

First Chairs at Trial More Women Need Seats at the Table

*A Research Report on the Participation of Women
Lawyers as Lead Counsel and Trial Counsel in Litigation*

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A Note from the Authors

Achieving greater gender diversity in the legal profession in general, and in lead trial roles in particular, has been an incremental, evolutionary process that we have witnessed firsthand ever since we graduated from law school. Bobbi became a lawyer in 1975, when women comprised only 20% of law students. Just ten years later, when Stephanie finished law school, that figure had doubled to 40%, and women were moving into the associate ranks of law firms at almost the same rate as men.

As young lawyers, we anticipated that many women would achieve successful legal careers, becoming partners, practice group leaders, and lead counsel on major matters in litigation and in corporate deals. We thought—along with many others—that the well-stocked pipeline of women lawyers beginning their careers would surely result in a substantial pool of women at the top of their profession.

We now know that relying on an entry-level pipeline to drive gender diversity is not enough. While women lawyers have been entering the profession in large numbers for three decades, they have not advanced at nearly the same rate as men. And the gender gap is larger with each step up the ladder, as shown by such studies as the NAWL Annual Surveys of law firms, the annual survey of *Fortune* 1000 chief legal officers conducted by the Minority Corporate Counsel Association, and NALP annual data about law firm associates and partners.

Our own experiences and observations as we progressed in our litigation careers have driven home the

day-to-day meaning of these statistics. We have each practiced in national firms as associates and partners and also in boutique firms with a mixture of women and men at senior levels. We have appeared in hundreds of cases and in dozens of courtrooms across the country. In all of those matters and jurisdictions, we have too often found ourselves to be the only woman (or one of very few) to appear as trial counsel or lead counsel.

Some may ask, why does it matter if relatively few women are in lead roles? We believe that one could just as well ask, why does it matter if there is a small or large pool of talent in the legal profession? Women lawyers make up at least 36% of the legal profession. To the extent that women are hampered in obtaining lead roles, not only do their own careers suffer, so too does the profession, as there is less diversity of thinking, less effectiveness in front of a broad range of judges and jurors, and less creative energy brought to bear on client matters.

No one seriously contends that women have less ability than men. Instead, commentators point to myriad social and structural factors to explain the slow progress of women lawyers. These include, among others, the impact of children and other family responsibilities on women's careers; bias, whether implicit or explicit; male-centered social norms and expectations about how to progress; outdated law firm cultures, policies, and structures that hinder the development of talent from diverse lawyers; the short-term busi-

ness focus of many firms; and social norms among men versus women with respect to rainmaking and client development. It is hard to know the relative impact of these factors in everyday practice, in part because the legal profession has virtually no systematic data about who receives first-line responsibility in major litigation and major deals—and how men and women come to play those roles.

First Chairs at Trial: More Women Need Seats at the Table is a first-of-its-kind empirical study of the participation of women and men as lead counsel and trial attorneys in civil and criminal litigation. Our goal was to understand the parameters of the gender gap in the ranks of lead trial lawyers, so that we in the legal profession will know how and where to seek changes. Using a random sample of all cases filed in 2013 in the United States District Court for the Northern District of Illinois, this report provides data concerning the level of participation by men and women in civil and criminal litigation and identifies characteristics of cases, law firms, and clients that impact the extent to which men and women serve in lead counsel roles.

As revealed in this study, women are consistently underrepresented in lead counsel positions and in the role of trial attorney for all but a few types of cases. In civil cases, men are three times more likely than

women to appear as lead counsel and to appear as trial attorneys. That substantial gender gap is a marked departure from what we expected based on the distribution of men and women appearing generally in the federal cases we examined (a roughly 2 to 1 ratio) and the distribution of men and women in the legal profession generally (again, a roughly 2 to 1 ratio). We found that type of case, nature of the parties, and type of legal employer affect gender disparities. Criminal cases also showed a pattern based on gender. Men are nearly four times more likely than women to appear as trial attorneys. Type of client makes a difference, as the majority of male lead counsel (66%) in criminal cases appeared for defendants, while the majority of women lead counsel (69%) appeared for the government.

In making recommendations for closing the gap, we set forth a number of best practices and strategies that can be implemented by law schools, law firms, courts, clients, and women lawyers themselves to increase the ranks of women lead counsel. We encourage others to use this study as a research template for examining the representation of women in leadership roles in litigation in other jurisdictions. It is time for more women to find their seats at the table as first chairs at trial—and this report is our contribution toward achieving that goal.



Stephanie A. Scharf



Roberta D. Liebenberg

Thank You

For decades, women and men have graduated from law school in roughly equal numbers. Yet, women have not maintained parity with their male counterparts as they progress in their careers. Stephanie Scharf and Roberta (“Bobbi”) Liebenberg have witnessed this phenomenon firsthand as trial lawyers. On far too many occasions, they often found themselves “the only woman in the room” when they appeared in court as lead counsel. Indeed, their experiences served as the impetus to determine if what they were seeing was the exception or the rule . . . and why.

We were excited when they approached us with their idea for this study because we recognized immediately the importance of such empirical research and

the broader application of the data collection process to other courts throughout the country. The result is *First Chairs at Trial: More Women Need Seats at the Table*, a joint project of the American Bar Foundation and the American Bar Association Commission on Women in the Profession.

Our thanks to Stephanie and Bobbi for their tireless efforts in spearheading the research and crafting a compelling final report. In *First Chairs at Trial*, they have made the case and offered strategies for increasing the number of women as lead trial counsel. They have given clients, law firms, courts, law schools, and women litigators the additional steps needed to close this gender gap.



Robert L. Nelson
Director and MacCrate
Research Chair,
American Bar
Foundation



Michele Coleman Mayes
Chair,
American Bar Association
Commission on Women
in the Profession

FIRST CHAIRS AT TRIAL

More Women Need Seats at the Table

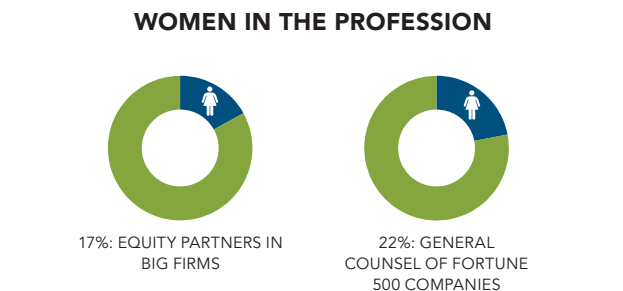
A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation

STEPHANIE A. SCHARF AND ROBERTA D. LIEBENBERG¹

This report and the research underlying it were inspired by our everyday experiences as trial lawyers. We have represented clients in lead roles in many different matters and in many federal and state court jurisdictions. Yet, far too often, when we enter a courtroom filled with lawyers on a range of cases, each of us is either the only woman lead counsel or, at best, one of only a few women taking the lead in court or in major parts of litigation.

