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'Boys' Network Slowly Making Room for Gender Diversity in MDL Leadership

By [Amanda Bronstad](/author/profile/Amanda Bronstad/) | May 29, 2018 at 06:56 PM

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When U.S. District Judge Edward Davila of the Northern District of California [appointed](https://www.law.com/dailybusinessreview/2018/05/16/judge-names-39-member-plaintiffs-team-to-lead-iphone-throttling-mdl/) 39 lawyers this month to lead multidistrict litigation over the alleged throttling of iPhones, he and the plaintiffs attorneys each praised the team's diversity, particularly since many of the top women in mass torts would be spearheading committees.

But still, 77 percent of the lawyers appointed were men, including the top two lead counsel positions, and only one minority attorney appeared to be on the team.

The case demonstrates how plaintiffs lawyers and judges have made great strides in recognizing that there needs to be more diversity in MDL leadership teams, which for years have been dominated by white male attorneys—or what some critics have called the **"Good Ol' Boys"** club. Many plaintiffs lawyers covet these leadership roles, which give them control over dozens, or sometimes thousands, of cases, and provide notoriety and substantial legal fees.

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Some women and minority attorneys have struck out on their own to get appointments, while many firms are diversifying their hiring or pitching new faces to MDL judges, who themselves are evolving into a more diverse corps.

"I think there is certainly a greater cognizance among the bench and bar of the need for diversity," said Ellen Relkin, who co-heads the defective drugs and devices practice group of New York's Weitz & Luxenberg. She got leadership appointments in four MDLs in 2016 and 2017. "Firms are realizing they need more women now, that there is an imperative there should be more women."

But even with that progress, it's still largely a world where men predominate.

The statistics bear that out. In 2017, the percentage of MDL leadership appointments going to female attorneys was higher than in 2016—but still below 30 percent. That's according to statistics compiled by ALM that looked at MDLs created in the past two years. In 2018, so far, 25 percent of leadership positions have gone to women.

Who's Leading Multi-District Litigation?		
	Women	Men
Average Total Leadership Rates 2011-2016	17%	83%
Average Tier 1 Leadership Rates 2011-2016	15%	85%
Average Tier 2 Leadership Rates 2011-2016	19%	81%
2012 Total Leadership	17%	83%
2012 Tier 1 Leadership	14%	86%
2012 Tier 2 Leadership	19%	81%
2013 Total Leadership	11%	89%
2013 Tier 1 Leadership	9%	91%
2013 Tier 2 Leadership	16%	84%
2014 Total Leadership	17%	83%
2014 Tier 1 Leadership	15%	85%
2014 Tier 2 Leadership	17%	83%
2015 Total Leadership	28%	72%
2015 Tier 1 Leadership	26%	74%
2015 Tier 2 Leadership	28%	72%
<small>Source: Vying for Lead in the "Boys' Club"</small>		
2016 Total Leadership	27%	73%
2016 Tier 1 Leadership	23%	77%
2016 Tier 2 Leadership	30%	70%
2017 Total Leadership	29%	71%
2017 Tier 1 Leadership	23%	77%
2017 Tier 2 Leadership	33%	67%
<small>Source: Law.com</small>		

And as for inclusion of minority attorneys? That's harder to track, but ALM's statistics show the majority of MDL leadership teams appeared to have no minority attorneys, though some have included representation of minorities.

That means the plaintiffs teams leading MDLs are starting to be more diverse, particularly as to women, but that the plaintiffs bar and judges have a long way to go.

"I do think the trend is continuing upward," said Dana Alvare, a legal research associate at Temple University's

Beasley School of Law. "Gender equality, in general, is in the limelight right now, which is a wonderful thing. There are people paying attention to this, and diversity in general, of course."

What the Numbers Say

Alvare did one of the few studies to look at diversity in MDL leadership teams. Her 2017 report, "Vying for the Lead in the Boys' Club: Understanding the Gender Gap in Multidistrict Leadership Appointments," showed what most lawyers already know: That white male attorneys have dominated the leadership of MDLs in past years. From 2011 to 2016, the report says, women made up an average of 17 percent of all MDL appointments. That number jumped to 28 percent in 2015.

