

Conversations With Women in IP

Transcript: Judge Shira A. Scheindlin

Irena Royzman

Hello, everyone. Welcome to Conversations With Women in Intellectual Property. I'm your host, Irena Royzman, head of Life Sciences at Kramer Levin. I'm joined today by the Honorable Shira Scheindlin. She was the first female magistrate judge in the Eastern District of New York. Judge Scheindlin was appointed in 1994 by Bill Clinton to the Southern District of New York, where she served as a district judge for 22 years. She has presided over dozens of intellectual property cases and was part of the Southern District's Patent Pilot Program. But she's best known for her rulings that have changed the lives of New Yorkers, including her landmark ruling on stop-and-frisk. Judge Scheindlin, who had Justice Ruth Bader Ginsburg as a mentor, has been involved in gender equality issues for decades and continues to be an outspoken advocate on gender disparity in big law. Since retiring from the bench, Judge Scheindlin is now a mediator and arbitrator at Stroock and devotes her time to many good works. I hope you enjoy the conversation.

Judge Scheindlin, thank you so much. And I would like to start with your early career. So you graduated law school, Cornell Law School, in the '70s. How was it to be a woman in law school then and also a mother from what I understand?

Shira Scheindlin

So, it was really being a minority, I'll start with that. There were maybe 10 women in the class of 160 people, so we were less than 10%. We were hovering around 5 or 6 or 7%. And there was no other mother, so I was the only one who already had children. I had gone to law school five years out of sync, so to speak, because I had gone to graduate school and had children. So I didn't go straight out of college. I was already a bit older than many of my classmates. So it was a class of one. I was the only one. Now, some of the men had been Vietnam veterans and they were a little older and they had children so I kind of bonded with that group, the ones who were already fathers and that was nice. We set up a study group. Remember how little groups formed study groups in law school? And it was a nice group, but there weren't a lot of women and there wasn't a lot of support.

What was surprising to me was how well I did. I didn't expect that. I thought I was just going to sort of scrape by and do real estate closings all my life. It never occurred to me that I would do so well in law school. But I think I understand why that would be, because I had to be very organized. I had to use my time very well as a mother and a wife and a homemaker. I had to get the work done. And I think some of the younger people that they had too much time, so they didn't know how to use it as efficiently. So there you are. So it was, it was different.

Irena Royzman

Wow.

Shira Scheindlin

(laughs).

Irena Royzman

Quite a change. So at the time, and I guess after you finished law school, did you have female and male mentors that influenced you and helped you direct your legal career? Real estate closings certainly isn't the way you chose to go.

Shira Scheindlin

No, I never did one in the end (laughs). You know, I didn't have any mentors, male or female, when I first entered law school. I honestly didn't know any lawyers. I had none in the family. I had no friends who were lawyers. Lawyers were not in my past. But, by the time I went through law school and graduated law school and began my early career, I did have some wonderful mentors. So one is a very famous woman, Justice Ruth Bader Ginsburg. And the way that happened is I transferred from Cornell to Columbia for my third year because my family moved to New York because my husband got a job in New York, so we had to move and leave Ithaca. So I did my third year there and I was a student in her seminar. She was teaching at Columbia at the time. And I liked her and she liked me and she helped me get my first job and my second job and she kind of stayed a mentor throughout my career, all the way through getting the judgeship. She was supportive all along. So, I consider her somebody who was, although very exalted, nonetheless a mentor because when I met her, she was just another professor and the first woman professor I had. So that was one mentor.

I also clerked for Chief Judge Charles Brieant, who was the chief judge at that time of the Southern District of New York. And he was a father of a lot of daughters. I remember he had four daughters and only one son, so he really believed in women having a career. He was very supportive, and he also helped me year after year after year. And the third one I would mention, and it's quite remarkable that we're having this conversation today, is Judge Jack B. Weinstein, who died today at the age of 99, two months short of his 100th birthday. So today was a very emotional

day. But he was a great mentor to me throughout my career. I started out as an assistant U.S. attorney. He was the judge. I tried my first case before him, then I became a magistrate judge, and we'll get to that, in the Eastern District and he was the chief judge. I became the special master in the Agent Orange case. So, I don't want to go on and on because we're going to talk about it later, I think, but he was always, always so supportive and such a good friend. So those were the ones I would mention as mentors.

Irena Royzman I understand that as a student, while still at Columbia, you had worked on a case with then Professor Ginsburg, later Justice Ginsburg, that brought equal pay to women academics at the City University of New York.

Shira Scheindlin That's right.

Irena Royzman Can you tell us about that?

