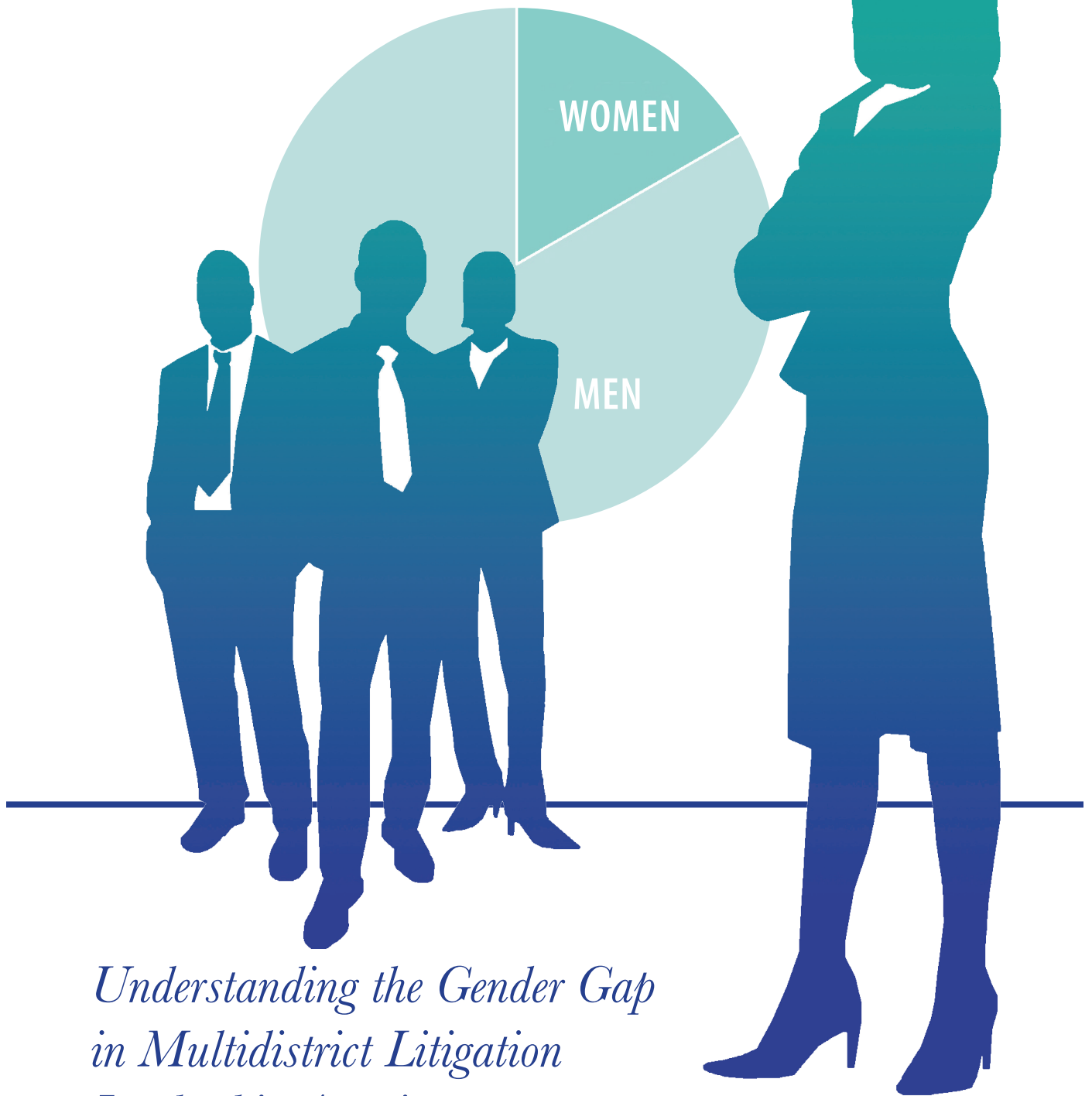


Vying for Lead in the “Boys’ Club”



*Understanding the Gender Gap
in Multidistrict Litigation
Leadership Appointments*

