

New judicial study: Birmingham women attorneys trail behind men in courtroom appearances

By Honorable Elisabeth A. French, Kimberly L. Bell, Maridi Huggins, Smriti Krishnan and Tina Lam

When Justice Ruth Bader Ginsburg first enrolled in Harvard Law School, she was invited to a dinner by the Dean of the Law School.¹ The dean asked Justice Ginsburg, along with the eight other women in her class, how she justified taking a seat at Harvard Law School from a qualified man.² Well-aware of the ramifications of her answer, Justice Ginsburg dutifully answered “[m]y husband is a second-year law student, and it’s important for a woman to understand her husband’s work.”³

Her answer underscores how valuable her position was: in 1956, Harvard Law had nine women enrolled and 491 men. In fact, at Harvard Law, there were a total of 34 women students between 1953 and 1955.⁴

Sixty-one years later in December 2016, there were 55,766 female law students enrolled at accredited law schools compared to 55,059 male law students.⁵ Change has certainly happened within the classrooms since the 1950s, but that difference has not corresponded to equivalent change in the profession. In 1970, female attorneys made up 4% of the profession, and in 2019, women comprised 38% of lawyers.⁶

In 2016, the Commercial and Federal Litigation Section’s Task Force on Women’s Initiatives of the New York State Bar Association (NYSBA) performed a groundbreaking, first-ever observational study (New York Study) “to ascertain whether there was, in fact, a disparity in the number of female attorneys versus male attorneys who appear in speaking roles in federal and state courts throughout New York.”⁷

The NYSBA task force devised and distributed a survey to state and federal judges throughout New York and then compiled the survey results. Published in 2017, the survey



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results found a clear disparity and gender imbalance in the courtroom. Specifically, only approximately 25% female attorneys appeared in commercial and criminal cases, 24% in lead counsel roles and 27.6% in additional counsel roles.⁸

Upon reviewing the results of this study, in 2018 the Birmingham Bar Association’s Women Lawyers Section (WLS) established its own task force to launch a study to determine whether there was a similar disparity in the courtrooms here.

The Birmingham study, known as the “Women Lawyers Section Observational Tracking Project” (Birmingham Tracking Project) involved tracking female and minority attorney contributions in the courtroom for a four-month period (August through November 2018).⁹

Twelve judges participated in the Birmingham Tracking Project: four from the Jefferson County, Alabama Circuit Court – Civil Division¹⁰ and eight from the United States District Court for the Northern District of Alabama.¹¹ Similar to the New York Study, each judge was given a questionnaire, designed to be an observational study, and was asked to record the gender and race of the attorneys who took the lead, secondary, and nonspeaking roles in all matters in their courtrooms over the four-month period. Upon the conclusion of the four-month period, the Birmingham WLS task force collected the forms and analyzed the data. More

than 1,100 questionnaires were completed, compared to the 2,800 responses in the New York Study.¹²

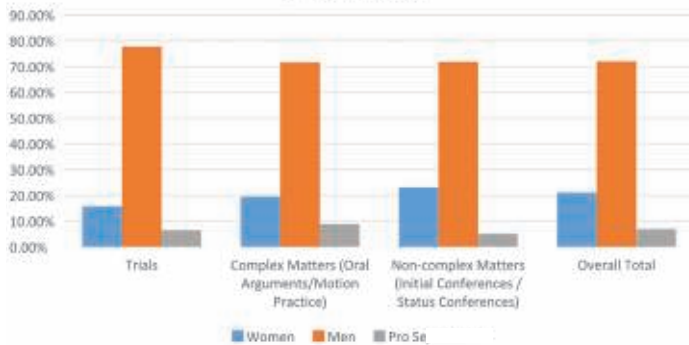
PROJECT’S FINDINGS

Overall, the Birmingham Tracking Project revealed women attorneys made court appearances as lead counsel on average a paltry 21% of the time versus men, who appeared 72% of the time.¹³ Digging deeper into the numbers, female court appearances as lead counsel decreases from 23.05% for basic status conferences to 19.5% for motion practice to approximately 16% for trials. Of course, that corresponds to male attorneys seeing the opposite, increasing trend as lead counsel. Specifically, male lead attorneys appeared approximately 71% of the time for both basic status conferences and motion practice, but increased to nearly 78% for trials.