Shira Scheindlin Yes. I didn't really work directly with her on that. She steered me to a summer job with the Vladeck firm; Judith Vladeck was a woman way ahead of her time. She was a prominent woman lawyer. In fact, her daughter Anne Vladeck then took over the firm, but Judith was one of the first remarkable women lawyers. And the Vladeck firm partnered with the New York Civil Liberties Union in bringing what's called the *Melani* case. The plaintiff's name was Melani, M-E-L-A-N-I, versus the City University. So since I spent the summer with the Vladeck firm, they asked me to stay on all year as an intern, and I worked on the *Melani* case with the Vladeck firm and with the NYCLU, and kept in touch with those lawyers for many years. So Justice Ginsburg knew, then professor, knew she was sending me for that case, but I didn't work directly with her. Although who knows, as an ACLU lawyer, which she was, she may have, for all I know, started the case while a professor.

Irena Royzman Got it. So I'd like to now jump to the work that you did as a magistrate judge, and that you already alluded to. In 1982, you became the first female magistrate judge in the Eastern District of New York.

Shira Scheindlin Oh, let me interrupt — the first judge, the first female judge in the Eastern District of New York, there was no district judge either. So the first female judge.

Irena Royzman So the first female anything. How did you come to be selected? I've heard you say that women lawyers need to ask for

opportunities, and is this an opportunity that you had asked for?

Shira Scheindlin

Interestingly, no, I was really recruited. Another great friend and mentor, he died long ago, was Judge David Trager, who was the U.S. attorney in the Eastern District of New York, and later became a district judge in the Eastern District of New York. And then he wasn't judge yet. But David Trager said to me, "You're going to apply for this." That's the way he spoke. He didn't tell you, "Do you want to?" He said, "You're going to apply." I said, "But I can't. I've only been a lawyer for five years." He said, "Well, that's the minimum qualification, five years. It's time for a woman. Apply." And I didn't think I'd get it. In fact, it would have gone, I'm sure, to Judge Amon; Carol Amon is now a district judge in the Eastern District, but she hadn't been in New York for five years. She was a little senior to me, about two years senior. I'm sure she would have been picked over me, but she didn't have the five years in New York. So I guess I was the right person in the right place at the right time. Mr. Trager was head of the search committee. So he must've been sure that the search committee or at least included me because they, I think they have to recommend five people to the full court and I was one of the five — maybe, for all I know, was the only woman of the five — and the rest is history. So I was selected, but I was a very new lawyer. I'd only been a lawyer between five and six years, which would never happen now for a magistrate judge. Many of them that are picked have been lawyers 20 and 25 years.

Irena Royzman

So how was it to be the first magistrate judge in the Eastern District?

Shira Scheindlin

The Eastern District is a very friendly district. The judges are very supportive and very friendly. There were three other magistrate judges then. They of course were all men, but they really helped me. They were also older than me. They'd been magistrate judges for a while, but they wanted me to succeed and they were very helpful in every way. So I felt supported by the other magistrate judges, I felt supported by the district judges. It was hard to be the first because it was an oddity. So some lawyers would look at you funny and try to see if they could, I don't know, get to you sort of in some way, but you had to use your powers and be strong and succeed, so I thought I did.

Irena Royzman

After five years you went back to private practice, I think both criminal defense and civil litigation. Do you think there's value to judges having private practice experience?

Shira Scheindlin

Oh, definitely. You know, I think, and we're going to jump ahead for just a minute. When I became a district judge, I had done

criminal work and civil work. I had done government work and private practice. That's the ideal resume, to have done all four. So I've been a prosecutor criminal, a defense lawyer criminal, civil litigation, both plaintiff and defense. So government and private is very important. For a long time we've had too many judges whose only experience was as a prosecutor. And that's being changed by President Biden because it was a lot of criticism that all the picks were prosecutors. I don't know if you've noticed, but all his early picks have been public defenders and civil rights lawyers, and he's really trying to have a different kind of diversity on the bench. I mean, it's true he wants diversity of ethnicity and gender and all of that, but he's also trying to get diversity of experience, and we didn't see that. We never saw a criminal defense lawyer become a judge. And now we're starting to see that. We never saw a civil rights lawyer become a judge, and now in his first few appointments, we're starting to see that. Just this week he nominated, for the Second Circuit, a specialist in voting rights law who's a head of that section at the Brennan Center and she's terrific, but would never have happened under the previous president. So yeah, or maybe many previous presidents. So I think it's good to have diversity of experience. And I certainly felt that my having done both civil and criminal, public and private, was a good background for being a judge.

Irena Royzman Very interesting. So in 1994, there were openings in the Southern District of New York and Bill Clinton appointed you. Did you want to be a district court judge?

Shira Scheindlin Yes. By then I did; I'd been a magistrate judge for five years.

Irena Royzman Yes.