Women have been attending law school and entering the legal profession in substantial numbers for the past 30 years.² When we began practicing law, we assumed, along with many others, that as the number of women lawyers increased, so too would the number of women in leadership roles. But women have not advanced into the highest levels of private practice or of corporate law departments at anywhere near the same rate as men. Today, for example, only 17% of equity partners in big firms and 22% of general counsel in the *Fortune* 500 are women.³

Beyond some basic data about job categories at senior levels, the legal profession has almost no systematic data about men and women in their everyday practice, including whether and how they obtain the necessary skills and experience to advance into lead roles. The NAWL Annual Surveys have filled some



data gaps by providing a longitudinal view of the retention and advancement of women lawyers in big firm practice.⁴ But we are not aware of any study that has systematically examined, based on representative data, the specific roles that women and men play on client matters, such as whether women are equally likely as men to be lead trial lawyer or lead deal lawyer.

This study is the first of its kind to provide an empirical snapshot of the participation of women and men as lead counsel and trial attorneys in civil and criminal litigation. In addition, the study examines various objective factors that may help explain why women occupy leadership positions in certain types of cases for certain types of clients. It is our hope that this study will lead to the development and implementation of specific policies and best practices to enhance the opportunities for women to take the lead

in the courtroom and be involved in the critical phases of cases.

Bearing those goals in mind, and with a focus on using readily available empirical data with the expectation that the research can be replicated in various jurisdictions and over time, we aimed to:

- a. obtain benchmark statistics about the role of women in litigation;
- b. identify characteristics of cases, law firms, and clients that may affect the roles played by women and men in litigation;
- c. provide insights into what firms, law schools, clients, judges, and individual lawyers can do to enhance the prospects for women to serve as lead counsel; and
- d. provide a research template for use in multiple jurisdictions in order to understand on a more comprehensive basis the factors for advancing women into lead counsel roles.

Several organizations and individuals were seminal to the research. The American Bar Association's Commission on Women in the Profession and the American Bar Foundation provided financial support and a welcome intellectual context for conducting the research. The Honorable Ruben Castillo, chief judge of the United States District Court for the Northern District of Illinois, encouraged the research and provided thoughtful views about addressing the results. Robert Nelson, director of the American Bar Foundation and professor of sociology, Northwestern University, was an early advocate for the research and provided thorough and valuable comments about the results. Jennifer Woodward conducted the random sample and much of the data coding. Jill May conducted additional data coding and patiently completed the many detailed data analyses. Jill was generous with her time and with her intellectual enthusiasm. Michele Coleman Mayes, current chair of the Commission on Women, has championed the study with gusto. Barbara Leff, communications and publications manager of the Commission on Women, reviewed multiple drafts without complaint and with a thoroughly professional eye to editing. Melissa Wood, director of the Commission on

Women, provided just the right administrative advice. We are grateful for all of their support.

STUDY DESIGN AND METHODOLOGY

Federal courts require a relatively detailed intake form for all filed cases as well as individual attorney appearance forms. All of that information is available through Public Access to Court Electronic Records (PACER), the public access service that allows users to obtain case and docket information online from federal courts. The required information provides the basis here for analyzing the level of participation of women as lead counsel and as trial attorney.

To perform the research, we took a random sample of all of the cases filed in 2013 in the United States District Court for the Northern District of Illinois. We chose the Northern District of Illinois for four principal reasons:

1. The Northern District of Illinois is a large and diverse locale. No single type of case dominates the docket.
2. As a group, the firms located in the geographic locale of the Northern District of Illinois are diverse with respect to size, employment of men and women, and types of cases and clients.
3. As with other federal courts, there is robust information about each filed case as reflected in the required Civil Cover Sheet for each newly filed lawsuit.
4. There is information in the lawyer appearance form showing by self-designation whether a lawyer is "lead counsel" and/or "trial attorney" or not. The Northern District classifies lawyers as members of its Trial Bar based on certain experience in the courtroom.⁵ Only members of the Trial Bar can appear as trial attorney in a given case.

Using the PACER system, we randomly selected 558 civil cases filed in 2013.⁶ There were 2,076 lawyers appearing in those 558 cases. In addition, we sampled 50 criminal cases, in which 135 lawyers appeared.⁷ We then created a database that coded characteristics

of cases as well as characteristics of lawyers in those cases. The coded case characteristics were:

- a. Whether the case is civil or criminal.
- b. The subject matter of the suit (for civil suits). The categories listed on the Civil Cover Sheet include contract, real property, torts, civil rights, prisoner rights, forfeiture/penalty, labor, immigration, bankruptcy, intellectual property, Social Security, federal tax suits, and other statutes.⁸
- c. Whether the suit is a class action.

The coded characteristics of lawyers appearing in those cases were:

- a. The nature of the party the lawyer represents: individual, business, United States, state or local government, or nonprofit.
- b. The side for which the attorney appeared, plaintiff or defendant.
- c. The attorney's practice setting: solo practice, small private firm, AmLaw 200 firm, AmLaw 100 firm, government (United States, Illinois, municipal), and some other categories.⁹
- d. Whether the lawyer appeared as "lead counsel" and/or as "trial attorney."
- e. Gender of the lawyer. If there was any confusion from the attorney's name as to gender, the attorney's name and photo were checked on his/her firm's public website.
- f. Whether the lawyer was retained by his/her client or appointed by the court.¹⁰

We would also have liked to study minority status and minority status interacting with gender. However, neither the Civil Cover Sheet nor the appearance form contains information that allowed us to determine the minority status of lawyers, and, therefore, we could not perform those analyses.

In conducting our data analyses, we sometimes used the lawyer as the unit of analysis and sometimes used the case as the unit of analysis, depending on the perspective and nature of the research question at hand. We analyzed criminal and civil cases separately.

The types of questions we sought to answer included these:

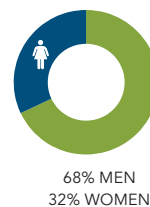
1. Do women and men occupy lead roles in litigation matters in equal numbers, as shown by their self-designated individual appearance as "lead counsel" or "trial attorney"?
2. Are there certain types of cases more likely to have men or women appear as lead counsel?
3. Are there certain types of clients (individuals, corporations, government entities, client opposing *pro se* parties) or sides (plaintiff versus defendant) that are more likely to retain men or women as lead counsel?
4. Are there certain types of practice settings in which men or women lead counsel are more likely to practice?

