

# Jack or Jackie?

## The Relationship of Gender and Expert Witness Testimony

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“Gender bias in the legal profession isn’t new. ... But nowhere is it more pronounced than among the ranks of female expert witnesses who must surmount multiple layers of ingrained stereotypes every day to do their jobs,” reports Bloomberg BNA as recently as August 2017.<sup>1</sup> According to data compiled by The Expert Institute in 2014 (but which remains accurate today), 83 percent of expert witnesses retained by attorneys are



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male and, on average, they are paid 60 percent more than their female counterparts for litigation-related services.<sup>2</sup> In the medical field, the income disparity climbs to 93 percent.<sup>3</sup>

Why is this? Are men intrinsically better at being experts? Doubtful. But that isn't really the issue. It is all about perception. Verdicts aren't based on absolute truths. They are derived from what jurors *perceive* to be true. Jurors view evidence through their individual filters, molded by life experiences. As long as gender biases are part of our culture, they will permeate jurors' life experiences, sometimes resulting in conscious or even unconscious bias.

Undoubtedly there are practitioners who will argue that in their experience, they have not seen a difference based on gender. However, this anecdotal evaluation may not be very reliable. Experimental studies enable researchers to control variables and conditions. Outside of an experimental model, there are simply too many variables to either rule in or out any causal relationships.

Over the past two decades, there have been many studies regarding gender and expert witnesses, often with conflicting results. As with most aspects of trial, there are no bright lines or clear-cut answers. Nevertheless, the research provides some interesting results to consider and evaluate within the specific case context.

## How Jurors Process Expert Witness Testimony

Social psychological research identifies two models by which jurors perceive experts and their messages. Central route processing occurs when the content of the expert's argument persuades the juror. The light bulb goes on, and the juror "gets it." However, when jurors have trouble understanding the evidence or the argument, they rely on extrinsic factors to evaluate the expert's testimony. Through this peripheral route, characteristics of the expert such as gender, likability and knowledge provide decisional shortcuts enabling confused or lower-cognitive jurors to form an opinion.<sup>4</sup>

### Case Complexity

Studies show that gender as a heuristic or peripheral cue plays a role in juror perceptions of expert testimony, particularly in more complicated cases.<sup>5</sup> In a 2005 study, researchers asked participants to award damages in an

antitrust price-fixing case. Under high-complexity conditions where the jurors could not systematically process the testimony, mock jurors awarded higher damages when the expert was male. The jurors also rated the impact of the price-fixing arrangement significantly greater when the expert was male (Schuller, Terry, & McKimmie, 2005).<sup>6</sup> However, under low-complexity conditions, they rated the impact of the price-fixing arrangement as greater when a female expert presented the evidence. In addition, although falling short of statistical significance, under the low-complexity model jurors tended to award higher damages when the female expert testified.<sup>7</sup>

Using an empirically developed Witness Credibility Model, recent studies evaluated the impact of additional peripheral cues on the persuasiveness of expert witness testimony. When testing the likability of the expert, the results indicated, not surprisingly, that jurors were more persuaded by experts whom they liked. Interestingly, this effect was magnified when the expert witness was a woman.<sup>8</sup>

They also examined the impact of knowledge on expert witness credibility. Jurors found both male and female experts more persuasive when they perceived them as highly knowledgeable. However, only male experts could still persuade even if jurors perceived them as mildly knowledgeable. Women experts needed to exhibit high knowledge in order to persuade (Neal et al., 2012).<sup>9</sup> This suggests that the impact of expert gender may be more prominent in highly complex cases.

### Social Role Theory

These results also relate to juror expectations about appropriate gender roles. Tess Neal, an Assistant Professor of Psychology at Arizona State University, has published more than a dozen peer-reviewed articles on expert witnesses and jurors. She explains that to persuade jurors, "Women experts must come across as both competent and knowledgeable (i.e., upholding their occupational role as an expert witness), but also warm and likeable (i.e., upholding their gender role)." Male experts must also:

come across as competent and knowledgeable ..., but there is no social role requirement in our culture that expects men to be particularly warm or likeable,

and thus men expert witnesses who are competent but unlikeable can be just as persuasive as men who are more likable. The same is not true for women expert witnesses.<sup>10</sup>

Generally, jurors expect males in the courtroom to be more aggressive, direct, loud and dominant, and females to be more patient, polite, controlled, and compromising. However, it becomes more complicated when a woman takes on the traditionally male role of expert witness. Women experts face a dilemma that "stems from a conflict between the stereotypes associated with women—warmth, caring, sensitivity—and the more aggressive, competitive, agentic stereotypes associated with the masculine role they occupy when they adopt the expert witness role (Eagly, 1987, Eagly & Koenig, 2008)".<sup>11</sup> Essentially, there are two simultaneous sets of juror expectations that female experts must consider relating to their communication style. Because of this unique duality, generalized research regarding gender, communication and conflict may not always translate well into the expert witness arena.

