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PROSECUTORS' OFFICES: WHERE GENDER IS IRRELEVANT

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On January 23, 1989, the New York Law Journal ran an article on up-and-coming partners in the major New York law firms.¹ Twenty-nine lawyers were profiled. None was a woman. Thus, the very publication that some five months earlier had published American Bar Association findings that women lawyers were not achieving positions of professional prominence "in nearly the percentages that their numbers and class rank would indicate,"² was itself providing powerful supporting evidence, at least insofar as the private sector was concerned.

I am convinced, however, that if one wrote a similar article about the best and brightest prosecuting attorneys in New York, women would be well-represented. Indeed, in recent years, women prosecutors at the state and federal level have routinely handled some of the most significant and newsworthy murder, organized crime, narcotics and public corruption cases.³ There is reason to think that in this area of legal practice—so long regarded as requiring the toughest, most aggressive lawyers—we are much closer to achieving the long-sought ideal of equal employment opportunity regardless of gender.

I base this conclusion in large part on first-hand experience. From 1979 to 1986 I served as an Assistant United States Attorney in the Eastern District of New York. In 1986, by order of the district's Board of Judges, I was named United States Attorney. During those seven years, I encountered virtually no gender discrimination. Of course, when I joined the office there was already a core group of a dozen extraordinarily talented women trying criminal cases. Indeed, court buffs whispered that these women were, as a group, more formidable adversaries than

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1. See *'Rising Stars' Shine in Major Law Firms*, N.Y.L.J., Jan. 23, 1989, at 1, col. 3.

2. See *ABA Report: Women in Law Face Overt, Subtle Barriers*, N.Y.L.J., Aug. 19, 1988, at 1, col. 1.

3. Women have represented the government in an extraordinary number of organized crime cases, including those involving Philip Rastelli, see *United States v. Rastelli*, 870 F.2d 822 (2d Cir. 1989), John Gotti, see *United States v. Gotti*, 794 F.2d 773 (2d Cir. 1986), and Anthony Provenzano, see *United States v. Provenzano*, 615 F.2d 37 (2d Cir. 1980). They have prosecuted IRA gunrunners, see *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984), New York state senators, see *United States v. Ruiz*, 702 F. Supp. 1066 (S.D.N.Y. 1989), religious leaders, see *United States v. Sun Myung Moon*, 718 F.2d 1210 (2d Cir. 1983), major securities law violators, see *United States v. Reed*, 639 F.2d 896 (1981), and unlikely murderers, see *People v. Chambers*, No. 86 Crim. 6394 (N.Y. Sup. Ct. 1988). They have spearheaded international law enforcement efforts, whether relating to the importation into the United States of Southeast Asian heroin, see *United States v. Mang Sun Wong*, No. 87 Crim. 043 (E.D.N.Y. 1987), or the extradition to Italy of financier Michele Sindona to stand trial for murder. See *In the Matter of the Extradition of Michele Sindona*, 584 F. Supp. 1437 (E.D.N.Y. 1984).

their male counterparts. Women already headed two of the office's five units, general crimes and business fraud. The coming years not only brought greater numbers of women into the office; they saw them achieve increased prominence. By 1986, when I left prosecution work, every unit in the office, including narcotics and public corruption, was, at one time or another, headed by a woman. When, in 1984, an Eastern District prosecutor was awarded the much-coveted Department of Justice's John Marshall Award for litigation excellence, the recipient was a woman.

The stature women now enjoy in prosecutors' offices is remarkable, considering that not long ago women were not thought to be temperamentally suited for the rough and tumble of criminal practice. Quite naturally, then, the question arises: how is it that in recent years this area of the law has become so particularly receptive to talented and hard-working women lawyers when others have not?

A few reasons readily suggest themselves. First, the employer is the government, which is charged with the enforcement of a wide variety of laws enacted in the last twenty years to ensure equal opportunity for women. It is hardly surprising then that government legal offices should have done the most to try to eradicate discrimination, either overt or subtle, against women in their own hiring practices. In short, the door for women has stood open wider and longer in government than in the private sector. Talented women, eager for the challenge and the high degree of responsibility available in prosecutors' offices, and sometimes concerned about less-than-welcoming environments in other areas of practice, have been coming through that door in large numbers. Indeed, the public sector may very well have been the beneficiary in past years of a disproportionately high percentage of the very best female litigators.⁴

It may also be significant that prosecutors' offices tend to be inhabited, even at management levels, by relatively young lawyers, often more comfortable with men and women in positions of equal importance than practitioners of another era. Furthermore, because prosecutors tend to earn considerably less money than lawyers in the private sector—a disparity that grows more disproportionate and disturbing each year⁵—

4. The ABA estimates that 13 percent of women lawyers, compared to 7.2 percent of men lawyers, are employed in government practice. See *ABA Report: Women in Law Face Overt, Subtle Barriers*, N.Y.L.J., Aug. 19, 1988, at 1, col. 1. In August of 1988, the majority of new assistant district attorneys in both Kings County and New York County were women. See *New Morgenthau Aides Mostly Women*, N.Y.L.J., Aug. 23, 1988, at 1, col. 3 (34 women and 25 men); *65 Prosecutors Named in Brooklyn*, N.Y.L.J., Aug. 24, 1988, at 1, col. 3 (33 women and 32 men). The United States Attorney's office for the Southern District of New York reports that 25.5% of recent applicants are women. Not insignificantly, 31% of new hires are women. In the Eastern District, 35 percent of all recent applicants to the United States Attorney's office are women. They represent 55 percent of all new hires.

