THE ONLY WOMAN IN THE ROOM: EXPLORING THE INTERACTION BETWEEN INSTITUTIONAL, STRUCTURAL, AND CULTURAL FACTORS THAT CONTRIBUTE TO THE GENDER GAP IN MULTIDISTRICT LITIGATION

by

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A dissertation submitted to the Faculty of the University of Delaware in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Sociology

Fall 2019

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ACKNOWLEDGMENTS

Thank you to the University of Delaware and my fantastic committee for their patience and guidance – Dr. Shdaimah, Dr. Turkel, and Dr. Leon. I especially thank my chair, Dr. Rise for his constant support and sage guidance throughout this long and winding road that is my untraditional education and career path. Last and certainly not least, thank you to my teammate, JB.
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This dissertation analyzes the persistent disadvantaging of women in multidistrict litigation (MDL) leadership appointments. First, it quantifies the gender gap by examining MDL dockets filed with the United States Judicial Panel on Multidistrict Litigation containing leadership appointments from 2012-2017 to establish the rates of female appointment and their progress throughout the time period. These quantitative findings establish a significant gender gap in MDL leadership appointments, serving as the basis for further exploration of the institutional, cultural, and interpersonal factors that contribute to this discrepancy. In-depth interviews with women MDL practitioners and one federal judge explore their experiences within their firms as well as at the MDL practice level. Utilizing an inequality regime analytical framework, this study analyzes how firm and practice organizational processes, culturally-infused interactions, and institutional influences interact and therefore perpetuate the persistent gender gap in MDL leadership appointments. The findings in this study aim to contribute to the literature about how inequality regimes work as well as more deeply inform future efforts and initiatives for women’s advancement in court-appointed leadership and the legal profession as a whole.
Chapter 1

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 (ABA, 2019; Sterling & Reichman, 2016). When compared to their male counterparts, women 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. However, research has not yet specifically identified the extent of the gender gap in court-appointed plaintiff leadership in multidistrict litigation.

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 over half of all federal litigation.¹ Within the multidistrict litigation process, a federal judge appoints plaintiff’s leadership counsel to represent a large number of plaintiff’s cases consolidated in the MDL. Appointment to plaintiff leadership of such large civil proceedings can be very lucrative and is considered very prestigious. It is also extremely competitive and is structured in a unique way when compared to other

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¹ See (Simpson, 2019), where according to a study by Lawyers for Civil Justice, MDLs now make up 53% of all federal litigation.
forms of litigation. Many of the largest and highest profile MDLs are liability cases regarding women’s products that are sold to women and involve alleged injuries to women. In these MDLs – for example the Yaz birth control, transvaginal mesh, Mirena IUD, Nuvaring birth control, and Zoloft birth control cases -- the vast majority of plaintiffs are women. However, with the exception of three of the transvaginal mesh MDLs, no women have been appointed to any of the lead counsel positions in these female-injury cases (Oliver & Eriksson, 2016).

While it is widely acknowledged by practitioners that a serious gender gap exists in MDL leadership appointments, research has not yet quantified the discrepancy or explored the ways in which the varied and specific procedural, structural, and cultural factors unique to this type of practice contribute to this discrepancy.

The vast majority of research about women and minority attorneys in the legal profession examine their experiences practicing within large private law firms, at the exclusion of smaller and boutique firms, where more “Plaintiff” firms would be categorized. Generally, a plaintiff’s attorney is a lawyer who represents individuals who have been harmed physically or financially, and commonly initiates suits against pharmaceutical companies, corporations, and other business and government organizations. In MDL, class actions, and other complex litigation, cases are consolidated so that individual plaintiffs typically do not select the attorneys who try and settle their cases. By contrast, large corporate defense firms, which are commonly on the “other side” of plaintiffs’ suits as they represent corporate entities, are constantly surveyed and publicly rated for their promotion and retention of women and minority lawyers, as well as their salaries, leave policies, “family-friendliness,”
and treatment of women. There is also a significant amount of pressure and sometimes requirement from their corporate clients to put together diverse working teams when they work on their matters. Plaintiff’s firms have not been not examined as a specific group at all, making them ripe for study to determine how the unique structures and cultures of their firms and the MDL court processes potentially contribute to the substantial gender gap in MDL leadership appointments. As in all professions, and certainly in the law, the experiences of women attorneys in multidistrict litigation and the reasons for the lack of gender diversity in MDL leadership are complex and varied. Therefore, a mixed-methods approach enables full examination of these issues.