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Introduction

Prior research has established that, despite nearly equal graduation rates from law school and entry into the profession for the last thirty years, a substantial and enduring gender gap in the legal profession remains. When compared to their male counterparts, female lawyers experience disparities in numerous areas including: earnings; receipt of necessary mentorship and sponsorship; promotion to partner and leadership positions within their firms; representation on the judicial bench; and serving as “first chair” or lead counsel in litigation. However, research has not yet specifically identified the extent of the gender gap in court-appointed leadership in multidistrict litigation. Multidistrict litigation (MDL) is a federal statutory mechanism that consolidates complex civil litigation cases and transfers the consolidated matter to one federal district judge for pretrial proceedings, accounting for 36 percent of all federal litigation. The transferee judge then appoints leadership counsel for the consolidated cases in a myriad of ways. Appointment to leadership of such large civil proceedings can be very lucrative and is considered very prestigious. While it is widely acknowledged by practitioners that a serious gender gap exists in MDL leadership appointment, research has not yet quantified the discrepancy across all types of MDLs, or the ways in which the varied procedural and cultural factors contribute to this discrepancy. This study examines the most recent five years of MDL dockets to establish the current rate of gender disparity in leadership appointments and identifies which, if any, case factors may have a correlation with these rates. These findings will serve as the basis for further exploration of the institutional, cultural, and interpersonal factors that contribute to this discrepancy through depth interviews with practitioners. It is intended that these findings will inform future initiatives for women’s advancement in court-appointed leadership and the legal profession as a whole. ■

Women in Law

In 2001, Professor Deborah Rhode aptly described the issue of gender inequality in the legal profession as the “no-problem” problem¹ referring to the assumption that the long-standing gender gap in the legal profession would eventually work itself out as time passed. Rhode noted that the increasing entry of women into law schools and the legal profession, while certainly progress to be acknowledged, created the widespread assumption that it would only be a “matter of time” before women moved up in the ranks of the profession and achieved parity with their male counterparts.² Predicated on the false notion that gender discrimination in the profession was eliminated by gender-neutral policies for hiring and advancement, this assumption fails to acknowledge the ways in which everyday personal interaction in firms and in court, as well as other institutional norms and routines, actually reinforce the established gender hierarchy in the legal profession. Though mostly unconscious, gendered standards for hiring, promotion, and job assignments, as well as gendered meanings and assumptions of masculinity and femininity routinely contribute to gendered differences, expectations, and disparities within work organizations.³

In light of the failure of this anticipated self-correction of the “women’s problem” in the legal profession, a great deal of research has attempted to measure and identify the causes of this enduring gender gap. The American Bar Association’s Commission on Women in the Profession notes that women currently make up 36 percent of the legal profession,



with women graduating law school and entering the profession at near equal rates to men for the last 30 years.⁴ In fact, at the outset of their careers, it appears that women have made parity with men. According to data released in December of 2016, women represent a slight majority of law students for the first time in history, comprising 50.3 percent of overall enrolled law students.⁵ In private law firms, 45 percent of all associates and 48 percent of summer associates are women.⁶ However, research indicates that women are not advancing at the same rate as men throughout their careers. Women make up only 21.5 percent of firm partners, 18 percent of both equity and managing partners in law firms, 31 percent of law school deans, and 27 percent of all federal and state judges.⁷ Given that the legal profession is one of the least diverse professions in America, it is not surprising that the gender disparity compounds when race is considered, with women of color making up less than 2 percent of equity partners.^{8, 9} Further, a recent study calculated a severe salary gap among law firm partners -- well beyond the national general salary gap -- with male partners earning 44 percent more on average than female partners.¹⁰

Given the difference between profession-entry rates and women’s advancement at higher levels of their career, it is necessary to look beyond the official gender-neutral policies for

admittance to the profession, hiring, and advancement to determine the cause of these significant disparities. While largely unconscious, enduring cultural, interpersonal, and institutional norms influence this inequality. For example, while certainly not exhaustive, some of these detrimental conventions include: negative perceptions of those utilizing leave and flexible work schedule options for care work; gendered beliefs about the “appearance” of male-female working relationships, potentially limiting women’s opportunities for the adequate sponsorship and networking opportunities so vital to advancement; and unconscious reference to gender in the assignment of tasks.¹¹ For example, a gender gap in billable hours exists even when women work longer hours than men, suggesting that women are tasked with more non-billable (administrative) duties within their firm, leading to potentially less time devoted to billing and business development, which are key factors for promotion.¹²

Culturally, the “hypercompetitive professional ideology”¹³ of the legal profession also tends to value “traditionally male” behaviors to the detriment of women. In the practice of law, women experience a double bind in which they must carefully balance performing aggressively and assertively enough to be considered competent to handle demanding legal scenarios while maintaining an acceptable level of the softness and agreeability required of hegemonic femininity.¹⁴ These largely unconscious cultural narratives about femininity affect many aspects of practicing law – both in firms and in the courtroom. For example, it has been shown that in hiring procedures, although hiring metrics are officially gender-neutral, those in charge of hiring and promotion still tend to do so through a gendered lens which can color people’s perceptions of women’s work.¹⁵ As one can imagine, this double bind requiring

balance of “male” and “female” characteristics can be especially problematic for female litigators.¹⁶ Research on the participation of women lawyers as lead and “first chair” counsel in all types of litigation found that women appeared as lead counsel in only 24 percent of the cases they examined.¹⁷ The same study found that in class-action litigation specifically, women appeared as lead counsel only 13 percent of the time.¹⁸ ■

