

Hearing The Need For More Women's Voices In The Courtroom

By **Carrie Cohen**

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For many female attorneys, the results revealed in the New York State Bar Association's recently adopted report on female litigators in the courtroom were not encouraging but not terribly surprising.

The report, entitled "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR," found only 25 percent of the attorneys who spoke in court over a four-month time frame were women.

That figure and others came from a first-of-its-kind observational study based on surveys completed by New York State and federal judges sitting in trial level and appellate courts. The report was prepared by the NYSBA's Commercial and Federal Litigation Section and authored by that section's former female chairs, including myself; retired U.S. District Court Judge Shira A. Scheindlin; Tracee E. Davis; Bernice K. Leber; Sharon M. Porcellio; Lesley F. Rosenthal; and Lauren J. Wachtler.

Despite disheartening findings in the report, there is reason for optimism. On Nov. 4, 2017, the NYSBA House of Delegates adopted the report and its recommendations to increase female voices in the courtroom. The recommendations were aimed at the three participants in major commercial litigation, namely law firms, the judiciary and corporate in-house legal departments.

The recommendations included, among others: institutionalizing a sponsorship program for female attorneys (law firms); adjusting rules that favor oral argument featuring junior attorneys (judiciary); and requiring that firms have diverse teams with the diverse team members performing substantial work on the matter (corporate clients). Already, those recommendations appear to be spurring positive conversations and actions.

The Bench

With powerful levers at their disposal, judges can have a significant role in helping to increase the participation of female attorneys as lead counsel in the courtroom. Happily, since the report was published, judges have sprung into action.

U.S. Senior District Court Judge Jack B. Weinstein of the Eastern District of New York, for example,



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credited the report with his recent issuance of a new courtroom rule designed to encourage more junior attorneys, many of whom are women, to speak in court. Additionally, Justice Henry J. Nowak in Erie County Supreme Court recently amended his rules to allow more attorneys from each party to speak in court. And the Chief Judge for the Eastern District of New York, Dora L. Irizarry, has indicated that she is working on changing her rules to encourage more diverse voices in her courtroom.

Anecdotally, there have been a multitude of reports of federal and state judges encouraging parties to have the more junior attorneys on their teams take an active role in the courtroom, including at trial.

Judges who previously have taken similar steps have reported positive results. Chief Judge Barbara M.G. Lynn of the U.S. District Court for the Northern District of Texas, for example, has made it her practice for the last 10 years to be more open to granting oral argument if a junior attorney is designated to argue the motion, which she credits with providing women and minorities with critical courtroom experience.

The Clients

Ultimately, of course, it is up to clients to decide who they want to represent them in court. To their credit, many companies and corporate in-house legal departments have made diversity an important factor in choosing their outside counsel. It is now routine for law firms to encounter requests for proposal that require a full accounting of women and diverse attorneys on the proposed team. Clients now realize, and social science studies reinforce, that more diverse teams make better decisions.

More recently, clients have gone beyond demanding diverse teams. This year, for example, the general counsels at Hewlett-Packard, Facebook and Metropolitan Life Insurance Co. have made news for policies that require their respective law firms to forfeit fees if the firms do not attain certain levels of diversity overall.

In other instances, clients have demanded that women and minorities not just be included on the legal team, but take an active role in the matter. This trend does not show any sign of abating. Just recently, J.P. Morgan announced that, in response to the report and the bank's continued focus on diversity issues, it has established a new "Leading with Diversity" initiative. The bank is kicking off the initiative early next year by inviting female and diverse lawyers from its regular outside law firms to attend an event where the report will be discussed. The importance of these actions by influential companies cannot be overstated. Client demand is a significant motivator for law firms, as is the shared goal of law firms and clients to offer female and diverse attorneys meaningful opportunities to succeed as attorneys.

The Law Firms

Most large law firms have committees and personnel devoted to promoting women within the firm and advancing diversity initiatives. But, while nearly half of all law school graduates are women, women make up just 34 percent of attorneys at law firms, according to the National Association for Law Placement. Those numbers drop more precipitously when considering only equity partners.

Clearly, the issue is not a lack of female talent. As discovered and detailed in the report, in public interest law, female lawyers accounted for 38 percent of lead counsel and 31 percent of attorneys overall. This jibes with my experience. As a former state and federal prosecutor, I witnessed a depth and breadth of female talent in government that discredits any notion that women are not effective in the

courtroom.

The challenge is to make sure that women find as many quality courtroom and trial opportunities in the private sector. Making more female partners is part of the answer. As the report details, an important way to ensure that more women make partner is establishing a sponsorship program that pairs an experienced partner with a senior female associate on her path toward partnership.

A sponsorship program's strength lies in its focus on concrete results, but the relationship must develop organically. Sponsors provide increasingly challenging "stretch" assignments with growing levels of responsibility; they assist the associate in developing and enhancing her presence and reputation within the firm; they introduce the associate to clients; and they use their own influence within the firm to promote the associate internally.

Morrison & Foerster LLP, for example, has long recognized the importance of sponsorship and a number of the firm's high-profile partners are successful testaments to the firm's commitment to sponsorship. Indeed, 39 percent of our board of directors are women, and, in 2017, 47 percent of partner promotions were women.

Of course, this culture of sponsorship is just one part of a multi-pronged approach — an approach that also must include a focus on a strong recruitment plan; the provision of excellent programming, training and resources; the strengthening of community among female lawyers; promoting connections with female alumni; and a focus on associate engagement. These efforts should not be solely focused on junior attorneys — in fact, our firm is one of the participating firms piloting the Mansfield Rule initiative, which is an effort to increase diversity in leadership ranks. The Mansfield Rule measures whether law firms have affirmatively considered female lawyers and attorneys of color — at least 30 percent of the candidate pool — for promotions, senior level hiring and significant leadership roles in the firm.

When it comes to making sure women can succeed in their chosen careers, there is no one perfect solution and one size does not fit all. What has become clear is that, to make progress, each stakeholder in the litigation process — judges, law firms and corporate clients — need to contribute to the solution, and experimentation and flexibility should be encouraged. The report has added to the discussion and hopefully will help achieve significant progress. It has been a long time coming, but continued attention and action by the relevant stakeholders surely will help narrow the gap.

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