Little research has been done specifically on expert witness gender and cross-examination. However, one study focused on intrusive questioning, such as, "Have you ever been raped?" or "Are you sexually attracted to the defendant?" It found that jurors reacted favorably to both male and female experts who responded assertively, even pointing out the inappropriateness of such questioning. Thus, regardless of gender, when facing intrusive questions, experts should not be defensive or passive, but appropriately assertive in their response (Larson, 2008)<sup>12</sup>

### Gender Congruency and Gender-Role Stereotyping

The subject matter of the case also can be relevant when analyzing the impact expert witness gender might have on the jury. Unfortunately, gender-role stereotypes are still prevalent in our culture.<sup>13</sup> When men or women enter roles that are stereotypically mismatched to their gender, prejudice may result even if the person is viewed favorably (Neal, 2014).<sup>14</sup>



According to research, female experts may outperform their male counterparts when the subject matter aligns with female-oriented societal stereotypes, such as battered woman syndrome (Schuller & Cripps, 1998), child abuse (Swenson, Nash, & Roos, 1984), and cosmetic sales (McKimmie, Newton, Terry, & Schuller, 2004; Schuller et al., 1998). On the flip side, male experts frequently test as more persuasive than women in cases involving “masculine” fields, such as construction (Schuller, Terry, & McKimmie, 2001).<sup>15</sup> These studies are relatively old in light of advances women are making in male-dominated fields, and the crossover of men into more traditionally female roles. A fresh look at gender congruency and juror expectation might reflect more progressive attitudes.

Because these results are based on cultural stereotypes, as our ideas about male, female and gender-neutral professions evolve, there should be a corresponding shift in juror expectations such that one day, gender congruency may be irrelevant.

### Gender of Juror

Few studies assess how juror gender in combination with expert gender affects decision making. Moreover, it is unlikely that anecdotal evidence, via post-trial interviews, would provide true causal effect. Biases that may be developed culturally from childhood can influence jurors’ actions, beliefs and opinions subconsciously. Jurors might attribute such opinions to a “gut feeling,” never even recognizing a hidden bias.

Research regarding the relationship between juror gender and attorney gender and presentation style might translate into the expert witness arena. In a 1996 study, researchers determined that male jurors were influenced by attorney presentation style, favoring an aggressive attorney to a passive one. Female jurors did not change their opinions based on presentation styles, suggesting that they were persuaded more by trial evidence (Hahn & Clayton, 1996).<sup>16</sup>

### Minimizing Gender Influence/Bias

Although research shows that the gender of an expert witnesses can affect juror perceptions of expert testimony, Professor Neal

maintains that in general, the weight of the evidence still matters the most to jurors. In close cases, however, expert gender can make the difference.<sup>17</sup> So, how can we use the data to create productive pretrial and trial techniques?

### Witness Preparation

Techniques for expert witness preparation in general is a topic in and of itself. But here are suggestions designed to specifically combat gender inequality issues.

- Make sure your expert can effectively teach jurors. Help them connect their research and evidence to the case facts. This will help jurors focus on the actual evidence and argument rather than peripheral cues. Because jurors appreciate experts who educate, this will also make the expert more likable, a particularly important characteristic for female experts. Finally, by assuming a role of teacher, which is traditionally associated with women, it can help counterbalance gender incongruity issues.
- Female experts in particular should use a more conversational tone and avoid overly technical terms. Researchers also recommend using the name of the defendant or plaintiff rather than referring to them generically and using inclusive statements, i.e., “we” or “us” when discussing members of the scientific community.<sup>18</sup>
- To increase likability, female experts should appear pleasant, warm, relaxed yet professional, and smile when appropriate. They should demonstrate some feminine traits rather than adopting masculine characteristics.<sup>19</sup>
- Portray competence and knowledge. Again, particularly for women, don’t underestimate the importance of sharing details regarding background information that establishes the expert’s professional experiences and expertise.
- Prepare female and male experts to respond assertively to intrusive questions on cross-examination.<sup>20</sup>

