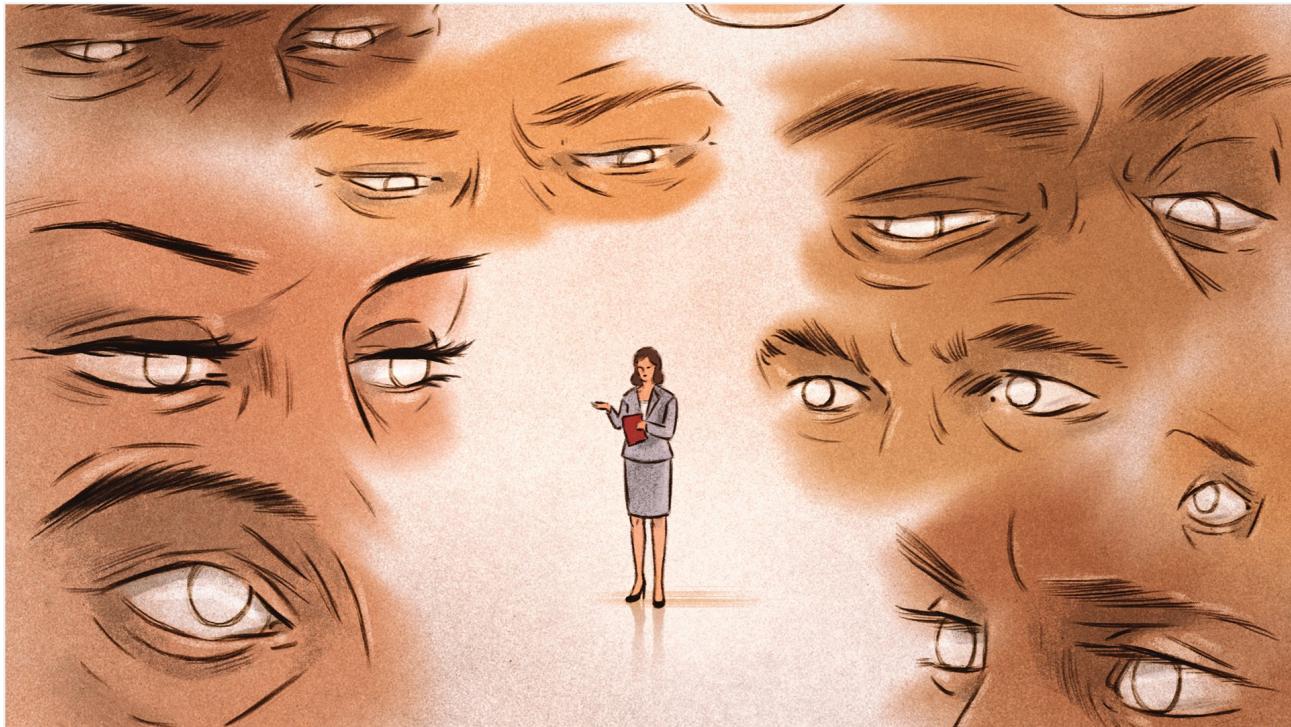


What It Takes to Be a Trial Lawyer If You're Not a Man

In more than a decade of arguing cases in court, I've witnessed the stubborn cultural biases female attorneys must navigate to simply do their jobs.



Isabel Seliger / Sepia

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SEPTEMBER 2018 ISSUE | CULTURE

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LAST YEAR, ELIZABETH FAIELLA took a case representing a man who alleged that a doctor had perforated his esophagus during a routine medical procedure. Before the trial began, she and the defense attorney, David O. Doyle Jr., were summoned to a courtroom in Brevard County, Florida, for a hearing. Doyle had filed a motion seeking to “preclude emotional displays” during the trial—not by the patient, but by Faiella.



“Counsel for the Plaintiff, Elizabeth Faiella, has a proclivity for displays of anguish in the presence of the jury, including crying,” Doyle wrote in his motion. Faiella’s predicted flood of tears, he continued, could be nothing more than “a shrewdly calculated attempt to elicit a sympathetic response.”