Alvare plans to release updated figures next month that show 24 percent of leadership roles went to women in 2016 and 2017 combined. ALM's data showed 27 percent in 2016 and 29 percent in 2017. Either way, that's a clear sign the increases aren't just anomalies, she said.

"We're not even close to 50 percent, but we do see there are changes that are happening," Alvare said.

Not all appointments are the same. In most MDLs, the top positions are co-lead counsel, often assisted by executive committees, which make the overall decisions in the litigation. Secondary positions are those on plaintiffs steering committees or on subcommittees, which handle specific tasks like discovery or trials. Alvare's study

compared appointments in what she called “Tier 1,” defined as lead counsel and executive committees, and “Tier 2,” or steering committees and liaison counsel. Her report showed that, on average, women made up 15 percent of Tier 1 positions but 19 percent of Tier 2.

That gap was even wider last year, according to ALM’s statistics: Women got only 23 percent of all Tier 1 positions but 33 percent of Tier 2 jobs. And that’s even more noticeable when limited to lead counsel positions.

“We do still see a major discrepancy, even more than the regular Tier 1 positions, when it comes to the main lead counsel, the figurehead,” Alvare said. “Is that the final rung on the ladder, where the glass ceiling is?”

That might change, particularly as [more female and minority judges \(https://www.law.com/nationallawjournal/almID/1202784158624/rookie-judges-start-to-wrangle-mdl-dockets/\)](https://www.law.com/nationallawjournal/almID/1202784158624/rookie-judges-start-to-wrangle-mdl-dockets/) are now handling MDLs. In 2016, the majority of judges who appointed leadership teams in MDLs were white and male, but in 2017, that group dropped to about half.

The data showed no correlation between a judge’s race or gender and the diversity of the lawyers they appointed.

In an MDL over allegedly [defective artificial turf \(https://www.law.com/njlawjournal/sites/njlawjournal/2017/06/01/defective-artificial-turf-mdl-sent-to-nj-judge/\)](https://www.law.com/njlawjournal/sites/njlawjournal/2017/06/01/defective-artificial-turf-mdl-sent-to-nj-judge/), for example, U.S. District Judge Michael Shipp, an African-American judge in New Jersey, appointed 11 white male attorneys to the leadership team on Aug. 22.

But, anecdotally, lawyers say that might make a difference.

“They’re probably more cognizant of it because they’ve lived it, too,” Relkin said.

And plaintiffs firms already in the MDL space are paying closer attention to who they hire, said Chris Seeger, founding partner of New York’s Seeger Weiss, who was appointed to six MDLs in 2016 and 2017. His firm consciously looks at applications of female and minority attorneys, as well as white men, and selects who is the most qualified.

“What’s happening over the past five to 10 years is guys like me are doing a better job of being conscientious in diversity in hiring in our firms,” he said.

Challenges Remain

Two big challenges for lawyers applying for leadership posts are whether they have the wherewithal to finance the litigation up front and, according to some judges, experience in managing MDLs, said Jaime Dodge, director of The Institute for Complex Litigation and Mass Claims at Emory University School of Law.

At many plaintiffs firms, the lawyer historically appointed to lead MDLs has both.

“A lot of them have embraced the idea that diversity matters,” Dodge said of plaintiffs firms. “But, at the same time, they’re a business, and it’s hard for a law firm to gamble their leadership slot, and that’s sometimes how they feel they’re being put in that position to handle it. How do we make it feel like it’s not a gamble?”

Many plaintiffs lawyers attempting to pierce that glass ceiling have struck out on their own.

Michael Roberts, raised in one of two Chinese families in a small rural Arkansas town, grew up with his share of discrimination, including at the University of Arkansas Bowen School of Law.