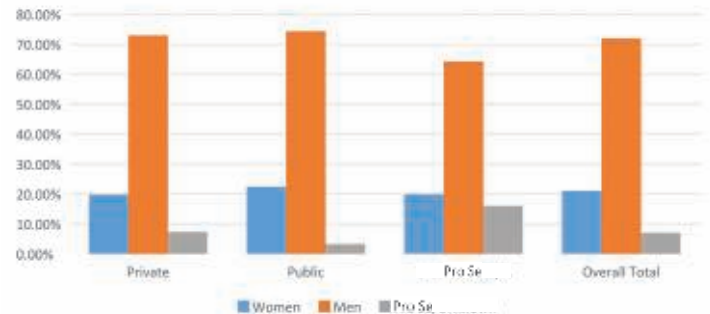
Comparing the results from the Birmingham Tracking Project to the New York Study, female attorneys in New York appear in court as lead counsel approximately 4% more frequently than their counterparts in Alabama. Interestingly, the NYSBA conducted the same study again this year to see if there had been any improvements in female attorney court appearances since the last study three years ago.¹⁴ In short, the answer was substantially no. The NYSBA found women lead counsel appearances only increased by approximately 1.4%.¹⁵

The New York Study from 2016 also

Birmingham Tracking Project: Court Appearances by Types of Proceedings



Birmingham Tracking Project: Court Appearances - Public v. Private Sector



revealed females were lead counsel for private parties barely 20% of the time but were twice as likely to appear as lead counsel for public sector clients.¹⁶ Three years later when the NYSBA conducted the study again, these statistics remained the same.¹⁷

However, the Birmingham Tracking Project's results did not show this same trend. Rather, the public/private counsel statistics were consistent with the overall rates of appearances of women and men as lead counsel in court. Specifically, in the private sector, women appeared approximately 20% of the time. Women attorneys appeared on behalf of public sector clients on approximately 22% of occasions. This is somewhat surprising since, as of May 2020, in the Federal Public Defender's office covering the Northern District of Alabama, there were 14 attorneys total with a 50/50 split of female and male attorneys.¹⁸ However, this may be explained by the fact that the Criminal Justice Attorney (CJA) panel is heavily male dominated with only four women attorneys out of a panel of 28 total lawyers.

The Honorable Shira Scheindlin, retired judge of the United States District Court for the Southern District of New York, who worked on the New York Study task force, stated, "The point of our study [and the Birmingham one] is to shine a light on a problem. We firmly believe that without metrics to back up what we suspect is the case, the issue will not be front and center for key players including law firms, in-house legal departments and the judiciary. By gathering these statistics, we are making the case that much more must be done before there is real gender parity in the legal profession."

NEXT STEPS

The lack of opportunities for women in the courtroom translates into fewer promotions

later on in their careers. For example, consistent with the results from the New York Study and the Birmingham Tracking Project, a 2019 Survey Report on the Promotion and Retention of Women in Law Firms by the National Association of Women Lawyers showed women comprise approximately 20% of all equity partners despite the fact that 47% of associates are female.¹⁹

Similarly, women only account for 20-25% of governance and compensation committee members, office-level managing partners, and practice group leaders. Moreover, females are largely unrepresented as firm managing partners.²⁰

In conclusion, the Birmingham Tracking Project shows that, despite the increasing enrollment of females in law schools across the nation, female attorney roles in Northern Alabama, courtrooms remain limited. As the New York Study's report stated, "The first step in correcting a problem is to identify it."²¹ That is what the Birmingham Tracking Project has demonstrated: there is a problem, namely that more women should be appearing in the courtroom.

While the exact reasons for this diminished capacity in courtrooms is unknown, the WLS is committed to changing gender courtroom dynamics. The next step in correcting this problem is to put forward solutions, and the last step is for those solutions to be implemented. The WLS intends to work toward solving this problem in its future endeavors.