Faiella told the trial judge, a man, that Doyle’s allegations were sexist and untrue. The judge asked Doyle whether he had a basis for the motion. Faiella says that he replied that he did, but the information was privileged because it came from his client. (Doyle told me the information had in fact come from other defense attorneys.) Faiella called his reply “ridiculous.” She told me: “I have never cried in a trial. Not once.”

As Faiella listened to Doyle press forward with his argument, her outrage mounted. But she had to take care not to let her anger show, fearing it would only confirm what Doyle had insinuated—that she would use emotional displays to gain an advantage in the courtroom.

The judge denied Doyle’s request, saying, in essence, “I expect both parties to behave themselves.” Afterward, Faiella confronted Doyle in the hallway. “Why would you file such a thing?” she demanded, noting that it was unprofessional, sexist, and humiliating.

“I don’t understand why you are getting so upset,” she says Doyle replied. (Doyle denied that gender was the motivating factor behind filing the motion; he said he had filed such motions against male attorneys as well.)

When I asked Faiella for a copy of Doyle’s motion, she said that she could send me examples from more than two dozen cases across her 30-year career. She said that at least 90 percent of her courtroom opponents are male, and that they file a “no-crying motion” as a matter of course. Judges always deny them, but the damage is done: The idea that she will unfairly deploy her feminine wiles to get what she wants has been planted in the judge’s mind. Though Faiella has long since learned to expect the motions, every time one crosses her desk she feels sick to her

woman, I have to act like it doesn't bother me, but I tell you that it does. The arrow lands every time."

FOR THE PAST TWO DECADES, law schools have enrolled roughly the same number of men and women. In 2016, for the first time, more women were admitted to law school than men. In the courtroom, however, women remain a minority, particularly in the high-profile role of first chair at trial.

In a [landmark 2001 report](#) on sexism in the courtroom, Deborah Rhode, a Stanford Law professor, wrote that women in the courtroom face what she described as a "double standard and a double bind." Women, she wrote, must avoid being seen as "too 'soft' or too 'strident,' too 'aggressive' or 'not aggressive enough.'"

The glass ceiling remains a reality in a host of white-collar industries, from Wall Street to [Silicon Valley](#). If the courtroom were merely another place where the advancement of women has been checked, that would be troubling, if not entirely surprising. But the stakes in the courtroom aren't just a woman's career development and her earning potential. The interests—and, in the criminal context, the liberty—of her client are also on the line.

What makes the issue especially vexing are the sources of the bias—judges, senior attorneys, juries, and even the clients themselves. Sexism infects every kind of courtroom encounter, from pretrial motions to closing arguments—a glum ubiquity that makes clear how difficult it will be to eradicate gender bias not just from the practice of law, but from society as a whole.

I began my career as a trial lawyer in 2001, the same year that Rhode published her report. I worked in the Federal Public Defender's Office in Los Angeles. When I took the job, I had braced myself for the stress; almost immediately, my caseload included clients facing lengthy prison sentences for serious felonies. I did not expect to be told in explicit terms that my gender would play a significant role in how I could defend my clients, and that learning this lesson was crucial to my success and by extension to my clients' lives. "There are things I can do that you

can't, and things you can do that I can't" was the way one of the male supervising attorneys in my office put it.

Let's start with the clothes. In my office, and in the U.S. Attorney's Office, where the federal prosecutors worked, the men stuck to a basic uniform: a dark suit, a crisp button-down shirt, an inoffensive tie, and a close shave or neatly trimmed beard. If they adhered to that model, their physicality was unremarkable—essentially invisible.

Women's clothing choices, by contrast, were the subject of intense scrutiny from judges, clerks, marshals, jurors, other lawyers, witnesses, and clients. I had to be attractive, but not in a provocative way. At one trial, I took off my suit jacket at the counsel table as I reviewed my notes before the jury was seated. It was a sweltering day in Los Angeles, and the air-conditioning had yet to kick in. The judge, an older man with a mane of white hair, jabbed a finger in my direction and bellowed, "Are you stripping in my courtroom, Ms. Bazelon?" Heads swiveled, and I looked down at my sleeveless blouse, turning scarlet.

