



# Another perspective: How do women impact the extinction of the *Trial Lawyer*?

*Responses to columnist Gary Gwilliam's take on differences between men and women in resolving cases*

BY DONNA BADER

J. Gary Gwilliam's article, *More musings on the extinction of a species: trial lawyers*, gave me something to think about. Have women changed the landscape and contributed to the "decline" in jury trials? When I attended law school in the 70s, women were expected, even encouraged, to go into more traditional areas of law. Some clients harbored a bias against women, wondering if they were tough enough for litigation. These clients envisioned trials as dogfights and they were being represented by the more gentle breeds.

In my experience, women of today are stronger and just as willing to go to court. But they also bring a different set of qualities with them. One trial judge I spoke with observed that women were usually better communicators, and they talked to their clients to find out what that client wanted from the litigation process. And sometimes trying the case was not the answer.

As Gwilliam points out, men have been taught to resolve conflicts by beating each other senseless and their egos often get the better of them. In what other profession are we allowed to yell, scream, threaten and bully, if we so choose? (Some women have also embraced these tendencies.) Gwilliam's focus on trying a case as the most important aspect of liti-

gation places undue importance on the attorney's ego needs. And sometimes, it is the clients who suffer for this.

Mediating cases is often a good alternative to trial because of the emotional and financial impact of prolonged litigation. The costs involved in litigation, which have risen dramatically over the years, is yet another factor. Everyone has to have one or more experts. And good experts are not cheap!

Some cases should and can be settled, and the decision to do so has no bearing on whether the trial lawyer is a man or a woman. Some clients – not the attorney – just don't want to go to trial, no matter how competent the trial lawyer is. This attitude may be reflected in the facts that case filings are down and more people are resorting to alternative dispute resolution.

If the money offered to settle is not enough, I don't find that women will sacrifice their clients in order to avoid litigation. Most of my colleagues seem to agree. Women are just as ready and eager to engage in trial when the conditions warrant it. And if an attorney – male or female – fears litigation and is taking on a case hoping it will settle, it impacts the negotiation process. If you are not ready and willing to try a case if the money on the table isn't acceptable, it has to affect your negotiations and the advice you give to a client.

While Gwilliam views trial work as a high form of art, he admits he is a "dinosaur." Attorneys just can't try cases in the same way they did 30 or 40 years ago. (At the beginning of the last century, famed attorney Clarence Darrow was known to take 8 to 9 hours on his opening statement and closing argument. Who has that kind of time?) Most jurors are busy people, who are often struggling to make ends meet, and no matter how fascinating the trial attorney might be, they just can't sit for days or weeks in the courtroom. In a recent case, the potential jurors were so openly hostile that the parties and attorneys opted for a court trial.<sup>1</sup>

How can Gwilliam pinpoint women as the reason that there are fewer jury trials? That he does so without any statistical analysis says more about his own perceptions of women. He also lumps women attorneys into a single group, much the same as he does with male trial attorneys, as if one size fits all. This overlooks the fact that women come in different shapes, sizes, and more importantly, personalities. (One only has to view the variety of responses to see the differences in personality types.) But since I am a collaborative type – one who relishes talking a man into acquiescence – I do applaud Gwilliam's willingness to expose a potential bias and open a dialogue on the subject.

Trial lawyers, even dinosaurs, must face the new realities of trying cases in



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the 21st Century. And that reality may include the fact that a jury trial – whether the trial lawyer is male or female – may not be in the clients’ best interests.



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**Endnotes:**

<sup>1</sup> You can find the L.A. Times article at <http://www.latimes.com/news/local/la-me-reluctant-jurors15-2010feb15,0,824472.story>

**What others have to say . . .**

“Gary Gwilliam, who I believe is quite respectful and appreciative of women, may very well be correct when he says things changed once women moved into the neighborhood. But I tend to think women were permitted to move into the neighborhood because things changed.