Shira Scheindlin I left partly because we were very underpaid, which has always been a problem for judges, and I had two children who are getting ready to go to college. And I said, "You know, I can be a private lawyer too. I can do this. It's not so hard. I know how to try cases." In fact, I found out that almost nobody else knows how to try cases, if they had not been a prosecutor and actually been in court before juries. So I had left, which was unusual then, but then when he, when President Clinton, was elected, there were a lot of vacancies and there were a lot in New York. New York was very short of judges. I think there were like eight vacancies at once, which is so unusual. So I said, "Well, it's now or never." So even though I was enjoying some of the benefits of private practice, like making a decent living, you don't get to pick your time. I said, I better apply. So I put in my papers, I didn't have somebody helping me behind the scenes. It was strictly merit. I put in my papers, I was interviewed. I had been a magistrate

judge, I had been in practice, I had been a prosecutor and the committee reported me out. And Senator Moynihan always wanted three names for each opening. So I was only one of three, but luckily, he picked me. So yes, I wanted it by then. I did.

Irena Royzman

And so based on your experience, both as a magistrate and then as a district court judge, do you think there are issues that female judges on the bench face that male judges do not?

Shira Scheindlin

You know, again, I think that was true early on. It's less true — the more there's a critical mass of women anywhere in any profession, it gets better. So when you're just, you know, two or three women judges on the whole bench, I think that some of the older males test you and can be a little rude and almost saying, "Look, young lady, that's not the way." I would, I would say, "Excuse me, did you just say 'young lady'? I'm, I'm sure you meant to say 'your honor.'" And they would straighten up: "Oh, oh, oh, of course." And then they would do it again. So some of these people really were testing you and being in a sense rude, because you have the same job as the man down the hall, but the man down the hall looked like them. He was older, he had white hair, you know, whatever, and they weren't used to a somewhat younger woman being in charge of the courtroom. But that's changed. I think there are so many women judges now on the federal courts, both district court, circuit court, Supreme Court, certainly state courts, that I don't know that that kind of testing goes on. At least not in the courtroom. I don't know what goes on behind the scenes. Back in their law firms, they might say, "You know, she's not this, she's not smart or she's not stronger." Well, who knows what they say to their male colleagues. But in the courtroom, I think they treat the judges the same.

Now that said, even as a judge, there's still politics in some of the things that you might want to achieve as a judge. So for example, I was on court committees in the federal judiciary, where I often was still the only woman, even back then. I mean, it was kind of amazing that by the 1990s, there still were not many women getting the plum assignments, whether it was multi-district litigation, whether it was the Judicial Conference Committees. I sit around a table at times and I'm still the only woman. And by the way, again, just jumping ahead for a minute, that happens today. I was on a meeting yesterday, a Zoom meeting on a case; there were nine men and me on the Zoom, and I couldn't believe it. This is, you know, 2021 and it's still happening. So, you know, you're conscious of being a minority. And we shouldn't be because women of course are 50% of graduating class of women lawyers for years. But I'll tell you, it does give me a lot of empathy with real minorities who just don't have that percentage of

possibility. So, you know, African American males or African American women or Hispanic women. I mean, they just are smaller, much smaller, percentages. And so they're often the only one in the room. They must be used to being the only one in the room and it's hard for them. So I think the women have already come much further than other minorities. And it's hard to call ourselves the minorities. In law schools, half the class are women. But when it comes to power and partnership and leadership positions, that's different.

Irena Royzman Now, and I think we've already addressed this to some degree, but did your experience on the bench change as the number of women judges increased?

Shira Scheindlin I think so. Meaning not just the local bench of the Southern District of New York, but the federal judiciary at large.

Irena Royzman Yes.

Shira Scheindlin So if I went to meetings, there would be training meetings, you know, continuing education for judges. There'd be a lot of women in the room and we would bond. We would have lunch, we would take a walk, go shopping, whatever. So you didn't feel alone. There were a lot of colleagues over the years and that, that's good. That's supportive, empowering, and all the good things. So I think the idea of a critical mass for any minority is very important. You don't want a one-off. A one-off doesn't change anything. You have to have enough to feel comfortable.

Irena Royzman I'd like to now turn to one of your most impactful decisions while you were on the district court, certainly impactful for really thousands if not millions of people, and that's your ruling on stop-and-frisk, and that ruling dramatically reduced police stopping largely Black and Latino men from about 700,000 in 2011 to 20-some thousand in 2015 without any significant increase in crime. So it's an enormously impactful decision. And during the case, Mayor Bloomberg, who was then the mayor of New York, had a dossier put together on your history, which portrayed you as anti-police, and it surfaced before you issued your landmark ruling in 2013. And what was that about, and was it intended to deter you? What's your understanding of that?

Shira Scheindlin So you ask one question, but you really ask a full picture of questions at once.

Irena Royzman (laughs) Yeah.

Shira Scheindlin Well, yes, it of course was a major ruling. And one of the most

satisfactory things about it is when the number of stops plummeted by 95%, crime didn't rise. I was so relieved, because what they said that day of the decision is New York's going to erupt, there's going to be so much crime and it's all her fault—that woman. She doesn't know anything about policing—that woman. So we already had that phrase, "that woman," which of course is gender bias. But, luckily, they were wrong. And very luckily for me. I would have felt responsible had the crime rate suddenly jumped up, but it didn't. So some of the newspapers actually wrote apologies. A few years later, there was an editorial in the *Daily News*, an editorial in the *New York Post* that essentially said we were wrong, she was right. And that was really, really very satisfying.