Observing my female colleagues and opposing counsel as I settled into the job, I took mental notes. Medium-length or long hair was best—but not too long. Heels and skirts were preferred at trial—but not too high and definitely not too short. And pantyhose. I hated pantyhose, both the cringe-inducing word and the suffocating reality. They itched miserably and ripped. But showing up in federal court with bare legs was as unthinkable as showing up drunk.

Clothing may seem trivial, but what a woman wears at trial is directly related to her ability to do her job. When impeaching a witness to expose a lie, the men in my office would march up to the witness box, incriminating document in hand, and shove it in the witness's face. I had to approach witnesses gingerly—because I was balancing on heels.

It wasn't just men who taught me what to wear and how to act. Later in my career, I had a female supervisor who told me in no uncertain terms that I should wear

makeover, and offered to pay for it. I didn't take her money, but I did take her advice, and I've borne the significant cost of these expectations since. My supervisors also reminded me to smile as often as possible in order to counteract the impression that my resting facial expression was too severe. I even had to police my tone of voice. When challenging a hostile witness, I learned to take a "more in sorrow than in anger" approach.

Reading over my old trial transcripts, I am taken aback by how many times I said "Thank you"—and how often I apologized.

This isn't just dated wisdom passed down from a more conservative era. Social-science research has demonstrated that when female attorneys show emotions like indignation, impatience, or anger, jurors may see them as shrill, irrational, and unpleasant. The same emotions, when expressed by men, are interpreted as appropriate to the circumstances of a case. So when I entered the courtroom, I took on the persona of a woman who dressed, spoke, and behaved in a traditionally feminine and unthreatening manner.

In some ways, this was easy. I had been raised to be polite and to show respect for authority. In other ways, this was difficult. When I got angry, I had to stifle that feeling. When my efforts failed, I feared having come across as strident—or, worse, as a bitch. When I succeeded, I felt as if I was betraying my feminist principles. But if there was a sliver of a chance that the girl-next-door approach would deliver a more favorable outcome, not taking it would be wrong. I told myself that my duty was to my client, not my gender.

In the seven years I worked as a deputy federal public defender, I fought hard for my clients, and I had my share of victories. But I was practicing law differently from many of my male colleagues and adversaries. They could resort to a bare-knuckle style. Most of what I did in the courtroom looked more like fencing. Reading over

to the judge, to opposing counsel, to hostile witnesses. And by how many times I apologized.

In 2017, after nearly a decade of holding jobs that offered limited opportunities to go to court, I took a position as a clinical professor at the University of San Francisco School of Law. I'm now training students to become trial lawyers by supervising their representation of criminal defendants in San Francisco Superior Court. During my first semester, all five of my students were women. Four were women of color. Eighteen years earlier, I had been sitting where they were. I wondered what had changed.

In 1878, CLARA SHORTRIDGE FOLTZ, who was living in San Jose, California, was left to raise five children on her own when her husband abandoned her. To support her family, Foltz decided to become a lawyer. California law prevented it: "Any white male" was eligible to practice law, but women and minorities were excluded. Undeterred, Foltz drafted the Woman Lawyer's Bill, successfully lobbied the state legislature to pass it, took the bar exam, and, on September 5, 1878, became the first female attorney admitted to the California bar.

Today, Foltz is seen in feminist legal circles as a pioneering hero. As a lawyer, she was an advocate for the poor and disadvantaged, who formed the bulk of her client base, since few people would voluntarily agree to female representation. In court, the men who opposed Foltz routinely used her gender to discredit her. In her memoirs, she recalled a prosecutor who had told the jury to reject Foltz's arguments on these simple grounds: "She is a woman, she cannot be expected to reason. God Almighty declared her limitations."

