



VYING FOR LEAD IN THE **BOYS CLUB** **2018** UPDATE

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VYING FOR THE LEAD IN THE “BOYS CLUB” 2018 UPDATE

Understanding the Gender Gap in Multidistrict Litigation Leadership Appointments

Introduction

It is well established that a substantial and enduring gender gap in the legal profession exists, despite nearly equal graduation rates from law school and entry into the profession for the last thirty years. Research shows that 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. Our first study, *Vying for Lead in the “Boys’ Club”: Understanding the Gender Gap in Multidistrict Litigation Leadership Appointments*,¹ quantified the gender gap in court-appointed multidistrict litigation leadership. 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, and such appointments are considered extremely desirable by practitioners. *Vying for Lead* established that the overall average rate of female appointment to MDL leadership positions was 16.5 percent in years 2011 through 2015. Men were found to be five times as likely to be appointed to leadership positions as women, and 37 percent of all the cases examined had no women at all in leadership positions. When hierarchy of leadership is taken into consideration, the gap widens for women in the top leadership positions. The rates remain constant regardless of the gender of the judge, the court’s jurisdiction, and the subject matter of the case. A significant increase in the average rate of female appointment was observed for cases initiated in the year 2015, prompting the question of whether it was a true measure of progress or just an exceptional year. This update examines the following two years, cases initiated in 2016 and 2017, to understand the current rates of female appointment in MDL leadership. These findings continue to 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’ problem”² 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.³ 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 every day personal interaction in firms and in court, as well as other institutional norms and routines, serve to 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.⁴

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, despite women graduating law school and entering the profession at near equal rates to men for the last 30 years.⁵ In fact, at the outset of their careers, it appears that women have reached 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.⁶ In private law firms, 45 percent of all associates and 48 percent of summer associates are women.⁷ 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.⁸ 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.^{9, 10} 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.¹¹

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. Though largely unconscious, enduring cultural, interpersonal, and institutional norms influence this inequality. 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.¹² 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.¹³

Culturally, the “hypercompetitive professional ideology”¹⁴ 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.¹⁵ 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.¹⁶ As one can imagine, this double bind requiring balance of “male” and “female” characteristics can be especially problematic for female litigators.¹⁷ 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.¹⁸ The same study found that in class-action litigation specifically, women appeared as lead counsel only 13 percent of the time.¹⁹

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.²⁰ 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.²¹ It is estimated that multidistrict litigation comprises 36 percent of the entire federal caseload.²²

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.²³ 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.^{24 25}

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.²⁶ 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."²⁷ Accordingly, a recent accounting of the fifty most-appointed repeat players revealed that only 11 are female.²⁸ 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.²⁹

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.³⁰

Our initial *Vying for Lead* study established the average rate of female appointment to MDL leadership for the first time. Analysis of the rate of total female appointment in years 2011-2016 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 showed 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, whereas the average male appointment rate for Tier One leadership positions was 85 percent. Although still a sizable minority, women were slightly more likely to be included in Tier Two leadership than in Tier One leadership, with an average appointment rate of 19 percent. Additionally, 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 position, usually lead counsel. The rates remained constant regardless of the gender of the judge, the court’s jurisdiction, and the subject matter of the case.

While a substantial gender gap in leadership appointment 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, Duke Law’s Bolch Judicial Institute 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.³¹ In both April of 2017 and (forthcoming) June of 2018, Duke’s Bolch Judicial Institute has held conferences with judges and practitioners focused specifically on the issue of increasing diversity in multidistrict litigation. In late 2015, the first majority-female leadership structure was appointed in the Power Morcellator MDL;³² in early 2016, a single female lead was appointed in the sought-after Volkswagen “Clean Diesel” case;³³ in late 2016, two women were appointed as co-leads in an antitrust MDL;³⁴ and another two women were appointed as co-leads in the large Johnson and Johnson Talcum Powder MDL.³⁵ 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.³⁶ While these positive efforts have yielded substantial awareness and commendable progress in increasing leadership diversity, there remains a significant gender gap. Tracking the average rates of female appointment is a necessary starting point for further exploration of the underlying factors contributing to this disparity, in order to better inform future initiatives for women’s advancement in court-appointed leadership.