As far as what Bloomberg did, you know, the day after the decision came out, there was a front-page picture in the *Times*, *The New York Times*, of Mayor Bloomberg, Commissioner Ray Kelly of the police and the then corporation counsel, Mike Cardozo, and they looked so angry. And my sort of label on the cartoon was three angry white men. I mean they never got it. They didn't get what it's like to be a young black male being stopped. I mean, I'm sure to them, it was like, so it's an inconvenience. It's two minutes. Well, it's not. It's not. It's humiliating. It's in public. They're men who — they couldn't go out without being stopped. They were stopped eight, nine times. One of the young men, who's now running for Manhattan district attorney. And by the way, I support him. He may win. He's a black male. He tells the story all the time when he campaigns. That he was stopped innumerable times. So it was a bad practice. And the news that the crime didn't go up shows that it wasn't particularly effective in fighting crime. That's what, that's what it shows — that the crime didn't go up in particular. Now the mayor and the police commissioner justified it and said, you know, if they know they're going to be stopped, they won't carry their guns. And we all know who carries the guns, and we all know who commits the crimes. And there were tape recordings that said it's young black men and we have to target them. So that was the mindset of the police department that if they could somehow intimidate young black men, there wouldn't be crime, but it doesn't really work that way.

As far as the dossier on me, that was a very unfortunate thing and it should never have happened. But what they tried to paint was a picture of me as sort of anti-police, which was not true at all. They did that by looking at my decisions on what's called motions to suppress evidence in criminal cases. But the problem with that is that most of the decisions on motions to suppress are oral. The judge just says it from the bench and that's it. I happened to write

opinions when I did grant suppression, because I wanted to encourage other judges to be brave and do it. So they looked at the written decisions only and said, "She's done it four times more than any other judge." Well, of course it wasn't the least bit true, but, because I was willing to do it in writing and write a reasoned decision to, as I said, give other judges courage, which is something I learned by the way, from my mentor, Judge Weinstein, who I already said, today's a sad day, but he would always do that because he wanted to be the first to make the point. So I'm not anti-police to this day. I don't like the phrase "defunding the police" and I've told people don't use it. It's a political bombshell, you don't need to say that; but on the other hand, you have to police, you have to do smart policing. You have to do constitutional policing. And my decision really said, you can stop people and you can frisk people because the Supreme Court said so, but you have to do it with reasonable suspicion. That's the law. So you're allowed to do it. They said so 50 years ago, or more now maybe 60, but you have to do it only when you have reasonable suspicion. The truth was they were doing it randomly. You're doing all the young black men they could find. And that's not constitutional policing. Because I think it's part of your question in a way that they, why did they do that dossier thing? I think it was to intimidate me and hope that they could deter a ruling they pretty much knew it was coming from earlier rulings in the same case. And you know, it was a non-jury trial. And I was not happy with that. I begged, I begged the plaintiffs. I said, it's better if there's a jury, because they'll say, "That judge, that woman." But if a jury decides, it'll have more credibility. But they couldn't do it because they were only seeking injunctive relief, not damages, and there's no jury for equitable relief. So then I said to the city of New York, "Can you get a jury? Is there anything you can do to force a jury?" And they said, "We researched it. We tried, nothing we can do." So it had to be non-jury. And I knew from the moment that decision was made that I was going to be a target.

Irena Royzman

And how did you handle it? I guess, just really by doing your job (laughs).

Shira Scheindlin

I guess that's what you can say. I did my job, certainly in issuing the opinion. It wasn't pleasant after that. I mean, the press camped out in front of my home. They followed me down the street. They yelled at me, "Are you going to get fired?" They didn't understand life tenure. It was a very ugly period, shall we say, in my life. It was not pleasant to be attacked, but I also had a lot of support. The newspapers were kind of split. *The New York Times* was extremely supportive, *Daily News* in the middle and the *New York Post* was very against. So, you know, because of the

people were against it. The people, if you did polling, were probably 50/50 as to whether it was the right thing to do to stop it or the wrong thing.

Irena Royzman

Interesting. So now to IP cases and you have had dozens of patent cases during your time on the bench, and you chose to be part of—the Southern District of New York is part of the Patent Pilot Program—and you were part of it, and patent cases are also typically quite high stakes. What attracted you to patent cases?