In 2002, Los Angeles renamed its downtown criminal courthouse after Foltz. It's inspiring to see a woman's name on the building; women lawyers continue to struggle to get inside, however. National data are hard to come by, but state-level studies paint a bleak picture. The New York State Bar Association, for example, found in a 2017 report that female attorneys accounted for just 25 percent of all

state. The more complex the civil litigation, the less likely a woman was to appear as lead counsel, with the percentage shrinking from 31.6 percent in one-party cases to less than 20 percent in cases involving five or more parties. The report concluded: “The low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, ex parte applications and multi-party matters.”

Over the past year, I’ve interviewed more than two dozen female trial lawyers from across the United States. Their experiences bear out these grim findings. Beth Wilkinson, a lawyer based in Washington, D.C., told me that the number of women who litigate “bet-the-company cases”—in which millions or even billions of dollars are at stake and a corporation’s ability to survive absent a win at trial is in doubt—is “abysmally low.”

Wilkinson enjoyed a formidable reputation at Paul, Weiss, Rifkind, Wharton & Garrison, a white-shoe firm where she was a partner, winning cases, bringing in new clients, and earning a high salary. But she told me she was “never in the inner circle. Big Law is a male-dominated place, and it is very hard for women to thrive in an institution built that way.” In 2016, she co-founded her own firm, Wilkinson, Walsh & Eskovitz, which represents a roster of major clients, including the NCAA, Pfizer, Duke Energy, and Georgia-Pacific.

The situation is worse for female litigators who are not white. According to a [2006 report by the American Bar Association](#), nearly two-thirds of women of color said they had been shut out of networking opportunities; 44 percent said they had been passed over for plum work assignments; and 43 percent said they had little opportunity to develop client relationships. In a survey and in focus groups, many described feeling lonely and perpetually on edge, anxious to avoid race- and gender-based stereotypes. One respondent said she was treated like an “exotic animal,” trotted out for photo ops at diversity and recruitment events but otherwise sidelined. An Asian American woman recounted being asked to translate a

"I want a Jew lawyer," a client once said to me. I told him I was Jewish. "No, a *man* Jew lawyer," he responded.

Kadisha Phelps is a 37-year-old associate at a Miami-based firm. She worked her way up to first chair in part by bringing in her own business: She's built a cottage industry representing former NFL players who claim that they were scammed out of their earnings by unscrupulous financial advisers. Phelps, who is African American, describes herself as "a pit bull in a skirt." But she told me that when she goes to court, she often has to bring one of her male partners along—even if he knows little about the case. "That older white man at the table carries some kind of credibility," she explained. "It gives judges the assurance that it's not just some little black girl out there on her own."

In July 2017, Phelps got into a heated debate with a male trial judge about how many depositions she would be allowed in a case her firm valued at \$2 million. Phelps had asked Douglas Broeker to join her in court to play the role of the silent white partner. When Phelps pressed her point, the judge turned to Broeker. "Maybe you should take a few minutes and walk out and try to calm your associate down," he said.

As Phelps's experience suggests, it can be difficult to separate the various forms of discrimination women face. "I want a Jew lawyer," a male client once said to me. I told him I was Jewish. "No, a *man* Jew lawyer," he responded.

THE PROBLEM ISN'T merely that women are outnumbered in the courtroom. It's that men occupy the positions of power in staggering proportions. Women make up only 33 percent of federal trial-court judges. As of June, Donald Trump had made 73 U.S.-attorney nominations. Sixty-six of them are men. The state-level statistics are just as dismal: 30 percent of trial-court judges are women. In 2015, according to the Women's Donor Network, an advocacy group, 17 percent of elected prosecutors were women; women of color made up 1 percent.

In the criminal context, the odds are that a female lawyer will face off against a male prosecutor in a contest overseen by a male judge.

Not all male prosecutors and judges harbor sexist views of women, though many do. Male lawyers referred to their female peers as “honey” and “sweetheart” in court frequently enough that, in 2016, the American Bar Association felt compelled to pass a rule designed to curtail the use of such demeaning terms. Judges, for their part, can reinforce gender stereotypes, implicitly normalizing them and even explicitly enforcing them. Female trial attorneys routinely report that male judges critique their voices as too loud or too shrill.

