

Attorneys

**More Women Plaintiff Lawyers
Becoming Complex Litigation Leaders**

Since Congress created a way to consolidate complex federal litigation nearly 50 years ago, men have been significantly more likely than women to run the country’s highest dollar cases for the plaintiffs.

New statistical research confirms what has been common knowledge for some time: Far fewer women have led the courtroom battles for plaintiffs in federal suits consolidated by the U.S. Judicial Panel on Multi-district Litigation.

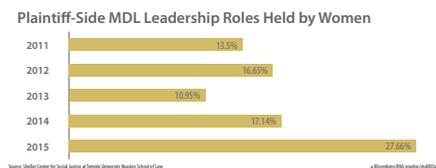
From 2011 to 2015, women made up just 16.55 percent of all plaintiffs’ MDL leadership appointments, Dana Alvare of the Sheller Center for Social Justice at the Temple University Beasley School of Law in Philadelphia, told Bloomberg BNA.

But, according to Alvare’s study, which hasn’t yet been published, this seems to be changing.

At least a little.

In 2011, the first year of the study, women held just 13.5 percent of the lead roles for plaintiffs.

But the 2015 figure jumped to 27.66 percent, said Alvare, a research fellow who analyzed the leadership for the center’s study on gender diversity in MDL leadership.



The Temple University study analyzed the 145 still-active MDLs created from 2011 to 2015, and the attorneys appointed to direct them. The cases came from 44 federal courts and 145 judges—43 female and 102 male. They spanned all types of litigation, from antitrust and securities matters to product liability and consumer litigation.

Meanwhile, a sampling of MDL plaintiffs’ leadership appointments in 2016 shows a number of women appointed to sought-after slots in complex federal cases.

Product liability MDLs involving alleged personal injuries tied to the anti-psychotic drug Abilify, the breast cancer drug Taxotere, talcum powder, and the pesticide Roundup all have women attorneys in top roles.

Additionally, two women are leading the charge for the plaintiffs in an antitrust suit against the makers of the heart drug digoxin and the antibiotic doxycycline.

Those appointments could indicate that the upward trend might have held in 2016, data which Alvare intends to look at, too.

A Lot of Work, Awareness. “It’s about time we are seeing these kinds of changes, but it’s not without a lot of work and a lot of awareness,” said Michelle Parfitt, head of the mass tort litigation group at Ashcraft & Gerel in Alexandria, Va., and co-lead counsel in the talc litigation.

“Equally important, though, it’s not just appointing women but appointing good lawyers who happen to be women,” Parfitt said.

The bench of good women attorneys is very deep, but institutional factors have historically impeded women’s participation in MDLs. More than a third of pending federal civil cases are consolidated in MDLs.

Such factors include that bar associations and other attorney groups were traditionally dominated by white men. As a result, women and minority lawyers got a slower start in forming the relationships that typically lead to professional opportunities, Parfitt said.

In addition, male attorneys, more frequently than female attorneys, benefited from mentoring.

And often attorneys submitted pre-ordered leadership slates to judges overseeing multidistrict litigation, with men repeatedly getting the plum assignments, Parfitt said.

This perpetuated a chicken-and-egg situation. Women weren’t chosen for leadership slots because they lacked the experience, but they weren’t given the experience they would need to land the coveted roles in the first place either, Roberta Liebenberg, co-lead counsel in the antitrust suit, told Bloomberg BNA.

The finances of an MDL, which require a large commitment of money and time from a firm, also work against women, who are far less likely than men to be equity partners with the ability to direct the firm’s financial decisions.

Judges At The Helm. A confluence of factors seems to be contributing to a change in women’s appointments to plaintiff-side leadership roles.

Chief among those: Judges are leading efforts to promote diversity, said Liebenberg, who chaired the American Bar Association’s Committee on Women in the Profession and co-authored the study “First Chairs at Trial: More Women Need Seats at the Table.”

Liebenberg’s study, though not connected with Alvare’s, included a number of MDL cases. The First Chair study looked at civil cases in the Northern District of Il-

Plaintiff Leadership Roles Held by Women (2011-2015)



Illinois in 2013. It found that 87 percent of leadership slots were held by male attorneys and 13 percent by female lawyers.

Class actions showed the highest disparity between male and female leaders, Liebenberg said.

And looking at law firm leadership, the study found that just 17 percent of equity partners in big firms were women.

