Gender diversity in the legal profession is an issue of ongoing importance. Although female attorneys have achieved great progress by making headway into judgeships and achieving some leadership appointments in complex and multidistrict litigation in recent years, the glass ceiling still exists.¹

While a great deal of effort and studies have been directed toward understanding the need for and achieving a more diverse bench, the same cannot be said about diversity in the leadership structure of complex litigation or MDLs. A trend toward diversity has begun, but progress is slow, and there is a lot of room for improvement. Lawyers and judges alike must recognize the importance of leadership diversity and take steps to not only meet but also welcome this challenge and usher in change. Generally, diverse groups tend to outperform nondiverse groups by a substantial margin, and they make more innovative business decisions than their homogenous counterparts.² This issue has been researched at length in the realm of strategic business development, and resoundingly, businesses with women in top leadership positions experience a distinct competitive advantage. This translates directly to an increase in the bottom
Men still outpace women in the number of appointments to leadership structures in complex and multidistrict litigation. Change is needed.

By Alyson Oliver and Reed Eriksson

line due to stronger organizational and financial performance. Similarily, the most important consideration in appointing attorneys to leadership positions in complex and multidistrict litigation is to achieve efficiency and economy without jeopardizing fairness to the parties. These complex cases are essentially microcosms of a business organization, and applying well-researched business principles to maximize the desired results is a natural parallel: Diversity breeds courtroom success.

Because these complex cases and MDLs affect a much larger—and presumably more diverse—group of people than smaller lawsuits, a more diverse leadership group is required for optimal results. The appearance of our legal system matters. The justice system needs to lead, not follow, on issues of access, equality, and diversity. Increasing the diversity of leadership in our cases will enhance public trust in our courts and our work.

But, unfortunately, the lack of diversity in these leadership roles is longstanding. We recently reviewed all pending MDLs created by the Judicial Panel on Multidistrict Litigation (JPML) and found that they reflect an astounding dearth of women in lead
counsel positions. Women have fared very slightly better in plaintiff steering committee appointments, but the reality is that white, male attorneys have been selected for the vast majority of these positions. Steering committee appointments, by their nature, place the appointed members at the service of lead counsel, so while the progress being made in diversifying these committees is welcome and needed, there is still a lack of diversity in lead counsel roles where the attorneys are leading the litigation.

Although the Obama administration has appointed more women and minorities to judicial posts than any before it, litigation leadership lags behind, and we attorneys need to embrace the changes that are necessary to create a more diverse, and inherently better, leadership structure.

The recent influx of women-oriented products liability cases that the JPML has consolidated over the last few years—including MDLs involving Yaz/Yasmin/Ocella birth control, six separate dockets involving transvaginal mesh, Mirena IUD devices, NuvaRing hormonal contraceptive products, and Zoloft/selective serotonin reuptake inhibitors (SSRI) drugs causing birth defects—has highlighted this issue. These federal mass tort cases, which span 10 MDL dockets, address products sold to all-female litigants, involving all-female physiology and all-female suffering.

Of the 10 federal MDL dockets, only three cases have female lead counsel—the transvaginal mesh MDLs against American Medical Systems, Inc., Ethicon, Inc., and Boston Scientific Corp. This stark lack of gender diversity is not only behind the times but also harms the clients.

Having female lawyers in visible leadership positions serves both strategic and symbolic purposes. The almost exclusively female plaintiffs in these types of lawsuits benefit from having female attorneys who can relate to their challenges and understand the issues in a way that—despite their efforts and qualifications—men simply cannot. Such a connection is invaluable in analyzing and conveying the issues that female consumers face in the course of litigation. The defense bar has discovered these benefits and has done a noticeably better job at placing women in leadership roles in these cases than the plaintiff bar, as evidenced by the recent decision of Bayer, Inc., to have the Mirena litigation defended by female lead counsel.

Time and time again, we have heard that being a member of an underrepresented group will not, in and of itself, make counsel a more meritorious candidate. While we do not disagree with that statement, this approach defines “meritorious” too narrowly in this context. Merit includes a vast range of different skills, qualities, and intellectual capacity; it should be judged more comprehensively. There is immeasurable talent in this profession. Because of the dearth of diverse leadership, women and minorities have not, as a practical matter, developed the same repertoire of lead counsel positions their male counterparts have developed. A history of appointment as lead counsel is a great asset, but it should not be a requirement when evaluating a candidate’s qualifications.

Fortunately, the trend appears to be moving in the right direction, if not necessarily at the proper pace. For example, before the leadership was chosen in the Mirena MDL in July 2013, the lead counsel-elect conducted multiple discussions to reach a consensus among the plaintiff bar regarding the slate leadership proposal being submitted to the court. During this process, multiple attorneys voiced their concerns that no women were being suggested for leadership roles, despite the women-oriented nature of the product at issue. On the record, Judge Cathy Seibel indicated that she believed leadership diversity in this litigation was important; ultimately, the slate that was submitted and approved was gender-diverse. While leadership in this litigation remains vested in an all-male co-lead counsel structure, the
plaintiff steering committee has more women on it than any other complex litigation case has ever had.

Change is required, and it is coming. Attorney groups active in these practice areas have embraced the conceptual need for diverse leadership. Male colleagues have been largely supportive as well, drafting letters and blogs advocating for diversity. However, what remains necessary across the board is an appreciation that litigation, and the judicial system as a whole, will benefit greatly from diversity.

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Notes
6. Author Alyson Oliver sent a letter to the judge, outlining many of the principals discussed here, regarding the symbolic and strategic need for female representation in a leadership role. In re Mirena IUD, MDL No. 2434, Dkt. No. 6 (S.D.N.Y. May 10, 2013).
7. Specifically, seven of the 13 attorneys appointed to the plaintiff steering committee were female. See In re Mirena IUD, MDL No. 2434, Dkt. No. 20 (Order No. 5: Organization of Plaintiff Counsel, Protocols for Common Benefit Work & Expenses) (S.D.N.Y. July 10, 2013).