(Isabel Seliger / Sepia)

Romany McNamara is a public defender in Alameda County's Oakland office. In 2011, she had just started litigating felony trials. One morning, a trial judge called two of McNamara's cases before she'd had a chance to introduce herself to her new clients or explain the legal process to them. When she asked for a brief delay in the proceedings, she says, the judge berated her in front of the packed courtroom. "He likes to humiliate young female trial lawyers," she told me.

McNamara had a third case that day. The judge waited until the end of the calendar to call it. When the courtroom emptied and McNamara started to walk out, she says, the judge beckoned her to approach the bench. As she stood before him, he offered a lukewarm apology, emphasizing the importance he placed on running his courtroom efficiently. Then he leaned in and said softly, "Don't do it again." McNamara says the judge then struck her on the back of her hand, hard enough to leave a mark.

"I could see the outline of where he hit me in white before it turned bright pink," she told me. "There was nothing *overtly* sexual about it," she said. "But that was absolutely the undertone, like: *You've been a bad girl.*"

McNamara told a colleague about the incident; I spoke with that colleague, and he confirmed that she had told him what happened, and that they had debated how she should respond. McNamara initially decided against filing a formal complaint. This "wasn't just any judge," she said. "He was a kingmaker. He brokered deals." She feared the repercussions of calling him out. "I thought he could ruin my career."

Years passed, but McNamara remained angry and disgusted. In 2016, she filed a complaint against the judge with California's Commission on Judicial Performance, describing the 2011 incident and accusing him of having physically assaulted her. The complaint has yet to be resolved.

Most judges, of course, don't strike female attorneys in their courtroom. But at various points during the first semester of the clinic, my all-female class of aspiring

In November, one of my students was slated to argue a motion before a judge who I knew could be nasty to female lawyers. Playing the judge's role in a mock argument to prepare her, I went out of my way to be sneering and combative, my best imitation of his behavior. And indeed, in court, when my student objected to opposing counsel's request for a continuance so that a police officer could testify, the judge laid into her for lacking professional courtesy. She tried to explain her reasoning, but he interrupted, not allowing her to demonstrate that the matter could be resolved without the officer having to testify. (Two months later, a different judge agreed: The officer didn't testify, and we won the motion.)

In class later, I asked my students whether they thought the judge would have treated a male attorney the same way. There was a long pause. "That's a joke, right?" one of them said.

Johnnie Cochran told one female associate: Be “the person in the courtroom that everyone loves.”

EVEN WHEN ARGUING before the most enlightened judge and against fair-minded opposing counsel, women enter the courtroom at a disadvantage. In America's adversarial system, the ability to compel useful testimony from a hostile witness is often essential to winning at trial. When you invade a witness's personal space, the witness may feel stress, anxiety, and anger. These emotions may lead the witness to blurt out helpful information. In general, jurors tend to be impressed by lawyers who demonstrate power and control in the courtroom. But for female lawyers, projecting power and control is a tricky proposition. When male attorneys show flashes of anger—a raised voice, a pointed finger—juries tend to view them favorably, as “tough zealous advocates,” according to research cited in a 2004 *Law & Psychology Review* article. When women betray anger, they may be seen as overly emotional.

Trial lawyers routinely talk with members of the jury when a case is over in order to

Baldwin, a partner at the personal-injury firm Kline & Specter, tries about five cases a year and has won a string of multimillion-dollar verdicts. “I always wear heels in front of the jury unless I am in pain,” she told me. Last June, Baldwin was in pain: The tendons in her feet were inflamed, so she wore flats to a trial. Afterward, a female juror told her that she had not cared for her shoes. “I never have a casual Friday,” Baldwin said. “You get less respect.”

SOME FEMALE TRIAL LAWYERS have succeeded in turning the attributes associated with their gender—compassion, warmth, accessibility—to their advantage, particularly once they get in front of a jury. Shawn Holley, a prominent entertainment lawyer in Los Angeles, told me that she makes her gender work for her. She described her courtroom affect as “polite and charming”—but not so polite or charming that it “gets in the way of the job that needs to get done.” Holley cut her teeth working as an associate for Johnnie Cochran during the O. J. Simpson trial. She said it was this quality—a sweet steeliness—that led Cochran to recruit her. He encouraged her to be “the person in the courtroom that everyone loves while being as capable and prepared as possible.” She followed his advice, and today she represents high-profile clients including Justin Bieber, Lindsay Lohan, and Kim Kardashian.

