

# Round Up the Usual Suspects:

## TRADITIONAL METHODS OF SELECTING FIRST CHAIR TRIAL COUNSEL IN PRODUCTS LIABILITY CASES EXCLUDE WOMEN AND WEAKEN THE DEFENSE.

“You can’t be shining lights at the Bar because you are too kind. You can never be corporation lawyers because you are not cold-blooded. You have not a high grade of intellect. I doubt you could ever make a living.” *Clarence Darrow to women lawyers. Morello, Bar Admission was Rough for 19th Century Women, 189 N.Y.L.J. 19 (1983).*

A product liability trial is a war. It is a long war. Years of skirmishes that culminate in a battle of epic proportions. You slog through discovery, motions to compel, depositions, expert discovery to arrive at “ready for trial” status. Then you have to distill all that has happened during this exchange and prepare a case strategy and a story of why your client should prevail. You have many weapons with which to do this: experts, your client, your skills as a communicator, tactician and performer. During this battle, however, you not only have to worry about your own performance, you have to manage your team and keep each member’s morale up at the same time that you maximize

and fear. The other side, however, has the same weapons. It is war that is not for the faint of heart, it is not for the weak and it is not for the ill-prepared.

It naturally follows that if trial is war, then it needs a leader, a general. How many famous or not-so-famous women generals do you know?

There are a disproportionate number of men who first chair product liability cases. This piece will explore this fact and challenge us as a profession to change this fact for the good of our clients, our women, our men and our legal system. Our system will be the best, most rich and most colorful when it is populated by a



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their capacity for and contribution to the fight. You have to develop and control the message that your team receives and conveys. You have to unite your entire arsenal so that it all comes together at just the right moment to ensure the highest quality communication of your vision, which only you truly understand. You need stamina because the hours are long and the stakes are highest when you are most stretched. You live off of adrenaline and desire and competition

diverse group of lawyers. It will be the most challenging and interesting when people of all backgrounds and demographics advocate together and against one another in front of a jury and judiciary similarly comprised.

### **THE USUAL SUSPECTS HAVE ALWAYS BEEN MEN**

In order to change the way that trial counsel are selected and the pool from which those selections are made, we must first examine what or who is

responsible for the indisputable under-representation of women in courtrooms around the country. There are many different barriers to consider.

There are institutional barriers which fail to maximize the recruitment, opportunities, promotion and retention of women. Trial work also provides additional unique challenges for women. Moreover, there are internal barriers that women possess which have affected the opportunities for their own success as trial lawyers.

Law firms have evolved from a model that was created by men for men. Only men participated in the American legal profession when it began and they set up a

system that worked in its historical context. The first woman in the country to be admitted to the practice of law was Arabelle Mansfield in 1869. Women were not admitted to the bar of the United States Supreme Court until 1879, ninety years after that Court was established, and even then it took a special Act of Congress before petticoats and pinafores were allowed inside those hallowed halls. See, *Alice L. O'Donnell, Supreme Court Historical Society 1977 Yearbook, "Women and Other Strangers Before the Bar" (1976).*

Most law firms' compensation systems give business credit to the business originator. The person who secured or inherited the client gets the majority of the compensation for work done for that client. This model encourages hierarchical arrangements or fiefdoms where there can be only one master ... the first chair trial lawyer. There is no financial incentive for the master to share or to train others to become first chair trial lawyers; once trained, they will either leave your hierarchy and you will have to replace them, or they will seek to share your hierarchy and your compensation will be reduced.

Firms do not provide women with formal and informal mentoring. Being a good lawyer is not enough, and the intangibles of a successful trial practice must be learned. Without the mentoring systems to teach young women how not only to try cases but to negotiate law firm politics and build their own client base, they are not set up for success by the very institution which will reap the benefit from that success. Of equal concern to the lack of mentoring is the lack of role models. There are so few women partners and even fewer women trial lawyers for young women to learn from and model their behavior after. Without models to show young women that they can balance a lively trial

practice with a lively home life, why would women believe it possible? Why would they put forth the effort necessary to achieve it?

There is also a systemic yet newly identified phenomenon described as "benign exclusion" wherein women are systematically albeit not intentionally left out of the process necessary to become successful trial lawyers. See, *Lauren Stiller Rikleen, Ending the Gauntlet: Removing Barriers to Women's Success in the Law (2006).* When there is a marketing opportunity or a trial, it is often the practice among the (male) first chair trial lawyers to round up the "usual suspects." Most of the current trial lawyers are men, and the people they think of when there are trials in

which leads to inappropriate differential treatment." *Garner Weng, Racial Bias in Law Practice, California Lawyer (Jan. 2003).* One of the most profound gender biases in the products liability trial setting is the "girls don't understand math and science" fallacy. This is a particularly devastating bias because product liability defense work involves technological, engineering, medical or scientific issues at its core. These are grey matter cases. Women in product liability work have historically been stereotyped into case management and discovery as compared to the expert witness development and first chair trial

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need of first chairs are men. A recent study determined, not surprisingly, that men are most comfortable with others like themselves. See, *Minority Corporate Counsel Association, Creating Pathways to Diversity: A Set of Recommended Practices for Law Firms (2000).* It follows then that if a man cannot try a case or needs someone to team up with, it will be another man.

Unintended gender bias also results in the systematic exclusion of women. This is not only true in firms but also in the courtroom. "Bias is not necessarily intentional. Social cognition theorists posit that bias is the function of the human brain trying to make sense of the world by making distinctions among the things it encounters. Once the brain creates categories, it tends to exaggerate the differences among the categories,

roles which have gone to men. Gender bias also exists regarding the commitment required to be the first chair trial counsel. It is true that to be the general or first chair, you must possess an extraordinary commitment to your craft and your client. The perception is that because women attempt to balance their commitment to work and family, they lack the total commitment necessary to try a case. This bias, which often grows out of a genuine concern that a woman needs to "be with her family," has a profoundly negative effect on her getting the career opportunities she deserves.