The first step in this study’s attempt to explain the persistent disadvantaging of women in MDL leadership appointments is to quantify the gender gap. In order to do so, multidistrict litigation dockets filed with the United States Judicial Panel on Multidistrict Litigation containing leadership appointments from 2012-2017 were coded and analyzed to determine the rates of female appointment through the years studied. These quantitative findings establish a significant gender gap in MDL leadership appointments, thus serving as the basis for further exploration of the institutional, cultural, and interpersonal factors that contribute to this discrepancy through in-depth interviews with practitioners. 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 qualitative phase of this research examined the interpersonal, cultural, and institutional factors that maintain this significant gender gap through in-depth interviews with women practitioners involved in leadership
appointments. These interviews explored women’s experiences both within their law firms and in the course of practice, including their experiences with judges, opposing counsel, and clients. At the firm level, respondents were asked to discuss their experiences with networking, obtaining meaningful mentorship, promotion, work-life balance, and parenthood ramifications. At the MDL practice level, interviews explored: 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; the division of labor on steering committees once appointed; the role judges play in considering and increasing diversity in leadership appointments; whether or not an “application” method of appointment is more beneficial than traditional “private ordering” slated by the attorneys for women and diverse lawyers; and the backlash experienced by women practitioners from recent gains women have achieved in the field. Utilizing an inequality regime analytical framework, this study analyzes how the organizational processes at both the firm and practice level and interactional processes and institutional influences together perpetuate this persistent gender gap in MDL leadership appointments. The findings in this study aim to contribute to the literature about how inequality regimes work as well as more deeply inform future efforts and initiatives for women’s advancement in court-appointed leadership and the legal profession as a whole.
Chapter 2

RELEVANT LITERATURE

Gendered Institutions

Within the workplace, women of all races and classes experience structural and cultural barriers that constrain their agency and career trajectories. Joan Acker’s seminal 1990 study established that organizational structure is not gender neutral and that assumptions about gender underlie the organization and function of the workplace structure. Acker describes the workplace as a gendered institution, created by men, for men and maintained by men (1990). Workplaces are gendered in their policies, practices, ideologies, images and distribution of power and resources. Success in the workplace is conditioned upon what Acker calls the “myth of the gender-neutral worker” -- one who has no childcare responsibilities and takes no break in employment (Acker 1990). Removal of formal barriers to employment based on gender has produced gender-neutral policies in all professions as well as the assumption that employment policies and practices are based upon and created for a gender neutral “ideal worker.” However, these “gender neutral policies” continue to have a disproportionately negative impact on women (Koskinen Sandberg, 2017; Bobbitt-Zeher, 2011; Williams, 2010: Britton, 2003).

The analysis of gender has been expanded and enriched by intersectionality, or intersectional theory, which examines race, gender, class and sexuality as simultaneous and overlapping categories that shape the lived experiences of individuals and groups. Now a dominant paradigm in the field of gender, an
intersectional approach to research leads to more thorough and comprehensive research. Intersectional theory, initiated by legal theorist Kimberle Crenshaw in 1989, affects both the theoretical and empirical design, execution, and interpretation of a study of gender (Collins, 1990; Collins, 2019). Key features of an intersectional approach include: recognition of race, class, gender and sexuality as socially constructed and simultaneous overlapping categories that shape the experience and inequalities for all people and groups; recognition that such categories/axes intersect and overlap to create unique experiences for differently situated individuals and groups; a focus on power and oppression that occurs from such distinctions and situations; how such categories serve as mechanisms of control and controlling ideologies and images; and the acknowledgement that these axes work at different levels of social life, thus bridging micro and macro theories of inequality (Collins, 1990; Collins, 2019). Patricia Hill Collins (1990, 2019) explicates her theory of the matrix of domination as an instrument or model to analyze intersecting axes of domination and power that produce different lived experiences for individuals and groups. Collins emphasizes the importance of examining power -- both the oppressor and oppressed – and its role in lived inequalities.

Work organizations are gendered on three levels: at the structural level; through the cultural and ideological assumptions upon which the structure and individuals draw; and the agency of male and female workers themselves (Acker, 1990; Karman, 2004; Britton, 2003). The agency of individuals within a gendered work organization is constrained by the gendered structural and cultural aspects of the workplace (Acker, 1990; Britton, 2003). Gendered standards for hiring, promotion, and job assignment, as well as gendered meanings and assumptions of masculinity and
femininity, contribute to gendered differences, expectations, and disparities within a work organization (Acker, 1990; Risman, 2004). At the cultural and ideological level, the genderization of meanings and construction/assumptions of masculinity and femininity contribute to gendered expectations (Bird, 1996; Britton, 2003). Risman (2004) found that even when men and women work in organizations with formally gender-neutral roles, gender inequality is reproduced in everyday interaction. Risman (2004) describes this as the “cultural component of the social structure” that creates habitual and non-reflexive actions (p. 432). Such interactional and routine expectations attached to gender create and maintain inequality in workplace relationships (Martin, 2003). It is within these structural and cultural constraints that women workers make their everyday work and career path choices (Britton, 2003).