In the wake of the publication of the First Chair study in 2015, judges at bench-bar conferences increasingly have been talking about the need for diversity, said Liebenberg, a partner at Fine, Kaplan and Black in Philadelphia.

The November 2016 appointment of Liebenberg and Dianne Nast of NastLaw LLC in Philadelphia marks the first time a large antitrust MDL has two women as co-lead counsel, Liebenberg said.

Also noteworthy, Judge Cynthia M. Rufe of the U.S. District Court for the Eastern District of Pennsylvania included a provision in the appointment order saying she expected the selected attorneys to provide MDL participation opportunities for those not appointed to leadership roles.

Judges are being told to expressly think about the value of a diverse leadership team when they get judicial training, Jaime Dodge, director of the Institute for Complex Litigation and Mass Claims at Emory Law School in Atlanta, told Bloomberg BNA.

Leigh O'Dell of Beasley Allen in Montgomery, Ala., co-lead counsel in the talc proceeding, agreed.

Attorneys involved in multidistrict litigation "are hearing judges acknowledge this, that it's important to get women and a far more diverse group of leaders out there to handle the litigation," O'Dell said.

The status quo isn't because there was a lack of qualified attorneys, O'Dell and Parfitt say.

It's just that diversity, including women and people of different cultures and ethnicities, wasn't being talked about before.

Appointment Process. Judges are also changing how they select plaintiff-side leaders.

More and more, attorneys who want these roles must submit individual applications to the presiding judge. That's in contrast to judges relying on group applications from pre-ordered slates of attorneys who have worked together on complex litigation in the past.

"I have seen a definite trend away from slates and toward public application procedures," Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein in San Francisco and sole lead counsel in the Volkswagen 'Clean Diesel' litigation, told Bloomberg BNA.

For example, judges overseeing the VW litigation and the litigation that followed the Deepwater Horizon rig accident used a public application process, Cabraser noted.

"This procedure promotes diversity naturally, without discounting merit, because it simply eliminates the barriers to entry that a slate system can subconsciously impose," Cabraser said.

Cabraser has worked on "scores" of MDLs since 1980, is one of three co-leads in the General Motors ignition switch litigation and serves on the plaintiffs' steering committee in the Takata airbag litigation.

"I would think that eight years from now, you'd be hard-pressed to find a slate that judges are signing off on," Dodge said.

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However, Cabraser said slates “do have the benefit of presenting the court with a group that can, demonstrably, work together. Some judges get the best of both worlds by allowing slate proposals while entertaining open applications, and then doing a ‘mix and match,’” she said.

Dodge, whose scholarship includes complex litigation, said if attorneys were chosen on a pre-ordered slate, it would likely be a function of leadership that had worked together on an identical case before, “and it would make sense to transport that knowledge to this one.”

And women are banding together more.

“Sisters are doing it for themselves: Women lawyers and attorneys of color are organizing, networking, and promoting and supporting each other,” Cabraser said.

“In only a couple of years, for example, Women En Mass, a self-organized group of women plaintiffs’ tort lawyers, has made tremendous strides in increasing the visibility of women lawyers in courtroom roles and in achieving court-appointed leadership positions,” Cabraser said.

Women En Mass, founded by Aimee Wagstaff of Andrus Wagstaff in Denver, hosts working events for female plaintiffs’ attorneys in mass torts and seeks to empower women in leadership.

Tippling Point Cases. Several attorneys singled out the Toyota sudden acceleration litigation as a tipping point toward gender diversity awareness. Plaintiffs alleged their cars lost value because of a tendency to accelerate unexpectedly.

Three competing all-male leadership slates, 65 attorneys in all, were presented to Judge James V. Selna of the U.S. District Court for the Central District of California at a hearing in 2010.

Jayne Conroy of Simmons Hanly Conroy in New York, whom Selna eventually appointed to the leadership team, told Bloomberg BNA that struck her “as an incredibly unfair situation, that there were no women on the slates.”

Conroy, who had been involved for a long time in MDL proceedings and felt she was qualified for a leadership role, spoke out publicly at the hearing.

“So my comment in Toyota to the judge was, how can it be that all 65 of the appointments on these perspective slates are men? And I am completely qualified,” she said.

“Then I made the secondary comment that it was even more stark because half of the Toyota owners are women,” Conroy said.