By answering such questions, we expect to have a better understanding of the roles played by men and women in the courtroom, whether there is a gender gap, and areas of focus for change.

I. IN CIVIL CASES, WOMEN APPEAR LESS OFTEN THAN MEN AND ARE FAR LESS LIKELY TO DESIGNATE THEIR ROLE AS LEAD COUNSEL OR TRIAL ATTORNEY

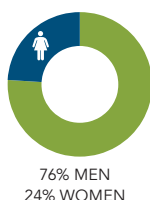
Roughly two-thirds of all attorneys appearing in civil cases—whether as lead counsel or trial attorney—are men. Thus, 68% of all lawyers who appeared in civil cases were men and 32% were women.¹¹ Of those attorneys appearing, a little more than half (54%) appeared as "lead counsel."¹²

ALL LAWYERS APPEARING IN CIVIL CASES



However, just as women and men did not appear generally at the same rate, men and women do not appear in lead roles in civil cases at the same rate

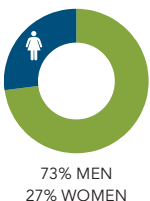
LAWYERS APPEARING AS LEAD COUNSEL



either. Among lawyers appearing as lead counsel, only 24% were women and 76% were men. In essence, a man is three times more likely to play the role of lead counsel on a civil case than a woman.

A similar pattern exists for men and women who entered their appearances as “trial attorney,” with 63% of all lawyers identifying themselves as a trial attorney on the case. The percentage of women serving as trial attorneys in civil cases was slightly higher than the percentage of women serving as lead counsel. But of those lawyers identifying themselves as trial attorneys, nearly three-quarters are men (73%) and slightly more than a quarter are women (27%).

LAWYERS ENTERING APPEARANCE AS TRIAL ATTORNEY



What these numbers show is that the steps to the role of lead counsel and trial attorney are much steeper for women than men. Women are significantly less likely to appear in courtrooms—although it could be argued that the gender difference roughly mirrors the difference between the proportion of men and women generally in the legal profession. On top of that gap, however, and more troubling, is the fact that when women do appear, they are significantly less likely than men to occupy the lead roles.

We also observed a marked gender gap when the unit of analysis is cases. Some 59% of civil cases had only men appearing as lead counsel; similarly, 58% of civil cases had only men appearing as trial attorney. In contrast, just 13% of civil cases had only women

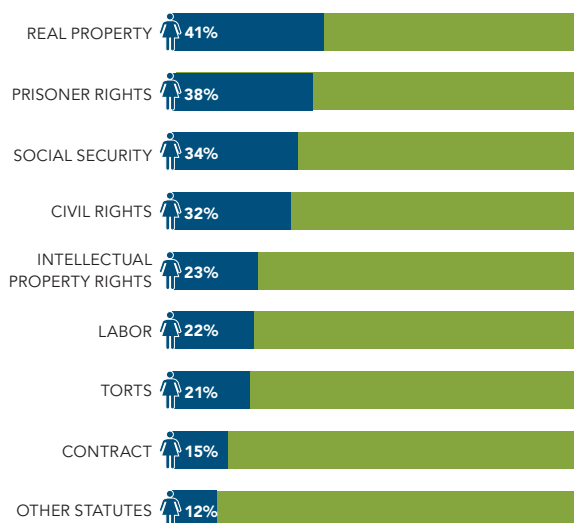
appearing as lead counsel, and 21% had only women appearing in the role of trial attorney.¹³

II. DOES THE TYPE OF CASE, TYPE OF PRACTICE SETTING, AND TYPE OF CLIENT AFFECT THE PARTICIPATION OF WOMEN IN LEAD COUNSEL OR TRIAL ATTORNEY ROLES?

We performed a number of analyses looking at factors that could affect whether a man or woman appears as lead counsel or as trial attorney in civil cases.

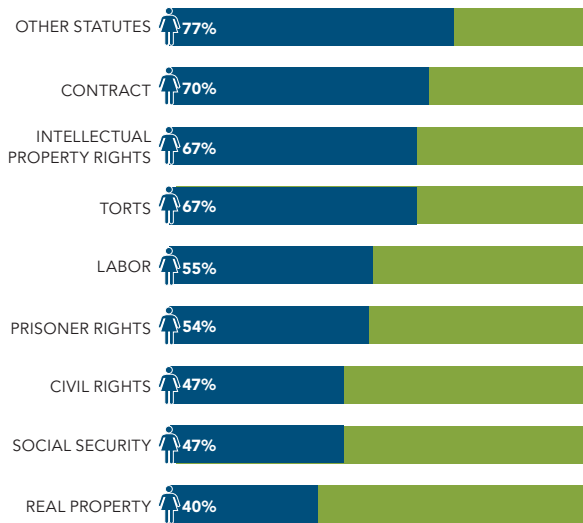
First, type of case shows a gender effect. For certain types of civil cases, lead counsel are predominantly male, including in “other statutory” cases (88% of lead counsel are male), contract cases (85% of lead counsel are male), torts (79% of lead counsel are male), labor (78% of lead counsel are male), and intellectual property rights (77% of lead counsel are male). On the other hand, there is no type of case in which women are more likely than men to be lead counsel—i.e., where the majority of persons who appeared as lead counsel were women. A similar pattern exists in the data for trial attorney.

PERCENTAGE OF WOMEN APPEARING AS LEAD COUNSEL



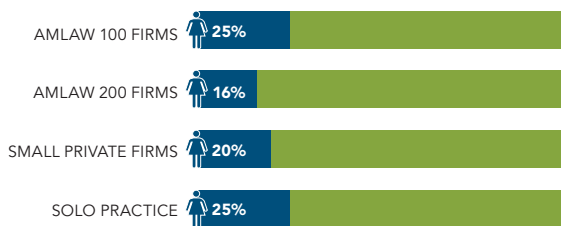
In the same vein, certain types of civil cases exhibited a greater gender gap than others, as shown by whether there were any women appearing at all as lead counsel. The following shows the results when we measured cases as a whole:

PERCENTAGE OF CASES WITH NO WOMEN APPEARING AS LEAD COUNSEL



With respect to practice setting, gender differences among lead counsel from private firms follow a 1 to 3 female/male gender ratio—or worse. In terms of the size of firms from which lawyers appear (AmLaw 100 firms, AmLaw 200 firms, small private firms, and solo practice), the percentage of women appearing as lead counsel is 25%, 16%, 20%, and 25%, respectively.¹⁴

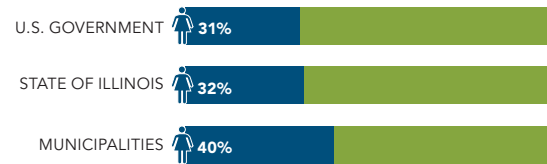
PERCENTAGE OF WOMEN AS LEAD COUNSEL BY SIZE OF FIRM



It is noteworthy that there is a greater likelihood of women being lead counsel in civil cases involving the U.S. government, the state of Illinois, and

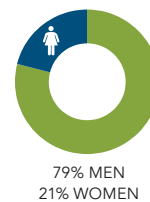
municipalities. Lead lawyers for the U.S. government, state of Illinois, and municipalities are, respectively, 31%, 32%, and 40% female.

