

## ***There Are New Faces Leading MDLs. And They Aren't All Men.***

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When lawyers were tossing around names to submit to the judge for a potential plaintiffs leadership team two years ago in a multidistrict litigation proceeding, Amy Keller at Chicago's DiCello Levitt threw her name in. After all, she had experience, serving as co-lead counsel in the MDL over the Equifax data breach.

"One of the attorneys, who was a man, made the comment of how I had already been appointed co-lead counsel in two other cases, and he was concerned I would not be able to handle a third case," Keller recalled in an interview. "I found that very interesting because never in my career have I ever heard someone say, 'Oh, can he handle another case?'"

Keller said "thinly veiled sexism" still exists in the mass tort and class action bar. But for her part, she moved on to other cases, and has notched six MDL appointments in the course of four years.

Keller's trajectory as a woman in the male-dominated MDL bar might be exceptional, but a new analysis of appointment orders for all federal MDL proceedings initiated from 2016 through 2019 suggests it may be indicative of a growing trend.

Women made up 40% of the 30 lawyers who received appointments to more than three MDLs during that period. The data gathered by Law.com show that many large plaintiffs firms—once reliant on a single, often male and white, veteran senior partner to lead the MDL practice—are spreading out appointments to a younger and a more diverse set of lawyers.

Keller tied with Melissa Emert, formerly of Stull, Stull & Brody, and now at Kantrowitz, Goldhamer & Graifman, as the woman with the highest number of appointments for the period examined by Law.com. The most any attorney received during the period was 10.

"These are badass attorneys who are also women," said Mike Morgan, of Morgan & Morgan, which ranked No. 2 in number of MDL appointments, with 16 appointments going to six men and two women. "When we look at the way the MDLs form, it was largely done before anybody got to the courtroom: The stereotypical, with cigars and whiskey, and people deciding who goes where. Then they'd say, 'Judge, great news! We've decided.' That doesn't happen today."

One area that still lags: minority attorneys. While more nonwhite lawyers have gotten appointments to MDLs, those at the very top are few. Of the top 30 on Law.com's list, only two identified as nonwhite.

Much has changed since even five years ago, when criticism mounted that "repeat players," mostly white male attorneys, got the bulk of the leadership appointments in MDLs. Leadership teams are becoming more diverse, and women are increasingly getting lead counsel roles.

Law.com's research unveiled new faces spearheading the cases. True, many are at firms known for MDL work, and most are male and white—but not all.

The data gathered by Law.com does not account for the size of an MDL, practice area or the actual position of the appointment, whether it is lead counsel or liaison counsel. It also reflects only those MDLs in which judges issued orders. The Judicial Panel on Multidistrict Litigation, which manages the creation of MDLs, does not publish data on attorney leadership appointments.

Law.com conducted its analysis by reviewing every appointment order issued by a judge in the 75 MDLs instantiated from 2016 through 2019. In tabulating its ranking, appointments to individual cases were only counted once, even if an attorney was appointed to multiple leadership positions on the same MDL. Gender and ethnic diversity data was determined using names, public profile pictures and by contacting attorneys directly. Due to limits in available data, Law.com's analysis was not able to factor in sexual orientation diversity.

Elizabeth Burch, a professor at the University of Georgia School of Law, compiled similar research in her 2015 article "Judging Multidistrict Litigation," which found judges overwhelmingly appointed "repeat players" in MDLs. At that time, her list of 50 top attorneys with MDL appointments, which focused only on cases involving product liability and sales practices, was 22% women.

Progress, she said, "seems really slow."

"When I talked to people about this, many years ago, back around 2015, maybe 2016," she said, "the story I got as to why women weren't more front and center ... was that each firm had a go-to big name. So, even if the women had lots of experience and had done a lot of work in the trenches, they were never the name put forth by the firm."

But Elizabeth Cabraser, of San Francisco's Lieff Cabraser Heimann & Bernstein, who is one of top women attorneys in MDLs, said that's no longer the case—at least, for some firms. Among her own firm's 19 MDL appointments, she is handling three of them. Another six women and five men are taking on the other cases.

