

## EXPERIENCE ON THE BENCH

REBECCA R. PALLMEYER†

Just five years after I began practicing law, I took a position as an Administrative Law Judge in our state’s quasi-judicial civil rights agency. Several years later, I was confirmed as a U.S. Magistrate Judge. In 1998, I was confirmed for a seat as a U.S. District Judge, a position I have held ever since. Thus, for most of my professional life, I have been called “Judge Pallmeyer.” I cannot imagine a job I would find more satisfying or one for which I am better suited than this one. I am keenly aware of my good fortune.

Being a judge is the ideal career for me for many reasons, some of them bound up in the fact that I am a woman. Let me attempt to explain this. In the 1980s, psychologist Carol Gilligan famously wrote that women speak with a “different voice.” Gilligan, and the feminist theologian Mary Daly, represent one of two schools of thought concerning women’s abilities—sometimes referred to as “difference feminists,” in contrast to what are referred to as “equality feminists.” On the one hand, the “equality feminist” side, are those who contend that in all relevant ways, women’s brains are much the same as men’s. That is, women are equally “hard headed,” equally capable of both deep thought and pettiness, no more or less capable than men in any intellectual direction. Gilligan and her progeny argued that women are equal, but different—that they have unique and special capabilities. They are more nurturing, she argued. They are more motivated to find consensus. They are oriented toward community and family over individual goals and rights.

As between these two views, I come down hard on the side of the “equality feminists.” I generally share the view, sometimes attributed to Justice O’Connor, that a wise old man and a wise old woman will reach the same conclusion in deciding cases. I have always been wary of the view that my brain is different. And I remain frustrated by the fact that in many areas of the law, considered more challenging (and all too often more lucrative)—securities, antitrust, patents—the bar skews male. Women are every bit as smart and analytical and imaginative as men. Further, I suspect they are no more likely to adopt some “communitarian” rather than zero-sum solution to a binary conflict.

But let’s assume for the moment that “Men are from Mars, and women

are from Venus.” If differences often attributed to gender are valid, then I suggest that women are particularly well-suited to the role of judge in many ways. In the modern federal court, judges are encouraged to be “active case managers”—meeting regularly with counsel, setting schedules, enforcing deadlines, and often brokering agreements or pushing compromise of one kind or another. Judges joke that discovery disputes remind us sometimes of playground squabbles, complete with complaints of “it’s not fair!” and “s/he started it!” Who better to straighten these disputes out than one who, a generation or two earlier, would have been encouraged to be a primary school teacher? To the litigants, perhaps a gentle reminder about courtesy comes more naturally from a woman.

If the stereotypical woman is less aggressive and more agreeable than her male counterpart, then what would be more appropriate than assigning her to preside over a trial? The judge has prepared well, set a schedule, ruled on the *in limine* motions, and considered and ruled on the jurors’ excuses. But once the trial is underway, the judge’s role is largely passive. She rules on objections as they come up but does not inject herself in favor of either side. She is sensitive to the jurors’ concerns. She is seen as approachable and generous—qualities that, I would argue, make her a more effective judge.

The job of judge suits the purportedly “fairer sex” in other ways as well. The work is not physically challenging. It is performed indoors, ordinarily in comfortable temperatures, during reasonable work hours. The time commitment is significant, but the judge sets the hours. We federal judges have private bathrooms and closets in our chambers, perks that other professional women would treasure. And while many professional women struggle with the expense and complications of dressing for work, we judges enjoy the uniform of utmost authority: In our black robes, we are always dressed for success.

Like so many professions, law is one in which women struggle for credibility. The robe (indeed often referred to as a “gown”) provides the judge with instant cred. Walk into the courtroom wearing the ultimate basic black dress, and a room full of people will rise to its feet. A woman judge, even one who is brand new to the bench, is called “your honor” and treated with deference. Her jokes draw laughs, and her pronouncements generate respect. She always gets the last word. Nor is the instant cred artificial for long; a year or two after taking the bench, a federal district judge will have more trial experience than most of the lawyers who appear before her. Bar organizations, eager to display their own inclusiveness, clamor for women judges to speak at conferences and serve on panels. The experience quickly enhances the judge’s profile.