PERCENTAGE OF WOMEN AS LEAD COUNSEL IN CIVIL CASES INVOLVING THE GOVERNMENT



By contrast, individual litigants and businesses are overwhelmingly represented by male lead counsel. Close to 80% of all lead counsel who represent businesses are male (79% male vs. 21% female), and the same percentage breakdown is found with respect to lead counsel who represent individuals.

LEAD COUNSEL REPRESENTING BUSINESSES AND INDIVIDUALS



Whether a party is plaintiff or defendant also affects whether their lead counsel is male or female. Among all women who are lead counsel in civil cases, 40% represent plaintiffs and 60% represent defendants. A more equal distribution between representation of plaintiffs and defendants is found for men appearing as lead counsel. Among all men appearing as lead counsel, 45% represent plaintiffs and 55% represent defendants.

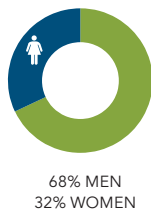
That said, and consistent with the data in Section I, the majority of all attorneys appearing as lead counsel for plaintiffs or defendants are men (for plaintiffs, 78% of lead counsel are men; for defendants, 74% of lead counsel are men). For those appearing as trial attorneys, among plaintiffs' counsel 75% are men and among defense counsel 70% are men.

LAWYERS APPEARING AS LEAD COUNSEL BY PARTY

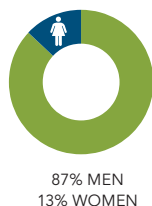


We also examined the subset of cases that were filed as putative class actions. There were 48 such cases in our sample, and 246 attorneys appeared in them. Looking at all attorneys who appeared in class actions, 68% are male and 32% are female—a 2/3 versus 1/3 ratio, which is not unlike the data for women appearing in civil cases. However, there is a marked gender gap when it comes to appearing as lead counsel. Among men appearing in class actions, 55% appeared as lead counsel. In contrast, only 18% of women who appeared in class actions filed their appearances as lead counsel.¹⁵ Looking at these data another way, of all of the lawyers who designated themselves as lead counsel in class actions, 87% were male.

LAWYERS APPEARING IN CLASS ACTIONS



LAWYERS APPEARING AS LEAD COUNSEL IN CLASS ACTIONS



Looking at all cases filed as class actions, we observed a similar gender gap in lead counsel roles. Of the 48 class action cases, 71% (34 cases) had only men appearing as lead counsel. Just one case (2.1% of cases) had only women appearing as lead counsel. In other words, 98% of class actions had at least one man as lead counsel but only 29% of class actions had any women as lead counsel.

We also reviewed data concerning civil cases in which the plaintiffs appeared *pro se*. We note that cases with *pro se* plaintiffs are often viewed as less complex, unlikely to go to trial, or have less at stake than cases where the plaintiff is represented by counsel. In this sample, there were 81 cases with *pro se* plaintiffs, in which 111 lawyers appeared for defendants. Of those 111 lawyers, 64% were men and 36% were women. The gender breakdown of lead counsel opposing a *pro se* plaintiff was similar: 65% men and 35% women. Thus, women appeared as lead counsel at the same rate they appeared generally in cases against *pro se* plaintiffs, a noticeable difference compared to other civil cases (except civil cases in which the client is a governmental party). Even so, in cases with *pro se* plaintiffs, women did not approach the number of men who appeared and were designated as lead counsel.

DEFENSE LAWYERS APPEARING AS LEAD COUNSEL IN PRO SE CASES

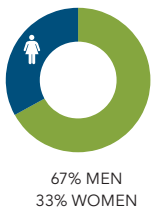


III. CRIMINAL CASES SHOW A MIXED PATTERN FOR WOMEN

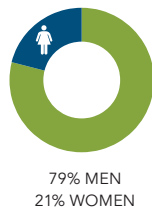
We looked separately at the sample of 50 criminal cases under the theory that criminal cases and clients could well show a different gender dynamic. Among men and women attorneys who appeared in criminal cases, the vast majority filed their appearances as lead counsel (88% of all men appearing and 89% of all women appearing).¹⁶ The result is not surprising, as criminal cases tend not to be layered with different levels of associates and partners. However, there

is a gender gap when it comes to appearances generally in criminal cases and therefore in the percentage of women versus men who play lead roles. Among all attorneys appearing in criminal cases, 67% are men. Among attorneys appearing as lead counsel, 67% are men (33% are women), and among attorneys appearing as trial attorney, 79% are men (21% are women).

LAWYERS APPEARING AS LEAD COUNSEL IN CRIMINAL CASES

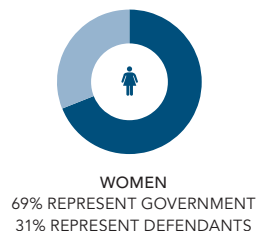
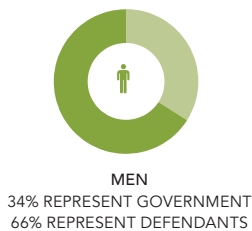


LAWYERS APPEARING AS TRIAL ATTORNEY IN CRIMINAL CASES



For criminal cases, there is also a gender impact by type of client. Of men appearing as lead counsel in criminal cases, 34% appear for the government and 66% appear for defendants. Of women appearing as lead counsel in criminal cases, the ratio is reversed: 69% appear for the government and 31% appear for defendants. In other words, women who are government prosecutors—compared to women in all other practice settings and client representations—have the greatest chance of appearing in a case as lead counsel.

LAWYERS APPEARING AS LEAD COUNSEL IN CRIMINAL CASES BY PARTY



Federal criminal prosecutions are important and powerful roles for any trial lawyer. The lower percentage of women lead counsel representing parties in civil litigation or representing criminal defendants suggests

to us that a number of social factors are impeding the retention of women as lead counsel, as explained below.