5. Starting salaries for Assistant United States Attorneys in the Eastern and Southern Districts of New York, who are required to have at least one and, more often, two years' experience before being hired, are generally about \$40,000. The maximum earned by even the most senior Assistant is \$71,000. This compares to the \$77-82,000 per year

most are, of necessity, members of two-income families. Thus, men sensitive to their own wives' talents and job-related problems perhaps have been more willing to recognize and reward the abilities of women with whom they work. Indeed, the particularly rapid rise of women in the United States Attorney's office for the Eastern District of New York in the 1970s and 1980s may be attributable, at least in part, to three successive male United States Attorneys—David Trager, Edward Korman and Raymond Dearie—whose extraordinarily capable wives left them with no doubt as to the abilities of women professionals.

Perhaps the factor most responsible for the advancement of women as prosecutors, however, is the very nature of prosecutorial work, which values talent and dedication above all else. A young assistant district attorney or United States Attorney will find herself on trial, with primary responsibility for a case, within a very short time of walking in the door. She will have to make opening and closing arguments, cross-examine hostile witnesses and draft necessary legal memoranda. More often than not, she will repeat the process a half dozen times or more before the year is out as more and more trials are assigned to her. The speed and frequency with which young assistants find themselves on trial makes it possible to judge new prosecutors based on one criteria: pure ability. There is no speculation. No years of posturing to persuade senior partners that at some unspecified future date one might actually be entrusted to appear in court. No tough-talking demeanor in the halls to demonstrate to one's peers how caustically one could deal with a difficult witness, if ever given the chance. A young prosecutor gets that chance to prove herself quickly and repeatedly. Talent, regardless of gender, thus is soon discovered not only by unit chiefs with supervisory responsibilities, but by judges, court personnel and the defense bar, all of whom spread the word effectively. Indeed, perhaps it is only now that I am on the bench and see the significant range of abilities among practicing litigators that I fully understand why courts are always so glad to have any first-rate lawyer appear in a case. Proficiency concerns us greatly; gender does not.

A young prosecutor's reputation also spreads rapidly throughout the law enforcement community. Agents, police officers and investigators are, in a real sense, a prosecutor's clients. I cannot imagine a client group that has traditionally enjoyed a more "macho" reputation, one that at first blush might have been expected not to be receptive to entrusting major cases to women. I also cannot imagine, however, a client group more concerned with the "bottom line," that is, was the case won or lost. Any prosecutor, male or female, willing to work hard and win cases, soon develops a loyal client base among law enforcement officers. Thus, a significant number of the best women prosecutors have proven that they could become the government's equivalent of a "rainmaker,"

starting salaries being paid by New York law firms to associates fresh out of law school. See *What Lawyers Earn*, Nat'l L.J., Mar. 27, 1989, at S12, col. 3.

with a result not dissimilar to that in private practice. Certainly, whatever competitiveness exists among the private bar for clients and cases is matched in intensity by that in the New York City prosecutorial arena, where two federal prosecutors, a federal strike force office, five district attorneys, and numerous special prosecutors all vie for good cases. In either circumstance, a lawyer who can bring in business is a valuable resource.

Recognizing that women, on sheer ability, have become successful "rainmakers" and trial attorneys in prosecutors' offices does not address the qualities that make them effective. Perhaps this is because no formula readily defines a successful prosecutor of either gender. Much has, of course, been written about the skills necessary to being an effective litigator, whether on behalf of a private or government client, whether in a criminal or civil case. Certainly hard work and good organizational skills are paramount. An ability to communicate effectively and credibly at various levels—with witnesses, juries and judges—is critical. Imagination is helpful; good judgment is valuable; a degree of luck is often determinative. Obviously some women, like some men, are stronger in some of these areas than in others. But as most experienced litigators recognize, an unquantifiable personal component exists in the development of an effective style of advocacy.

Here again, women prosecutors may have had an advantage over their counterparts in private practice. They simply have more opportunities to watch lawyers with different advocacy styles than do young lawyers in large firms where only a few cases a year are tried by only a few partners. Under the latter circumstance, the role models may be good, but somewhat limited. In contrast, a young prosecutor may watch and learn from numerous colleagues and, more importantly, may experiment on a regular basis with different techniques until she develops her own style. The very breadth and richness of the prosecutorial experience has thus contributed to the fact that no stereotype exists for a successful female prosecutor any more than for a male.

Of course, if there was any group that, on occasion, did not seem particularly receptive to women prosecutors, it was defendants. One could sometimes sense their attitude that, as bad as it was to have been caught by the government, to have been prosecuted by a woman was the ultimate insult. Fortunately for women prosecutors, defendants have no say in the assignment of criminal cases.

Unfortunately, however, women have found it much more difficult to advance in the criminal defense bar in the numbers they have in the prosecutors offices.⁶ Some legitimate concern does exist among women prosecutors that their abilities can take them only so far. Certainly the major

6. Of 132 criminal lawyers who accept appointments in the Eastern District of New York to represent indigent defendants, only nine are women. Of 172 such lawyers in the Southern District of New York, only 21 are women.

law firms are rarely interested in experienced prosecutors of either gender, however able, unless they can bring with them some client base. It is economics more than ability that hurts women in this regard.⁷ Similarly, when prosecution becomes enmeshed in politics, women have not fared very well. For example, only one woman, Elizabeth Holtzman, serves as an elected district attorney in the state of New York.

Despite these concerns, one cannot deny the fact that, in the day-to-day work of criminal prosecution, the primary criteria for success are ability and diligence. On such a level playing field, women have succeeded in making gender an obsolete issue.

7. See 'Rainmaking' at Law Firms: *The Last Hurdle for Women*, N.Y.L.J., Mar. 1, 1989, at 1, col. 3 (outlining considerable difficulties women still face in securing clients).