Research Methodology

In order to quantify an updated rate of female appointment, all MDL cases filed with the JPML in years 2016 and 2017 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. Accordingly, a total of 37 additional cases, including 20 cases from 2016 and 17 cases from 2017 are included in this analysis. In cases where leadership appointments were made to firms rather than individuals, memoranda submitted in support of the firms were examined to determine which attorneys were listed as lead for the firm in the case. As always, 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 accordingly to analyze the rate of female appointment at all levels of case leadership.³⁷ In order to accurately code each attorney's self-identified gender, genders were determined by individually examining the pronouns utilized in their firm website biographies.³⁸

Due to the variation in structure and type of each appointed leadership group, it is 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).³⁹ 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.⁴⁰ The rate of female appointment⁴¹ was then quantified in each case for total leadership, as well as Tier One and Tier Two leadership individually for comparison. Cases were also coded to establish the average rate of female appointment to the very top leadership position(s) in each case, most likely lead counsel, for comparison.

Results

Coding and analysis of cases initiated in the years 2016 and 2017, revealed that plaintiff leadership was appointed in 37 cases spanning 24 federal district courts.⁴² In the subject 37 cases, leadership was ordered by a female judge 12 times. All types of MDL cases were included for analysis, including:

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

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 24 percent, with a corresponding male appointment rate of 76 percent. In other words, men were three times more likely to be appointed to leadership than women in MDL cases, with 24% percent of all cases having no women at all in leadership positions.⁴³

Total Leadership Rates 2016-2017

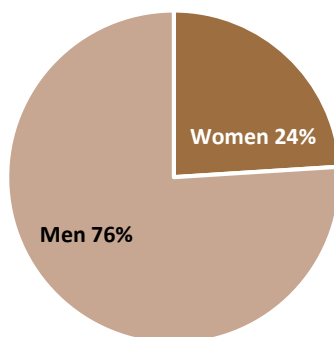


Figure 1

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 21 percent (lower than the overall female appointment rate) whereas the average male appointment rate for Tier One leadership positions was 76 percent. Further, 46 percent of all cases had no women at all in Tier One leadership positions, and 97 percent of all cases had at least one male in Tier One leadership. Although still a sizable minority, women were slightly more likely to be included in Tier Two leadership than in Tier One leadership. The average female appointment rate for Tier Two leadership positions was 29 percent (a higher rate than the overall average female appointment rate), and the average male appointment rate for Tier Two positions was 71 percent.

Tier One Leadership Rates 2016-2017

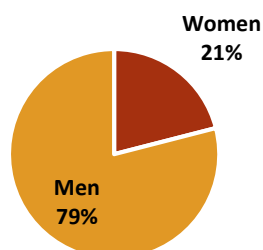


Figure 2

Tier Two Leadership Rates 2016-2017

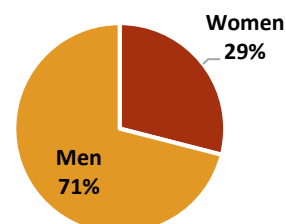


Figure 3

Cases were also coded and analyzed to determine the average rate at which women were appointed to the top leadership position. In most cases, this would be the position of lead counsel or liaison counsel, depending on how the appointing judge structured and named the leadership positions in each case. A lead counsel position

can be a single appointee or commonly in teams of two or three appointees. The 2016-2017 data revealed an average female appointment rate to lead counsel of 22% and 21% in years 2016 and 2017 respectively. As seen in Figure 4 below, these rates were consistent with the average rate of female appointment to lead counsel in 2015. Men are appointed lead counsel at an average rate of 78-79%.