Shira Scheindlin

Patent cases are very challenging because you learn so much. In some cases, you don't really learn anything. You're doing the teaching, so to speak, by, you know, studying the issue and writing the decision. But in patent cases, you always learn, always learn some field of science that you never knew before, whether it's a medical device, whether it's a computer program, whether it's, I don't know what, a plant supplement, there's always something you're learning in a patent case. So I found it fascinating. Maybe it's an electrical system. I mean, I had patent cases off on all kinds of products over the years, and they're always fascinating and challenging. And I also find the patent lawyers are the best. I mean, I don't want to just say this because you're an IP lawyer, but they work well together, I have to tell you. They don't fight as much as commercial lawyers, they get along. Because, I guess, because they're not always plaintiff lawyer or defense lawyer. On some cases, they're on the sort of plaintiff's side, and other cases they are on the defendant's side. So you have that plaintiff/defendant split. So it's a collegial bar. It's a very smart bar. I mean, how can you do patent work unless you're very smart? Because you have to be a lawyer and a scientist most of the time. You have to really be both and understand this complex material. So I guess I found those cases incredibly challenging, but I also have to admit that I like to challenge myself. I don't really have any science background or computer background. I have to tell you the truth. So every time I got a patent case like that, I thought, "Those poor lawyers. They're dealing with somebody who's not going to get it." And I didn't get it right away. I had to really study and kind of teach myself, you know, some field that wasn't natural for me. I was not a biology major, a chemistry major, a math major. I wasn't any of those things. So it wasn't easy, but it was challenging. So that's why I liked it.

Irena Royzman

Did you find the challenge just to be the science or also the law?

Shira Scheindlin

No, more the science. Because the law is something I am comfortable with, whether it's a contract case or a product liability case or a criminal case. I do know how to, I think, read

cases and I do know how to figure out precedent and I do know the standard of summary judgment and I do know when it's hearsay. I mean, there's many things I know which are trans — we call "trans substantive." Doesn't matter what substantive field, all those rules are the same. So it isn't so much the law that I found hard, but the science. Trying to understand whether there's been an infringement is not an easy thing or construing terms in claim construction, and *Markman* hearing, of course, you know all this, like claim construction. It's not easy. Because claim construction is science. That's not law. I mean, you have to understand the patent and try to construe what did this inventor mean. And you know, there's various standards. There's meaning in the patent and then you, if you look at extrinsic evidence and if you do, which one and the dictionaries. I mean, there are several levels of what you can look at. If you do patent work, you know all that. But so, no, I think it was the science that was hard for me, not the law.

Irena Royzman

Are there any patent cases that come to mind that are particularly memorable?

Shira Scheindlin

One or two that went to trial. Because, patent cases almost never go to trial. They go through claim construction, they may go through summary judgment, then they settle or they appeal. You know, if it's adverse, if there's summary judgment is granted, they appeal. So it's unusual to have a trial. But I remember there was one trial about a medical device and it was so beautifully tried. Again, the lawyers were so fantastic that they could explain these complex items to a jury. And you knew that you had more education than the jury, and they were really struggling and listening and your job as a judge was to help as much as you could through your charge, your rulings, to make it as clear as you could. And the lawyers also had to make it as clear as they could do so that they would understand it. And there were a lot of those cases, those hard cases were in a number of districts at the same time, I remember that. So other judges were dealing with them too. So I remember that because it went to trial. Although, you know, I don't know if you want to stick only with patent because you, this is women in IP.

Irena Royzman

Yes. Absolutely.

Shira Scheindlin

So I bought some of my copyright cases and there were a couple of those that really stood out in my mind. One was called *Hogan v. DC Comics*, where I had to write a lot about the idea of substantial similarity. And that's kind of a landmark case. You can look it up later. And one is called *Price v. Fox Entertainment*, also about copying. It had to do with access. You know, you have to

get to access because you don't have direct evidence of copying. So I had a lot of fun with copyright cases. I remember having one called *Eve of Milady*, and it was cited a lot at the beginning of my career on the bench. It had to do with bridal gowns and the design of bridal gowns. So that one became a very popular case for a while. So, there's at least three copyright cases that I remember very well. And then of course, there's trade secret litigation, which I think you still call IP. Do you? So there's ...

Irena Royzman

Yes.

Shira Scheindlin

Yes. So I've always found that to be very fascinating too. Defining the trade secret, was it misappropriated, wasn't it? What's a misappropriation? You get almost how similar again. So I like trade secret. I like copyright. I like patent, and I'm missing one, which am I missing?

Irena Royzman

Trademark.

Shira Scheindlin

Trademark. Thank you. Thank you. Of course, of course. I'm embarrassed, but you won't tell anybody except everybody listening to this recording.

Irena Royzman

I won't.

Shira Scheindlin

So, yes, trademark was also fascinating. I had a number of trademark cases over the years, energy drinks, I had one. So I had lots of fun trademark cases, which I think all the judges like. And there's no science, they're not difficult like patents. Patent is the really hard one. Trademarks and copyright are more intuitive.

Irena Royzman

OK. So let's turn to what you're doing now and also your transition from being a district court judge to ADR and mediation. You were, as we were discussing, able to effect real change as a judge, and your decisions on stop-and-frisk and solitary confinement and others impacted the lives of really millions of people for the better. And why did you decide to make a change and step down from the bench in 2016?