### Jury Selection

There are no inherent differences between male and female expert testimony. It all falls back to how jurors perceive the testimony. Attorneys with a female expert testifying in

a traditionally male field should look for jurors who would be more receptive based on their own life experiences. Identify people who have had favorable exposure to women in male-oriented roles. More important, identify those who may have strict gender-stereotyping attitudes or who have had negative experiences with women in male fields. Take full advantage of attorney-conducted voir dire to explore these issues and ask follow-up “how” and “why” questions of individual jurors. Use supplemental jury questionnaires if possible. And most important, recognize that despite what they say, it is very unlikely that jurors will be able to set aside their biases.

### Helping Jurors Combat Implicit Biases

Rarely are there enough peremptory strikes to excuse all jurors who might be biased but are not excused for cause because they assure the judge that they can be fair. So, how do we make the best of it? Some judges and scholars suggest that explicit instructions can help to reduce implicit bias.<sup>21</sup> Mark Bennett, Senior U.S. District Judge for the Northern District of Iowa, asks the venire to pledge the following: “I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.” Once the jury is empaneled, he instructs:

Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense.<sup>22</sup>

The empirical data on the effects of such instruction are mixed.<sup>23</sup> Some see it as counterproductive, since people don’t like to be told



they are prejudiced.”<sup>24</sup>

There are also concerns that in attempting to adjust for a bias, jurors may actually overcompensate (Wegener, Kerr, Fleming, & Petty, 2000).<sup>25</sup> Hopefully further research will clarify the effects.

Hollywood has grabbed on to the shocking impact felt when jurors recognize their own biases. Mathew McConaughey stunned everyone in *A Time to Kill* when he asked the jury to close their eyes and visualize the brutal rape and beating of a young black girl. Voice quivering, he asked, “Can you see her? I want you to picture that little girl. [dramatic pause] Now imagine she is white.”

In an episode of the TV show *Bull*, the defense took a similar approach in a case involving a female pilot and gender bias. He showed the jury pictures of a boy and two girls being bullied, adding that one of the kids stood up to the bully and defended the others. He then asked the jury what color shirt the brave child was wearing. The jury erroneously assumed it was the boy, prompt-

ing a dramatic moment of self-reflection.

Would such an approach be as effective in real life? Perhaps. But maybe the bigger takeaway from such portrayals is that beyond the TV juries, millions of viewers at home, forced to check their own biases, may ever so slightly adjust their own filters when it’s their turn in the jury box.

### Beware of Oversimplifying

Supreme Court Judge Sonia Sotomayor has said, “Whether born from experience or inherent physiological or cultural differences ... our gender and national origins may and will make a difference in our judging.” Jurors instinctively and unwittingly use their personal experiences in life to make judgments and assess credibility. In fact, our jury instructions require them to “consider all of the evidence in light of reason, common sense, and experience.”<sup>26</sup> Heuristic factors such as gender, ethnicity, age, race, and appearance can shape jurors’ preconceived notions and expectations resulting in biases.

Combining these elements with more substantive considerations such as knowledge and experience makes selecting an expert witness very complex.

It can be particularly challenging as research on these issues is ever evolving. For example, a 2017 study suggests that in some cases the “right look” may be more impactful on jurors than gender, age or ethnicity.<sup>27</sup> Jurors reacted most favorably to expert witnesses, regardless of gender, who looked like the stereotypical image of a friendly but slightly nerdy “good scientist,” similar to a favorite high school physics teacher, or cast member of *The Big Bang Theory*.<sup>28</sup>

Even focusing on the one aspect of gender, there are so many factors to consider. The type of case, complexity of the testimony, the jurors’ experiences, the expert’s experience, and personal characteristics of the expert all play a part. Determining the right expert for your case cannot occur in a vacuum. It is a dynamic element that functions interactively within the context of the litigation. **AZ**

## endnotes

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14. *Id.*
15. *Id.* at 5; see *supra* note 5 at 1-2.
16. See *supra* note 5 at 4.
17. See *supra* note 1.
18. See *supra* note 11 at 13-14.
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