Holley has constructed a persona that works for her in her area of the law. But when I talked with her and other women who have enjoyed courtroom success, I saw a pattern emerge. Many of them excelled in areas where being seen as a woman first and a lawyer second gave them an advantage over their male adversaries.

Embracing traits traditionally associated with women seems to pay off particularly well in litigation involving so-called women’s issues. In many of these cases, female trial lawyers are favored and even actively recruited. In the civil arena, for example, women have thrived in high-stakes medical-malpractice lawsuits where the plaintiff claims that the defendant’s product injured her genitalia or reproductive organs.

For a number of years, Ethicon, a subsidiary of Johnson & Johnson, has been defending itself against tens of thousands of cases alleging defects in mesh devices

other conditions. Some patients who had the devices implanted experienced complications such as bleeding and the perforation of internal organs.

In 2013, Kimberly Adkins, a 48-year-old Ohio woman, sued Ethicon, claiming that the mesh sling implanted to treat her incontinence had caused permanent internal damage, leaving her unable to have sex. Ethicon retained Kim Bueno, a partner at the Texas-based law firm Scott Douglass & McConnico, to serve as lead counsel. In May 2017, the case went to trial in downtown Philadelphia. My sister Jill was picked to be one of the jurors.

I could not fathom why Ethicon would let Jill on the jury. I figured that my sister, a mother of two, would naturally be sympathetic to Adkins. For many women, minor urinary incontinence is a fact of life after childbirth—we cross our legs before sneezing and locate the nearest bathroom immediately upon entering an unfamiliar place.

But Jill, who has a doctorate in education policy, also comes from a family of lawyers—including our father, her husband, and three sisters. Bueno told me later that she was counting on jurors like her: highly educated individuals who would listen to both sides and apply the law to the facts.

I'm confident my sister did exactly that, but she told me she had been impressed by more than just Bueno's command of the law. Jill had related to her. She was the only woman lawyer in a courtroom packed with attorneys. The men were dour and dull; Bueno was personable and dynamic. She referred to the female anatomy with confidence and ease. By contrast, Adkins's all-male team struggled when forced to ask personal questions. "If you can't say the word *vagina*, you are probably not the best lawyer for the case," Jill said. By tiptoeing around their client's injuries, Adkins's male lawyers undersold her pain and failed to prove its direct link to Ethicon.

A turning point in the trial, Jill told me, was Bueno's cross-examination of Adkins. "She kept her same friendly demeanor while asking some very tough questions. She

And she did it without seeming mean or horrible.” In a case involving complicated issues relating to female genitalia, my sister said, “I trusted her more because she was a woman.”

In a sweeping victory for Ethicon, the jury found that the mesh had been defective but that Adkins had failed to prove that it had caused her injuries. (In August 2017, the judge overrode the jury’s verdict; Ethicon has appealed.) When I spoke with Bueno, she told me that she has been involved in hundreds of mesh cases. “A woman is able to cross-examine a female personal-injury victim with greater sensitivity,” she said. “She can probe a little further without coming across as attacking the victim.”

LYNNE HERMLE conducted what was perhaps the highest-profile cross-examination of 2015. Ellen Pao was seeking \$16 million in damages from her former employer, the Silicon Valley venture-capital firm Kleiner Perkins Caufield & Byers, claiming that she had experienced gender discrimination—and had been fired when she’d spoken up about it. Hermle, a partner at Orrick, Herrington & Sutcliffe, was the lead counsel for the all-female defense team. Hermle is the senior partner in Orrick’s Silicon Valley employment group, where 10 of the 13 attorneys are women. “I think women are better at the conflict aspect in the courtroom,” she told me. “We are able to confront people directly and dismantle false stories in a way that men can’t do without coming across as a bully.” In the Pao case, “I had a really tight, well-crafted cross-examination that never involved shouting.” The proof, Hermle said, was in the result: The jury ruled for her client.