An example of a structural/policy barrier to women and mothers is the rampant insufficiency of maternity leave (Manuel & Zambrana 2009). Similarly, Britton’s 2003 study of women prison workers illuminated how women are coerced into gendered positions with less possibility of promotion by cultural ideals of women as weak. The women prison guards find their agency constrained when they are forced to either risk being perceived as “less-womanly” and participate in the expected male behavior or maintain their desired femininity, but accept lower status positions within the workplace (Britton 2003). Similar barriers were exposed in Pierce’s 1995 study of women employed in private law firms. With law firms serving as extremely gendered institutions, women attorneys face the same constrained choices as the women in Britton’s prison study – they must exhibit traditionally male qualities of aggressiveness and intimidation to be respected; however they risk their perceived womanhood in the process (Pierce 1995).
Gendered institutions also impact the way in which women “do gender” at work. To West and Zimmerman (1987), gender is something that people “do” in their everyday lives. They highlight the importance of accountability in their theory – that is, that people are held accountable both by other people and institutions in society for displaying appropriately gendered behaviors and appearance. Individuals experience social sanctions if they do not “do gender” in accordance with prescribed social expectations. Further, Martin’s 2003 study of gender in the workplace explicated that gender is done within the gendered structure of the workplace. Martin theorized that gender is accomplished through gendered practices of organizations, and through individuals practicing gender within such organizations. Drawing on Acker’s (1990, 1992) work on gendered institutions, Martin acknowledges that gender is accomplished on multiple levels in the workplace. Specifically, “practices” refers to the policies and procedures established by the institution that are available for workers to engage in. Workers thereby “practice” gender when they choose their actions within the available practices of their work institution. For example, Martin shows how networking within the workplace by going out to dinner with coworkers and supervisors is a valuable (in terms of future career advancement) practice that exists in the work institution. However, male workers “practice” gender when they avoid or do not initiate attending dinners alone with women coworkers based upon gendered assumptions and potential gendered effects of perceived inappropriate sexual behavior based on gender difference. More recent literature on gendered institutions draws upon this earlier work to study how cultural, structural, and interpersonal factors interact to contribute to gender disadvantage in organizations (Bobbit-Zeher, 2011; Koskinen Sandberg, 2017). For example, Bobbit-Zeher’s analysis of filed gender
discrimination complaints found that discretion of policy enforcement was a primary mechanism for discrimination when based upon cultural ideas about women. Additionally, Koskinen Sandberg’s 2017 work established how gender pay gaps can be attributed to gendered cultural valuations of jobs and performance evaluations. Koskinen Sandberg notes that the “gender-neutral” policies in pay systems serve to legitimize “gender based wage disparities,” and suggests evaluation of how organizational processes and practices produce and reproduce gender inequality (2017, p.1).

Research has established that certain structural changes need to happen in order to fully allow women to achieve equality in the workplace and to address the persistent work-family-balance strain. Most research recommends more flexible work policies grounded in women’s real, lived experiences that alleviate the male-centered ideal of the workforce – such as flexible hours (Gatta, 2009; Manuel and Zambrana 2009), reward structures for different career trajectories (Peskowitz, 2005), and family leave policies for both men and women (Gerson, 2011). While these recommendations are helpful, they focus exclusively on gender. Recent scholarship emphasizes intersectional approaches. Acknowledgement of structural and cultural barriers to women’s success in the workplace, using an intersectional approach, is necessary for progress.

In sum, ignoring structural, cultural and ideological factors on women’s agency and ability to successfully participate in the workforce does not present a true reflection of women’s status or abilities to “succeed” in social institutions. Assumptions of liberal individualism, barrier-free workplaces, and corporate non-responsibility for family and life outside of the workplace (Acker,
2005) contribute to the lack of visibility for these constraints. Women’s choices with regard to work and family are still heavily constrained by gendered ideologies, structural barriers within the institution of work, race, and class.

**Women in Law**

In 2001, Professor Deborah Rhode aptly described gender inequality in the legal profession as the “no-problem’ problem,” referring to the assumption that the long-standing gender gap in the legal profession would eventually work itself out as time passed (Rhode, 2001; Rhode, 2002). Rhode noted that the increasing entry of women into law schools and the legal profession, while certainly constituting progress, 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 (2002 at p.1001). Predicated on the false notion that gender discrimination in the profession would be 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 (Risman, 2004).

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 38 percent of the legal profession, despite women graduating law school and entering the profession at nearly equal rates to men for the last 30 years (ABA, 2019). In fact, at the outset of their careers, it appears that women have reached parity with men. In some years, women represent a slight majority of law students for the first time in history, for example in 2016 comprising 50.3 percent of overall enrolled law students (Pratt 2016). In private law firms, 46 percent of all associates and 49 percent of summer associates are women (ABA 2019). However, research indicates that women are not advancing at the same rate as men throughout their careers, occupying a significant minority of the high-status, higher-power, and higher income positions. Women make up only 22.7 percent of firm partners, 19 percent of equity partners, 22 percent of managing partners in the 200 largest law firms, 30 percent of Fortune 500 General Counsel, 35 percent of law school deans, and 34 percent and 30 percent of all federal and state judges, respectively (ABA, 2019). Women make up only 12 percent of firms’ highest leadership roles, such as managing partners, practice group leaders, and members of firm executive committees (Violante & Bell, 2018). 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 8 percent of private practice attorneys and 3 percent of all equity partners even though they make up almost 20 percent of law students (Violante & Bell, 2018). 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 women partners (Lowe, 2016).
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. 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 unfortunately exacerbated by the Me Too movement backlash, 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 (Rhode, 2015). 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 (Rikleen, 2015).