For most Americans, the courts remain the most respected government institution. In the courtroom and in chambers, the judge is the authority

figure and, if not fawned over, is nearly always accorded respect. The significance of this, for a woman judge, cannot be overstated. I have presided over dozens of cases alleging discrimination or harassment based on sex. Of course, not all of these cases are meritorious. But even when the challenged conduct is not truly actionable, and always when it is, I am struck by the offensive, hostile, and even violent behavior experienced by working women. Women whose very presence on a plant floor or factory is deemed an affront are tested, bullied, verbally abused, and sometimes assaulted. As recently as this year, I have had two cases in which a plaintiff has presented credible evidence that she was fired minutes after, and in direct response to, disclosing to her supervisor that she was pregnant. Even in purportedly enlightened professional settings, women are judged or misjudged on the basis of their appearance, interrupted at meetings, overlooked for leadership roles, and denied recognition. Almost every woman I know can recount an incident in which her suggestion or idea fell on deaf ears, only to be received with enthusiasm when repeated (sometimes just seconds later) by a man. Today, we hear men who cite the “#MeToo” movement in refusing to meet with a woman, even to give her an assignment or feedback—thus using the experience of women as victims as an excuse to victimize them further.

Women judges are not completely immune from these insults, but we are largely so. Our pay is set by statute; we are not able to ask for a raise, but neither are we subject to any nagging concern that a man in the same position is earning more money. Litigants undoubtedly talk about us behind our backs. Lawyers may interrupt or push back against women judges more than they do with men. In the end, though, the judge gets the “last word,” and few men or women have the temerity to express any open disrespect. Fewer still are the times a man will sneer, in her presence, at a woman judge’s body, or voice, or mannerisms. In short, we are taken seriously, as is our right.

I personally benefit from all of these features of the job. I came to the bench qualified by a well-trained mind, common sense, and a willingness to work hard. I now have vast trial experience, but I could not make that claim when I took the bench. Perhaps I would not be able to make the claim even today were it not for the practice, in the federal district court, of random assignment. In our court, when a new judge is sworn in, the Clerk of Court creates that judge’s case assignments from a random draw of cases pending in the court. The new judge starts work on cases old and new, challenging or straightforward, significant or trivial. Then, as new cases are filed, these new cases are assigned at random. That means that if a “heater” case gets filed the day a new judge takes the bench, she or he has an equal chance of drawing that case, regardless of the new judge’s complete lack of experience.

It is easy to see the problems such a system creates. An inexperienced judge may be thrust into a case in an unfamiliar area of the law. The judge’s

uncertainty may result in delays as she learns the law, or confusion if the lawyers attempt to take advantage of the knowledge gap. And a judge who has significant expertise in a particular practice area may not be the one to whom a difficult case in that area is assigned.

But if the random assignment system has its downsides, many women lawyers who practiced with a private firm, as I did, will also immediately recognize its value. What we want most is to have that equal chance. As a young lawyer at a Chicago law firm, I recall being “next in line” for a juicy piece of litigation, and was excited when, just at that time, our firm landed a challenging commercial litigation assignment on the west coast. To my dismay, the associate-level work was assigned to a male colleague two years my junior. I summoned up courage to ask the partner in charge why I had been passed over this work, and he did not challenge my assertion that I was due up for the project. Instead, he told me that he and the other partners had decided (without consulting me) that I would not want to take on a case that would require so much travel “because you are married.”

You know the punch line: the younger male associate was married as well. The firm was concerned enough about my young colleague’s happiness that it arranged to rent a spacious apartment for him and fly his wife to the west coast office every weekend. The young man’s career was launched. The experience he had with that case qualified him as one of the firm’s star litigators. And months later, when there was a lull in the action, he and his wife were able to take a European vacation using the airline miles they had racked up.