IV. SUMMARY OF THE FINDINGS

It is evident that women are consistently underrepresented in lead counsel roles in all but a few settings and for all but a few types of cases. In civil cases, men are three times more likely to appear in lead roles than women, which is a marked departure from what we expected based on the distribution of men and women appearing generally in federal litigation (a roughly 2 to 1 ratio) and the distribution of men and women in the legal profession (again, a roughly 2 to 1 ratio). In private practice settings, the gender gap is greatest in AmLaw 200 firms, compared to AmLaw 100 firms and other smaller firms not on the AmLaw lists. In addition, women are more likely to be lead counsel representing civil defendants rather than civil plaintiffs. On the other hand, men appearing as lead counsel in civil cases are somewhat more evenly distributed between representing plaintiffs and defendants.

Moreover, in the majority of civil cases (59%), lead counsel are all men, even though it is typical for more than one lawyer to enter an appearance in a civil case. A much smaller proportion of civil cases (13%) have all women as lead counsel. The findings show more gender segregation in civil cases than we would have predicted. In essence, more than 70% of cases are defined by lead counsel of one gender or the other, not a mix of male and female lead counsel.

If we were to extrapolate these statistics to the almost 11,000 civil cases filed in the Northern District in 2013,¹⁷ we would see that approximately 6,490 cases had no women appearing as lead counsel, and about 1,400 cases had no men appearing as lead counsel.

Women representing the government had better odds of appearing as lead counsel, at roughly the same rate as women generally appeared (a 2 to 1 male-to-female ratio) and at roughly the same rate as their distribution in the legal profession. Without putting too fine a point on the results, we certainly observed a private vs. public sector gender gap for women in lead roles.

The results in criminal cases—where one side is the government and the other a private party, albeit a

criminal defendant—show a pattern consistent with the private vs. public sector gender gap we observed in civil cases. Women lead counsel in criminal cases represent the government more than twice as often as they represent criminal defendants. For men, the ratio is reversed: men appear as lead counsel for private defendants twice as often as they appear for the government.

Even so, only a minority of attorneys appearing in criminal cases are women. Those women who appear, however, almost always file their appearances as lead counsel and in about the same ratio as men. Overall, and looking across all practice settings, women in the public sector and women in criminal matters have a substantially greater chance of playing lead counsel roles than those in the private sector working on civil cases.

We also note that class actions—considered by many to be both high-stakes and complex litigation—are dominated by male lead counsel. Indeed, the grouping of lead counsel in class actions is about as close to gender segregation as we can imagine. Although we did not look at the role of men versus women as lead counsel in multidistrict litigation—another type of litigation considered complex and high-stakes—our personal experience has been that it is rare for women to be appointed by judges as lead or liaison counsel.¹⁸ On the opposite side of the spectrum are cases with *pro se* plaintiffs, which are more likely to have women as lead counsel than the typical civil case (except for cases where counsel represent government entities).

V. BEST PRACTICES FOR LAW SCHOOLS, LAW FIRMS, CLIENTS, JUDGES, AND WOMEN LAWYERS

Men and women have been graduating from law school and entering private firms at about the same rate for many years,¹⁹ and on a clean slate we would expect men and women to progress at about the same rate into lead counsel roles. But as our research shows, the trial bar continues to have a substantial gender gap.

The gender disparity we observed may reflect the overall career arc for women in private practice. As shown by the NAWL Surveys, men are less likely than

women to leave private practice, men are more likely than women to advance beyond the associate ranks and become partners, and men earn more than women. Such disparities in advancement and compensation can stem from factors outside the control of women (such as implicit bias), affecting the types of assignments women receive, performance evaluations, and even an ability to meet billable-hour requirements.²⁰ The result will be a cumulative negative impact on the ability of women litigators to receive increasingly better assignments and greater opportunities to serve in lead roles in the courtroom.

Other social factors may impinge, as well, on opportunities for women lawyers. As one example, lawyers who have taken time out of the labor force to attend to family responsibilities are less likely to become partners and earn less if they do become partners, and that phenomenon disproportionately affects women.²¹ Additional reasons are more closely linked to the dynamics of becoming lead counsel. There may be bias (sometimes implicit, sometimes not) by senior partners or clients who choose their first-chair lawyers; the impact from judges or opposing counsel who make inappropriate or stereotypical comments and act accordingly; and the increased scrutiny and double standards that women experience in the courtroom.

Research by the ABA Commission on Women in the Profession and other organizations has shown that implicit bias hinders the progress of women lawyers, and this also can apply to women litigators.²² Senior lawyers who choose their co-counsel in courtrooms are overwhelmingly male, and they may automatically choose someone like themselves—i.e., another male. Certainly, implicit biases play a role, such as the belief that a woman lawyer will express too much emotion. Ironically, male litigators who display the same level of emotion are considered “deeply passionate” about the case. When a woman litigator raises her voice to make a point or argues forcefully, she may be viewed as being overly aggressive. A male litigator acting in the same way is typically viewed favorably for zealously representing his client. Thus, women lawyers often have to demonstrate greater levels of competence and proficiency and are held to higher standards than their male colleagues.

Women trial lawyers must also occasionally deal with opposing counsel and judges who make inappropriate or stereotypical comments. Many women have reported being patronized and called “honey” or “dear” or referred to by their first name in the courtroom. Indeed, a Defense Research Institute survey found that 70% of women attorneys experienced gender bias in the courtroom.²³

The underrepresentation of women among lead lawyers may also stem from certain client preferences, as some clients prefer a male lawyer to represent them in court.²⁴ In addition, women may too often be relegated by their law firms to second-chair positions, even though they have the talent and experience to serve as first chairs. The denial of these significant opportunities adversely affects the ability of women to advance in their firms.²⁵

All of these issues apply with even greater force to women trial attorneys of color, who face the double bind of gender and race. We have no doubt that had we been able to measure the impact of gender and minority status, the results would show an even more difficult road for women lawyers of color—as has been shown repeatedly in other studies on gender and race.²⁶

The lack of women as lead counsel is not explained by a disparity in talent or ability between male and female trial lawyers. To the contrary, women can be highly effective courtroom advocates.²⁷ Jurors are receptive to women attorneys,²⁸ and many commentators have observed the potential benefits of representation by women lawyers in litigation and at trial.²⁹

The overwhelming view today is that being an effective trial lawyer is not a matter of gender. As well-known litigator Elizabeth Cabraser put it, “There are as many ways to be a good, effective lawyer as there are people who want to be a good, effective lawyer.”³⁰ And while not giving wholesale credit to gender stereotypes, Cabraser also recognized that gender stereotypes have play in courtroom effectiveness: “If you go by stereotyping, women have a great advantage because women have had to learn to listen—listening to judges is more important than talking to judges; listening to what the witnesses are saying is more important than saying what you’ve already decided you want to say. . . . Women have had to learn to do that.”