Multidistrict Litigation

The United States Judicial Panel on Multidistrict Litigation (commonly referred to as the JPML), is a special body of the federal court system that manages multidistrict litigation in the United States. The JPML was created in 1968 and since then has presided over 600,000 cases and 2750 dockets.¹⁹ The panel, consisting of seven appointed sitting federal judges, decides motions for the centralization of civil cases. The JPML considers whether civil actions in two or more federal judicial districts should be transferred to a single federal district for consolidated pretrial proceedings. The purpose of this consolidation is to conserve resources as well as avoid duplication and inconsistency between cases involving the same matter.²⁰ It is estimated that multidistrict litigation comprises 36 percent of the entire federal caseload.²¹

Once the litigation is assigned and transferred to the district court and a specific federal judge, the judge presides over all pretrial matters, including appointing leadership counsel to create a more efficient process in most MDL cases. Leadership positions in MDL cases are highly coveted and prestigious as they include the potential for large fees as well as the opportunity to play a prominent role in large, high-profile cases, both conferring great benefit to a practitioner's career.

The leadership appointment process is quite varied between judges and cases. In each case, the assigned judge has discretion to decide the process of appointment, the number of leadership roles appointed, the types of leadership roles, and the duties of each role. The Manual for Complex Litigation offers

general guidance for judges making appointments, indicating that it is important for judges to consider numerous factors including but not limited to: the physical and financial resources of counsel; counsel's ability to commit to a long term project; the ability of counsel to work with others; and counsel's experience in the subject type of litigation.²² Common wording in judicial orders in a majority of MDL cases regarding criteria for appointments is as follows:

Criteria for Appointments. The Court will consider only attorneys who have filed an action in this litigation. The main criteria for these appointments are:

- (1) knowledge and experience in prosecuting complex litigation, including class actions and other MDL actions,
- (2) willingness and ability to immediately commit to time-consuming litigation,
- (3) ability to work cooperatively with others, and
- (4) access to sufficient resources to prosecute the litigation in a timely manner.^{23, 24}

Beyond these general guidelines, the exercise of judicial discretion has led to a wide variety of appointed leadership structures. Common leadership roles include variable combinations of lead counsel, liaison counsel, executive committees, steering committees, and special counsel positions assigned to specific duties necessary in certain matters. Additionally, judges' methods of appointment vary. Traditionally, judges appoint leadership through "private ordering" or what is sometimes referred to as the "consensus model." In private ordering, judges request that the usually large group of attorneys

representing all plaintiffs come to an agreement on leadership amongst themselves and present a leadership slate to the judge for approval. While judges will sometimes make alterations to the proposed slate, most are entered as an official leadership order as presented. It is argued that this traditional method of private ordering consistently yields appointments of a very small group of MDL “repeat players” into key leadership positions.²⁵ Research regarding repeat players in MDLs shows that this tight network of attorneys is mostly male and referred to by some as the “good ol’ boys club.”²⁶ Accordingly, a recent accounting of the fifty most-appointed repeat players revealed that only 11 are female.²⁷ Further, research has identified a key group of attorneys that routinely maintain elite positions in this network as well as their connection to each other throughout numerous prestigious cases, asserting that they have significant influence on the “practices and norms that govern multidistrict proceedings,” frequently to their benefit.²⁸

In lieu of private ordering, judges have recently increased their use of an individual application process for appointment, inviting all attorneys to file individual applications for appointment. These applications are customarily filed with the court along with a memorandum making the case for their appointment, detailing: attorneys’ experience in similar MDL cases; their ability to work well with others; their ability to commit to the case; and assertions of adequate firm resources including the ability to financially front such extensive litigation. Some judges will then allow each attorney a few minutes in court to make a verbal presentation to the judge regarding why they should be included in the leadership. It is asserted that such “application” methods of appointment help to circumvent the repeat player issue by giving newcomers a fighting chance at obtaining leadership

positions, thus potentially leading to a more diverse leadership group.²⁹

While a substantial gender discrepancy in leadership still exists even with the increase in appointment by application process, notable efforts and progress have been made to address this “no-problem problem.” Recent years have seen increased awareness and discussion of the lack of diversity in court appointments. In 2014, the Duke Center for Judicial Studies developed “Standards and Best Practices for Large and Mass-Tort MDLs” that included a provision to encourage diversity as a consideration in leadership appointments in MDLs.³⁰ In late 2015, the first majority-female leadership structure was appointed in the Power Morcellator MDL;³¹ in early 2016, a single female lead was appointed in the sought-after Volkswagen “Clean Diesel” case;³² and in late 2016, two women were appointed as co-leads in an antitrust MDL.³³ Further, some notable judges have begun including language in their leadership orders providing opportunities for “less-senior” attorneys outside of the repeat-player network to participate in the steering committees and presentation of arguments in an effort to offer a more diverse group the experience necessary for future leadership appointment.³⁴ While these positive efforts have yielded substantial awareness and commendable progress in increasing leadership diversity, there remains much work to be done. Discovering the actual rates of appointment by gender in MDLs is a necessary starting point for further exploration of the underlying factors contributing to this disparity, which will inform future initiatives for women’s advancement in court-appointed leadership. ■