Yet Hermle’s success in the Pao case came at the expense of a woman ostensibly fighting for gender equity in [an industry notorious for its chauvinism](#). I asked her whether she saw an irony in this. Hermle said no. Pao, she maintained, was simply the wrong messenger for a righteous cause.

Hermle’s success has been a boon for her practice at Orrick. But a nagging question remains: ~~Would women like Bueno and Hermle have had the same opportunities if~~

having a gender-based advantage—as, say, a prosecutor in a homicide division? Hermle argued that taking on cases in which being a woman offers an advantage can provide a ladder up and out. “Women can use these [cases] to get high-profile trial experience, which is hard to get, but ultimately I think that falls away once you achieve a certain stature.” She told me that only about 40 percent of her cases involve gender and that some of her biggest wins came when she was defending companies against discrimination claims based on race, ethnicity, disability, or religion. Since her win in the Ellen Pao case, Hermle has defended both Twitter and Microsoft in class-action lawsuits brought by employees alleging gender discrimination.

EVERY WOMAN I interviewed said she had experienced Deborah Rhode’s double bind: the imperative to excel under stressful courtroom conditions without abandoning the traits that judges and juries positively associate with being female. It is a devilishly narrow path to walk, and can severely hinder the ability to offer a client the best and most zealous defense.

I know this because in the middle of a case in 2013, I consciously stopped trying to walk that path. My client had been convicted in 1979 of a murder he did not commit and had spent 34 years in prison. The case against him was preposterous, and the refusal by the Los Angeles County District Attorney’s Office to concede error infuriated me. Just days into the evidentiary hearing that would determine his fate, what was left of the state’s case fell apart.

For the first and only time in my life as a litigator, I knew we were going to win. As the hearing had gone on, I had grown angrier. Now I had nothing to lose by pretending otherwise. When I went after the police, who I believed had lied and covered up evidence, I was by turns angry, sarcastic, and, yes, aggressive. My cheeks were red, not from shame but from righteous indignation. My voice shook as I questioned my client, not because I was being hysterical or manipulative but because the travesty of his stolen life broke my heart. In closing, I raised my voice and slammed my fist into my open palm as I argued to the judge—a woman—that

myself to feel the full range of emotional responses and to use the full array of tactics available to men.

The judge threw out the conviction. Afterward, my client's 76-year-old mother paid me what I consider the greatest compliment of my career. Gripping my wrists, she looked at me and said, "You are a trial beast."

I tell my female law students that their body and demeanor will be under relentless scrutiny from every corner of the courtroom.

T WOULD MAKE FOR a tidy ending to say that I am training my law students to be trial beasts. But it would not be true. The case I just described, tried before a female judge, and in which I was armed with overwhelming evidence of my client's innocence, comes along once or twice in a career in criminal court—if ever. My students will litigate murkier cases in courtrooms controlled by men, facing juries who will be more willing to listen to and be convinced by a traditionally feminine woman.

In 1820, Henry Brougham, a lawyer tasked with defending Queen Caroline before the House of Lords against allegations by her husband, King George IV, that she had committed adultery and should be stripped of her crown, explained his role this way: "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty."

I've always loved that definition of a lawyer's work and its description of the sacrifices we make for our clients. But in the courtroom, whether as an attorney or as an instructor, I'm constantly reminded that women lawyers don't have access to the same "means and expedients" that men do. So I tell my female students the truth: that their body and demeanor will be under relentless scrutiny from every

wear and how they speak and move. That they will have to find a way to metabolize these realities, because adhering to biased expectations and letting slights roll off their back may be the most effective way to advance the interests of their clients in courtrooms that so faithfully reflect the sexism of our society.

Sometimes I worry that I am part of the problem, that I am holding my students back by using valuable class time to pass on the same unfair rules that were passed on to me. And then we go to court.

This article appears in the September 2018 print edition with the headline “May It Please the Court.”

ABOUT THE AUTHOR

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