Most recently, the American Bar Association’s Commission on Women in the Profession, in conjunction with the Minority Corporate Counsel Association, and the Center for WorkLife Law at Hastings College of Law performed a study on lawyers’ experiences of bias in the workplace (ABA et al., 2018). It reported that women of color, white women, and men of color repeatedly feel that they have to go “above and beyond” to get the same recognition and respect as their white male colleagues, experiencing what the ABA terms “Prove-It-Again Bias.” It found that all women and men of color are constantly reminded that they do not fit with the common image of the white male lawyers, reporting that white women are mistaken for administrative
staff, court personnel, or janitorial staff 44 percent more than reported by white men, and men of color report experiencing this bias 23 percent more than white men (ABA et al., 2018, p.6). Women of color report experiencing this bias 50 percent more than white men. Women of all races reported what the ABA calls “Tightrope Bias,” or feeling pressure to behave in feminine ways, including performing office “housework” like taking notes in meetings, while experiencing significant backlash for exhibiting more “masculine behaviors,” such as being competitive and assertive, that often contribute to the success of their male colleagues (ABA et al., 2018 p.5). Further in accordance with much of the extant research, women lawyers of all races widely reported experiencing “Maternal Wall” bias after having children, including: being passed over for promotions, being demoted or paid less, given lower quality assignments, and experiencing significant stigma for taking leave, working reduced hours, and/or working a flexible schedule (Williams, 2000). Additionally, white women consistently reported that their commitment to practicing law as well as their competency was questioned after having children (ABA et al., 2018). All groups of lawyers confirmed that there is a “flexibility stigma” surrounding leaves of absence and working reduced or flexible hours. In sum, the ABA report concluded that bias along gender and racial lines exists in all “seven basic workplace processes” of law firms, including:

1. Getting hired
2. Receiving fair performance evaluations
3. Getting mentoring,
4. Receiving high quality work assignments
5. Access to networking opportunities
6. Getting paid fairly
7. Getting promoted (ABA et al., 2018)

The ABA report also confirmed that men of color and all women experience less bias when they work in-house as opposed to in the traditional law firm model and that sexual harassment remains a significant issue in the profession.

Culturally, the masculine “hypercompetitive professional ideology” (ABA et al., 2018) and assumed meritocracy (ABA et al., 2018; Castilla & Benard, 2010) of the legal profession also tends to value “traditionally male” behaviors to the detriment of women. The “ideal worker” in a law firm is an “all or nothing employee” with an inflexible and extreme amount of expected work hours (Bond et al., 2003; Collier 2015; McGinley 2013; Rhode 2001; Williams, 2010; Stone, 2007; Percheski, 2008; Hagan & Kay, 2010). Numerous studies have specifically classified legal education and the legal profession as gendered institutions that are masculine in nature (Collier, 2015; McGinley, 2013; Martin & Jurik, 1996; Pierce, 1995; Epstein, 1995; Gorman, 2005; Seimsen, 2004; Thornton, 1998; Guinier et al., 1997). 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 (Rhode, 2014; Pierce 1995; Gorman, 2005). These largely unconscious cultural narratives about femininity affect many aspects of

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2 Organizations that consider themselves to be “highly meritocratic,” as the law firm model does, have been found to be more in fact more biased than other organizations (ABA et al, 2018; Castilla & Benard, 2010).
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 (Gorman, 2005). As one can imagine, this double bind requiring balance of “masculine” and “feminine” characteristics can be especially problematic for women litigators (Pierce, 1995). 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 (Scharf & Liebenberg, 2015). The same study found that in class-action litigation specifically, women appeared as lead counsel only 13 percent of the time (Scharf & Liebenberg, 2015).

The traditional law firm model places high value on competition and aggressive self-promotion while it measures success by compensation, the most hours worked and the biggest book of business (Epstein et al., 1999; Abbott, 2004; Williams, 2000). As Epstein et al. describe, “Unprecedented demands for availability and client service are now made on lawyers, and a tally of their billable hours is distributed to everyone within law firms” (1999, p.5). At first, many lawyers thrive on this model due to the financial compensation, exciting challenges and professional success; however, as research shows, for most lawyers, this model eventually becomes unhealthy as both male and female attorneys, with or without children, report experiencing substantial work/life conflict (Catalyst, 2001). The legal profession’s movement from a “competitive meritocracy” model that encouraged participation of women and minorities in the legal profession in the past has evolved into the prevalent “hypercompetitive ideology” of today (Wald, 2010). Literature suggests that the
traditional law firm model is inherently discriminatory against women as it is based on men’s experience (Abbott, 2004; Williams, 2000; Pierce, 1995). According to Williams (2000), it assumes a married male lawyer with a wife attending to home and children and glorifies the workaholic lawyer who takes no time for family life. Reichman and Sterling’s (2002) study of Colorado attorneys reveals that law firm structure and culture disproportionately negatively affect women because successful employment and advancement is based upon two expectations with regard to time: uninterrupted and full time work; and the expectation that attorneys be on-call and available at all times for work. Reichman and Sterling argue that law firm mandates that work is the “uncontested priority” of both female and male attorneys’ time accordingly produces a distinctly gendered disparity for success in the legal profession (2002, p.948; see also Epstein et al., 1999).