Research Methodology

In order to determine the current gender gap in MDL leadership appointment, the most recent 500 MDL dockets filed with the JPML as of July 1, 2016 were coded and analyzed. Data were collected from individual court dockets for each case using Bloomberg Law. Cases that were not transferred as MDLs or where formal leadership appointments were not made were excluded from the set. This yielded 145 cases, both pending and resolved, that were transferred to District Courts where formal leadership was subsequently ordered on or before July 1, 2016. The 145 cases analyzed span years 2011 through 2016 and include all types of MDL cases. In cases where the judge appointed firms rather than individuals to leadership positions, memoranda submitted in support of the firms were examined to determine which attorneys were listed as lead for the firm in the case. In the event that it was not clear who was the lead attorney, those cases were excluded.³⁵

As suspected, the method of appointment and structure of the appointed leadership varied greatly between cases. This variability required individual assessment of each case's docket to establish if, when, and how, leadership was appointed, as well as the variety of leadership positions created for each specific case. Each case in which leadership was formally ordered was coded for the type of claim, which district court the case was transferred to, the date of case filing at the JPML, the gender of the appointing judge, the size and structure of appointed case leadership, the gender of the attorneys appointed, and the rate of female appointment to case leadership.³⁶

In order to accurately determine each attorney's self-identified gender, genders were determined by individually examining the pronouns used in their firm website biographies.³⁷ Additionally, due to the wide variety of case types or case subject matter, cases were classified by type. Using the case type categories/labels assigned by the JPML in their dockets, cases were broken down into four subject matter groups. These groups included

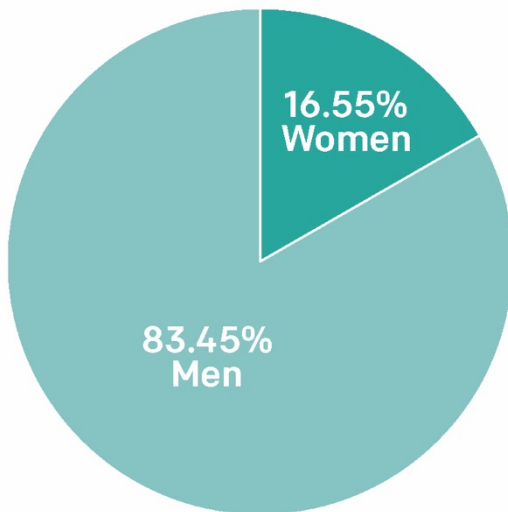
1. antitrust and securities, commodities exchanges;
2. personal injury product liability and health cases;
3. marketing and sales practices and non-personal injury product liability; and
4. "other" which includes air disasters, common disasters, contract, employment practices, intellectual property, miscellaneous statutory actions, and other fraud.

Due to the variation in structure and type of each appointed leadership group, it became necessary to parse out a tiered coding of leadership position hierarchy. Although the leadership positions in each case may differ in names, it is clear from the orders that there are not only general leadership positions (usually a steering committee), but leadership positions within the leadership (usually lead and/or liaison counsel, sometimes an executive committee). Thus, each leadership group was coded for "Tier One" positions which included leadership within the leadership and "Tier Two" positions comprised of lower tier leadership positions.³⁸ The rate of female appointment³⁹ was then quantified in each case for total leadership, as well as Tier One and Tier Two leadership individually for comparison. ■

Results

Coding and analysis of the available data revealed that cases spanned years 2011 through 2016 in 44 federal district courts. In the 145 cases analyzed, 102 appointments were made by male judges and 43 of the appointments were made by female judges. Case types were almost evenly distributed between the four case type categories, with the largest being the sought-after “personal injury product liability health cases” at 30 percent.

