

Gender Bias (or Not): Advice for Appellate Advocates

By Hope Viner Samborn

As Elena Kagan took her seat on the U.S. Supreme Court, marking the first time that three women have sat on the high court at the same time, many legal observers heralded her arrival as the catalyst needed to reshape that bench and state appellate courts into more welcoming territory for female lawyers.

However, a shift away from judicial gender-biased behavior appears already to have taken hold in many state appellate courts. In these courts, women and men are treated equally, according to many well-respected, long-time judges and advocates. And the advocacy styles of both sexes seem to mirror one another rather than differ from each other.

Georgia Supreme Court Justice Leah Ward Sears, who was the first African American woman to serve as a chief justice in the United States. “It is not rare to see women in court anymore. It is not rare to see women judges on the court,” adds Sears, who was considered a contender for the Supreme Court post Kagan filled.

Stats in the States

In 48 states, women sit on their state’s highest court, according to statistics compiled by the National Center for State Courts in Williamsburg, Virginia. Women hold at least 40 percent of the seats on high courts in 23 states. In three of these states, women comprise a majority of the justices. Women

serve as the chief justice in 20 states. And every state has had a female high court justice.

Despite these gains, instances of gender bias in the courts were reported in a recent American Bar Association (ABA) study, *Diversity in the Legal Profession: The Next Steps*, released in April 2010 by the ABA Presidential Commission on Diversity. The report, however, does not specify the courts where the gender bias occurred.

In contrast, one state study indicated a lack of gender-biased treatment of lawyers by judges. The study, *Survey on Perceptions of Race and Gender in the Courts*, published by the New Jersey Supreme Court Committee on Women in the Courts in July 2009, considered 851 lawyer responses to

a Web-based survey.

Seventy-two percent of the respondents indicated they had not perceived a judge treat a lawyer “advantageously” because of race or gender. However, responses varied by gender and race. While 85 percent of the male respondents gave that response, only 65 percent of the women answered similarly. White respondents were more likely than those of color to indicate they did not perceive judges treating lawyers beneficially because of their race or gender.

A higher percentage of respondents—81 percent—indicated they had not perceived an incident in which a judge treated a lawyer adversely because of race or gender. Again, race and gender factored into the answers. Of the respondents, 94 percent of the men chose that response, compared with 73 percent of the women and 66 percent of the respondents of color.

One reason that gender bias may be eroding in the state appellate courts is that more and more women are specializing in appellate advocacy, according to Mary Vasaly, a partner with Maslon Edelman Borman & Brand, LLP in Minneapolis, whose 27-year practice has focused on appellate work as well as complex commercial and probate and trust litigation.

“It is attractive for women to practice appellate law in part because of the schedule being very predictable. You are not going to get a motion suddenly before your argument,” according to Vasaly, which makes this practice appealing to women and men with families. “When your children are very young, it can be very good.”

One recent study indicated that a lawyer’s gender may influence how the U.S. Supreme Court decides a case. The study, *Have We Come a Long Way, Baby? The Influence of Attorney Gender on Supreme Court Decision Making*, published in *Politics & Gender* (Cambridge University Press, May 2010), concludes that “the influence of gender is less a function of gender stereotypes, and more a result of women attorneys constructing arguments with a different voice.”

Despite this study, Vasaly and other appellate lawyers and judges say women and men craft and present their arguments similarly. Appellate practice is based largely on brief writing. “It is pretty uniform,” she says. “The big debates are over footnotes. I don’t think there is a male way to write or a female way to write.”

Vasaly adds that there is a lot less variation in oral argument style partly because of the type of lawyers who are attracted to appellate practice. “You tend to be more introverted and more interested in the [substance of the] argument,” she notes.

Tips for Oral Argument

Sears and other appellate judges and advocates offer tips for both men and women practicing in the appellate courts, but one pointer is aimed a little more squarely at women: Speak

up. “I got annoyed as a woman with women who would not speak up,” Sears says. “It is not really a gender thing. Some men did that as well.”

Some women have naturally softer or higher pitched voices than men, and they need to speak louder, says California Supreme Court Associate Justice Kathryn Mickle Werdegarr, who has been on the high court bench for 16 years.

Prepare an oral argument outline, make a list of questions you might be asked—especially the hardest ones, and write out the answers.

Voice quality is also an issue for both sexes. “Some people have screechy voices. It is unpleasant. It distracts you,” Werdegarr says. She recommends that these individuals utilize a voice coach.

Knowing the facts and the law and presenting both in easily understood terms, even with voice issues, is the key to a good oral argument, Sears says.

“Judges are very smart people, but they are not specialists in your area,” says Sears, now a partner focused on appellate advocacy with Schiff Hardin LLP in Atlanta. “Talk to judges as you would your parents—as if your parents are very, very smart college professors, but they are not experts in contracts or torts.”

Another pointer is always to engage in an oral argument if given the opportunity, and do not read from the brief to the court. Instead, find a hook. “The very best lawyers will find the underlying justice in everything,” Sears says.

“Make an impression,” the former Georgia justice advises. One way to do this is to create an interesting exhibit such as a pie chart or visual aid. “It is a sound bite age; you should take advantage of it.” Create something in the judge’s mind so it will be remembered easily, she adds.