Mentorship of new attorneys or associates by senior attorneys is considered to be critical for advancement in the legal profession and is positively linked to job satisfaction (Kay & Wallace, 2009; Reichman & Sterling, 2002). Specifically, mentorship has been found to be distinctly linked to women attorneys’ job satisfaction and promotion prospects (Esptein, 1995, 2004; Mobley et al., 1994; Wallace, 2004). An associate’s mentor plays an important role in the promotion process by educating a new attorney on firm culture and the necessities for advancement, providing a professional role model, and serving as an advocate for their mentee among the supervisory ranks of the workplace (Reichman & Sterling, 2002). Studies show that women attorneys are more likely than male attorneys to be excluded from mentor/mentee relationships, finding it uniquely difficult to form such a relationship with senior attorneys who are most likely male (McManus, 2005; Epstein et al., 1999).
Epstein et al. (1999) note that the informality of the mentor structure contributes to the exclusion of women in this imperative relationship, and therefore contributes to the disparate treatment of women desiring to advance to partner. Further, Kay and Wallace’s (2010) study of the long term effects of receiving mentorship revealed that having more than one mentor more than doubles the beneficial effect of mentorship across a variety of career factors.

Women in law firms experience a significant pay gap that research shows is caused by numerous factors, including: gendered “objective” metrics for compensation and promotion (Ridgeway, 2011; Wald, 2010; Williams, 2000); denial of women partners’ “fair share” to origination credit when bringing in new clients to the firm (Williams & Richardson, 2010); lower billing rates (Silverstein, 2014); unstructured performance and promotion reviews (Dinovitzer et al., 2009; Williams & Richardson, 2010); and recent changes in firm promotional levels that result in more women being promoted to “counsel” - a non-partner track position - than partner (Rikleen, 2013).

Research also shows that women attorneys find themselves at a disadvantage with regard to networking inside their own workplaces with partners and superiors, thereby affecting their potential for advancement within their firms. Kay & Hagan (1998) found that women attorneys score lower in firm social and cultural capital, which in turn has a negative effect on their promotion prospects. It has also been shown that networking and social interaction in firm culture and with partners has a distinct positive effect on women attorneys’ promotion prospects when compared to men (Kay & Gorman, 2008; Noonan & Corcoran, 2004; Kay & Hagan, 1998).
These structural and cultural constraints therefore influence women attorneys to choose their professional trajectories accordingly. Several studies reflect that gender disparity is greatly diminished when female leadership is institutionalized in the legal setting. For example, Gorman’s (2006) study of the promotion events of large law firms reflected that law firms with greater numbers of existing women partners tend to promote more women associates (see also Beckman & Phillips, 2005; and Phillips, 2005) and a more recent study found that women partnership rates are higher at firms where there are more women in charge (ABA, 2019).

**Analytical Framework: Inequality Regimes**

Scholars utilize numerous analytical frameworks to explain the persistent gender gap in the practice of law. Social science frameworks such as gendered organizations, lack of fit, implicit bias, and cultural super schemas have been employed to make sense of women’s extremely slow progress despite the now long standing gender parity in law school education and entrance into the profession. Social science research has informed much of the increased attention given to diversity and inclusion, the implementation of women’s initiatives and diversity consultants in firms, and implicit bias trainings happening across the profession.

As noted above, a gendered organization approach analyzes a law firm’s organizational structure, exposing the extent to which its policies and practices are not gender neutral, but rather that assumptions about gender underlie the organization and function of the workplace structure (Summerlad, 2012). Expectations for lawyers at law firms include being an “all or nothing employee” (Hagan & Kay, 2010; Percheski, 2008; Williams, 2010), excessive work hours with
little flexibility, as well as fitting in to firms’ masculine culture (Collier, 2015; McGinley, 2013; Rhode, 2001; Pierce, 1996). This results in a perceived “lack of fit” for women lawyers in firms which women internalize it as “their problem” while being inundated with programming about how they can improve their competencies, ignoring the structural “processes by which they are evaluated and the practices that sabotage their career development” (Rhode, 2011, p.1048).

The concept of implicit bias - how individuals unconsciously make biased decisions to the detriment of certain groups - is also used by social science scholars to understand how gender and racial bias explain the challenges that women face in law (Wald, 2015; Sandgrund, 2016). Common experiences of implicit bias experiences by women lawyers includes: women lawyers being assumed to be support staff or interpreters (Sandgrund, 2016); law students being more likely to see men as judges and women as paralegals as well as more likely to associate women with family responsibilities (Levinson & Young, 2010); and confirmation bias influencing performance evaluations in law firms (Reeves, 2014). Similarly, cultural super schemas and status expectation theory has been used as a framework for evaluating the gender gap in law (Reichman and Sterling 2013; Ridgeway 2011). Gender, operating as a cultural super schema, “pumps gender into the interactionally mediated work process by cueing gender stereotypes” (Ridgeway, 1997, p. 231). For women, as “lower-status actors,” this means receiving much stricter performance reviews when compared to men, as well as consistently being regarded as “underperforming” despite their achievements when compared to male lawyers in their firm (Sterling & Reichman, 2016, p.387; Reichman & Sterling, 2013).
Gender parity and diversity initiatives are increasing in popularity as more and more corporations and law firms are hiring consultants and in-house staff to design diversity and inclusion initiatives that usually include bias trainings as well as networking and mentorship programs (ABA et al., 2018). However, research tells us that such programming typically does not “move the needle” when it comes to closing gender and diversity gaps (Sterling & Reichman, 2016, p.388; Kalev, Dobbin, & Kelly, 2006), and rather suggests that further research and initiatives move beyond changing women’s behaviors and people’s thoughts about gender and diversity, but rather examine the structures and business processes that maintain this enduring gap (Rhode, 2014; ABA et al., 2018; Sterling & Reichman, 2016). Sterling and Reichman suggest that legal scholars move toward utilizing a framework of relational inequality, to “integrate prevailing frameworks of gender disadvantage and map them onto an organizational process to develop a more robust understanding of women’s quite durable disadvantage” (2016, p.387). Specifically, Sterling and Reichman suggest the utilization of Tomaskovic-Devey’s (2014) conceptualization of organizations as inequality regimes.