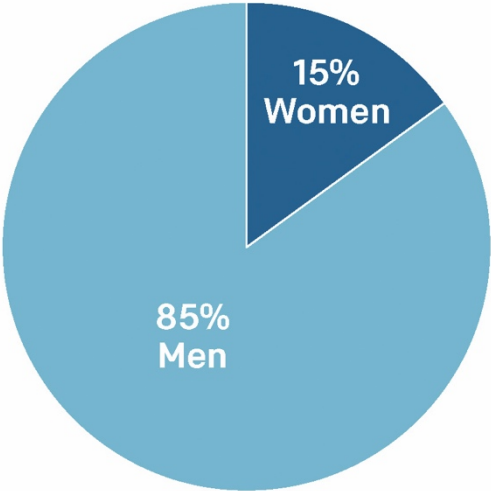
Total Leadership Rates



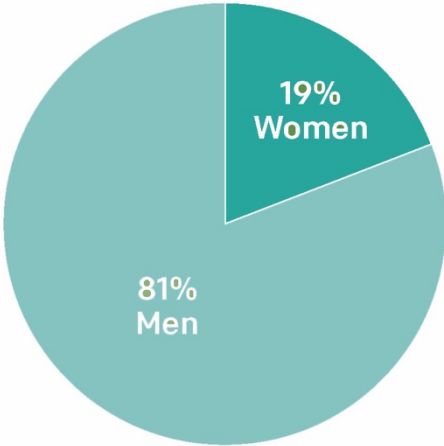
Analysis of the rate of total female appointment (including both Tier One and Tier Two) throughout the data time period revealed an overall average rate of female appointment of 16.55 percent, with a corresponding male appointment rate of 83.45. In other words, men were five times more likely to be appointed to leadership than women in MDL cases, with 37 percent of all cases having no women at all in leadership positions.

When broken down into tiered leadership, results show that women were less often appointed to top tier, or “Tier One” leadership positions. Specifically, the female appointment rate for Tier One leadership positions was 15 percent (less than the total leadership rate) whereas the average male appointment rate for Tier One leadership positions was 85 percent. Further, 49.7 percent of all cases had no women at all in Tier One leadership positions, and 98 percent of all cases had at least one male in the highest leadership positions, usually lead counsel. Only three of the cases examined had female-only lead counsel -- the notable Volkswagen “clean diesel” case that included a substantial steering committee beneath the single female lead (see above), and two other small cases in which the single female leads were the entirety of the leadership roster in their respective cases. Conversely, the average female appointment rate for Tier Two leadership positions was 19 percent (a higher rate than total leadership), and the average male appointment rate for Tier Two positions was 81 percent. Although still a sizable minority, women were slightly more likely to be included in Tier Two leadership than in Tier One leadership.

Tier One Leadership Rates



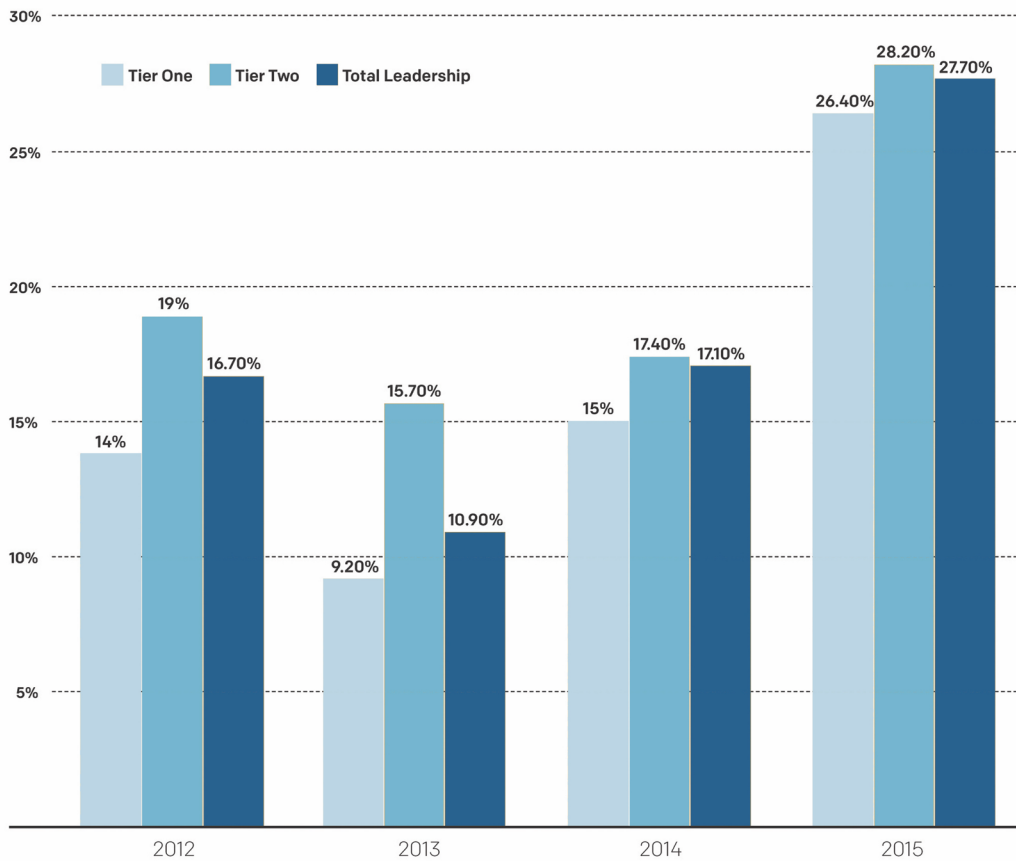
Tier Two Leadership Rates



Turning to potential correlative factors, an independent-samples t-test was conducted to compare the rates of female appointment for male and female judges, revealing that there is no relationship between the gender of the judge making the appointment and the rate of female appointment to leadership positions in MDL cases.⁴⁰ One-way analysis of variance (ANOVA) was calculated on both the type of case and district court location of cases to determine if their variation produced any significant difference in female appointment. Like the gender of the judge, these analyses were not significant, indicating that there is no relationship between type of case or district court location and female appointment in MDLs.⁴¹