I have gotten over my resentment about this incident. My junior colleague who got the great assignment has gone on to have a successful career, but so have I. He is well-compensated as a partner at a local law firm (not the same one where we started practice), and I am now the Chief Judge of the federal district court in Chicago. I left the law firm relatively soon after the incident I have described. That incident was not the reason for my departure, and I am not one who believes that “everything happens for a reason.” Still, it might well be that, had I advanced more rapidly in the law firm, I would not have left when I did, and would not have achieved the success in the judiciary that I have so valued.

For that reason and others, while the incident is in the rear-view mirror, I have not forgotten it. I hope assumptions such as those that excluded me in those early days are now being set aside. In most private practices, though, I know the significance and importance of attracting and servicing “big” clients, who generate challenging issues and can be counted on to pay their large legal bills. Doing so is difficult for any young lawyer who lacks connections, and had I stayed in private practice, it would have continued to be a challenge for me.

How fortunate I am to work in a position where past connections do not matter. Random assignment is a gift. I am as likely to draw the high-profile case as my male colleagues are, and that has been true since I took the bench. As a result of random assignment, I have presided over the “big” cases: the public corruption trial of a sitting Illinois governor, multi-defendant gang/drug-distribution cases, “bet the farm” patent infringement cases, multi-district products liability litigation, and large-scale bankruptcy and commercial disputes. I have also had my share of the “little” cases, some of which make a heartbreaking difference to the human beings affected: criminal charges of illegal entry into the United States, individual employment discrimination cases, claims of excessive force against police officers, and challenges to the conditions of confinement in prisons and jails.

One of the memorable “little” cases was one involving an eight-year-old boy (“N.R.”) and a box of crayons. You recall that the events of September 11, 2001 had a huge effect on the nation. One immediate effect of 9/11 was a “zero tolerance” policy for many things, including weapons in schools. N.R.’s family situation was complicated, and he had just moved in with his grandmother. The grandmother was raising a couple of other grandchildren as well, including a kindergartener who was a cousin of N.R.’s. N.R.’s teacher gave the grandmother a list of school supplies that N.R. and his classmates were expected to bring, including art supplies. N.R. didn’t have what he needed, so his grandma did what many adults would do under the same circumstances: she gave N.R. a box of crayons and markers that belonged to his cousin. When N.R. got to school that morning, and the teacher told everyone to pull out their boxes of crayons, N.R. did so. And among the crayons in this box that N.R.’s grandma had taken from his cousin was a spent shell casing—that is, a bullet shell.

We don’t know where the shell came from, or what the grandmother knew, but I was quite sure that N.R. had nothing to do with it. N.R. compounded his trouble by showing the bullet shell to a classmate, not to the teacher. But the classmate showed the shell to the teacher, the teacher took things to the next level, and eight-year-old N.R. was expelled from the third grade. By the time N.R.’s family brought the case to court, nearly three months had passed. And what was truly startling to me is that N.R. had been out of school that entire time, getting just one hour of education once a week, with a tutor at the local public library.

Most of us remember what we were doing in the third grade: we were learning to multiply and divide. We were working on a science project, or memorizing spelling words. And most of us also know that if you miss these things in the third grade, things slide downward in a hurry. The idea that this little boy had missed more than one third of the third grade haunted me. I ordered the school district to begin providing him with five hours of tutoring

every day, to make up for the time he was missing in school, until I could rule on the family's challenge to the school district's "zero tolerance" policy. When the school district's lawyer asked how soon the school would have to get this tutoring underway, I said, "Tomorrow."

You may not be surprised to learn that this was all it took. The school district did not have funds to pay for a private tutor every day for N.R. They put him back in the classroom. The case ended about a week later.