Tomaskovic-Devey asserts that “organizations are not neutral vessels but rather are inequality regimes embedded in social structures populated by culturally infused people.” (2014, p.52). His relational theory of workplace inequalities focuses on organizations’ “central role” in producing (and reproducing) inequalities (2014, p.51). We know that society’s entrenched inequalities - categorical distinctions such as race, class, and gender - are created through interaction and permeate structures, organizations, and culture (Risman, 2004; Bonilla-Silva, 1997). Tomaskovic-Devey posits that it is these enduring inequalities’ “inscription in organizations that gives
[them] both their material consequences and durable character” (2014 p.52).

Expanding upon existing inequality regime theory, Tomaskovic-Devey identifies four mechanisms that generate organizational inequalities within an inequality regime: resource-pooling, claims-making, exploitation, and opportunity hoarding (2014, p.51; see also Tilly, 1998 and Acker, 2006). Exploitation occurs when organizational actors extract value from the work efforts of others at their expense (Tomaskovic-Devey 2014). It is interactional -- with all organizational actors potentially benefiting from or being disadvantaged by it -- and it is often institutionalized in certain positions in the organizational hierarchy. According to Tomaskovic-Devey, “Successful exploitation is often institutionalized in the status hierarchy of positions. Positions then become the basis for opportunity hoarding” (2014, p. 59).

Opportunity-hoarding, otherwise known as social closure, occurs when organizational actors monopolize valuable resources and positions for themselves and those within their social circle or “categorically similar actors” (Tomaskovic-Devey, 2014, p. 59). Opportunity hoarding actors use their status and/or position to limit opportunities for “out-groups while preserving them for incumbents and socially similar individuals” (Tomaskovic-Devey, 2014, p. 59). Opportunity hoarding can be subtle and perhaps even thought to be generous by the hoarder -- like giving opportunities to those in your network -- as well as through taken-for-granted interactional mechanisms that are accepted as routine by the excluded (Reskin, 2003). According to Tomaskovic-Devey, “Because of their taken-for-granted nature, closure and exploitation can often be accomplished without much open opposition. Open opposition however, often reveals the power in the relationship.” (2014, p. 59)
Tomaskovic-Devey expands upon opportunity-hoarding and exploitation to include two organizational inequality mechanisms previously overlooked by contemporary sociology: “resource pooling” and “claims-making.” Resource pooling is based upon the understanding that organizations are “resource pooling units” in that they generate income that is then used to pay for their operating costs, leaving a residual surplus to be distributed to actors within the organization (p.55). The amount of resources - or income - pooled is not only a measure of the productivity of the organization but can also serve as a measure of an organization’s power in the market-at-large and therefore justifies its continued existence (Tomaskovic-Devey, 2014). These income streams with residual funds to be distributed then become targets of opportunity-hoarding and exploitation by actors within the organization. This is especially true for an organization such as a plaintiff’s firm, where their income from successfully adjudicating cases comes in as lump sums to be distributed to partners in the firm. It is through the “claims-making” process that actors within an organization exploit others and hoard opportunity.

Analogous to the other mechanisms for inequality generation in organizations, claims-making takes place within social relationships with various power and status dynamics (Tomaskovic-Devey, 2014). Claims-making can be both explicit and embedded in routine organizational practices, including but not limited to: wages (both requested salaries/bonuses as well as standardized wages and raises); negotiating conditions of employment; and asking for certain work/experience opportunities. Once an organizational actor makes a claim, management must decide if and how to direct organizational resources to the claims-maker. When making a claim, that actor supports their claims for being deserving of the resources using
cultural frames considered to be legitimate in the organization and profession. But not all potential claim-makers feel that they have the power or capital to do so. Some actors do not make claims, and some claims are ignored, having an overall effect of repressing claims. One of the most fundamental sources of exploitation in interaction is to deny an individual or group the capacity to make claims at all -- this is often accomplished by bullying or harassment to deny workers agency and strip them of credibility (Tomaskovic-Devey, 2014). As Tomaskovic-Devey explains:

The ability to contemplate a claim and the probability of validation are not only functions of local social relations, but also of the institutional environment, which selectively strengthens some claims over another. Law, markets, culture, social movements, and models from other organizations are all resources for claims-making within organizations. Which resources and categorical distinctions generate legitimacy and coercive powers are relational and institutional products” (2014, p. 67).

