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Oyez Us Roar: Reflections on the Diversity of Appellate Counsel

By Ellen Robb – May 17, 2019

The U.S. Supreme Court first assembled in 1790. Ninety years later, Belva Lockwood was the first woman to argue an appeal before the Court. How far have female attorneys come since Ms. Lockwood made her Supreme Court argument in 1880? Not far enough.

A Look at Mississippi in 2018

I practice in Jackson, Mississippi, and as part of my practice, I watch the oral arguments that the Mississippi Supreme Court and Mississippi Court of Appeals broadcast and archive. I do so primarily to keep abreast of the types of cases that are argued and how the court decides, but I find the information particularly useful in my practice as a mediator, especially with the relatively new Mississippi Rule of Appellate Procedure 50, which encourages appellate mediation. The appellate courts do not hold oral arguments in every case, but they are mandatory in death penalty cases. For all other types of cases, parties request an oral argument in their briefing.

While watching the arguments, I incorporate notes into a spreadsheet, and I began including some basic demographic information on the attorneys. In watching the arguments, it became rather noticeable when a woman was one of the advocates. According to my independent observations, in 2018, 70 arguments were broadcast, and 152 attorneys argued their cases. Of those 152 attorneys, just 23 were female. Notably, of the 152 attorneys, just 10 were African American, 5 male and 5 female.

Put differently, of the total number of attorneys who argued before the Mississippi appellate courts in 2018, only 15 percent were women. In comparison, according to membership data provided by the Mississippi Bar in January 2019, women comprise 30 percent of active members of the Mississippi bar (6,946 total active members located in the state, of which 2,089 are women). The relative paucity of women attorneys making oral arguments in Mississippi appellate courts undoubtedly is a huge issue and calls for much more attention.

It's Not Only Mississippi

While I have not completed an in-depth study of other appellate courts, the data I have found in Mississippi does not appear to stem from some notion that Mississippi is "backwards." According to a November 2017 report, women were lead attorneys in New York state and federal trial and appellate courts just 20 percent of the time. A 2017 article by Dr. Adam Feldman, "A Dearth of Female Attorneys at Supreme Court Oral Arguments," found only 17 percent of the attorneys arguing before the Supreme Court from 2012 to 2016 were women. In the article, several "reasons" why men

outnumbered women (better performance, more interest) were discounted; Dr. Feldman concluded that "no reasonable statistical explanation can account for the difference in participation between male and female attorneys before the United States Supreme Court."

Oral arguments before appellate courts are a small slice of the large pie that makes up the legal profession. Though it is small, it is an important part. The law clerks for the judges and justices are taking note of who is arguing each case. There is a good chance the judges and justices who are not on the panel—and their law clerks—are watching too. Indeed, in a 2017 *New York Times* op-ed, former female federal judge, Shira A. Scheindlin, not only noticed the problem but opined that judges could help solve it by suggesting that the brief writer (often a woman) be the one to argue. Occasionally, especially in high-profile cases, the bar and the public are equally aware of the gender and race of lawyers who appear before the courts. The diversity (or lack thereof) of these lawyers shapes others lawyers' and the public's perception of the profession as a whole.

What's "Trending" Outside the Legal World Is Creeping into It

It is fair to say that if you have not heard of a modern-day push for equality—whether the #MeToo movement, various legislation concerning equal pay for women, or the seeming avalanche of reports and resources addressing bias against women—you are living under a rock. Whether the bias against women is actual or perceived, intentional or not, it matters. And it should matter to you because it increasingly matters to your clients.

For example, as reported by the ABA, insurance giant MetLife recently convened outside counsel to request that they create formal plans to retain and promote diverse talent as part of individual business models. Firms that were not up to par were to be removed from the list of MetLife's approved outside counsel. That is a big deal. The seriousness of corporate entities' commitment to and demand for diverse outside counsel was commemorated in the widely circulated January 2019 Open Letter to Law Firm Partners signed by general counsel and chief legal officers of more than 170 companies. The letter noted that "[c]ollectively, [the companies of the signatories] spend hundreds of millions of dollars annually on legal services and we are committed to ensuring equality in the legal profession." The authors of the letter then expressed their expectation that "the outside law firms we retain to reflect the diversity of the legal community and the companies and the customers we serve."

The Buzz from the Bar—How Women Can Develop Appellate Practices

So how does a woman get the lead role? No doubt, developing an appellate practice is hard work. My curiosities led me to reach out to appellate attorneys and get their input. Several were kind enough to share their thoughts. Along with writing the appellate brief, common suggestions were finding a mentor, taking pro bono cases, having confidence, and being prepared. (Several tips on developing an appellate practice are thoughtfully addressed by Brandon Maxey in "Breaking into the Appellate Practice as a New Attorney," *For the Defense*, February 2019).

A former president of the American Academy of Appellate Lawyers, Sylvia Walbolt of Carlton Fields in Tampa, Florida, echoed the opinion that the brief writer should make the oral argument. Her suggestions include finding a mentor, offering to participate as opposing counsel in mock oral arguments, and taking pro bono appeals in courts that regularly grant oral arguments. Ms. Walbolt refreshingly advised that women have been in the forefront in Florida appellate cases for years.

Melinda Kollross of Clausen Miller in Chicago, Illinois, is the firm's cochair of the Appellate Practice Group. Ms. Kollross's success as an appellate attorney comes from preparation and practice. During an argument, she suggests answering questions directly and enthusiastically, which demonstrates a command of the case. Ms. Kollross was guided by two mentors (both male) who believed that the author of the brief should make the oral argument. She recalled an instance where a client had reservations about having her argue a multimillion-dollar insurance case before the Seventh Circuit and opted to hire a senior male from another firm. Ms. Kollross convinced the client to conduct moot arguments where both she and the rival attorney argued. After the moot argument, the client would make its final selection. Ms. Kollross was the winner of the mock argument and must have rocked at the Seventh Circuit because the case settled favorably for her client soon after.

Margaret Cupples, with Bradley in Jackson, Mississippi, also suggests taking pro bono cases to build experience. In addition, Ms. Cupples suggests that women should actually ask for the oral argument assignment. She also observed a trend in which judges prefer that the brief writer present the argument. A former chair of the Mississippi Bar Association's Appellate Practice Section, Michael Bentley (also of Bradley's Jackson office), suggests finding a mentor and participating in appellate-focused bar organizations. Kacey Bailey of Barry, Thaggard, May & Bailey, LLP in Meridian, Mississippi, suggests—in addition to hard work and preparation—reaching out to busy solo practitioners who may appreciate referral to or collaboration with a capable appellate attorney.

Linda Morkan of Robinson+Cole in Hartford, Connecticut, a fellow of the American Academy of Appellate Lawyers, emphasizes the need to have confidence, which can be gained through thorough preparation. She prepares by holding mock oral arguments with other attorneys posing as judges, as well as practicing the argument solo. Ms. Morkan is convinced that the brief writer is best suited to argue the case, and she provided the following anecdote: In a circumstance where she authored the brief, a male partner insisted on arguing before the appellate court. He made a concession during the argument that was fatal to their position without realizing the repercussions of the statement. This opened her eyes (and those of many of her clients) that the person most familiar with the issues should be the one answering the questions from the bench.

Conclusion

Ready or not, changes are happening. Women should make it known that they want the opportunity. Rather than asking, "Can I argue the case?" they should say, firmly but politely, "I want to argue the case" or "I should make the argument." Meanwhile, I'll be watching appellate arguments in Mississippi (and perhaps some other states). Let's see how the numbers and percentages change!

Ellen Robb is an owner at Robb Law Offices, PLLC, in Jackson, Mississippi