

Women Who Rule

By Irena Royzman and Anne Hassett

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While women judges are increasingly deciding important and complex high-stakes patent cases, women lawyers continue to lag behind men as lead counsel arguing such cases in federal court and in administrative proceedings at the Patent Trial and Appeal Board. The disparity is striking: At every level of the US judiciary, the percentage of women among those judging patent cases dwarfs the percentage of women who are the lead counsel presenting them. Here, we collect and present data on the extent to which women make rulings on patent law compared to the far lesser extent to which they are leading the presentation of these cases.

District Courts

Women judges increasingly preside over patent cases. As of June 1, 2017, 34 percent of district court judges are women.¹ Notably, women comprise 40 percent of the chief judges in the 10 most popular venues for patent litigation, including significant forums such as the Northern and Central Districts of California and the Southern District of New York. The Northern and Central Districts of California are among the top five districts for patent litigation. The percentage of women chief judges is even higher (54 percent) among the 13 district courts participating in the US patent pilot program. The patent pilot program, which was established in 2011, is aimed at building judicial expertise in handling patent disputes. During the first five years of the patent pilot program, 12,000 patent cases were filed in the participating courts. The program steers patent cases to the judges who opt to hear them and have an interest in patent law. Women represent 42 percent of the judges who have opted to participate in the patent pilot program, and are typically generalists with an interest in complex litigation. Yet, men predominate among those who lead the presentation of these cases in the courtroom and on appeal, despite the many women patent litigators.

Patent Trial and Appeal Board

In accordance with the America Invents Act of 2011 (AIA), the United States Patent and Trademark Office (USPTO) formed the Patent Trial and Appeal Board (PTAB). The PTAB is now one of the most active forums for patent validity litigation in the United States. It hears and rules on patent validity trials in specialized administrative proceedings, including inter partes, post-grant, and covered business method patent reviews. In addition to AIA trials, the PTAB hears appeals from adverse USPTO exam-

iner decisions in patent applications and reexamination proceedings, and renders decisions in interference proceedings. The PTAB's administrative patent judges have technical degrees in addition to a law degree. As in the US district courts, a third of the PTAB judges are women.

Likewise, the percentage of female attorneys who are lead counsel in proceedings before the PTAB lags behind the percentage of male lead counsel and the percentage of women PTAB judges. According to recent data compiled by Docket Alarm, only 12 percent of the attorneys who are listed as appearing in PTAB cases are women.² This percentage counts women lawyers listed on any PTAB brief and necessarily exceeds the percentage of women lawyers who are lead counsel at the PTAB.

Federal Circuit

The court that hears appeals of patent cases, the Federal Circuit Court of Appeals, has an even higher percentage of women judges than the district courts or the PTAB. Five of the 12 active circuit judges, including the chief judge, are women, for a total of 42 percent. The Federal Circuit, one of 13 circuit appellate courts in the federal system, is the only one that hears appeals of patent cases. It has a higher percentage of women judges than seven of the other circuits. The national percentage of active circuit court judges who are women is 37 percent as of June 1, 2017. The five women judges are Chief Circuit Judge Sharon Prost and Circuit Judges Pauline Newman, Kimberly A. Moore, Kathleen M. O'Malley, and Kara F. Stoll. Three of the five women judges (Judges Newman, Moore, and Stoll) have technical degrees, with Judge Newman having a PhD from Yale University in chemistry. A total of five of the 12 active judges have technical degrees, with the three women slightly outnumbering the men.

The Federal Circuit, with Chief Judge Prost at its helm, oversees all appeals of patent infringement litigation and PTAB proceedings in the United States. The women judges are ruling on and authoring some of the most important decisions influencing the course of patent proceedings. Chief Judge Prost, for example, recently authored a landmark decision on the written description requirement for antibodies and on the use of post-filing evidence in written description and enablement challenges in *Amgen Inc. v. Sanofi*.³ After the United States Supreme Court denied certiorari in *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*,⁴ a case holding that a breakthrough biotech invention was not patent eligible, Chief Judge Prost, joined by Judges Moore and Stoll, in a first for the Federal Circuit since the Supreme Court's decisions in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*⁵ and *Alice Corp. Pty. Ltd. v. CLS Bank International*,⁶ found a life sciences invention patent eligible in *Rapid Litigation Management Ltd. v. CellzDirect, Inc.*⁷—providing much-needed guidance for the district courts and some relief to the life sciences sector.

While women Federal Circuit judges are having a profound impact on patent law, the percentage of women attorneys arguing patent appeals to the Federal Circuit is low. Of 100 Federal Circuit decisions in patent cases (other than Rule 36 affirmances) in June through October of 2017, only 15 (7.5 percent) of the 200 lead counsel representing either the appellant or appellee were women. Yet, as the number of women judges at the Federal Circuit grows and its panels increasingly have one or more women judges, the numbers of women lawyers arguing to the Federal Circuit should also change over time.

Supreme Court

Since 2010, women make up a third of the Supreme Court justices. Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, the three female judges on the Court, have presided over some of the most important patent cases that have ever come before the Supreme Court—cases ranging from whether isolated genes can be patented to what procedures of the US biosimilars statute are enforceable under federal law. Although none of the nine Supreme Court justices has a technical background, the Court is increasingly active in the area of intellectual property and is reshaping the landscape of patent litigation and innovation in the United States. The number of women presenting these cases to the Supreme Court, just as to the Federal Circuit, is low. Of the 27 patent-related decisions since 2011, women argued on behalf of the petitioner or respondent only 7.4 percent of the time (men argued 50 times and women four). The four women who argued represented the petitioner in each case. All of the respondents were represented by men.

Going Forward

At every level, from trial courts to the Supreme Court, women are increasingly ruling on patent cases. Whether or not they have a technical background, many women judges embrace resolving disputes in complex, high-stakes patent litigation. They seek out these cases through the patent pilot program, and are building their reputations for expertise in deciding these uniquely challenging cases.

The private sector needs to catch up with the courts and the PTAB. Because women are a significant percentage of the judges in venues rich with patent cases, and are seeking out and excelling at ruling on such cases, then we must ask: Why is there such a difference between the bench and the private sector? Perhaps one factor is that patent cases are there for the judges' taking, but the same is not true for women litigators in the private sector, where the designation of lead counsel is not a matter of self-selection.

For now, we note that women increasingly hear and rule on patent cases. And the greater percentage of women ruling on patent cases than arguing them suggests that the difference between the bench and the private sector is playing a key role. Exploration of the reasons for this difference and implementation of solutions to resolve them is vital to ensure that women lawyers are presenting these important cases as lead counsel and managing them at companies commensurate with their numbers in the profession.

Endnotes

1. BARRY J. McMILLION, CONG. RESEARCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS (2017), <https://fas.org/sgp/crs/misc/R43426.pdf>.
2. Dennis Crouch, *Gender Analytics: Using Litigation Data to Evaluate Law Firm Diversity*, PATENTLY-O (Sept. 6, 2017), <https://patentlyo.com/patent/2017/09/analytics-litigation-diversity.html>.
3. 872 F.3d 1367 (Fed. Cir. 2017).
4. 788 F.3d 1371 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2511 (2016).

5. 566 U.S. 66 (2012).

6. 134 S. Ct. 2347 (2014).

7. 827 F.3d 1042 (Fed. Cir. 2016).