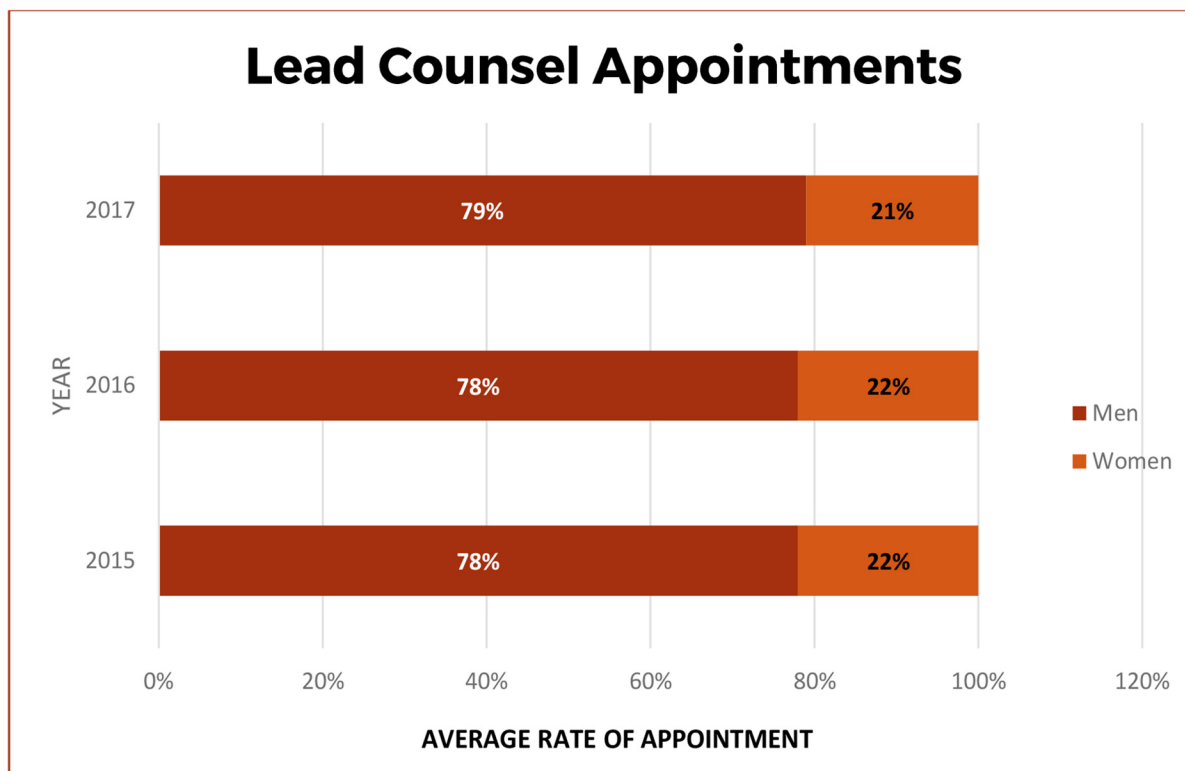


Figure 4

Figure 5 depicts the average rate of female leadership appointment for Total Leadership, Tier One, and Tier Two years 2012 through 2017. There was a clear jump in the average rate of female appointment in all categories in 2015 as detailed in the first phase of *Vying for Lead*.⁴⁴ The current data for 2016-2017 indicates a very slight increase in total appointment rates and small decreases in both average Tier One and Tier Two appointment rates. The linear trend lines for each category of leadership reveal an overall upward direction of the female leadership appointment rates, increasing steadily over the total six years of data.