I have handled the "big" cases; I am known for them. Random assignment has given me plenty of public attention. But in many years as a federal judge, I can't think of a case that I found so satisfying as one involving one little boy and one odd little episode with a box of crayons. I realized that N.R. might well get into more trouble down the road. But because the court was there, and because people have to do what I tell them to do, this little boy was not turned out of the education system at age eight.

I have been extremely fortunate in my professional life. I served as law clerk to Judge Rosalie Wahl, the first woman justice of the Minnesota Supreme Court. Before her appointment, Justice Wahl had devoted her practice to representing indigent criminal defendants at a law school legal clinic. Her appointment to the state's highest court drew the predictable criticism: that she did not have relevant civil or commercial experience to be effective. The criticism emerged again two years after her appointment, when the Justice was required to run for election statewide to a full ten-year term, but Justice Wahl brushed it off. She assured voters she had learned on the job and would continue to do so, "just like the men did." I, too, learn on the job, just as the men do. I, too, have cases both large and small in which I make the decisions.

Justice Wahl referred to herself as my "mother in *the* law," and indeed that is what she was. Justice Wahl's intellect, decency, and integrity made her the ideal role model for me, and her calm confidence in my abilities continues to motivate me, years after her death. She would be proud and delighted that I am now the Chief Judge of the federal court in Chicago, the first woman to serve as Chief in this district. In the federal courts, the role of Chief is filled by the judge of the court who has the greatest seniority but has not yet reached the age of 65. So the very fact that I am now Chief Judge is a function of the fact that I didn't have to campaign for the position or win a popularity contest with my colleagues.

For several years, I have been part of the faculty for a labor and employment law seminar conducted by the American Law Institute in Santa Fe, New Mexico. Santa Fe is a great venue in part because during the days of the seminar, we are often able to tour the federal courthouse or the New Mexico Supreme Court building, which was built by the WPA and is on the

National Historical Register. Since 1942, the New Mexico Supreme Court has honored its former chief justices with a portrait that hangs on the second floor in a room now known as the Hall of Chief Justices. The Chief Justice in that state is selected by her fellow justices, but by tradition, every justice takes a turn in that position—except for Justice Mary Walters, the first woman to serve on the Court. Justice Walters served on the New Mexico Supreme Court from 1984 to 1988, but when her turn to be Chief rolled around, she was passed over by her colleagues. Years later, Justice Pamela Minzner became the first woman to serve as Chief Justice. Justice Minzner took action to right the wrong done to her predecessor in a significant way: she moved Justice Walters’s portrait into the Hall of Chief Justices, naming her an honorary Chief Justice.

My own photo hangs in the Chief Judge’s courtroom in the Dirksen Courthouse. My status as Chief is, as I’ve explained, a function of seniority. But it is also a function of the decision of my predecessor to step down several months before the conclusion of his own term, and before my 65<sup>th</sup> birthday. Judge Ruben Castillo announced his decision on March 8, 2019—International Women’s Day. Judge Castillo was ready to leave; but he chose to do so deliberately to ensure that the court would not wait years longer to be led by a woman judge. What an honor it is to fill this role at a time in history when all of our institutions are under challenge. The judiciary is the one I am called to, and have been blessed to serve. Theodore Roosevelt said, “Far and away the best prize that life has to offer is the chance to work hard at work worth doing.” I’m not sure Teddy Roosevelt was right; my family and friends are dear prizes as well, but the chance to work hard as a federal district judge is for me the work most worth doing.

I am the first woman to serve as Chief of this court, but I will not be the last. Women and men will follow me in this role. They may well find it quaint or slightly ridiculous that there was a time when my appointment seemed groundbreaking. My responsibility is to ensure that those who follow me get the same chances that I have had, and that the court continues to administer justice with an even hand. Judges must continue to work hard on the cases they are assigned, large and small. To carry out this responsibility is an extraordinary honor. It is indeed “work worth doing.”