We believe it is imperative that actions be taken to address and remedy the continuing gender imbalance in the courtroom. The result will be a much deeper pool of skilled attorneys available to represent clients in the courtroom and a cadre of trial lawyers who more closely reflect the diversity of our society, litigants, judges, and jurors.

The ABA Commission on Women in the Profession is planning to work with law schools, law firms, corporations, judges, and individual women lawyers around the country to identify the steps that can be taken so that women receive the training and courtroom experience needed to become skilled trial lawyers. We hope that state and local bar associations, trial lawyer groups, and women’s bar organizations will shine a spotlight on the need to increase the number of women serving in lead counsel positions and hold programs focusing on best practices, such as those suggested here, to accomplish that goal.

A. LAW SCHOOLS

Law schools can play a major role in training women to serve as effective trial lawyers. Women law students should be encouraged to become trial lawyers and receive training and mentoring by trial attorneys to perfect their skills in moot court, legal aid clinics, and trial competitions. Teaching tools should be specifically designed to help women law students navigate the implicit biases they may face in the courtroom. Also, in light of the results of our study, law schools should advise women law students who want to become trial lawyers that, at the current time, government litigation positions will enhance their opportunity to play a lead role and gain first-chair experience.

B. LAW FIRMS

Law firms should focus on specific training for women litigators, recognizing that traditional means of obtaining trial experience may no longer suffice. Since certain large law firms or clients prefer that important depositions be taken only by partners or senior associates, and first-chair trial lawyers are overwhelmingly men, firms must be even more resourceful to ensure that all of their litigators, and particularly

their women litigators, are getting the experience that will allow them to be successful and confident in the courtroom.

Law firms should also encourage women lawyers to take *pro bono* cases or secundments in district attorney or public defender offices so that they will have the opportunity to get into court and hone their trial skills. Depositions of less important witnesses and custodians of records can also provide needed experience. Similarly, oral argument experience can be obtained in discovery disputes and less central motions in state and federal matters.

In addition, women lawyers should be strongly encouraged to participate in trial training and advocacy programs, those conducted both in-house or by outside organizations, such as the National Institute of Trial Advocacy (NITA) and bar association groups.

It is also important that law firms use metrics to track the professional development of their associates, so they receive the appropriate amount and level of trial experience, and take action to remedy any deficiencies.

Finally, we recommend that law firms avail themselves of the ABA Commission on Women's Grit Project Toolkit,³¹ which provides training concerning "grit" and "growth mindset." These important traits, which can be learned, entail perseverance and resiliency and can be enhanced through deliberate practice. As one experienced trial judge has sagely observed, these traits are essential to becoming a great trial lawyer and enable litigators to learn and develop even from setbacks and defeats that they experience in the courtroom.³²

C. CLIENTS

Clients can also play an important role in increasing the gender diversity of the trial bar. First, clients can be proactive in retaining women litigators to be their lead trial lawyer in their cases. In addition, clients can use their considerable economic clout with their law firms to insist that women be given prominent positions and significant responsibility in trial teams assembled by the firm for the client's matters.³³

Clients can also keep track of the names of women attorneys in trial court opinions issued in the subject areas of importance to the client. This data can then

serve as the basis for compiling names of experienced, successful women litigators, thus expanding the pool of "go-to" lawyers used by the company. Likewise, general counsel or senior in-house counsel can recommend women litigators they have retained to other in-house colleagues. In addition, companies can provide women litigators with specific training concerning the particular subject areas in which the company has most of its litigation.

Finally, clients can require firms to maintain metrics on how their company's cases are being staffed and the roles women lawyers are playing in their cases, with an eye toward ensuring an increase in the ranks of women trial lawyers.³⁴

D. JUDGES

Judges are also integral to the efforts to increase the number of female first-chair trial lawyers. Judges can be mindful of appointing experienced, qualified women lawyers as lead counsel, liaison counsel, or members of the steering committee in MDL class action cases.³⁵ Judicial appointments of women litigators as special discovery or bankruptcy masters, trustees, or guardians ad litem can help increase the visibility and credibility of women lawyers, which will help them advance to equity partnership and develop as rainmakers.³⁶

In addition, a number of judges have sought to incentivize law firms to provide greater opportunities for courtroom experience to their women and minority associates. For example, certain judges around the country have made it a practice of allowing argument on motions that would otherwise not be heard, as long as the advocate will be the associate working on the case, rather than the partner.

E. INDIVIDUAL WOMEN LAWYERS

Individual women lawyers need to take the initiative to develop the skills, tools, and expertise necessary to be an effective trial lawyer. Women lawyers can and should affirmatively reach out to seek assignment to cases where they will get to play an active role in the litigation and obtain trial experience. It is a given, of course, to learn the substantive law involved in the case

and master the rules of evidence and the rules of civil procedure. But there is more.

It is also important to be aware of gender dynamics in the courtroom and take steps to deal with or overcome them. Body language is critical, including maintaining an outward appearance of calm, even in moments of stress and pressure. Women need to “own” the courtroom with their presence and also with their voices. Soft voices of either gender can be distracting or ineffective at trial, but some women naturally have softer voices. Thus, they will need to adjust their volume so as to take full command of the courtroom. Moreover, women trial lawyers need to be mindful that their appearance is often carefully scrutinized by others in the courtroom. Like it or not, one’s hairdo, shoes, and even the decision to wear slacks instead of a skirt can often engender comments.³⁷

Women should seek opportunities to be courtroom-ready by taking trial advocacy classes and taking on *pro bono* matters where they are in the lead. Small cases are good for learning all of the key aspects of litigation and can give women the courtroom confidence that is so much a part of being an effective advocate. And we advise women never to turn down the opportunity to be part of a trial team. There are so many upsides to saying “yes” and enough downsides to saying “no” that, to our minds, the only right answer is “yes.”

As discussed above, women lawyers have many advantages in the courtroom—they connect well with

jurors, particularly with women jurors, who often comprise half or more of the jury pool; are viewed as more credible and trustworthy; and are in many instances overprepared rather than underprepared. Women litigators have ample reason to be confident in their effectiveness as trial counsel.

CONCLUSION

Fostering the success of women litigators redounds to the benefit of clients, who obtain top-notch representation in their cases; to law firms, which have made a substantial investment in hiring and training their women litigators; and to women lawyers themselves, who are able to realize their full potential and advance in their careers. We believe it is imperative for all concerned that women are encouraged and supported in their pursuit of a career in the courtroom and the role of lead counsel at trial.

We hope that this study will heighten awareness about the existence of significant gender disparities in the ranks of lead trial lawyers. We want to spur a dialogue that will result in concrete and effective actions to increase the numbers of women lead trial counsel. These recommended best practices will help women litigators develop their skills and obtain the same opportunities for leadership roles and success in the courtroom as their male colleagues.