Make a point and move on. “You don’t have to circle back around the bar five times,” Sears cautions. And don’t throw in the kitchen sink, Werdegarr notes. “It takes away from your argument,” she says.

“Never mislead the court about the record or facts,” Werdegarr advises. “Once you do, [judges] don’t pay attention to what you are saying about other points.”

Thorough Preparation, Careful Listening

The focus of oral argument should be the law and public policy, never the facts of a case. “The facts have nothing to do with the argument,” says Judge Lynne A. Battaglia, a 10-year veteran of the Maryland Court of Appeals, the state’s high court. “We are not the people you are trying to get a sympathetic reaction from. What you really want to do is convince us on the efficacy of your legal argument.”

To ensure that you cover the important points, prepare an outline, Vasaly recommends. Be prepared for questions and hypotheticals. Listen to a judge’s question. Do not interrupt, and answer a question when it is asked. Do not defer the answer.

“The question will give you a lot of information. It will tell you what the judge really cares about,” Sears says. “You need to answer the judge’s concerns.” About which Werdegarr adds, “Don’t say you will answer that later. If you don’t know an answer, offer to brief it.”

Make a list of the questions you expect and the answers. “I write out the hardest questions I might be asked and write out the answers” Vasaly says. “You can think of 80 percent of the questions you will be asked. Then

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Focus on Diversity

After a distinguished career as a litigator at Howrey LLP, an arbitrator, and a trial advocacy instructor, Karen Lockwood of Washington, D.C.—who is also a member of the *Perspectives* editorial board—says she became a diversity consultant “because I was running to something, not running from something.” As a bar leader, she discussed strategies to increase diversity and saw that it resonated with people. “They said things like, ‘I never thought of that before,’” she says.

Lockwood realized she wanted to do more insightful work in diversity that would require immersing herself in diversity data and business literature. She left practice and in May 2010 she founded The Lockwood Group LLC, in Camden, New Jersey, which she hopes will become a business large enough “to leave a lasting name in this field.”

“Undoubtedly, my background gives me more empathy and trust” than that of the typical consulting practice, Lockwood says. “I understand the challenges of law firms like I understand how my blood flows.” Typically she is called in to consult on developing women and minority lawyers to become more effective rainmakers. Her approach is to convene a workshop in which lawyers at all practice levels explore how to create rainmaking teams and share expertise on how to build a book of business.

“I’m always strategizing about attracting clients and constantly rethinking services,” Lockwood says, noting that her business now includes strategic and group coaching. She scoffs at the suggestion that she’s retired from the law after 31 years of practice. “I’m still in the law. I am working with it and presenting it all the time.”

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and you do need to speak up to be heard,” she says. “If a woman is concerned about being too loud or too shrill, they might want to try it out.”

Competent and well-prepared lawyers will consider the image they want to project before a jury. “The goal is not necessarily to be likeable,” Wald says. “But you need to be aware that these [perceptions] happen so at least you can make a conscious decision and know that it might have that effect.”

“It usually boils down to competence and ability,” Ellis says. “As long as you’re good at your job, you know your material—that’s what juries will ultimately focus on. But you don’t want them to work to get there by running contrary to expectations.”

The goal, Shapiro says, is “calling attention to your arguments instead of you.”

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those answers will spring to mind.”

Women should not wear clothing that is too low cut or see-through, and men should not wear distracting ties. But women do not need to dress in conservative, button-down suits.

“Sometimes you can see what you don’t want to see,” Battaglia says, especially because judges often sit physically higher than the advocates. “I certainly wouldn’t want to call attention to my body when I was trying to get a legal point across.” Werdegar agrees. “Attire should be something we don’t even notice,” she says.

... And a Few Key “Don’ts”

Be careful not to offend the judges. During one argument, a judge questioned a lawyer, and the lawyer replied directly to the judge: “With all due respect to the court, you are reading XYZ case all wrong,” Battaglia says. “It is one of the worst things to do before an appellate judge. He didn’t win. Why be offensive to the people who are going to be deciding the case? There is a diplomatic way of differing.”

To prepare, Battaglia recommends that lawyers conduct a mock argument before other people—even family members. “When you hear some of the things you say about cases, it is so

much more graphic,” she points out.

Don’t attack your opponents personally. “I don’t find it very effective when people who are arguing in an appellate court or trial court take on the other side directly rather than take on a point legally,” says Battaglia, who heads the Maryland Court Commission on Professionalism. For example, one lawyer characterized another’s argument as “disingenuous.” She says this approach just doesn’t work.

Watch the theatrics because you are arguing to a judge, not a jury, Werdegar advises. Several judges caution appellate advocates to be careful not to point at the judges or walk from the podium toward the bench.

Do not use legal jargon or an alphabet soup of initials and abbreviations that are not extremely well known. “If we don’t understand you, you are going to lose,” Sears says.

But also be careful to stay away from overused colloquialisms and clichés. One catch phrase Battaglia says lawyers use but must avoid in oral argument is “to be perfectly candid”—as if they weren’t being candid before.”

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