

## SECTION UPDATE

BY CARRIE H. COHEN AND THE COMMERCIAL AND FEDERAL LITIGATION SECTION TASK FORCE ON WOMEN IN THE PROFESSION



# Where Are the Women Litigators?

Former Chairs of ComFed Section Work to Advance Women's Role in the Courtroom

There has been much written and discussed during the last decade about whether women are appearing in court with the expected frequency given their numbers in the profession. The Commercial and Federal Litigation Section counts among its former chairs a substantial number of prominent women litigators as well as a former United States District Judge and a former President of the New York State Bar Association. These alumnae banded together and with the full support and commitment of the Section's leadership formed an *ad hoc* task force devoted to the issue of women litigators in the courtroom. The task force began its work in 2016 and has undertaken a project seeking to diagnose whether there is a disparity – and, if there is, to make concrete suggestions to eradicate it.

### Background

#### Prior Studies of the Numbers of Women Litigators in the Courtroom

Approximately one year ago, a research report, entitled *First Chairs at Trial: More Women Need Seats at the Table*, was prepared by two women attorneys with support from the American Bar Association's Commission on Women in the Profession and the American Bar Foundation. This report was based on a "docket study" of all cases filed in 2013 in the Northern District of Illinois. The data reported was drawn from a review of Civil Cover Sheets filed in those cases and totaled 558 civil cases and 50 criminal cases. As a baseline, the study noted that, as of the date of the study, women made up 17 percent of all equity partners in big firms and 22 percent of general counsel in Fortune 500 companies. The results of the Northern District of Illinois study showed that women were underrepresented in the courtroom. Here are just a few of the findings:

- Of all appearances in *civil cases*, 68 percent of the lawyers who appeared were men.
- Of those appearing as *lead counsel*, 76 percent were men, meaning that men were approximately three times more likely to appear as lead counsel in a civil case than women.
- Of those appearing as *trial counsel*, 73 percent were men,

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meaning that, like lead counsel, men were approximately three times more likely to appear as trial counsel in a civil case than women.

- The gender gap was greatest in certain areas of law including contracts, torts, labor, and intellectual property. The gender gap was less apparent in civil rights, social security, and real property cases.
- When the government was a party (federal, state, or local), women were more likely to appear, ranging from 31 percent when the federal government was a party to 40 percent when the state or a municipality was a party.
- By contrast, when individual litigants or businesses were a party, almost 80 percent of lead counsel were men.
- Of those women who were lead counsel, 60 percent represented defendants, but only 40 percent represented plaintiffs.
- For class actions, men comprised 87 percent of lead counsel.

In a news article written in August 2015, the Chief Judge of the Northern District of Illinois confirmed these findings anecdotally. He spoke at the ABA annual meeting and was quoted as stating that, in his 21 years on the bench, he has seen only 14 or 15 cases where women served as lead counsel.

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The Section's task force anecdotally believed that New York courts would have numbers similar to those found in the Northern District of Illinois. Indeed, the District Judge of the Southern District of New York who served on the task force, the (ret.) Hon. Shira A. Scheindlin, reported to the task force that she had a remarkably similar experience to that of the Chief Judge from the Northern District of Illinois. The task force also spoke with judges of the New York State courts who reported a similar gender disparity in appearances in their courtrooms.

### The Data Collection

In order to determine whether women litigants actually are underrepresented in our New York federal and state courtrooms, the task force conducted a survey that tracked appearances by gender in federal and state courts for a set time period. The task force created a simple, one-page user-friendly questionnaire that asked judges in all four federal District Courts in New York, the New York State Court of Appeals, the four New York State Appellate Departments, and the ten Commercial Divisions to track all court appearances by gender and type of case for a three-month time period (September through December 2016).<sup>1</sup> Specifically, the questionnaire asked the judges to indicate whether the litigant who spoke in court was a woman and, if so, in what type of case she appeared, identified by subject matter and whether the case involved a government party or a private party. The form also asked what type of proceeding was held – for example, a trial, a motion, an appeal, or an evidentiary hearing. The form tracked appearances primarily in civil cases, although it also tracked federal criminal cases.<sup>2</sup>

As the Commercial and Federal Litigation Section has a longstanding relationship with the judiciary, the participation in the survey from the bench was fulsome. Judges of three of the four federal District Courts, the New York State Court of Appeals, the four Appellate Departments, and almost all of the Commercial Divisions generated survey responses. In fact, the task force received more than 4,000 survey responses and analyzed more than 200 arguments before the Second Circuit.

### The Survey Results and Next Steps

The task force has spent the first quarter of 2017 aggregating the survey data and currently is working on drafting a report detailing such data. If the findings show a distinct gender disparity in the numbers of court appearances, then the task force will begin to work on proposing remedies to eliminate such disparity.

Indeed, the task force has not waited for the survey results to be tallied before beginning to work on possible suggested remediation (assuming based on prior reports and studies that the disparity does indeed exist). Again, drawing on the Section's longstanding and productive relationship with the judiciary, the task force has held several roundtable discussions attended by many members of the state judiciary as

well as other prominent litigators in federal and state courts. These roundtables have produced a litany of suggested next steps and concrete proposals aimed at ensuring that women are appearing in court in equal numbers as men. Thus, the remedial sections of the report are well under way.

### The Related ADR Project

As many of the task force members are commercial litigators, the task force expanded its initial mission to now include a study of the percentages of women who appear in Alternative Dispute Resolution forums, in particular in arbitration and mediations as attorneys and as neutrals. Like the women in the courtroom project, previous studies had been conducted with respect to ADR providers. According to the author of a 2014 article on gender diversity in international arbitration, only 10 to 15 percent of appointments in international arbitration have been women. When the matter involved more than \$1 billion, the percentage shrank to 4 percent. Recent data shows statistics for each international ADR center. For example, in 2015, in arbitrations under the auspices of the International Centre for the Settlement of Investment Disputes, women were appointed in only 12 percent of the cases. For fiscal year 2015, arbitrations conducted by The International Institute for Conflict Prevention & Resolution (CPR) reflected that women were appointed in only 10 percent of cases although they made up 18 percent of the panel. Other ADR organizations reported similar statistics.

The task force decided that like its courtroom study, the ADR study would be based on direct observations of ADR proceedings. Accordingly, the task force prepared a questionnaire similar to the one used in federal and state courts and secured the cooperation of a number of well-known ADR organizations. The ADR organizations agreed to distribute the questionnaire to their neutrals so that the task force could obtain sufficient raw data about the number of mediations and arbitrations that were being handled primarily by women and in what field of law and how the neutral had been selected for those proceedings. The task force expects to receive initial data responses by the second half of 2017 and then to begin preparing a report with suggested proposals to improve the gender breakdown in the ADR context, if applicable.

### Conclusion

While in some respects, the Commercial and Federal Litigation Section task force's work has just begun, securing the participation of so many federal and state court judges as well as ADR providers truly could not have been possible without the strong connection between the Section and the bench and bar. The task force looks forward to continuing the ongoing dialogue and contributing to it in a meaningful and lasting way. ■

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1. For the Second Circuit Court of Appeals, the requested data was available (and obtained) through the court's electronic filing database.

2. The questionnaire did not account for transgendered persons.