Endnotes

1. Stephanie Scharf heads the Litigation Practice at Scharf Banks Marmor LLC, a nationally prominent women-owned law firm. She represents corporations in business litigation, class actions, product liability, and complex tort defense. Currently a commissioner of the ABA Commission on Women in the Profession, she is a former president of the National Association of Women Lawyers. Stephanie founded, designed, and directed from 2006 through 2013 the *NAWL Annual Survey of Retention and Promotion of Women in Law Firms*. She also designed and conducted the only national survey of women's initiatives in law firms, under the auspices of the NAWL Foundation. Stephanie received a JD and PhD in Behavioral Sciences from the University of Chicago and was Senior Study Director, NORC, before practicing law. Her email contact is SScharf@scharfbanks.com.

Roberta ("Bobbi") Liebenberg is a senior partner at Fine, Kaplan and Black in Philadelphia, where she focuses her practice on class actions, antitrust, and complex commercial litigation. She served as past chair of the American Bar Association Commission on Women in the Profession from 2008 to 2011 and 2013 to 2014. She also served as chair of the ABA Task Force on Gender Equity. She is a founder and now chair of DirectWomen, the only organization whose mission is to increase the representation of women attorneys on corporate boards. She has been named by the *National Law Journal* as one of its "50 Most Influential Women Lawyers in America" (2007) and as one of the country's 75 most "Outstanding Women Lawyers" (2015). Her email is rliebenberg@finekaplan.com.
2. See American Bar Association statistics, showing that in 1985 women accounted for about 40% of first-year law students and that percentage increased in subsequent years, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf.
3. See data from Minority Corporate Counsel Association about the percentage of women general counsel in the *Fortune* 500 and data reported by the NAWL Foundation and the National Association of Women Lawyers about the percentage of women equity partners, [http://www.diversityandthedigital.com/datb/november december 2014#pg20](http://www.diversityandthedigital.com/datb/november%20december%202014#pg20); NAWL Annual Surveys from 2006 to 2013, posted at www.nawl.org (<http://www.nawl.org/p/cm/ld/fid=82>). In contrast, women have fared substantially better in the judiciary than in private settings. For example, women comprise 35% of federal appellate judges and 32% of federal district court judges, as well as 34% of state appeals judges and 29% of all state judges, http://www.nawj.org/us_state_court_statistics_2014.asp; <http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1>.
4. The first eight NAWL surveys were designed, implemented, and largely reported by Stephanie A. Scharf. The eighth survey report was largely co-authored by Ms. Scharf and Ms. Liebenberg.
5. See criteria for Trial Bar Membership at https://www.ilnd.uscourts.gov/home/_assets/_documents/Trial%20Bar%20Instructions.pdf.
6. Before finalizing the sample, we eliminated (1) any case that was filed but then transferred out of the Northern District; (2) cases that were part of the 17 MDL cases filed in the Northern District in 2013; (3) cases where attorney appearance forms were not filed for both sides or were missing a Civil Cover Sheet, unless that information was available from other documents filed with the court; (4) cases that were *pro se* on both sides; (5) cases where all attorneys on one side withdrew; (6) cases involving foreign nations; and (7) any attorney who withdrew from the case.
7. Before finalizing the sample of criminal cases, we eliminated cases without attorneys appearing on both sides, prisoner transfers, and "suppressed" cases.
8. "Other statutes" are a wide-ranging collection of 17 types of actions not covered by other substantive legal categories on the federal Cover Sheet. The "other statutes" category includes such areas as false claims, antitrust, banks and banking, deportation, racketeer influenced and corrupt organizations (RICO), consumer credit, agriculture, and freedom of information, among others.
9. For other categories, such as nonprofit and corporate in-house attorney, the number of lawyers appearing was too small to analyze.

10. While we coded this variable, there were too few cases for a reliable analysis.
11. At first blush, this male/female ratio appears to be roughly consistent with the distribution of men and women in the legal profession; the American Bar Association reports that 36% of the legal profession are women. *See* American Bar Association Market Research Department, February, 2015. In the same vein, as of October, 2014, it is reported that 38% of Illinois attorneys were women. *See* http://www.iardc.org/2014_Annual_Report_Highlights.pdf. However, it is unclear how much weight to give these estimates because of several unknown factors. First, the ABA had data on lawyers in 43 states, representing only 59% of the lawyer population. We do not know how the unreported population differs—with more or less women—than the reported population. Second, we suspect that the statistics about total lawyers include those who have been practicing for more than 40 years, which could lead to two countervailing trends: on the one hand, the older segment of the bar is overwhelmingly male (because of the demographics of law school graduates 40-plus years ago), while on the other hand, the older segment may be less actively engaged in litigation because they are either working part-time or are fully retired. *See, e.g.*, “Lawyer Retirement Policy and Opinion Explored in New Survey,” http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/51df5c74-cd4f-404a-b24e-5729df0c7092/resource/Lawyer_Retirement_Policy_and_Opinion_Explored_in_New_Survey.cfm. Third, current surveys show that women lawyers leave the private practice of law in greater numbers than men. *See* note 3, above. As a result of these and other factors, we do not believe there are fully reliable data about how many men and women nationally or in Illinois are active in a litigation practice. Short of better data, however, for purposes of this report we extrapolate from the reported data and assume that a little more than one-third of practicing litigation lawyers are women.
12. This analysis includes all cases where there were lawyers appearing on both sides and excludes the relatively few cases where one side appeared *pro se*. We note that in any given case, more than one attorney can designate himself or herself as lead counsel for the same client on the matter. Also, more than one attorney can designate himself or herself as trial attorney for the same client.
13. By inference, 28% of civil cases had both men and women appearing as lead counsel, and 21% of civil cases had both men and women appearing as trial attorneys.
14. We note that the majority of lawyers appearing as lead counsel come from small private firms (60%)—those not in the AmLaw 200 and also not solo practitioners. AmLaw 100 and 200 firms—the nation’s top 200 firms by gross revenue—account for 15% of lawyers appearing as lead counsel; solo practitioners account for 9% of lead counsel; government lawyers account for 14% of lead counsel; and there is a sprinkling of lead lawyers from other settings.
15. The trial attorney designation shows a similar pattern for class actions.
16. Of the 135 lawyers who entered appearances in criminal cases, 119 appeared as lead counsel.
17. *See* Federal Judicial Caseload Statistics 2014 at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C00Mar14.pdf>.
18. Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U.L. Rev 71, 93 n. 102, 120 n. 251, Table 1 at 139-40 (April 2015) (presenting empirical study of repeat players in MDLs and noting gender gap within repeat players); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass Tort Multidistrict Litigation*, 64 Emory L.J. 329, 363-67 (2014) (presenting empirical data on the significant gender gap in plaintiffs’ executive and steering committee and defense side appointments).
19. EEOC, *Diversity in Law Firms*, <http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf>. More recently, in 2009 through 2014, for example, approximately 45% of associates in law firms were women. *See* NALP publication, “Diversity Numbers at Law Firms Eke Out Small Gains: Numbers for Women Associates Edge Up After Four Years of Decline” at Table 1, http://www.nalp.org/lawfirmdiversity_feb2015#table1.
20. *See, e.g.*, Roberta Liebenberg, “Plugging the ‘Leaky Pipeline’ of Women Attorney Attrition,” ABA The Young Lawyer Vol. 15 No. 9 (July/Aug. 2011); Roberta Liebenberg, “Has Women Lawyers Progress Stalled?,” *Legal Intelligencer*, May 28, 2013.