Regression analysis of the year of case filing with the JPML showed a statistically significant increase in total female leadership appointment rates throughout the years examined ($b=.025$, $p=.019$) as well as a significant increase in the rate of Tier One appointments since 2011 ($b=.027$, $p=.023$). The most significant increase took place between the years 2013 and 2015 due to a dip in female leadership in 2013.⁴² Notably, there was a substantial increase in 2015 for women in both total leadership positions and Tier One Leadership positions. In 2015, the average rate of total female appointment increased to 27.65 percent, and the average rate of female appointment in Tier One positions increased to 26.44 percent, both of which are considerably higher than the average rates of previous years. There was not, however, any significant increase in the Tier Two appointment rate throughout the years sampled, indicating that women’s involvement in Tier Two positions has remained relatively constant. This difference indicates that the significant increase in total leadership rates is

Average Rate of Female Leadership Appointment in Years 2012-2015



largely due to women being appointed to Tier One increasingly throughout the data time period.

Due to patterns noticed during data collection, a regression analysis was also run to determine whether the size of the total leadership group (or positions available) had any effect on the rate of female appointment. Interestingly, a significant and positive correlation was found ($b=.002$, $p=.040$). As the number of possible leadership positions increased, the average rate of female appointment increased as well. In other words, women were afforded a higher percentage of the leadership opportunities in cases in which larger numbers of attorneys were appointed to leadership. Further, when

regressions were run to examine the effect of larger leadership rosters on appointment rates for Tier One and Tier Two individually, there was no correlation for Tier One appointment, and a more significant correlation for Tier Two appointments ($b=.003$, $p=.004$). In other words, a larger total roster of leadership significantly increased women’s appointment to leadership, specifically to Tier Two positions, but it did not translate into increased Tier One positions. ■

*** years 2011 and 2016 were excluded from the chart because the total caseload from each year was not included in the data*

Discussion and Conclusion

Overall, there is a quantifiable and substantial gender gap in MDL leadership appointments. This gap remains consistent regardless of the location of the court, the gender of the appointing judge, and the subject matter of the case. The lack of difference between case types was surprising given prior research indicating that women are represented more often and as lead counsel in certain types of litigation.⁴³ This finding indicates that MDL (and perhaps class action) cases may be consistent with regard to gendered appointment, as one “type” of case regardless of subject matter of the MDL.

Although the average rate of female appointment did not steadily increase each year, greater numbers of women were appointed over time. The appointment rates of 2015 are especially encouraging. Further research will be conducted on the rates of female appointment for the year 2016 and beyond in order to determine whether 2015 was a positive anomaly or a real indicator of progress for female practitioners.

When appointed, women were consistently more likely to be appointed to the less-prestigious and less-lucrative Tier Two leadership positions rather than Tier One positions. The substantial increase in not only Total Leadership, but in Tier One leadership specifically throughout the time period assessed is particularly promising. Future research will explore this study’s finding that



the gender gap narrows as the size of total leadership increases. Why are women appointed at a higher rate the larger a case grows? Is there a greater sense of inclusiveness or openness to a larger pool of potential leads as a case gets larger?

The results of this phase of the study, while necessary, inform only as to the existence of a gender gap in leadership appointment and its consistency by eliminating certain potential contributors like location, case type, and gender of the appointing judge. Given the limits of the information available in the court dockets, the answers to the questions about how and why this discrepancy occurs can be answered only through further qualitative study. As with all gender issues, many factors including interpersonal, cultural, and institutional factors both in individual law firms and the courts likely contribute to the gender gap in appointments.

Based on preliminary interviews, further research is currently being conducted through depth interviews with individuals involved in the leadership appointment process to assess the following:

- Whether certain processes of appointment give newcomers a better shot at appointment and therefore yield more diverse leadership rosters;
- the specific barriers that women face in vying for lead counsel;
- the work load differential and division of labor on appointed steering committees;
- the relationship, if any, between female appointment and women's issue litigation; and

- barriers to court time, partnership, and meaningful sponsorship for women within their law firms.