¹ Interview by Philip Galanes with Ruth Bader Ginsburg, Supreme Court Justice, and Gloria Steinem, Founder, Ms. Magazine, in Washington, D.C. (Nov. 14, 2015), available at <https://www.nytimes.com/2015/11/15/fashion/ruth-bader-ginsburg-and-gloria-steinem-on-the-unending-fight-for-womens-rights.html>.

² *Id.*

³ *Id.*

⁴ Cynthia Grant Bowman, *Women in the Legal Profession from the*

1920s to the 1970s: What Can We Learn From Their Experience About Law and Social Change?, 61 *Maine Law Review* 1, 25 (2017).

⁵ Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, *The New York Times* (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html>.

⁶ *Id.* at 15; American Bar Association - Commission on Women in the Profession, *A Current Glance at Women in the Law 2019*, https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf.

⁷ New York Bar Association, Commercial and Federal Litigation Section's Task Force on Women's Initiatives, *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR* (2017), available at <https://nysba.org/app/uploads/2017/08/Com-Fed-Women-Initiatives-Report-Amended-1.pdf> (last visited June 16, 2020).

⁸ See *id.*; see also Corinne Ramey, *Fewer Woman Lawyers Have Top Courtroom Roles in New York*, *The Wall Street Journal* (August 6, 2017), available at <https://www.wsj.com/articles/fewer-woman-lawyers-have-top-courtroom-roles-in-new-york-1502049664> (last visited June 16, 2020); see also, Hon. Shira A. Scheindlin, *Female Lawyers Can Talk, Too*, *The New York Times* (August 8, 2017), available at <https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html> (last visited June 16, 2020).

⁹ The Birmingham Tracking Project, unlike the New York Study, also collected race data. This article focuses on the gender data; however, an analysis of the race related data and a related article will be published in the near future.

¹⁰ According to the Alabama Bar, as of July 6, 2020, there are approximately 5,534 attorneys in Jefferson County with males comprising approximately 66% and females approximately 34%. In the 31 counties in the United States District Court – Northern Division, there are 9,695 attorneys and the breakdown between male and female attorney mirror Jefferson County with 66% males and 34% females.

¹¹ This study would not have been successful without the help and participation of the following judges and their court staff: Honorable Pat Ballard, Honorable Karon Bowdre, Honorable Staci Cornelius, Honorable John England III, Honorable Elisabeth French, Honorable Madeline Haikala, Honorable Jim Hughey III, Honorable Herman Johnson, Jr., Honorable Abdul Kallon, Honorable John Ott, Honorable Javan Patton, and Honorable C. Lynwood Smith, Jr. The participation of the judges and their court staff was remarkable, especially considering their various court caseloads and duties. They went above and beyond to provide this data. We are truly thankful for the support we received.

¹² Scheindlin, *supra*.

¹³ *Pro se* and unknown individuals accounted for approximately 7% of court appearances.

¹⁴ Hon. Shira A. Scheindlin, *Women Still Lag in Courtroom Talk. Here's Why* (May 28, 2020), available at <https://www.law.com/newyorklawjournal/2020/05/28/women-still-lag-in-courtroom-talk-hereswhy/> (last visited June 15, 2020); see also Susan DeSantis, *Gender Disparity in New York Courtrooms Persists Three Years After Landmark State Bar Association Report Decrying Inequity* (May 28, 2020), available at <https://nysba.org/gender-disparity-in-new-york-courtrooms-persists-three-years-after-landmark-state-bar-association-report-decrying-inequity/>.

¹⁵ See *id.*

¹⁶ Scheindlin, *Female Lawyers Can Talk, Too*, *supra*.

¹⁷ Scheindlin, *Women Still Lag in Courtroom Talk. Here's Why*, *supra*.

¹⁸ The state court judiciary system in Jefferson County is unique compared to other jurisdictions in Alabama. Specifically, the civil and criminal courts are divided into separate divisions. In this study, no state court criminal data was collected. Unlike the state court in Jefferson County, the judges in the United States District Court for the Northern District of Alabama preside over both civil and criminal matters.

¹⁹ Destiny Peery, *2019 Survey Report on the Promotion and Retention of Women in Law Firms* (2020), available at <https://www.nawl.org/page/nawl-survey> (last visited June 22, 2020).

²⁰ *Id.*

²¹ New York Bar Association, *supra*, at 18.