21. *See, e.g.*, M. C. Noonan and M. E. Corcoran, “The Mommy Track and Partnership: Temporary Delay or Dead End?” *Annals of the American Academy of Political and Social Science*, Nov. 2004, vol. 596, no. 1, 130–150.
22. Implicit biases are unconscious biases that everyone has, both men and women, and that affect what we notice about people, what we remember about them, how we interpret their behavior, and the actions we take in relation to them.
23. “A Career in the Courtroom: A Different Model for the Success of Women Who Try Cases,” *DRI—The Voice of the Defense Bar*, 2004, at pp. 11, 58.
24. *Id.* at p.11; “Women in the Courtroom: Best Practices Guide,” *DRI*, 2007, at p.6, http://www.google.com/url?sa=t&rcrt=j&q=&resrc=s&source=web&ccd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.dri.org%2Fdri%2Fwebdocs%2Fwomen_in_the_courtroom_best_practices_guide.pdf&ei=i2tqVMrHAtCkyASv0ILYBA&usg=AFQjCNGKG2u8yW5-cU0IRf5d_63bXIKUkQ&sig2=rPrkNLznu_-qyj-Edj2JUQ&cbvm=bv.79908130,d.aWw.
25. *Id.*
26. *See, e.g.*, National Association of Women Lawyers Annual Survey of Retention and Promotion of Women Lawyers, for the years 2008 and 2013, <http://www.nawl.org/p/cm/ld/fid=82#surveys>; “Visible Invisibility: Women of Color in Fortune 500 Legal Departments,” American Bar Association Commission on Women in the Profession, 2012; “Visible Invisibility: Women of Color in Law Firms,” American Bar Association Commission on Women, 2006.
27. Lynne Bratcher, “Women Trial Lawyers—As Good or Better Than Men,” Nov. 2009, <http://uncommoncourage.blogspot.com/2009/11/women-trial-lawyers-as-good-or-better.html>.
28. *See, e.g.*, Victoria Pynchon, “Juror Attitudes to Women in the Courtroom,” Feb. 2012, <http://www.forbes.com/sites/shenegotiates/2012/02/15/juror-attitudes-to-women-in-the-courtroom>; Bratcher, “Women Trial Lawyers—As Good or Better Than Men,” *id.* at note 27; Jan Nielsen Little, “Ten Reasons Why Women Make Great Trial Lawyers,” June 2006, http://www.kvn.com/templates/media/files/pdfs/Jan_Column_June2006.pdf.
29. *Id.* at notes 27 and 28; *see also* L. Spano and J. L. Meihls, “You Go Girl! How Women Can Gain an Advantage in the Courtroom,” Trial Partners, Inc., <http://www.trialpartners.com/images/yougogirl.pdf>.
30. Founder of Lieff, Cabraser, Heimann & Bernstein LLP, quoted in H. Hayes, “Women Winners of the Plaintiffs’ Bar,” http://www.americanbar.org/content/dam/aba/publishing/perspectives_magazine/women_perspectives_womenwinners.authcheckdam.pdf.
31. *See* ABA Commission on Women, www.ambar.org/grit.
32. *See* Judge Mark Bennett, “Eight Traits of Great Trial Lawyers: A Federal Judge’s View on How to Shed the Moniker, ‘I Am a Litigator,’” *The Review of Litigation*, Winter 2013, Vol. 33, No. 1; “Grit, Growth Mindset, and Being a Great Trial Lawyer,” *Woman Advocate*, Section of Litigation, March 9, 2015; <http://apps.americanbar.org/litigation/committees/womanadvocate/articles/winter2015-0315-grit-growth-mindset.html>.
33. *See* “Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers,” ABA Task Force on Gender Equity, www.americanbar.org/GenderEquity.
34. *Id.*
35. *See* “Standards and Best Practices for Large and Mass-Tort MDLs,” at *Best Practice* 4E, pp. 58–60 (“The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements for the case.”), Dec. 2014, <http://law.duke.edu/judicialstudies/research>.
36. *See* Roberta Liebenberg, “The Importance of Diversity in a Court’s Exercise of Its Appointment Powers,” *Counterbalance*, Fall 2011, at 36, http://www.nawj.org/files/counterbalance/cb31_2.pdf.
37. Karen L. Hirschman and Dr. Ann T. Greeley, “Trial Teams and the Power of Diversity,” *DecisionQuest* (“Jurors more often make comments about the dress and physical appearance of women lawyers.”) *See* <http://www.decisionquest.com/utility/showArticle?objectID=1678>.

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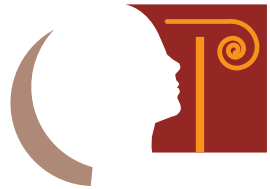
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About the Commission on Women in the Profession



**Commission on Women
in the Profession**
American Bar Association

As the national voice for women lawyers, the ABA Commission on Women in the Profession forges a new and better profession that ensures that women have equal opportunities for professional growth and advancement commensurate with their male counterparts. It was created in 1987 to assess the status of women in the legal profession and to identify barriers to their advancement. Hillary Rodham Clinton, the first chair of the Commission, issued a groundbreaking report in 1988 showing that women lawyers were not advancing at a satisfactory rate.

Now in its third decade, the Commission not only reports the challenges that women lawyers face, it also brings about positive change in the legal workplace

through such efforts as its Women of Color Research Initiative, Grit Project, Margaret Brent Women Lawyers of Achievement Awards, and educational programs addressing issues of importance to women lawyers (such as leadership, pay equity, and negotiation). Drawing upon the expertise and diverse backgrounds of its 12 members, who are appointed by the ABA president, the Commission develops programs, policies, and publications to advance and assist women in public and private practice, the judiciary, and academia.

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