Great variations exist between inequality regimes, as organizations are situated in and subject to broader institutional influences, including: history, culture, politics and social movements, markets, professions, and the like. Practices are extremely varied between organizations due to their specific processes and history -- and can be both formal and informal in nature, as well as hidden and explicit (Acker, 2006). As Joan Acker explains:

I have suggested the idea of inequality regimes, interlinked organizing processes that produce patterns of complex inequalities. These processes and patterns vary in different organizations; the severity of inequalities, their visibility and legitimacy, and the
possibilities for change toward less inequality also vary from organization to organization (2006, p.459, emphasis added)

There is extreme variability within the practice of law, between types of firms as well as types of practice (both substantively and procedurally), making a one-size-fits-all analysis of the cause of women’s disadvantage in law and possible solutions inappropriate. Utilizing an inequality regime framework allows us to examine the specific ways in which organizational structures and their mechanisms, culture, complex identities, and outside institutional influences like history, culture, intersectionality, politics, social movements, and organizational fields interact and relate to each other to produce and reproduce inequalities. As Tomaskovic-Devey astutely points out, because these interactional mechanisms create and recreate inequalities, they are also the grounds at which to look for “dismantling” existing inequalities (2016, p. 67). This study examines how the unique and particular organizational mechanisms in MDL plaintiff practice -- at both the firm and practice levels — interact with both interactional processes and institutional influences to perpetuate the persistent gender gap in MDL leadership appointments. It is intended that analysis as a relational inequality regime will better inform future initiatives for practical and effective ways to remove barriers to women’s advancement in court-appointed leadership, and hopefully to women in law at large.

Research Questions

- What is the gender gap in MDL leadership appointments?
• Utilizing an inequality regime analytical framework, how do the organizational mechanisms at both the firm and practice level interact with both interactional processes and institutional influences to perpetuate this persistent gender gap in MDL leadership appointments?
Chapter 3

RESEARCH METHODOLOGY

Introduction

The vast majority of research about women and minority attorneys in the legal profession examines their experiences practicing within large private law firms, at the exclusion of smaller and boutique firms, where more “Plaintiff” firms would be categorized. Generally, a plaintiff’s attorney is a lawyer who represents individuals who have been harmed physically or financially, and commonly initiate suit against pharmaceutical companies, corporations, and other business and government organizations. Large corporate defense firms, which are commonly on the “other side” of plaintiffs’ suits as they represent corporate entities, are constantly surveyed and publicly rated by institutional organizations3 for their promotion and retention of women and diverse lawyers, as well as their salaries, leave policies, “family-friendliness,” and treatment of women. There is also a significant amount of pressure and sometimes requirement from their corporate clients to put together diverse working teams when they work on their matters. Plaintiff’s firms have not been examined as a specific group at all, making them ripe for study to determine how the

unique structures and cultures of their firms and the MDL court processes potentially contribute to the substantial gender gap in MDL leadership appointments.

Before this study, the oft-perceived gender gap in multidistrict leadership appointments had not been quantified. As in all professions, and certainly in the law, the experiences of women attorneys in multidistrict litigation and the reasons for the lack of gender diversity in MDL leadership are complex and varied. Therefore, a mixed-methods approach enables full examination of these issues. First, a quantitative analysis was conducted to establish the existence of and quantify the gender gap in MDL leadership appointment (which can then be used to document potential progress over time.) While it is certainly important to be able to measure this gap, these numbers can only tell us so much. To explore why this gap occurs and the reasons for its durability, a qualitative analysis using in-depth interviews was conducted in order to capture these women attorneys’ personal experiences in both their firms as well as in their MDL practice and to inform removal of otherwise hidden barriers to their success in their field.

**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.⁴ 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.\textsuperscript{5} It is estimated that multidistrict litigation comprises over half of the entire federal caseload (Simpson, 2019).

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 (MCL 4\textsuperscript{th}, 2004).

\textsuperscript{5} “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, 2014; MCL Fourth, 2004).
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.6

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 a mutual 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 (Williams et al., 2014; Burch, 2015; Burch & Williams, 2016). Research regarding repeat players in MDLs shows that this

6 See Vizio, Inc., Consumer Privacy Litigation: Attorneys appointed to leadership have to put up trial costs which can entail large sums of money.
tight network of attorneys is mostly male and referred to by some as the “good ol’ boys club” (Bronstad, 2015). Accordingly, a recent accounting of the fifty most-appointed repeat players revealed that only 11 are women (Burch & Williams, 2016). 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 (Burch & Williams, 2016).

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 support 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 (Dodge, 2014).

