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TOP
Women Lawyers *Addendum*
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Woman judges: Different but equal

By Dalila Corral Lyons

The American legal system was forever changed on the day in 1981 when Sandra Day O'Connor joined the U.S. Supreme Court. Many expressed skepticism about her ability - as a woman - to be fair and impartial, but she had an answer: "I've always said that at the end of the day, on a legal issue, I think a wise old woman and a wise old man are going to reach the same conclusion."

When Ruth Bader Ginsburg became the second woman on the top court, she was far less restrained: "So now the perception is, yes, women are here to stay. [W]hen will there be enough [women on the Supreme Court]? [If] I say when there are nine, people are shocked. But there'd been nine men, and nobody's ever raised a question about that."

Women now occupy judgeships at every level, and the system of justice is far richer because it reflects their unique experiences and perspectives. When O'Connor retired from the Court in 2006, women comprised less than 5% of all law school students; relatively few served as judges. Today more women than men are enrolled in law schools across the country, they issue rulings from every level of the bench, and three Supreme Court justices are of the female persuasion.

Women as judges have changed the way we think and talk about the



law. Do women judge differently than their male peers? If so, is this cause for concern or celebration?

Many women judges

Data shows that at the end of 2022, approximately 40% of the state's judges were female. More women than men occupied seats on the state's Supreme Court and on many other courts within the state. Several counties - primarily those with only one or two judges - had no women serving as judges. As of

March 2023, 51% of the governor's judicial appointments were women.

These numbers underscore the significance of women's contribution to the science and art of judging. Women justices on the California Supreme Court and on the state's appellate courts are regularly reviewing and ruling on fundamental principles of law. Their decisions will have a deep and long-standing impact on both the profession and the general public.

It is natural to question whether

the law - as embodied in court decisions - is now different than it would have been had only men been making those decisions. Do women read facts, interpret laws, or respond to litigating parties differently than do their male counterparts?

Many experiences

The idea that women may view the law, or the facts to which the law is applied, differently than men may be troubling. The law is the law; the facts are the facts. There should be little room for wiggle.

Both Chief Justice John Roberts and Justice Clarence Thomas told Congress during their confirmation hearings that judges should be like baseball umpires, framing their decisions against clear lines drawn in the dirt or placed around the batter's/litigant's torso. But all judges, whether male or female, bring into the courtroom their unique experiences and perspectives. It would be unrealistic to assume that they can simply put those aside when considering matters before them.

Personal backgrounds and biases are an inherent and inescapable part of being human beings, even for judges. The outcomes of cases, however, should never depend on the gender, race or other characteristics of the decision maker. Only the law and the facts should ultimately drive the result.

Judges must therefore do their best to put personal biases and prejudices aside when rendering decisions. Their experiences and

backgrounds can nevertheless enrich and improve the legal system even when they don't affect the results. We will never know how past cases would have been decided if women judges had been involved, but we can look at current court dynamics and draw some broad conclusions.

Do women judge differently?

Are there differences in the way women and men view their world and render judgments? At least one study found concrete differences in the ways men and women deal with conflict and stress. Women exhibit a "tend and befriend" response to stress that is different from men's "flight or fight" response. Researchers posit that "women's hormones allow a more generous and communal response to stress than do men's hormones," and these differences may be innate or may be the result of "developmental paths imposed on male and female children."

Another study examined how women work as mediators, identifying a host of "soft" skills that female mediators bring to the process. Women, the researchers found, tend to be more sensitive to gender inequalities, and as mediators they focus more on the relational nature of conflicts, rather than power and hierarchy issues that tend to occupy men. Instead of looking only at facts and the law, women mediators are more likely than their male counterparts to put things in context. The study found that they see both the bigger picture and the emotional details of cases before them, something male mediators tend not to do.

If there are intrinsic differences between how men and women deal with and resolve conflicts, these same differences should play out in the work of teachers, doctors, athletes, artists, lawyers, and yes, even judges. But when a judge views things differently or expresses thoughts in an alternative manner, it may be cause for concern.