Shira Scheindlin

I think that's the hardest question you're going to ask me during this interview, and I always have difficulty answering it. But I think my reasoning was that I wanted to be a more active involvement in good works than I could do on the bench. It's true I could write a decision that affected many people, but I couldn't myself become active in doing good deeds, and I wanted to be able to do that. At that point in my career, I'd done 22 years. I'd had senior status already, actually 27 years if you combined both

judgeships. That's a lot of years. I thought change would be invigorating. I thought it would be good, and I have taken on a lot of public interest work. I am now the co-chair of the board of the Lawyers' Committee for Civil Rights Under Law. They do wonderful work in voting rights in criminal justice, in economic, inequality, in housing. And as a co-chair of the board, I'm extremely active in the organization. So that's been very satisfying. I'm also on the board of The Bronx Defenders, which does criminal defense work throughout New York. I mean, primarily in the Bronx, but in a way throughout New York. Wonderful organization of defenders. I'm on the board of the American Constitution Society. First year off the bench, I started an immigrant defense project. Just started it by trying to get law firms interested in doing pro bono representation. We brought about 30 law firms into the practice of immigrant defense work, we raised money, we finally hooked up with the AILA, A-I-L-A, which has their professional group. So, I was able to become more active and I was able to speak out and I was able to write. I've written now a lot of op-eds on a lot of issues that have been published widely, *New York Times*, *The Washington Post*, this and that, very good publications, *The National Law Journal*. So I thought it's time to use my voice in a different way to be able to speak out, to be able to be a leader in good works. So that's one reason.

The other reason I thought, well, I want to challenge myself again. And I thought, you know, as a judge, you have a whole staff of people helping you. You have bunches of law clerks and interns. You've got a lot of people helping. As an arbitrator or mediator, you do it all yourself. So I thought I'd get more engaged directly in the work, really dig in, really read every brief and every case in a different way. So I thought change would be good. It would be invigorating.

I also had one other view that made sense to me then, I don't know if it makes as much sense to me now, but some judges stay too long. And I thought, "You know, I want to go out at the top of my reputation. I don't want to begin to go downhill." And there were some judges, and I don't want to name them because you may be able to guess yourself, who stay too long and they're not sharp anymore. And you draw their name out of the wheel and the lawyers go, "Oh no, not him. Not her. She doesn't, she's out of it now." I never wanted to get to that point. So I thought it was at the sweet spot where I knew I still had my brains and my power. I didn't risk my sort of, my declining years and my reputation by not being up to it. So I think judges are not always sensitive to when it's time to leave. So I took a chance and left. But of course, now the follow-up question is, and how have you found it now that

you're out there?

Irena Royzman Exactly. And it's been five years.

Shira Scheindlin So, if you'll let me answer that question.

Irena Royzman Yes.

Shira Scheindlin This is important to me because, you know, I do a lot of accepting invitations like this, but I want your audience who listen to this to hear me out on this. It's not been easy in ADR. To my surprise, women do worse in ADR than they do as lawyers. We're simply not picked. We don't know what the lawyers think: "Women aren't as smart. They aren't as strong. They aren't this, or that." A male judge leaves the bench, he's busy in one year. A female judge leaves the bench, and we've talked to each other, we don't get the work. Now, why would that be? So I think there's a real gender divide in ADR that's worse than in law. And as you know, I've done two major studies for the New York State Bar on women speaking in court. Maybe you know both of those reports. So we track both in court, first-chair role for women, second chair, and then in ADR. And statistics in ADR are abysmal. Now, it's not true in employment law. They get the mediations for employment law because they think of it as a women's field. But when it comes to commercial cases, contract cases, IP, we don't get picked. We don't get picked. So it's been more discouraging than I had expected or than I had hoped. I thought, "Wow, you know, I've got a good reputation as a former district judge and a former magistrate judge, I'll get picked." I don't get picked. So you know, when I say yes to you, you have to give me a chance to say this because I would like you and your colleagues to pick me and you don't, you don't. I've only had two or three IP cases all this time.

Irena Royzman It doesn't make sense, right? Because we're talking about judges—the neutrals are judges—so why do you think women are being selected less? And I have the percentages, the percentages are abysmal. The percentages are 4%, right?

Shira Scheindlin Yeah.

Irena Royzman For big cases

Shira Scheindlin For big cases, right.

Irena Royzman But we're talking about experienced judges.

Shira Scheindlin We are, because people perceive men as somehow superior (laughs). And I realize there're going to be males in your

audience. I got nothing against males. I like them. But, they sure have some funny views on women. And I think one of them is that we're just not as competent. Something like that, because there's no other reason that I wouldn't get picked, you know. Just once. I've never had a patent case. I think I've had one copyright mediation, two — maybe two — maybe one or two trademark. That's it. I mean, very small number, very small number. And, I know people in your bar and I don't understand it. So, you know, I thank you for letting me make this two-minute pitch out of 60 minutes, but I think you understand why I'm doing it.