He started his career doing defense work. When he switched sides, he noticed that the “same old group” was handling mass torts for plaintiffs even though his firm, the Roberts Law Firm in Little Rock, Arkansas, has been representing corporations suing over antitrust matters for nearly two decades.

“They’re good lawyers, don’t get me wrong,” he said. “But I didn’t know any of them, and they didn’t know me.”

Roberts said the experience and collegiality helped him get a foot in the door. He got on the leadership team for two antitrust MDLs—one involving generic drugs, and the other, Restasis eye drops. Female and minority lawyers have to stand out, he said, noting that another partner at his firm, Karen Halbert, who was a computer scientist for 20 years before becoming a lawyer, used her experience in electronic discovery to get on the plaintiffs’ steering committee of the Equifax litigation this year.

“You’ve got to create a brand,” Roberts said. “You’ve got to brand yourself so that you’re known for being good in a certain area.”

Of course, many of the MDLs in which female and minority lawyers have gotten appointments are smaller. In the MDL over diabetes drug Farxiga, for instance, five of the seven attorneys appointed on July 13 were women—but there are about 50 cases.

In the MDL over opioids, in contrast, which involves more than 700 lawsuits, U.S. District Judge Dan Polster of the Northern District of Ohio [approved](https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/04/judge-approves-expanded-opioid-mdl-leadership-team/) (https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/04/judge-approves-expanded-opioid-mdl-leadership-team/) a slate of 22 lawyers on Jan. 4—and only three were women. An original proposal had three additional women but two were dropped in favor of male counterparts at their firms after Polster said only one lawyer from each firm could be appointed.

“You need years of MDL experience to be able to do leadership work in that litigation because it’s just a really complicated settlement picture and litigation picture,” said Relkin, who is on the leadership teams of both Farxiga and opioids.

One way to get in is through Tier 2 positions, often heading up a subcommittee on the team. U.S. District Judge Eldon Fallon of the Eastern District of Louisiana, who ended up approving fees to more than 100 lawyers in the Vioxx MDL, supported the idea of having subcommittees and other positions to encourage diversity.

“It’s a way of getting these folks in the process,” he said.

That could get more difficult as some federal judges have increasingly insisted on lean leadership committees to bring down legal costs.

Lori Andrus of San Francisco’s Andrus Anderson, who helped create an annual retreat for women practicing in mass torts called Women En Mass, said she liked the idea of judges looking for opportunities within the leadership structure for women. But she cautioned that it shouldn’t be the status quo.

“If that’s a staging ground, OK,” she said. “We can do better.”

Part of the problem, she said, are the myths that still exist due to unconscious bias. She said she regularly gets mistaken for the court reporter, for instance.

“Women’s presence in the courtroom is commonplace these days,” she said. “Why is anyone thinking I’m a court reporter?”

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Many lawyers said a new trend is emerging—established plaintiffs firms are putting up female and minority lawyers before an MDL judge or to their own colleagues. In many MDLs, plaintiffs attorneys work out on their own who the members of the leadership team will be—then pitch the slate to a judge, who often approves it as is. Dodge said that system allows plaintiffs attorneys to feel more secure about pitching new faces for leadership posts.

Seeger said he keeps diversity in mind when calling up lawyers to join a proposed slate for leadership.

"It's going to have to start with the law firms—putting those people out there and giving them the opportunities to lead," Seeger said. "I think firms are doing better with that. They're still not there, but they're doing better."

In the National Football League concussion case, for example, Seeger, who is co-lead counsel, brought in TerriAnne Benedetto, a partner at his firm, to assist him. He said Benedetto probably shows up in court more often than he does.

That helps because white male attorneys have the perception of natural credibility just walking into the courtroom, Andrus said. Female and minority attorneys have to earn it.

"When a man lends his credibility to a woman, when the white person lends credibility to a person of color, her credibility goes up even further," she said. "The big shot guys who routinely get these appointments when they're truly authentically spreading credibility throughout their firm—it's a tremendous asset to the justice system. It's not just doing a favor for a woman."

Correction: This story corrects the law school Michael Roberts attended.

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