Average Rate of Female Leadership Appointment Years 2012-2017

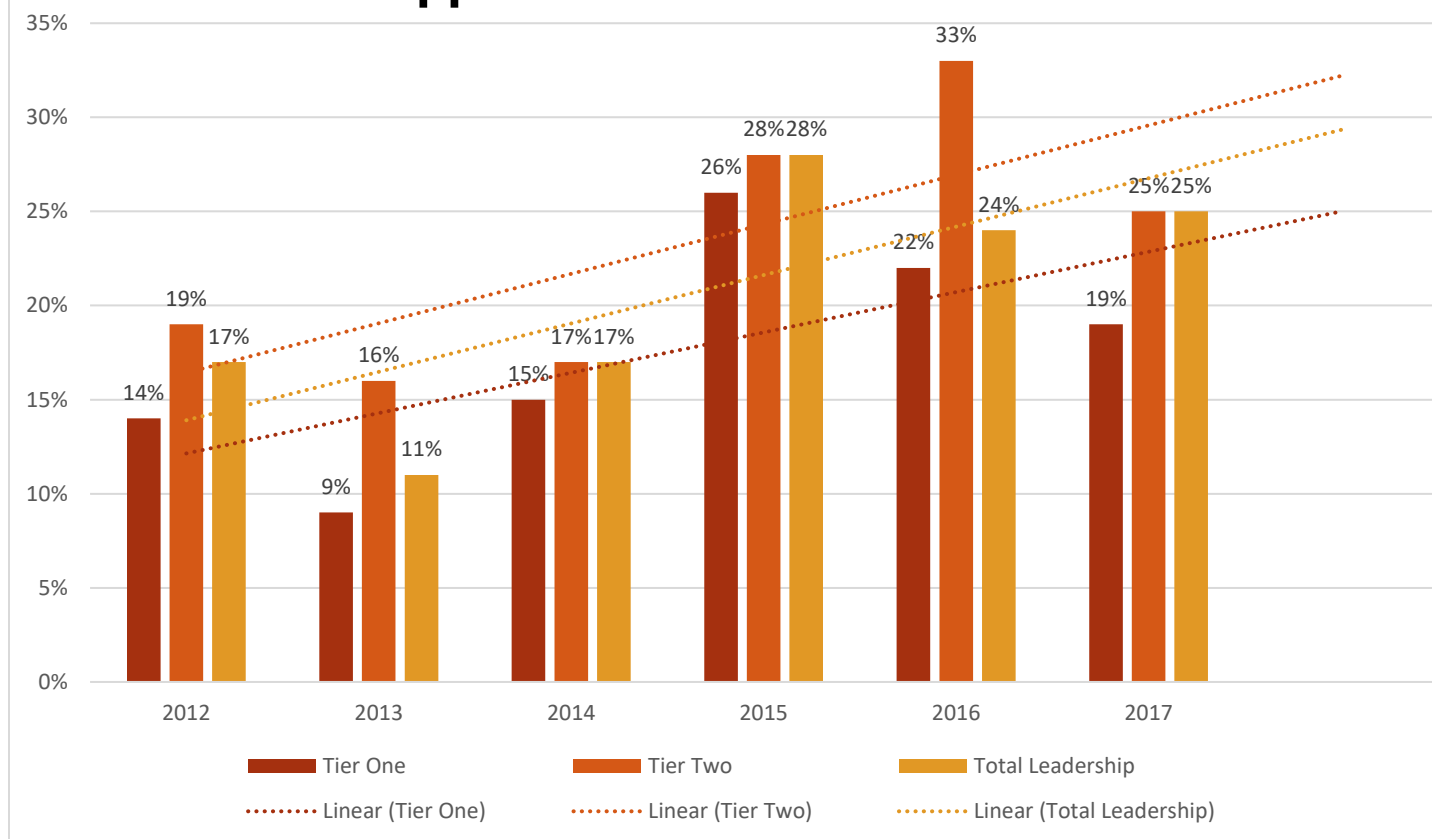


Figure 5

Discussion and Conclusion

Overall, results indicate that the gender gap in multidistrict leadership appointments remains substantial. Consistent with the previous findings from 2011 through 2015, women are appointed at far lower rates than men in all categories of leadership positions. The initial phase of this study showed a dramatic increase in average female appointment rates in the year 2015, prompting the question of whether it was a true measure of progress or rather an exceptional year. While the current results from years 2016-2017 do not indicate another substantial increase like the notable gains in 2015, the current results do indicate that the increase in 2015 is indicative of a substantial shift in leadership diversity that has the potential to keep increasing. The linear trends of the average rates of female appointment over all the years analyzed indicate consistent and steady progress for female leadership.

The relatively static nature of the rates in years 2016 and 2017 shows the strength of the existing structures and culture that maintain this gap. While there is a general acknowledgement of increased awareness of this issue among the appointing judges, as evidenced in their orders and actions, there are also significant barriers at the firm level that hold many women (and others outside of the "repeat players" group) back from even becoming a contender with the experience required to receive an appointment to leadership. There are a lot many largely unconscious cultural factors (including unconscious bias) that detrimentally affect women gaining sufficient

mentorship, promotion, and trial experience at the firm level. This gap is a complicated issue that cannot be resolved with only one type of effort.

