyers and consultants (consciously or subconsciously) strike women and persons of color from juries because they are women or persons of color. Indeed, verdicts are still being reversed for this reason. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

Yet, as is so often true when someone makes decisions based on negative assumptions about race or gender, striking persons of color and women from a jury usually does not serve a client. It more often than not works against the client's best interest.

Studies show that diverse juries make better decisions. Diverse juries deliberate longer, discuss a wider range of facts, and make fewer factual errors than non-diverse juries. For example, one study found that the presence of black jurors caused white jurors to engage in more thorough deliberations as opposed to hasty, bias-driven deliberations. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psych. 597 (2006). The study consisted of 29 mock juries who watched a video trial, in which a defendant of color faced charges of sexual assault, and were asked to make a decision. The study showed that panels of white and black jurors deliberated longer, discussed more facts, made fewer mistakes about the facts, made fewer uncorrected inaccurate statements, identified more "missing" evidence, and mentioned racism more frequently while they objected to the topic less frequently. *Id.*; *see also* Joshua Wilkenfeld, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of* Grutter v. Bollinger, 104 Colum. L. Rev. 2291, 2307-08 (2004); *cf. Ballard v. U.S.*, 329 U.S. 187, 193-94 (1946) ("[A] distinct quality is lost if either sex is excluded."); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) ("When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . . .").

Not only do longstanding studies suggest that a diverse jury is important, they demonstrate that the more diverse the jury is, the better. In other words, having a small number of a minority race on a jury may not give you the "diversity effect" you want because small numbers or a number of one can be muted. As the minority presence within a group becomes less marginal, however, minority members became more extroverted and take on more leadership roles within the group. Wilkenfeld, *supra,* 104 Colum. L. Rev. at 2312 (citing Ji Li et al., *The Effects of Proportional Representation on Intragroup Behavior in Mixed-Race Decision-Making Groups,* 30 Small Group Res. 259, 265

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(1999)).

And while this article is less focused on issues of fairness and related societal normative imperatives, it still needs to be mentioned that diversity in the courtroom serves a fundamental societal value. The lack of diversity in juries undermines the legitimacy of the legal system. *E.g.*, Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003). One need look no further than the reactions to the acquittals of the sheriffs who beat Rodney King, the acquittals of various police officers for violence against African Americans, and the June protests over the killing of George Floyd to know this is so.

Diverse Trial Teams Are Better Advocates, Particularly Before Diverse Juries

Studies also show diverse trial teams perform better.

Women, men, black, brown, white, straight and LGBTQ+ lawyers bring unique perspectives and experiences to the courtroom. According to studies, a team consisting of diverse lawyers may take more time to reach consensus, and it is that very effort and process, research shows, that results in a better-prepared, client-responsive team. A diverse team can not only present the case the client wants, it can also anticipate and address the alternative point of view the other side will present. *See* David Rock, Heidi Grant & Jacqui Grey, *Diverse Teams Feel Less Comfortable—and That's Why They Perform Better*, Harv. Bus. Rev., Sept. 22, 2016; Scott Page, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (Princeton Univ. Press rev. ed. 2008).

A diverse team also offers opportunities for pairing counsel and witnesses in ways that are more engaging, tactically advantageous and balanced to the jury. A diverse team provides more flexibility (and ability) to avoid matching a lawyer with a witness whom the lawyer has no business asking any questions of due to subject matter, demeanor, or any of the thousands of other reasons witness/lawyer matchups are carefully considered before and during trial. Karen L. Hirschman & Ann T. Greeley, *Trial Teams and The Power of Diversity*, 35 LITIGATION, no. 3, 2009, at 23.

Where Do We Start?