While this research identifies a substantial gender gap in MDL leadership appointment, results hopefully also indicate positive progress. These findings will serve as the basis for future monitoring of appointment rates in years to come, as well as further exploration of the institutional, cultural, and interpersonal factors that contribute to this discrepancy. These findings aim to inform future efforts and initiatives for women's advancement in court-appointed leadership and the legal profession as a whole. ■

Endnotes

¹ Deborah L. Rhode, “The Unfinished Agenda: Women in the Legal Profession,” Chicago: American Bar Association Committee on Women in the Profession (2001); *See also* Deborah L. Rhode, “Gender and the Profession: The No-Problem Problem,” *Hofstra Law Review*: Vol. 30: Issue 3, Article 16 (2002).

² *Id.* at 1001.

³ Barbara J. Risman, “Gender as social structure: Theory wrestling with activism,” *Gender & Society*, 18(4) 429-450 (2004).

⁴ American Bar Association, “A Current Glance at Women in the Law May 2016,” http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may_2016.authcheckdam.pdf. (2016).

⁵ Timothy Pratt, “More Women than Men in Law School for the First Time Ever,” *Bloomberg Law*, <https://bol.bna.com/more-women-than-men-in-law-school-for-first-time-ever/> (2016).

⁶ ABA, *supra* note 4.

⁷ *Id.*

⁸ Lauren Stiller Rikleen, “Women Lawyers Continue to Lag Behind Male Colleagues: Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms,” http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_wotsol/written_materials/2_nawl_2015%20survey.authcheckdam.pdf (October 2015).

⁹ The American legal profession is one of the least racially diverse in the country, with over 85 percent of its attorneys reporting as Caucasian. *See* Bureau of Labor Statistics, “Household Data Annual Averages: Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity,” <https://www.bls.gov/cps/cpsaat11.pdf> (2015).

¹⁰ Jeffrey A. Lowe, “Partner Compensation Survey,” Major, Lindsey & Africa, <https://www.mlglobal.com/publications/research/compensation-survey-2016> (October 13, 2016).

¹¹ Deborah R. Rhode, “The Trouble with Lawyers,” Oxford University Press (2015).

¹² Rikleen, *supra* note 8.

¹³ Eli Wald, “The Changing Professional Landscape of Large Law Firms, Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms,” 78 *Fordham Law Review* 2245 (2010).

¹⁴ Rhode *supra* note 1; Jennifer Pierce, “Gender Trials: Emotional Lives in Contemporary Law Firms,” Berkeley: University of California Press (1995); Elizabeth H. Gorman, “Gender stereotypes, same-gender preferences, and organizational variation in the hiring of women: Evidence from law firms.” *American Sociological Review*, 70(4), 702-728 (2005).

¹⁵ Gorman, *supra* note 14.

¹⁶ Pierce, *supra* note 14.

¹⁷ Stephanie A. Scharf and Roberta D. Liebenberg, “First Chairs at Trial: More Women Need a Seat at the Table,” American Bar Association (2015).

¹⁸ *Id.*

¹⁹ *See* United States Judicial Panel on Multidistrict Litigation, <http://www.jpml.uscourts.gov/>.

²⁰ “The objectives of an MDL proceeding should usually include: (1) the elimination of duplicative discovery; (2) avoiding conflicting rulings and schedules among courts; (3) reducing litigation costs; (4) saving the time and effort of the parties, attorneys, witnesses, and courts; (5) streamlining key

issues, and (6) moving cases toward resolution (by trial, motion practice, or settlement).” Duke Law Center for Judicial Studies, “Standards and Best Practices for Large and Mass-Tort MDLs,” at 1, https://law.duke.edu/sites/default/files/centers/judicialstudies/standards-best_practices-exec_summary-final.pdf. *see* Federal Judicial Center, Manual for Complex Litigation (Fourth)(2004).

²¹ Elizabeth Chamblee Burch and Margaret S. Williams, “Repeat Players in Multidistrict Litigation: The Social Network,” *Cornell Law Review*, Forthcoming; UGA Legal Studies Research Paper No. 2016-04 (August 10, 2016).

²² Federal Judicial Center, Manual for Complex Litigation (Fourth) § 10.224 (2004).

²³ *See Vizio, Inc., Consumer Privacy Litigation*, No. 8:16-ml-02693 (C.D. Cal.).

²⁴ Attorneys appointed to leadership have to put up trial costs which can entail large sums of money.

²⁵ Margaret S. Williams, Emery G. Lee III, Catherine R. Borden, “Repeat Players in Federal Multidistrict Litigation,” *Journal of Tort Law*, Volume 5, Issue 1-2, pp. 141-172 (Apr. 2014); Elizabeth Chamblee Burch, “Judging Multidistrict Litigation,” 90 *N.Y.U. L. REV.* 71, 95–101 (2015); Burch and Williams, *supra* note 21.

²⁶ Amanda Bronstad, “‘Good Ol’ Boys Club’ in MDL,” *National Law Journal*, Sep. 28, 2015.

