

MAY 2010

Men and women as trial lawyers

Different doesn't mean weaker, it just means different.

By J. Gary Gwilliam



Gwilliam

Well, it is nice to know that somebody reads my column! I certainly got a response to my February 2010 column about women being a factor in the declining number of civil jury trials. While I stand by my opinion that women in the law *may* be a factor in the changing way we practice, I want to make it clear that it is *not* the major factor in the changing landscape of civil litigation.

Some of the respondents seemed to think that I was suggesting that women were "the reason" there were fewer jury trials (Donna Bader's column of March 2010, *www.plaintiffmagazine.com*). Even my good friend, Mike Withey, from Seattle seems to think so. (See Letter to the Editor, April 2010, *www.plaintiffmagazine.com.*)

In my first column on the "extinction of the trial lawyer" (Plaintiff, January 2010), which it seems most of the respondents were not aware of, I suggested that the primary reasons for fewer jury trials are as follows:

- Proliferation of mediation and the pressure to settle the case;
- Increasing financial exposure of litigation and trial;
- Politics and tort reform;
- It is harder to win cases on the merits.

I found very interesting the comments that Debbie Hines of Washington, D.C., made in her letter to the editor. Ms. Hines also appears to believe that I was singling out women as *the* major cause of fewer jury trials. While I agree with Ms. Hines that "tort reform has played a major role in decreasing jury trials," I vigorously disagree with her comment that "before anyone places blame on women perhaps one should consider male trial lawyers of the 1990's did not fight or win the battle against tort reform."

While Ms. Hines is certainly entitled to her opinion, I respectfully disagree with it. In 1988, I was the President of the California Trial Lawyers Association (now known as the Consumer Attorneys of California or CAOC). At that time, there was a 10% contingency fee limitation provision on the ballot as well as a no-fault insurance initiative. These two initiatives would have completely wiped out our profession and prevented wrongdoers from ever being held accountable for their actions. Because of the hard work of many, many people, we won that battle in California.

For over 25 years, I have been fighting tort reform. I know that most of the good trial lawyers – *male and female* – have indeed done their best to fight these never-ending attacks. We are all in this together and I doubt that anyone who reads this magazine has fought longer or harder against tort reform than I have.

A common thread of the responses was that the column was sexist and demeaned women by suggesting they would settle cases for less money instead of trying them. Well, even my long-time law partner, Steve Brewer, agreed that the tone was sexist. I certainly didn't mean it to be sexist, but I just as certainly never said that women "settled cases for less." In fact, I stated "women's ability to be tough and effective in the courtroom isn't the issue." I don't believe that settling cases is a sign of weakness. More often than not, it is a sign of good judgment, especially when cases are becoming more and more difficult to win at trial.

What if, in pointing out differences between men and women, I had used the analogy that women were less inclined towards going to war (a jury trial) than men; that women preferred peace talks (a mediation session) because it was a better alternative than killing each other? Would readers have vigorously disagreed, citing Margaret Thatcher and Sarah Palin as examples of hawkish women?

Some responses suggested that I lumped "women attorneys into a single group, much the same as male trial attorneys as if one size fits all." Does this criticism mean that we cannot generalize anymore? Are we to be so politically correct that we can't refer to male or female traits in general without pointing out that there are individual differences? What about jury selection? Aren't we acknowledging the reality of cultural bias when we ask a jury consultant if our case theme will play better with men or women?

Then there is a letter to the editor from Marjorie Wallace. Ms. Wallace tends to agree with my anecdotal opinion (I never claimed it was scientific) that women are different than men because boys and girls are taught to resolve conflicts differently. She believes, as do I, that there is a "new paradigm for conflict resolution across the board."

However, Ms. Wallace does indicate that her opinion differs from mine because she thinks I see this as a "bad trend." I have not said that. My column asked, "Is the trend towards fewer trials good for our injured clients, for the civil justice system, or for society as a whole?" The jury is still out on that issue and I will address it at a later time.

There are some older male trial lawyers of my generation who feel that the old way of trying cases – where the winner takes all – is still the best. Not me. I see this male-dominated model to be outdated. The fact that attorneys might want to resolve cases through mediation

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certainly doesn't mean that those lawyers are weaker or are afraid to go to trial. Quite frankly, it may mean that they are exercising better judgment in this day of negative jury results.

I do still think we need to ask ourselves how the large influx of women into our profession has affected it. I have long argued that there should be more women trial lawyers and I have been very happy to see the women's caucus grow in size and importance. I certainly feel women are equal to men, but I recognize women have certain strengths that men don't and vice versa. I stand by my suggestion that we are different. Thank God! Different doesn't mean weaker, it just means different.

So what of the undeniable and seemingly unstoppable trend towards fewer jury trials in our profession? There are serious questions raised by this trend. How far will it go? What does it really mean? Can we as plaintiffs' lawyers take advantage of this to the benefit of our clients? These are issues that I will continue to explore. In the meantime, keep your responses coming as long as they aren't accompanied with rattlesnakes in my mailbox or envelopes with white powder in them . . .

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