Given the limits of the information available in court dockets, answers to questions about how and why this discrepancy occurs can be answered only through further qualitative study. The next phase of research at the Women in Legal Leadership Project examines the interpersonal, cultural, and institutional factors that maintain this significant gender gap through in depth interviews with practitioners and judges involved in leadership appointments. Specifically, at the court level, interviews explore: the intricacies of the appointment process and specific barriers to more diverse appointments; the financial barriers that preclude women and those outside of the traditional “repeat player” network from forming their own firms and seeking independent leadership in MDL cases; and the division of labor on steering committees once appointed.

Additionally, and certainly of significant influence, the qualitative study examines the barriers women and diverse attorneys experience at the firm level that have an enormous impact on their success and ability to obtain leadership appointments. At the firm level, interviews explore: obtaining the requisite trial experience for appointment; promotion to leadership within their firm; navigating work-life balance issues; obtaining necessary and meaningful sponsorship; and navigating the complex networking required to succeed in the appointment process. These forthcoming findings aim to more deeply inform future efforts and initiatives for women’s advancement in court-appointed leadership and the legal profession as a whole.

¹Dana J. Alvare, “Vying for Lead in the ‘Boys’ Club’: Understanding the Gender Gap in Multidistrict Litigation Leadership Appointments,” Temple University Beasley School of Law 2017, <https://www2.law.temple.edu/cs/publication/mdl-study/>.

²Deborah 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).

³*Id.* at 1001.

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

⁵American Bar Association, “A Current Glance at Women in the Law May 2016,”

http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.authcheckdam.pdf. (2016).

⁶Timothy 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).

⁷ABA, *supra* note 5.

⁸*Id.*

⁹Lauren 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).

¹⁰The American legal profession in 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).

¹¹Jeffrey A. Lowe, “Partner Compensation Survey,” Major, Lindsey & Africa, <https://www.mlaglobal.com/publications/research/compensation-survey-2016> (October 13, 2016).

¹²Deborah R. Rhode, “The Trouble with Lawyers,” Oxford University Press (2015).

¹³Rikleen, *supra* note 9.

¹⁴Eli 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).

¹⁵Rhode *supra* note 2; 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).

¹⁶Gorman, *supra* note 15.

¹⁷Pierce, *supra* note 15.

¹⁸Stephanie A. Scharf and Roberta D. Liebenberg, “First Chairs at Trial: More Women Need a Seat at the Table,” American Bar Association (2015).

¹⁹*Id.*

²⁰*See* United States Judicial Panel on Multidistrict Litigation, <http://www.jpml.uscourts.gov/>.

²¹“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).

²²Elizabeth Chamblee Burch and Margaret S. Williams, “Repeat Players in Multidistrict Litigation: The Social Network,” *Cornell Law Review*, UGA Legal Studies Research Paper No. 2016-04 (August 10, 2016).

²³Federal Judicial Center, Manual for Complex Litigation (Fourth) § 10.224 (2004).

²⁴*See Vizio, Inc., Consumer Privacy Litigation*, No. 8:16-ml-02693 (C.D. Cal.).

²⁵Attorneys appointed to leadership have to put up trial costs which can entail large sums of money.

²⁶Margaret 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 22.

²⁷Amanda Bronstad, “‘Good Ol’ Boys Club’ in MDL,” *National Law Journal*, Sep. 28, 2015.

²⁸Burch 2015, *supra* note 26.

²⁹Burch and Williams, *supra* note 22.

³⁰Jaime Dodge, “Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation,” 64 *Emory Law Journal* 329 (2014).

³¹Duke 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.”

³² 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).

³³ 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).

³⁴ 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).

³⁵ *In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation*, 3:16-md-02738 (New Jersey).

³⁶ 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."

³⁷ 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.

³⁸ 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.

³⁹ In cases where appointments were made to specific task leadership positions and it was not clear from the docket whether said position should be classified as Tier One or Tier Two when coding, the lawyers appointed to those positions were contacted directly for more information in order to code with better accuracy.

⁴⁰ 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.

⁴¹ 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.

⁴² 17 cases were initiated in year 2017, and 20 cases were initiated in 2016.

⁴³ This is lower than the 37% shown in years 2011-2015. See Alvare 2017, *supra* note 1.

⁴⁴ Alvare 2017, *supra* note 1.

VYING FOR LEAD IN THE **BOYS CLUB** 2018 UPDATE

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