When judges interpret the law, they presumably do so within specific boundaries. But even Justice O'Connor recognized the complex and multi-layered landscape against which judges issue their decisions: "We don't accomplish anything in this world alone... and whatever happens is the result of the whole tapestry of one's life and all the weavings of individual threads from one to another that creates something."

Do women decide differently?

When examining the way women judges approach their work, we want to know whether - and how much - their gender may affect the ultimate legal outcome. A 2000 study of state trial judges in Pennsylvania sought to determine whether the gender of the litigant or of the judge affected the outcome of cases. Litigant characteristics did not appear to affect judicial decisions, but the gender of the judge did.

Feminist scholars argue that women bring a different perspective to the law and seek different outcomes from the process than do their male colleagues. Conventional law, they say, reflects a male perspective and thus focuses on separation, individual rights, and abstract rules, whereas a woman's perspective is colored by her own experience.

favor of plaintiffs in civil liberties, criminal justice and employment discrimination cases. But it concluded that "with few exceptions scholars have largely found that the voting behavior of women and men on the bench is more alike than different."

With the exception of cases involving sexual abuse, gender-based discrimination, or other such inequities, women judges appear to decide cases not significantly differently than their male counterparts. This should provide comfort to Justices Roberts and Thomas, as well as others who believe that judge-umpires should maintain clear boundaries when assessing litigants' pitches.

Women build consensus

Even when women judges arrive at the same or similar conclusions

facts and the law of cases before them differently. Their voices, experiences, and perspectives suggested another way of looking at things, encouraging male judges to reevaluate and reconsider their positions. Women opinion authors were more likely to advocate for outcomes representing the "middle ground" when compared to opinions by male judges, and female judges tended to be more successful than their male colleagues in finding 'middle-ground' positions.

Conclusion

The ability to "think like a woman" can clearly produce a positive outcome in the legal process. Litigants who feel that their stories are heard and appreciated may be more open to settling disputes; counsel encouraged to find a solution may be more amenable to setting aside the boxing gloves and sitting down at the negotiating table. Any decision maker skilled or trained to build bridges should be able to foster resolution even in the most difficult and contentious cases.

As Justice Ginsberg said, women judges are here to stay. Every day, decisions are being made and opinions issued that reflect the perspectives and experiences of women. When those decisions address historic gender-based inequities or other troubling gender matters, a woman's insights and experiences may be critical to achieving a just outcome.

Women judges have enriched and improved the legal system by bringing their unique experiences and perspectives to the bench.

Women judges may therefore approach cases involving gender-based discrimination and sexual abuse differently than male judges. Justice O'Connor made news when she joined a liberal majority in 1999 in upholding the right to sue schools for peer-to-peer sexual harassment under Title IX. The all-male conservative dissent, from which she split, focused on states' rights. O'Connor's decision was likely influenced by her own experiences of differential treatment in her legal career.

A 2009 New York Times article examined whether women judges decide cases differently than male judges. It cited an unpublished paper which found that female judges were more likely than male judges to decide in favor of plaintiffs who alleged sex discrimination in the workplace. They decided other cases - involving disability law, environmental issues and capital punishment - in conformance with their male peers.

A 2019 paper reviewed studies conducted since the 1980s on the purported gender differential in judging. It found empirical support for the proposition that female judges who have experienced discrimination are more likely to rule in

as men, how they arrive at those conclusions is generally different. Women mediators, according to researchers, generally avoid competition and isolation, striving instead for rapprochement and cooperation. Whether managing the divide between litigants or the personalities and egos of their fellow judges, women may be working with a different tool set, or they may be wielding their legal tools in a new or different manner.

A 2013 review of research into how women judges approach cases found that female judges tend to exert influence in ways that differ significantly from most of their male colleagues. Women are more likely than men to use an approach favoring participation, collaboration, and consensus building.

The research showed that the gender of the assigned judge mattered to the resolution of the case - not in the final verdict but in how litigants and counsel reached resolution of their matter. Settlement was common in all types of cases, but female judges were more likely than male judges to succeed in fostering settlement for their cases.

Women judges were also able to help their male peers view the

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