"Some firms are all about the person at the top, usually a guy," Cabraser said in an interview. "Other firms

have made a more conscious effort to advance the careers of their partners, including women partners, other partners coming up, and partners of color. We're beginning to see that happen."

A significant number of the top 30 lawyers do not come from big plaintiffs firms.

While some firms have done well diversifying leadership of MDLs, others have shown "egregious abuses," putting women forward for the appointments but not giving them the power to make decisions after that, said Lesley Weaver of Bleichmar Fonti & Auld in San Francisco.

Weaver, who made the top 30 list with four MDL appointments, left a career at larger plaintiffs firms in 2016 because she wanted to get more leadership positions in complex litigation, including MDLs.

The larger firms always put forward "repeat players," she said. "There was not a lot of room for grass to grow."

She said it's still a struggle for new players.

"Every day, in every interaction, you have to prove yourself," she said. "That never goes away. Every day is an opportunity to succeed or fail. You have to keep pushing, and you have to continue."

Much of the push for change has come from judges, particularly as those appointed to MDLs also have become less white and male. In an MDL over the heartburn medication Zantac, for instance, U.S. District Judge Robin Rosenberg of the Southern District of Florida appointed 26 lawyers May 8, nearly half of whom were women and four were minorities, plus a "leadership development committee" that will provide "mentorship and experience."

Senior U.S. District Judge Charles Breyer of the Northern District of California, in his appointments of lawyers in the Volkswagen emissions MDL, created in 2015, "changed the arc of my career," said Weaver, who was put in a leadership position on the massive case.

"I was well known to people," she said. "I just hadn't been appointed and wasn't considered a player."

But the fight to get recognized doesn't end at getting an appointment, she said. Even after joining the Volkswagen team, she had to compete with veteran attorneys to get work on the case. She had help from key lawyers, like Cabraser, who was lead counsel, but she also used her fluency in German to start investigating connections in the case.

"I ran to the open field and made myself valuable," she said. "The way you get the repeat is to get people to see you."

Tina Wolfson, of Ahdoot & Wolfson in Los Angeles, who earned four MDL appointments, started by getting leadership positions in cases that were not necessarily MDLs. In particular, she focused on class actions targeting companies, like Neiman Marcus and Experian, over data breaches.

She also was persistent in getting her name out there.

"Just keep doing it," Wolfson said, emphasizing the importance of getting "good at your craft." "And if you want to be the next Elizabeth Cabraser, do what she did, which is work on important cases and keep throwing in your application. And don't be intimidated by not being on someone's team."

When U.S. District Judge William Orrick III of the Northern District of California asked lawyers to submit applications to lead the multidistrict litigation against electronic cigarette maker Juul, he emphasized the importance of diversity. The request drew several prominent plaintiffs firms, including Lief Cabraser.

But Cabraser purposely didn't put her own name in the hat. Instead, her junior partner Sarah London sought the role of lead counsel—and she got it.

"I could put my name up, and maybe I'd get picked because I'm a known quantity," Cabraser said. "But there needs to be a mix, needs to be a balance. We need younger people with energy and new ideas and the spirit of innovation and work ethic."

Many of the top firms, defined by Law.com as those that got 10 or more MDL appointments, had leadership appointments spread across several lawyers, including Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, which had a dozen lawyers get appointments, all but one male, and tied with Lief Cabraser for the No. 1 spot.

"It's not just that we're shuffling who the repeat players are," Cabraser said. "We're widening the scope of leadership."

But that doesn't mean the more familiar names have disappeared. In her Oct. 16 application for the Juul leadership post, London mentioned that Cabraser and other senior partners at her firm would "devote their considerable experience to this case."

Veteran MDL attorney Joe Rice said he sometimes files affidavits to support lawyers at his firm, Motley Rice, or takes a phone call verifying their work on a case with him.

"There's an effort among a number of firms to diversify the MDLs, but at the same time not sacrifice the MDL," Rice said. "That's the fine line the MDL judge has to draw, is to make sure that the plaintiffs, the injured parties

in the MDL, have the best representation available but, at the same time, try to have diversity in that."