Irena Royzman

And that's one of the reasons we're talking and one of the reasons that we have this series is because this really has to change.

Irena Royzman

Let's talk about COVID and the impact of COVID on both the practice of law and women more generally. Has COVID impacted your practice and how you do things?

Shira Scheindlin

Yes, of course, everybody does things remote now. So a mediation is done just like we're talking now. You know, Zoom has the ability to have breakout rooms and it feels exactly the same as doing a mediation in person. Same thing with arbitration. I was on this Zoom eight hours today on an arbitration. I heard the witnesses all day. It's a little more tiring, to do it on the screen than in the courtroom. But from what I hear, there's been more business in mediation and arbitration than there was before. I guess, because people couldn't get to court and they wanted a resolution so they just agreed to mediate and/or arbitrate. So I think it's been very good for the ADR business. COVID has been good for that business, shall we say.

And many of us speculate that we're never going to go back, that people are going to like doing it on Zoom. And I don't mean to use Zoom because that's a company, but let's just use it generically, remote, remote hearings. People like it because they don't have to pay their lawyers to travel, they don't have to put them up in a hotel. The companies I've talked to, general counsels who say, "We're never going back to in-person. We love this. We're saving so much money on sending our lawyers on planes all across, you know, from New York to California and back and hotels and food and all the rest. We don't need to do any of that." So I think that practice is really going to change. I'm not sure ADR will ever go back fully to in-person. Now there'll be some cases where everybody will want to be in-person, but I don't see it returning 100% in-person. I think remote is here to stay.

Now, let's talk more generally about how it's impacted women

lawyers. I don't have firsthand experience because at this age I don't have young kids at home, obviously, but I read the papers and I hear that for women, young women lawyers, COVID has been very difficult. Because they're home, their kids have been out of school, they've been doing remote schooling, they've got to supervise remote schooling. I do have grandchildren and I know if we don't sit with them, they don't pay any attention to the screen. So parents have really been working very hard through this period. They can't just work all day the way they used to. So it hasn't been so easy for women lawyers to stay on the sort of track that would result in, you know, the old-fashioned seven- or eight-year partnership. It's been hard for them. So I think COVID has been particularly hard on minority women and on women generally, and it's not been good for them. So while it's been supposedly good for ADR, it's also been hard on women lawyers.

Irena Royzman

Do you think it'll be helpful to women long term? Because we're seeing as you're describing that remote work works. That it's effective. People are productive. Lawyers are productive and can carry out what they need, can do what they need to do from home. Do you think in the long term that mindset will help women?

Shira Scheindlin

I do, because by then the kids will be back in school. So they won't have to be trying to be a lawyer at home while they're watching two or three kids under 10. I mean, that's what was impossible in a small apartment, which is New York. So once the kids are back in school, if they do work remote, if they do work several days in the office, several days from home, it'll work out fine and they won't have to travel. And travel was always hard on young mothers in particular. How do you leave home for a three-week trial in Oklahoma or something? It's really been tough, so that may be gone. So I do think in the long run remote work could be beneficial to women.

Irena Royzman

So I'd like to, and we started talking about it in the context of your experience in ADR, but I'd like to talk about making opportunities for women and your thoughts on how to do that. In the 22, let's put it all together, in the 27 years that you've been on the federal bench, had much changed in terms of who was presenting the cases to you?

Shira Scheindlin

Yes and no. As I mentioned earlier in this interview, the two studies I did for the New York State Bar show that women kind of plateaued and haven't improved. So on the first study, which was four years ago, 19, I'm sorry, 2017, second one was 2020. So we thought it might change in those four years, partly because our

study got so much attention and publicity, but the figures barely moved. So what we found is women in lead speaking roles in court made up only 25%. And our study was done observationally. Judges actually filled out a questionnaire for every appearance for three months at every level, state and federal court, trial and appellate. That's how we did this study. So we know it's pretty accurate and women were the lead only 25% of the time. And, it's worse than that because we found a great disparity between public sector and private sector. So the private sector was really down to about 20% that the woman took the lead because the public was 35%. So the average came out as 25, but it really wasn't 25 on the civil side. So again, it's shocking that after all these decades of being half the graduating class, still, the speaking in court is 80% male and only 20% female on the civil side. And the figures were the same pretty much throughout the state, pretty much whether it was federal or state court and pretty much whether it was trial or appellate.