The first step in fostering diversity in the courtroom is to show up with a diverse trial team. And notwithstanding the arguments above for diversity, this is easier said than done. It requires "allies." An ally is more than just someone who is on board with the cause because it helps others. Allyship comes from the heart as much as the mind. In the words of the Co-Leader of Orrick's Complex Litigation Practice and Co-chair of Diversity & Inclusion, Darren Teshima, an "ally" isn't just someone who wants to help a diverse colleague, it's something you do for yourself: "An ally is a litigator who says, 'I don't want to be part of homogenous teams anymore, so I'm going to use my own power and resources to make sure our teams are more diverse.' It's a client who says, 'I want a diverse trial team not only because they are more likely to win but because it's who we want representing our company.'"

Clients are key allies because they must approve who appears for them in court. But law firms are essential players in this alliance as well. It is the law firm that can suggest who else might represent the client's interest. It is the law firm that can suggest that perhaps the client overlooked a talent that may bring distinctive assets to the particular matter. And it is the law firm that can show diverse lawyers they have a career path that leads to first-chairing trials.

Judges also can be allies and encourage diversity. For example, in a recent case, a judge congratulated the two law firms for having diverse litigation teams. The judge's statement impacted everyone in the courtroom that day—clients, partners, associates, and paralegals. That a judge would take notice is significant as other litigants will strive to please.

Making a Difference

In the end, diversity in all its forms makes a difference at trial. Trial lawyers have every incentive—and we submit, the ethical duty as officers of the court—to advocate for it.

Should race or gender be the sole or defining basis of a decision to keep a person on the jury or hire an attorney? No. But nor should they be disqualifying, which is largely how they have historically been considered. Rather than fear old stereotypes, consider the advantages a diverse viewpoint may offer. Rather than

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turn to the same trial team, consider what a more diverse team of advocates might bring to the table.

Does everyone have an obligation to be an ally? That's an individual choice. The question is what kind of a justice system, what kind of a society, do you want to be part of? If it's different from what we have today, what simple everyday choices can you make, as a trial lawyer, in-house counsel or judge, to advance that change?

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"third-party" and/or "direct" indemnity, a court will apply traditional canons of interpretation in an attempt to discern the parties' intended meaning. Cal. Civ. Code § 2778 (setting forth certain rules "unless a contrary intention appears[.]" A broadly worded indemnity provision that does not expressly limit itself to third-party claims can be interpreted to apply to all claims, including claims between the parties. *Hot Rods, LLC v. Northrop Grumman Systems Corp.* 242 Cal. App. 4th 1166, 1181, 196 Cal. Rptr. 3d 53 (2015) ("[The] parties expressly adopted a broad definition of 'claim' and 'person' that encompasses 'any alleged liabilities,' and covers both first and third party claims."); *see also Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010, 1027, 124 Cal. Rptr. 3d 105, 116 (2011) ("This language does not limit indemnification to third party claims and extends indemnification to 'any and all' damages incurred by the [parties] . . . ."—concluding that "'Indemnify' Includes Direct Claims Between the Parties").

II. Indemnity May Go So Far as Exculpation

In rather extreme circumstances, an indemnity clause can even act as an exculpatory clause. For instance, Party A (the Indemnitor) might be obligated to indemnify Party B (the Indemnitee) as to Party B's own harms inflicted upon Party A. Party A sues Party B for breach of contract or in tort. But Party A also owes a broad indemnification obligation to Party B. Accordingly, any recovery against Party B in favor of Party A would trigger Party A's indemnification obligation and functionally absolve Party B of any liability. This result is counterintuitive. But courts will enforce agreements that way, provided the parties clearly "go out of their way and say 'we really, really mean it,' . . . ." *City of Bell v. Superior Court*, 220 Cal. App. 4th 236, 250, 163 Cal. Rptr. 3d 90 (2013) ("Cases which have interpreted an indemnification agreement to act as an exculpatory clause between the parties to the agreement have involved agreements which contain language clearly providing that the indemnification clause applied to such claims.".) Moreover, "[a]n indemnity agreement may provide for indemnification against an indemnitee's own negligence, but such an agreement must be clear and explicit and is strictly construed against the indemnitee." *Rooz v. Kimmel*, 55 Cal. App. 4th 573, 583, 64 Cal. Rptr. 2d 177 (1997). Exculpation

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