Courtrooms also contain substantial barriers for women. When you walk into a court with your rolling brief bag and the bailiff

tells you, "court reporters sit over there," that playing field is not level. Judges and other court personnel possess the same biases that the law firms have about the role of women in litigation. Judges often discount the import of the message when it comes from a woman rather than a man. They also curtail women in their argumentative fervor. A woman's strenuous advocacy is more likely to be characterized as aggressive or shrill while a man is just being assertive. In a recent survey of women who try cases, 70.4% of those trial lawyers indicated that they had experienced gender bias in the courtroom. *Shelly Hammond Provosty, DRI Task Force Examines the status of Women Litigators at Law Firms, Of Counsel, July 2005.*

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Women share the responsibility for their absence from trial practice as well. Women leave. This is a devastating institutional reality. Women now equal or outnumber men as law school graduates. Women currently enter law firms as 45-50% of the entering class. But, as of 2000, women represent only 16% of the partners and only 14% of the equity partners at these same law firms. *Catalyst, Women in Law: Making the Case 26 (2001).* Being a trial lawyer is very hard work. It consumes your time and requires much sacrifice. You do not control your days as so much of your life is dictated by the courts or opposing counsel. Moreover, as Justice Sandra Day O'Connor acknowledged "women professionals do have primary responsibility as a practical matter for having children and doing a lot of the housekeeping that it takes to provide a home, and they spend roughly twice as

much time on these cares as do professional husbands. *Justice O'Connor, Speech for National Women's History Month (March 8, 2006).*

Women perform a cost benefit analysis when considering life as a trial lawyer. In surveying the landscape, they see very few women trial lawyers, very few women partners, very few women leaders of firms, and very few women judges and they decide that their extraordinary efforts are not likely to be rewarded and they opt out. When they leave, the gender-biased assumptions made by law firms, judges and opposing counsel that women lack dedication and are less likely to be around to finish the war are substantiated. By

opting out, they then predispose the next generation to similarly reject the life of a trial lawyer. Women leave and they usually leave because they are unable to strike a balance between work and family. *Shelly Hammond Provosty, DRI Task Force Examines the status of Women Litigators at Law Firms, Of Counsel, July 2005.*

Women don't do it right. Women do not ask for things. We do not ask our clients for work. We do not ask our partners for assignments. We do not ask to try cases. Women believe that if we work hard and demonstrate our talent, we will get what we deserve, whether we ask for it or not. Conversely, men have very little problem asking for what they want. If a man asks for a trial and a woman hopes for it, who gets it? Trial lawyers

need to be bold and assertive and not just in the courtroom.

## **ROUNDING UP THE USUAL SUSPECTS IS A BAD BUSINESS MODEL**

Women enrich the legal landscape. They bring different ideas, approaches, viewpoints, and solutions to problems. Women serve on juries. Women buy the products that we are defending. Women must, therefore, try cases. Women must take their place in the legal arena in proportion to their place in the world.

Corporate clients have made sweeping changes in their expectations regarding trial counsel. Clients now make demands about how their cases are to be staffed and those demands include the requirement that women will not just staff cases but will play prominent roles in the case development and trial. Women are required, not just as window dressing, but as participants or leaders. Corporations financially incentivize their in-house counsel to hire women trial lawyers. They also demographically analyze the billable hours and business credit given and issue diversity report cards upon which they make future hiring decisions.

In the last five years, one notes a trend of corporate edicts regarding diversity and inclusion. In 2004, Sara Lee General Counsel Roderick Palmore created a "Call to Action" in a document that reaffirmed corporate commitment to diversity and stated that the endorsing corporations would end or limit their relationships with law firms

that did not increase the number of women and minority lawyers hired and retained. This document was initially signed by seventy-two Fortune 500 companies. *Melanie Lasoff Levs, Call to Action – Sara Lee’s General Counsel: Making Diversity A Priority, MCCA Diversity and the Bar (Feb. 2005).*

At the same time that clients are requiring a demographically different trial team, law firms are paying a high cost for the crisis of attrition. The cost of losing an associate is astronomical, generally estimated between \$250,000 and \$400,000. Law firms are realizing that, although attrition seems to be disproportionately a female issue, the *cost of attrition* is gender-neutral. In fact, the cost of attrition is borne disproportionately by men because they disproportionately own these firms.

While clients are demanding women and firms are facing the real costs associated with losing women, women have discovered the concept of professional free agency. It is no longer the case that you graduate law school, go to work at a firm, become a partner and retire from that same firm. Women can forum shop for the environment that is most likely to set them up to succeed. And women are doing this with increased frequency.

Being a successful product liability trial lawyer involves the ability to communicate high level technical concepts to a jury in such a way that they understand the issues and agree with your perspective. There is nothing uniquely masculine about that. Women communicate differently than men and a team of available women

trial lawyers maximizes our clients’ potential to put together the ideal trial team. Most jurors, like the rest of us, have been influenced, convinced and persuaded by women in their lives. There is no reason to think that this will not also hold true during the trial of a complex, catastrophic products liability case.

“Women hold up half the sky and they will do so in our courts. They need no favors. They need only equal respect for their talent and equal sharing by men of the job of bringing up the next generation.” *Justice Ruth Bader Ginsburg, Columbia Law School Panel Discussion (April, 2003).*

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