The big difference is when you worked in the public sector. So if you were a prosecutor or a defense lawyer or assistant attorney general or assistant corporation counsel, then gender didn't seem to matter. It was a wonderful thing because there were no clients saying, "Hey, this is a bet-the-company case, I can't have a woman trying this case. I mean, it's a billion-dollar case, you know. I'm all for being equal, but not when my company's at stake." So you don't get that in the public sector, you get the best person. So, I'm troubled by that. And as I said, in big—when I had big cases as district judge, you know, the billion-dollar types, I'd often look out at the sea of men. I had a big environmental MDL — multidistrict litigation. I had a number of big securities fraud cases where the room was packed, I mean, 30, 40, 50 lawyers in the room in my environmental MDL, or some of my biggest securities fraud cases. And out of the 30, 40 or 50, you'd see one woman in one corner and one woman in another corner, that's it. Maybe two out of 50. And I would look out at the room sometimes and say, "Does anybody in here look like me?" (laughs). I mean, it was very discouraging. The judge was a woman, the law clerk was a woman, but the lawyers were still all men. So change has come quite slowly. And that's another thing I had meant to mention. You'll forgive me if it sounds like yet another pitch, but there are judges who pick special masters in certain kinds of cases where they're needed; they're almost always male. They just keep picking the same guys. Again, women are not picked nearly equally with men in the big appointments.

Now that said, in the study, we talk about how can things really move, how can things change. And we called it a three-legged

stool—meaning law firms, clients and the judiciary. I think the judiciary of those three is way ahead. The judiciary, particularly the MDL world, is really focusing on being sure that court-appointed lead counsel and liaison counsel are diverse. And many judges are putting in their orders, “Please submit a diverse slate. I will not pick all men for the leadership slate in an MDL or in a class action.” So I think judges are more sensitive to that, even though I just said that it’s not equal on special masters around the country, but OK. But mostly when they’re picking the lawyers, they’re pretty aware of diversity. So the judges are good. The next one who’s really good we think are the clients. A lot of clients are getting very committed to diversity. And they’re saying to their lawyers, “If you don’t put together a diverse team, we aren’t going to use you. We’re going to pick a different firm. We want to see African Americans, we want to see Hispanics, we want to see women. We want to see diverse people. LGBTQ people. We want to see a diverse team.” So the clients are pretty good too. Sadly, I think the third leg of the stool is the least committed, which is law firms. They talk well, they talk the talk, but they’re not, in my opinion, yet walking the walk. And that takes me back to ADR. So some of them are focusing on staffing the case in court, but they don’t think of it when they pick neutrals. So I think the firms really are the ones picking those neutrals. The client usually says, “Listen, you know the lawyers, you should pick them. We don’t know these names. We get a list from AAA or from JAMS, we don’t know these names.” So they leave it to the lawyers, and the lawyers pick people they know. So, we’re still working, hoping that law firms will become more sensitive to diversity issues. But I think the judiciary and the clients are starting to really get it.

Irena Royzman

What do you see as the barrier to real change?

Shira Scheindlin

I mean, the answer has to be perception. This has been studied by psychologists. They’ll look at groups of resumes and if they can identify from the name of the person whether somebody’s black or white, they’ll take the same resume, it’s been tested. In other words, it’s a fake resume and it has exactly the same qualifications. They’ll always pick the white one, or they’ll always pick the male, even though the resumes are identical. So it’s called unconscious bias. There are biases that people have that they don’t even realize they have. And one of those is who’s superior and who is inferior. And so, you know, when they see, I don’t know, a young African American or a young Hispanic woman or whatever it is, they have a perception this person has benefited from affirmative action, can’t be as good as the white classmates. Even if it turns out their resume is pretty much identical. They have the same number of A’s or B’s, they already believe that they’re not up to the same level. And until we can

defeat unconscious bias, then that's a barrier. You asked me, what is the barrier? I think it's perception. It's unconscious bias. But a lot of people are working on overcoming it, so I'm hopeful.

Irena Royzman

What's your best advice to women interested in complex litigation, such as patent litigation?

Shira Scheindlin

So my best advice is if, if you're not for yourself, who will be? It's an old saying. You have to be the one to be your own advocate. You can't really expect somebody to do it for you. So you have to go up to that partner and say, "I'd like to work on that case. I really am interested in patent cases. I have the background for it. I want to do it. Put me on your team." So I think in the end, people admire people who speak up for themselves, which is why I took two minutes to say, "Choose me." Why shouldn't I say that? I'm surprised I have to say it with my resume or background. You should think of it all for yourself, but in case you don't, I have to be my own advocate. And just the way I have to, even at this stage in my career, a young person also should think of it that way. She needs to push herself forward. I don't mean to be pushy, but to advocate for herself. She needs to find mentors, she needs to volunteer a lot. And I don't mean volunteer to set up the table for the staff. That I don't like. Volunteer to do as much of the work as possible on the case and to get real work. "I want to work on that brief. I'd like to be on the trial team. When can I take my first deposition? When can I defend it?" So I think being your own advocate is the best advice I can give.

Irena Royzman

Thank you very much.

Irena Royzman

I want to thank the Honorable Shira Scheindlin for her time. She definitely leaves us with food for thought. The challenges for women lawyers in the private sector, even for highly experienced, distinguished judges are real, and we need to collectively work on overcoming them. Thank you all for joining us for Conversations With Women in IP. See you next time.

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