Some of my recent email highlights disturbing observations by several of my female colleagues. The first was an update from an MDL panel hearing at which the Judicial Panel on Multidistrict Litigation (JPML) hears from lawyers involved in complex litigation across the country on whether and where to centralize lawsuits. The hearings also are opportunities for lawyers to network, negotiate, and strategize. For those of us whose caseloads include securities, antitrust, mass tort, or consumer litigation, these near-monthly events are critical.

But what my colleague noted with dismay, I can confirm as a percipient witness: Out of more than 100 attorneys in the courtroom, about 10 percent were women. Of those who presented arguments throughout the day, the percentage was even lower. I was one of those allotted the customary two minutes to make points about centralizing claims arising from a tragic air disaster. I have attended MDL panel hearings since the early 1980s, and I have not seen the percentage of women lawyers—especially on the plaintiff side—rise appreciably. Perhaps that makes me part of a supposed “elite,” but instead I feel lonely. There should be more of us.

Three of the seven judges who serve on the JPML are women, including the panel’s only appellate judge. This is the highest number of women on the panel yet, and it has included at least one woman member for many years. What is true for the panel is true for the federal and state benches as a whole: The judiciary far outclasses the plaintiff bar regarding women’s participation and leadership.

The second email, a first-person report from a day of oral arguments in the Fifth Circuit, emphasizes this point. Despite the Fifth Circuit’s status as one of the leading federal appellate courts in the country, with several notable female judges, the percentage of women presenting oral arguments was, at best, 20 percent. While I have not confirmed who argued what and for whom that day, I have most often observed more women arguing for the defense side than the plaintiff side. Our plaintiff bar—of which I have been a proud member since my admission to practice—lags behind.

What is wrong with us? Don’t tell me there is a lack of qualified women who wish to serve as plaintiff advocates. That excuse holds no merit.

The defense bar has more diversity than we do—their corporate clients demand it. So why aren’t more of us “good guys,” gals?

Is it the plaintiff lawyers’ economic model, which values entrepreneurship over selfless team players? Maybe, but that can’t be the entire answer. Women are noteworthy for their relative absence from court appointments to plaintiff leadership roles; the result is that women are far too few in the courtroom, as first- or second-chair trial attorneys or as oral argument presenters in all phases of litigation. Yet they are committed, taking risks in contingency cases, and sometimes working for lower salaries and with less prestige than their defense-side sisters. They are behind the scenes, by writing brilliant briefs, researching,
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investigating, cross-examining deposition witnesses, and working with experts. These are demanding and valued functions, and women acquit themselves brilliantly in these roles. This should lead to more visibility in the courtroom, but it hasn’t. Why not?

The women leaders on the plaintiff side often do not mentor their female colleagues. I admit that I have fallen short myself, but this does not let male trial lawyers off the hook. They enjoy a near-monopoly in the courtroom spotlight and have a responsibility to ensure that their successors resemble our diverse society. Male trial lawyers should be working to ensure that the plaintiff bar, from the vantage point of the bench and the jury box, is at least as diverse as the people occupying those seats. So, guys, I’m talking to you.
Meanwhile, women are not waiting to be led into the spotlight; we’re leading ourselves. I have never been so gratified by a single event in the evolution of the plaintiff bar as I have been by Women En Mass, an association started and run by and for the benefit of female plaintiff tort lawyers. This group holds regular meetings, provides mentorship and encouragement for female lawyers at all levels, and actively promotes increased leadership roles for women in new and ongoing mass tort litigation. In its brief existence, it has had spectacular success: More women have been appointed to leadership roles in plaintiff steering committees and other court-appointed plaintiff leadership structures within the past year than in many previous years combined.

This trend will continue. The judges presiding over complex litigation understand the importance of diversity, and the long-established network of the “usual suspects” (of which I have been one of the few female members) is coming to understand its value as well.

If you are a female plaintiff attorney, you need to join and participate in organizations that support diversity. If you are a male plaintiff attorney, you need to understand, at the deepest level, that actively promoting women to roles of equal visibility, influence, and importance is in your own self-interest, because it is in your clients’ best interests.

Some judges have nudged law firm leaders to do what they should do, without judicial prompting: staff their cases with lawyers who reflect the diversity of our country. One such judicial leader, Judge Harold Baer of the Southern District of New York, caught flak from U.S. Supreme Court Justice Samuel Alito for asking class action plaintiff firms to “ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics.” While Baer’s admonition may or may not be an enforceable black-letter rule, it certainly addresses concerns of adequate, effective, and informed representation in class actions and is a compelling representative goal for all litigation. Baer stood up for a principle on which we should need no more prompting and posed a question that we need to answer. If the law belongs to all the people, why don’t our lawyers look like more of us? If we can’t bring ourselves to do it just because it is right, let’s at least do it because it works.

More fundamentally, the inclusion of women and minority lawyers as courtroom leaders is crucial to the survival and progress of American tort law, and it embodies the cornerstone of our goal as lawyers: access to justice in U.S. courts. So lead, by helping women follow you, or simply get out of the way as we build our own initiatives. And to all of my female colleagues, especially younger attorneys with your entire professional lives before you: I’ll see you in court!

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Notes
2. There are various journalistic accounts of this exchange between Baer and Alito. See e.g. Ian Millhiser, Federal Judge Slams Justice Alito’s Lack of ‘Understanding or Interest’ in Race or Gender Equality, ThinkProgress (Dec. 9, 2013), www.thinkprogress.org/justice/2013/12/09/3036081.