²⁷ Burch 2015, *supra* note 25.

²⁸ Burch and Williams, *supra* note 21.

²⁹ Jaime Dodge, “Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation,” 64 *Emory Law Journal* 329 (2014).

³⁰ Duke Law Center for Judicial Studies, “Standards and Best Practices for Large and Mass-Tort MDLs,” https://law.duke.edu/sites/default/files/centers/judicialstudies/standards-best_practices-exec_summary-final.pdf.

(2014). *See* Best Practice 4E: “The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case.”

³¹ *See* Order of Judge Kathryn H. Vratil, dated Nov. 19, 2015, in *In Re: Ethicon, Inc., Power Morcellator Products Liability Litigation*, No. 15-md-2652 (D. Kan.) (Dkt No. 10).

³² *See* Judge Breyer’s order appointing lead counsel, “Pretrial Order No.7: Order Appointing Plaintiff’s Lead Counsel, Plaintiff’s Steering Committee, and Government Coordinating Counsel,” *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation MDL*, No. 2672 (N.D.Cal. August 17, 2016).

³³ Appointment by Judge Cynthia Rufe of the Eastern District of Pennsylvania in *In re Generic Digoxin and Doxycycline Antitrust Litigation*, *see* Max Mitchell, “In ‘Extremely Rare’ Move, Two Women Appointed to Lead Antitrust MDL,” *The Legal Intelligencer*, <http://www.thelegalintelligencer.com/id=1202773459170/In-Extremely-Rare-Move-Two-Women-Appointed-to-Lead-Antitrust-MDL?mcode=0&curindex=0&curpage=ALL> (November 30, 2016).

³⁴ *See* Judge Cynthia Rufe of the Eastern District of Pennsylvania in *In re Generic Digoxin and Doxycycline Antitrust Litigation*, No. 2-md-02724 (E.D. Pa. August 5, 2016): “The court expects that the leadership will provide opportunities for attorneys not named to the plaintiff’s steering committee, particularly less-senior attorneys, to participate meaningfully and efficiently in the MDL, including through participation in any committees within the plaintiff’s steering committee and in determining which counsel will argue any motions before the court.”

³⁵ One case was removed from the data set for only appointing firms where no lead attorney names were identifiable from supporting memoranda. There were three additional cases that designated leadership by firms only where the lead (or Tier One) attorneys’ names were discernable from supporting memoranda but supporting (or Tier Two) leadership was listed as firms-only with no discernable individual attorney names. In such cases, the Tier One leadership was coded for gender, and the Tier Two leadership was excluded from analysis.

³⁶ This research examined appointments made for Plaintiffs’ counsel only. Although it is important to examine both sides of the aisle, formal court appointments are rarely made for the defense. Due

to the large number of plaintiffs/claims in each matter, appointment of Plaintiff leadership becomes necessary and thus has specific ordered appointments that are ripe for quantitative study.

³⁷ In an effort to avoid assumptions made on typically-gendered first names, this method was utilized to most accurately identify how each attorney self-identifies. It is assumed that each attorney is most likely aware of and has approved their website biographies.

³⁸ For example, if a case included lead counsel positions, an “executive committee” and “steering committee”, the lead and executive committee positions were coded as Tier One positions, while the steering committee positions were coded as Tier Two positions for analysis. When a case included only lead counsel positions and an executive committee, the lead counsel positions were coded as Tier One and the executive committee positions were coded as Tier Two positions for analysis.

³⁹ The rate of female appointment = number of females appointed / total leadership positions appointed in each case. The rate of female appointment was coded for each tier and overall leadership in each case to determine the average rate of female appointment in each time period, case type, and all other variables examined. The average rate of appointment was utilized rather than a straight percentage of leadership positions acquired by female attorneys in order to limit the potential skewing of results due to the extremely variable number of possible leadership positions in each case.

⁴⁰ There was no significant difference in female appointment rates for male and female judges when analyzed for total leadership positions [t(142)=-.852, p=.396], Tier One positions [t(143)=-.209, p=.835], or Tier Two positions [t(78)=.608, p=.545].

⁴¹ ANOVA results for case type were not significant; F(3, 141) = 2.12, p=.100. ANOVA results for district court were also not significant F(43, 101) = 1.198, p=.229.

⁴² Year 2016 had only two cases in which leadership appointments were made by July 1, 2016, so it is premature to make assessments about the year 2016. Future research will update the analysis to include appointments made in 2016.

⁴³ See “First Chairs at Trial” study (Scharf and Liebenberg *supra* note 17) where gender participation as lead counsel varied between different types of cases and parties. See also Rebecca L. Sandefur, “Work and Honor in the Law: Prestige and the Division of Lawyers’ Labor,” *American Sociological Review* 66(3), 382-403 (2001).