Keeping in mind that trial lawyers, acting as modern day gladiators, made great contributions in areas such as product safety, I think people began to realize social problems like drunk driving, drug abuse, family violence, child molestation and bias against groups were more sorely in need of our attention and resources than individual wrongs.

So I disagree with Mr. Gwilliam’s conclusion that women in the law resulted in fewer jury trials. We still have plenty of jury trials!”

Justice Eileen C. Moore  
California Court of Appeal

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Gwilliam’s suggestion that there are fewer jury trials because more women are becoming trial lawyers is unsupported by

any research or evidence. The concept that women trial lawyers settle cases for less instead of trying them for more because it’s in their “nature” to compromise is demeaning to women, as is his thinly veiled suggestion that women trial lawyers are bad for clients, bad for the civil justice system and bad “for society as a whole.” Shame on you for even publishing it. Would you have published it if he had instead entitled it:

“We try far fewer jury trials today than ten years ago. Is the growing number of gays in trial practice a factor in this conundrum?”

“We try far fewer jury trials today than ten years ago. Is the growing number of African Americans in trial practice a factor in this conundrum?”

“We try far fewer jury trials today than ten years ago. Is the growing number of wheelchair bound attorneys in trial practice a factor in this conundrum?”

I think not. I strongly urge Plaintiff, a magazine of which I have served as a Contributing Editor, to engage in more responsible journalism.

Shirley K. Watkins, A Woman Trial Lawyer, Los Angeles

P.S. When I go to mediations (as I often do as a “woman” trial lawyer), all I see are men everywhere...talking, talking, talking.

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“If this is a theory (rather than public musing), it collapses on its own premises. A trial is not literally going outside and fighting physically. It consists mostly of staying inside and talking. And if women resolve disputes by talking, then trials should be just perfect for them. I find it odd that that he doesn’t attribute the increase in such things as mediation to more obvious causes, such as the increasingly prohibitive costs of litigation and the concerted efforts courts have made since the 1980s to push settlement and unclog the courts.

Howard Posner  
Los Angeles, CA

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“I have had a theory that you do not see as many women taking cases on contingency because women are risk adverse. In fact, I have seen investment studies that show that women do better in the stock market because they are more prone to buy and hold than buy and sell (much like the way they treat remote controls). Does that translate into not wanting to try cases? It depends. Speaking from my own personal experience, I believe I have a good win record because I know which ones need to settle. There have been cases, however, that I knew I was going to win and if I couldn’t get my client 95 percent of what they wanted, I took the case to trial.”

Adina T. Stern  
Rancho Santa Margarita, CA

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I’m skeptical. Okay, for those of us who took Logic 101, let’s fill in the blank: Women lawyers mean fewer trials; Fewer trials are bad for plaintiffs; Therefore, women lawyers are \_\_\_ for plaintiffs. Is that it, or am I missing something?  
Steven B. Stevens  
Los Angeles, CA

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“How about the growing number of cases filed each year? The caps on damages make trials near impossible. What about the boom of alternative dispute resolution avenues over the past 15+ years, (including many law school and post-JD courses about ADR tools, such as mediation)? Or the growth in the total number of lawyers over the past 20 years, men and women? I’m not saying that in some cases, women aren’t more likely to take a few more passes at talking something through before drawing a line in the sand, but there are other potential reasons.”

H. Shaina Colover  
Newport Beach, CA



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“Interesting article. Any chance the cases are settling because the men are scared to try a case against us? Just kidding, but in seriousness, one factor I think that has some truth to it is that women tend to have the ability to come up with some creative settlements. It is not to say that our male counterparts are

not as capable but oftentimes tend to take a black and white approach. The law is not always so black and white. If there is truth to the author’s theory that women tend to be willing to talk it out, perhaps you take that and couple it with the woman’s ability and willingness to be creative that can facilitate the settlement.”

Rose Amezcua-Moll  
Orange, CA

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*[Ed. Note: There were seven additional comments submitted anonymously. Although the writers had a lot to say, we decline to publish them without permission for the use of their names.]*

