

PERSPECTIVE

Addressing the Gender Divide in the Courtroom

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Former U.S. District Judge Shira A. Scheindlin recently published an opinion in the *New York Times* titled “Female Lawyers Can Talk, Too,” in which she criticized the gender imbalance of lead counsel appearing in courtrooms. Judge Scheindlin specifically discussed her 22-year experience on the bench observing male attorneys who assumed the speaking roles in court proceedings, even when it was clear that their female associates were more familiar with the case. Judge Scheindlin’s article reverberated throughout the legal community because it profoundly described the experience of so many female lawyers. Although many law firms are working diligently to narrow the gender gap in the legal profession, Judge Scheindlin’s article underscores



the critical role that judges—and clients—can serve to ensure that female attorneys receive equal opportunities to lead in the courtroom.

Current State of Gender Diversity in the Profession

Women currently represent almost half of law school graduates and receive offers from law firms at similar rates as men. NALP, *NALP Diversity Infographic: Women*. However, women continue to be

underrepresented in law firm partnership ranks and as lead counsel and trial counsel in civil litigation. ABA, “First Chairs at Trial: More Women Need Seats at the Table.” According to a recent report by the American Bar Association, 68 percent of all attorneys appearing in civil cases are men. See *id.* The same report found that only 24 percent of lawyers appearing as lead counsel were women. See *id.* The gender gap of lead counsel increases as cases become more complex. For example,

among lawyers appearing as lead counsel in class actions, only 13 percent are women. See *id.* As Judge Scheindlin highlighted, these statistics illuminate the cold reality that women are generally not receiving the same courtroom opportunities as men, even when the talent and ability among male and female trial lawyers is equivalent.

Call to Action by Judges

In her article, Judge Scheindlin advises law firms to “stop paying lip service to diversity and take concrete steps to change.” Federal and state judges across the country are similarly calling for increased diversity among attorneys appearing in court, particularly as lead counsel. Some judges, including former U.S. District Judge Harold Baer Jr., have even issued orders requiring that law firms make every effort to put at least one woman and one minority on the trial team. Class Action Order, *In re Gildan Activewear Inc. Sec. Litig.*, No. 08 Civ. 5048 (S.D.N.Y. Sept. 20, 2010). Other judges, such as U.S. District Judge Jack Weinstein, have updated their courtroom rules to encourage more argument opportunities for junior lawyers to address concerns that women and minority

lawyers are underrepresented as lead counsel in the courtroom. Alan Feuer, “A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule.,” *New York Times*, Aug. 23, 2017. Other judges have gone so far as to insist that they will not appoint a firm to a plaintiffs’ management committee unless there is at least one woman on the team. NYSBA, “If Not Now, When? Achieving Equality for Women Attorneys

Recent pressure from judges and corporate clients demonstrate that we now may be at a tipping point when it comes to greater gender diversity in the profession.

in the Courtroom and in ADR,” July 2017. As these examples show, members of the judiciary are pushing against the status quo by taking affirmative steps to ensure that female attorneys have equal opportunities in the courtroom.

Clients Push For Gender Diversity

In addition to judges, corporate law departments are also demanding diverse case teams among their outside counsel. Some corporate clients and general counsels insist on diverse litigation teams, and often expressly state to outside

counsel that their cases must be handled by a diverse team consisting of both men and women. For example, Medtronic, the largest biotechnology company in the world, recently implemented a new program to diversify the pipeline of younger associates working on its case teams by creating the Medtronic Preferred Provider Program (MP3) Associate Council. According to Jason Piche, principal legal counsel at Medtronic, “the Associate Council was formed to help develop and retain a more diverse and inclusive group of young lawyers in our MP3 Network. The program provides in-depth exposure to Medtronic products, executives and third-party relationships, so that these attorneys are not only bringing diverse viewpoints, but are also better equipped to understand and respond to the legal needs of the company.” Other major companies are similarly pressing law firms to increase gender diversity at all levels of seniority within their outside legal team. See, e.g., Ellen Rosen, “Facebook Pushes Outside Law Firms to Become More Diverse,” *New York Times*, April 2, 2017. Thus, while judges are working to ensure women lawyers have opportunities to take the lead in the

courtroom, corporate law departments are applying much needed pressure to ensure women get staffed on the case teams in the first instance.

Impact on Law Firms

Under the watchful eyes of judges and clients, law firms are now scrutinizing the demographics of their case teams more than ever. Robins Kaplan is among (what is likely a minority of) the law firms that are systematically tracking the types of courtroom opportunities that its attorneys receive, on a semi-annual basis, to identify and eliminate possible gender disparities. Because of these initiatives and others, Robins Kaplan's female attorneys serve as lead counsel in traditionally male-dominated practice areas such as antitrust, mass tort, personal injury, and financial litigation. To be sure, every woman in the firm's mass tort practice, from associates to senior-level partners, currently serves as court-appointed lead counsel in a pending multidistrict litigation. Robins Kaplan is also one of the few firms with women in key leadership positions, with its female attorneys serving as chairs of committees, heads of practice groups, and as members of the executive board.

While judges and corporate law departments are helping to incentivize law firms to lead on gender diversity, the wealth of scientific literature also demonstrates that increased diversity leads to better performance and enhanced results. For example, an article in the Harvard Business Review cited empirical research showing that diverse teams are simply smarter. David Rock and Heidi Grant, "Why Diverse Teams Are Smarter," Harvard Business Review, Nov. 4, 2016. Specifically, studies have found that diverse teams raised more facts related to the case, made fewer factual errors while discussing available evidence, were more likely to constantly reexamine facts and remain objective, processed information more carefully, and introduced more innovative ideas. *Id.* Other research has found that more diverse litigation teams can favorably impact the outcome of trial. NYSBA, "If Not Now, When?," *supra*. Diversity improves performance, which in turn improves the bottom line. See, e.g., Sheryl L. Axelrod, ABA, "Disregard Diversity at Your Financial Peril: Diversity as a Financial Competitive Advantage."

Where Do We Go From Here?

Although the state of gender diversity in courtrooms has been on the

national agenda for decades, there has been little change in the representation of women in the higher ranks of the legal profession. Recent pressure from judges and corporate clients, however, demonstrate that we now may be at a tipping point when it comes to greater gender diversity in the profession. By heeding the advice of judges and clients who value diversity, law firms may finally ensure that all of their lawyers, including female litigators, receive an equal opportunity to not only appear, but to play a key role in the court-room.

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