“I felt afterward, there was more of a recognition of the need for diversity on a leadership team,” she said, and “now, without a doubt, it’s something judges are saying they are looking for on leadership committees.”

After Toyota, “I began to see more judges ask, are there lawyers of color, or females, on your team?” Conroy said.

“The Toyota case was an exemplar of someone going from ‘we’re all talking about the need for change,’ to someone expressly asking for change,” Dodge told Bloomberg BNA.

Another noteworthy appointment?

Cabraser as sole lead counsel in the massive VW emissions litigation, Conroy said.

The suits were consolidated in December 2015.

Less than a year later, in October 2016, Judge Charles R. Breyer of the U.S. District Court for the Northern District of California approved a \$14.7 billion settlement between Volkswagen, consumers and the federal government covering hundreds of thousands of cars with 2.0-liter diesel engines. The engines allegedly included “cheat” devices that allowed them to get around federal emissions requirements.

That was “the perfect situation of the right person for the right job and everyone rallying to get the job done,” Conroy said.

Nuances of MDL Structure. One nuance of MDL leadership is a discrepancy in prestige between “Tier 1” slots, which include lead counsel and other top spots, and “Tier 2” slots, which include lower-level leadership appointments such as to the plaintiffs’ steering committee.

Alvarez looked at the breakdown of these “leadership within leadership” appointments and found that more women have been chosen for the lower-level spots.

Women made up 15 percent of the coveted Tier 1 appointments, and 19 percent of the Tier 2 slots in the studied cases, she said.

“People are still struggling with, how do we get diversity into that (top) rank,” Dodge said.

The hope is that more women will have opportunities to be in steering committee roles, establish themselves, and then move up into the executive roles or co-lead roles in their next case, she said.

The dearth of women in top leadership spots is entwined with the small number of women who are equity partners in their law firms.

“I think it’s a step in the right direction that lawyers are putting (more) women on the leadership committees, but we need time there to develop the kind of financial clout necessary to really lead,” Conroy said.

“I think we lag behind in that just because of the reality of where women sit in those equity positions.”

And another professor who has studied MDLs offered another nuance.

“My own take on diversity is that cognitive diversity is more important than identity diversity,” Elizabeth Chamblee Burch told Bloomberg BNA.

Cognitive diversity focuses on diverse knowledge and expertise stemming from training, experiences, expertise and identity.

“While identity can play a role by creating experiential differences that prompt contrasting analytic tools to develop, physical characteristics alone may tell us little,” said Burch, a professor at the University of Georgia Law School in Athens, Ga., who specializes in complex litigation.

For example, a Mexican American woman raised in an upper class family who attends Harvard Law School may have similar analytical tools and training as white males attending the same school, she said.

“As such, cognitive diversity can’t readily be identified from someone’s appearance; training and life experiences are traits that require understanding someone’s background.”

Maybe Better on Defense Side. The situation looks somewhat better for women on the defense side, because companies choosing their legal teams typically have diversity goals that apply to outside counsel, some defense attorneys say.

Companies are “putting their best foot forward, and diversity is very important to those large companies,” Michelle Hart Yeary of Dechert LLP in Princeton, N.J., told Bloomberg BNA.

“If they are going to say, ‘Here’s the legal team that’s going to represent me,’ they make conscious decisions and efforts to make sure it’s a well-rounded team,” said Yeary, who is the second-lead attorney for AbbVie, Inc. in multidistrict litigation over testosterone products.

“Big companies were early in adopting rules about wanting diverse teams representing them in court, in terms of gender, race, in wanting that years before we saw any talk about that from the judiciary,” said Dodge, who previously defended companies in employment class action suits.

Alvare, of Temple University, told Bloomberg BNA her new data provides a starting point for looking harder at the gender diversity problem in plaintiff-side leadership.

Next, she said, comes a qualitative analysis. “We need the numbers but we want to get to the ‘why’ this is

happening. Then you can come up with solutions to increase diversity,” she said.

Alvare said she has begun the second phase of the project—interviewing women attorneys about their experiences, their backgrounds and their journeys to get into leadership.

She also plans to interview male attorneys.

The center intends to publish the study results and present the research at conferences, something that’s already begun, Alvare said.

The hope is to “put the research to work making positive change in the profession,” she said.

One more finding that could provide food for future thought: Women, for the first time, outnumber men as law students at ABA-accredited law schools, according to American Bar Association data.

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