

ARTICLES

Overcoming the Status Quo: Women Securities Litigators in the Courtroom and the Boardroom

As we continue to press for greater agency and equality, here are a few suggestions to help women securities litigators remain top of mind with clients.

By Susan S. Muck and Charlene (Chuck) Shimada – April 1, 2021

Securities litigators are often required to transition seamlessly from arguing billion-dollar cases in court to advocating before the U.S. Securities and Exchange Commission (SEC) and from representing corporations during internal investigations to helping boards of directors solve corporate crises. Over the past several years, a dramatic surge in securities class actions has fueled an even greater demand for lawyers who can successfully defend these high-stakes matters. This trend is likely to accelerate under the Biden administration, based in part on an anticipated increase in regulatory investigations that often trigger securities class actions. Although securities litigation has historically been dominated by white men on both the plaintiff and defense sides, women continue to make strides in winning lead roles in these highly sought-after “bet your company” representations.

When we began practicing in the 1980s, we joined different San Francisco litigation powerhouses. Yet, at that time, our two firms combined had fewer than five women litigation partners. Not surprisingly, securities litigation suffered from the same lack of diversity; the field was dominated by white men, even as more women became general counsel or directors of litigation and more law firms claimed an abiding commitment to diversity. The disparity remained pronounced over the next three decades, notwithstanding the increased numbers of women partners at major law firms.

In the fall of 2012, out of a recognition that too few women were routinely selected for lead roles in securities cases, a small group of us decided to form a networking organization for women securities litigators in California. We wanted to encourage more women to enter securities litigation, to support those women already in the field by establishing a source of education and referrals, and to ensure that women play an even greater leadership role in the future of securities litigation. From the 7 women who originated WISe (Women in Securities), including the 2 of us, we now have over 500 members. And although we initially began as a group for women defense attorneys, our membership now encompasses women in the plaintiffs’ bar, in the government, and in corporate legal departments. Our programs have included receptions with then SEC chair Mary Jo White and members of the West Coast SEC offices, workshops aimed at business development and marketing, “reaching across the v.” to discuss developments with our sisters in the plaintiffs’ bar, and educational programs on securities law and governance principles. While each of our events has sought to promote the advancement, mentoring, and education of women securities litigators, equally valuable is the empowerment and agency we find from being together.

In the meantime, the tide has begun to turn. In-house attorneys responsible for selecting securities class action defense counsel routinely consider the diversity of proposed teams, including which partner will “lead” the matter. Prominent directors—increasingly focused on the diversity of the companies they steward and on their own ranks as board members—insist on diverse governance counsel in high-profile engagements. And courts are increasingly focused on the issue. In a recent securities class action in Ohio, Judge Algernon Marbley approved the institutional investor’s choice of lead counsel where that firm’s proposed leadership team in the action included one woman and at least lawyers of color and the firm’s overall composition was also diverse, explaining that “whenever possible, the Court strives to appoint a diverse leadership team that is representative of the diversity of the [p]laintiffs.” And in the U.S. District Court for the Northern District of California, Judge James Donato recently declined to approve the leadership structure of plaintiffs’ counsel in a consumer class action because all of the lawyers in the proposed committee of lead counsel were men. It would not be surprising to see other judges express similar views when considering lead counsel in securities class action cases. All of this has brought about increased opportunities for women and other diverse partners to take leading roles in securities litigation.

The fact that some clients are now insisting that their outside firms have women partners who will take the lead in the courtroom and the boardroom has added to women’s progress in securities litigation. Firms with authentic commitments to diversity and inclusion must field defense teams that include women in lead roles—or cede the opportunity to competitors. And women partners who are fortunate to have lead roles in securities cases must help set the course for the many younger partners who are still developing their securities litigation practices.

Suggestions to Help Women Securities Litigators

As we continue to press for greater agency and equality, here are a few suggestions to help women securities litigators remain top of mind with clients:

Be proactive.

Follow developments in securities litigation and look for opportunities to reach out to clients with substantive suggestions or trenchant observations they won’t hear from others. Follow the business developments shaping your clients’ industries and learn when those developments present an opportunity for you to reach out and suggest a meeting or call.

Be accessible.

Make sure your client knows you will move heaven and earth to return a call. You can’t always win a case or even a motion, but you can always be available to provide thoughtful, strategic, accurate advice.

Be practical.

Develop litigation strategies that serve your clients’ interests sensibly and pragmatically, without letting ego drive decision-making. Impractical or needlessly aggressive approaches do not build confidence with clients.

Be empathetic.

As much pressure as you may feel, your client has it worse; your client has been sued in a publicly filed document accusing your client of securities fraud. Whatever benefit you bring by successfully moving to dismiss the case or having it thrown out at summary judgment, the company has nevertheless had to spend money on a lawsuit the client usually believes should never have been filed.

Be inclusive.

Strive to build an exceptional team of diverse lawyers who offer unique perspectives. Diverse teams are able to offer more comprehensive guidance, a benefit clients understand and appreciate.

Be efficient.

Your client is in a business, and that business has nothing to do with paying for securities lawyers. Although public companies generally have directors' and officers' insurance to help fund the defense or resolution of securities cases, the carrier does not begin paying until the company exhausts a very large deductible. And carriers are repeat players in securities litigation; they will encourage insureds to hire lawyers who set reasonable expectations and who meet those expectations. So build accurate forecasts for what your defense will cost and stick to your budget.

Be patient.

Securities class actions are high-profile cases with a lot at stake: money, reputations, possible regulatory or criminal exposure. General counsel and directors and officers understandably want their lawyers to be known quantities—partners with years of experience, a long list of successes, and confidence in both the courtroom and the boardroom. Even lawyers with decades of experience are second- or third-chair partners in securities cases, so do not be discouraged. From our standpoint of a combined 75 years of practicing securities litigation, the future of women and other diverse attorneys in the field has never seemed brighter, so long as we continue to put in the hard work needed to develop our skills and maintain a passionate commitment to diversity and inclusion.

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