Motley Rice had 13 appointments go to 10 lawyers, five of whom were women. Rice himself was appointed to two MDLs.

The firm has been sending its more junior lawyers to MDL seminars and conferences, encouraging those in their fourth or fifth years of practice to develop skills to get appointments, Rice said.

Firms with the most MDL appointments to women were Robins Kaplan, which had five women attorneys get eight appointments, while four men got six; Weitz & Luxenberg, with five appointments held by four male attorneys and eight by four women; and Lockridge Grindal Nauen, whose 11 appointments went to three women and two men.

Among the top firms is longtime player Seeger Weiss, whose partner, Chris Seeger, a veteran in MDLs, ranked No. 1 with 10 appointments. He and partner Dave Buchanan got all 12 appointments for the firm.

Seeger insisted, however, that his firm has tried to diversify its applicants for leadership and that the firm has several other lawyers working on an MDL than just him.

"We've had partners apply for appointments," he said, naming colleagues Parvin Aminolroaya and Jennifer Scullion, "and they haven't yet had that much success, but we're still trying. And we're working hard to promote our younger partners."

He also cautioned against appointing attorneys who do not have enough experience, calling some of his experiences working with new MDL lawyers a "mixed bag."

"I have worked with some new, young people who have come in and been given opportunities and completely dropped the ball, fallen out of the case and really wanted no part of it after putting a toe in it," he said, "and I've seen some spectacular new names rise to the top."

Burch acknowledged that the "old guard" could be moving on at some firms in favor of the "next generation of leaders," but that also means most of the firms getting MDL appointments are the same as before.

"My concern wasn't just identity diversity but cognitive diversity and thinking in different ways," she said. "If you have the same law firms that are training people in the same sort of ways, which presumably they are, then you might have less of that than if you had an influx of new firms and faces."

Many of the traditional firms in MDLs have focused on products liability matters, disasters and consumer fraud.

But practices new to MDLs, such as data breach cases and antitrust litigation, both of which are growth areas in class actions, have dominated recent MDL appointments.

"It definitely opens the field to people who wouldn't be in mass torts, but there's a lot of firms that generally are involved in MDLs that don't have expertise in antitrust and data breaches," Rice said.

Some firms have spread out to those specialties to get some of that work. At Morgan & Morgan, for instance, the busiest partner was John Yanchunis, whose six appointments include MDLs over data breaches affecting Yahoo, Equifax and Capital One.

"His ability to walk in and having that experience and background in it has helped, not only in the data world but class and MDL world," Morgan said. "He merges those two experiences in his own career."

One area where change has been especially slow is the lack of ethnic diversity in MDLs.

Although the shortage of minorities is a problem in the legal industry overall, many firms have placed nonwhite attorneys in positions subordinate to those who are in leadership roles, Keller said.

"The attorneys running the case day to day are fully capable, have great ideas, come from a totally different perspective from your own," she said, "and it's time we take a good hard look at how we, the plaintiffs' bar, recruit and encourage and select people to be on these leadership slates."

Roland Tellis, a South Asian man and one of the few minorities who made the top 30 list, with four MDL appointments, called the plaintiffs bar in MDLs "a relatively small club."

Tellis, head of Baron & Budd's class action group, switched from the defense bar about a decade ago. He said he broke into MDLs by seeking out positions on plaintiffs steering committees, rather than for lead counsel.

"Everybody wants to be co-lead in every case, but there's a process," he said. "And if you can apply for PSC spots and show your skills, that leads to opportunities to build your track record, build your reputation. Then, you have a story to tell the next time."

From 2016 to 2019, he got appointments to serve on the plaintiffs executive committee in the opioid litigation and as co-lead counsel in cases against Wells Fargo and airbag manufacturer ZF-TRW.

But he acknowledged that the MDL bar remains largely white.

Law.com, There Are New Faces Leading MDLs. And They Aren't All Men.

"Lawyers of color still lag, and it's too bad," he said. "I'm often reminded of that when I look around the table."

*Ben Hancock contributed data analysis for this report.*

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