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 MDL leadership appointments. In
2014, the Bolch Judicial Institute at Duke Law School 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. In both April of 2017 and June of 2018, Duke’s Bolch Judicial Institute held conferences with judges and practitioners focused specifically on increasing leadership diversity in multidistrict litigation. In late 2015, the first majority-women leadership structure was appointed in the Power Morcellator MDL; in early 2016, a single female lead was appointed in the sought-after Volkswagen “Clean Diesel” case; in late 2016, two women were appointed as co-leads in an antitrust MDL (Mitchell, 2016); and another two women were appointed as co-leads in the large Johnson and Johnson Talcum Powder MDL. Women-centered trial lawyer (plaintiff) conferences and groups have also seen a rise in activity in recent years. For example, Women en Mass (WEM), a conference for women mass tort attorneys, held its seventh annual networking conference in 2019 and the American Association of Justice (a leading Plaintiff trial lawyer organization) has a very active Women Trial Lawyers Caucus.

7 (Duke Law Center for Judicial Studies, 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.”
10 Appointment by Judge Cynthia Rufe of the Eastern District of Pennsylvania in In re Generic Digoxin and Doxycycline Antitrust Litigation, No. 2:2016-md-02724 (E.D. Pa.)
12 See http://www.womenenmass.com/.
13 See https://www.justice.org/networking-center/women-trial-lawyers-caucus
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 appointments. For example, Judge Cynthia Rufe of the Eastern District of Pennsylvania includes the following language in her appointment orders:

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. ¹⁴

While these positive efforts have yielded substantial awareness and commendable progress in increasing leadership diversity, there remains a significant gender gap acknowledged by both male and female practitioners. Tracking the average rates of female appointment is a necessary starting point for further exploration of the underlying factors contributing to this disparity; however, further inquiry into the lived experiences of women practice multidistrict litigation is necessary to explore the structural and cultural factors contributing to this gap.

Quantitative Data Collection - Establishing a Gender Gap

The first step in this study’s attempt to explain the persistent disadvantaging of women in MDL leadership appointments was to quantify the gender gap. In order to do so, multidistrict litigation dockets filed with the JPML containing leadership appointments from 2012-2017 were coded and analyzed (as detailed below) to determine the rates of female appointment through the years studied. Due to the initial study parameters established by the Women’s Legal Leadership Project, the initial phase of quantitative data (hereinafter referred to as “Phase One”), included cases filed with the JPML between July 2011 through 2015 (encompassing the “most recent 500 MDL cases” at that time). Due to the widespread interest for an “update” on the potential gender progress experienced in 2016 and 2017, a Phase Two of the quantitative analysis was conducted quantifying the gender gap in cases initiated in 2016 and 2017. In both phases, data was collected by the researcher from individual court dockets for each case using Bloomberg Law. Cases that were not transferred to federal court from the JPML to be adjudicated as an MDLs or where formal leadership appointments were not made were excluded from the set. In Phase One, this yielded 145 cases, both pending and resolved, that were transferred to Federal District Courts where formal leadership was subsequently ordered. The 145 included all types of MDL cases. In cases where the judge appointed firms rather than individuals to leadership positions, memoranda submitted in support of the firms were examined to determine which attorneys were listed as lead for the firm in the case. In the event that it was not clear who was the lead attorney, those cases were excluded. This resulted in
the removal of one case, and the partial coding for two cases.\textsuperscript{15} In Phase Two all MDL cases filed with the JPML in years 2016 and 2017 were coded and analyzed in the same manner as Phase One. Phase Two yielded a total of 37 additional cases, including 20 cases from 2016 and 17 cases from 2017 to be analyzed.\textsuperscript{16} All cases in which leadership was appointed were coded to reflect the structure of the leadership positions created by the judge as well as the gender makeup of the leadership class.

In order to avoid assumptions made on typically-gendered first names, genders were determined by individually examining the pronouns used in the appointed attorneys’ firm website biographies. This method, although very time consuming, was utilized to most accurately identify how each attorney self-identifies. It is assumed that they are most likely aware of and have approved their website biographies. Unfortunately it was impossible (and improper) to attempt to code for the self-appointed race of each appointed attorney as race is not signified by a pronoun. The decision was made to address intersectionality only in the qualitative interviews.

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. Due to the variation in structure

\textsuperscript{15} One case was removed from the data set for only appointing firms where no lead attorney names were identifiable from supporting memoranda. There were three additional cases that designated leadership by firms only where the lead (or Tier One) attorneys’ names were discernable from supporting memoranda but supporting (or Tier Two) leadership was listed as firms-only with no discernable individual attorney names. In such cases, the Tier One leadership was coded for gender, and the Tier Two leadership was excluded from analysis.

\textsuperscript{16} 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.
and type of each appointed leadership group, it became necessary to parse out a tiered coding of leadership position hierarchy. Although the categories and types of leadership positions differed from case to case, it was clear from the court orders that there are not only general leadership positions (usually a “steering committee”), but also leadership positions within the leadership (usually lead and/or liaison counsel, sometimes also an executive committee just below the lead position, yet higher than the plaintiff steering committee). 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. The rate of female appointment was then quantified in each case for total leadership, as well as Tier One and Tier Two leadership individually for comparison. The rate of female appointment = number of women appointed / total leadership positions appointed in each case. The average rate of appointment was utilized rather than a straight percentage of leadership positions acquired by women attorneys in order to limit the potential skewing of results due to the extremely variable number of possible leadership positions in each case. Phase Two additionally included coding to establish the average rate of female appointment to the very top leadership position(s) in each case, most likely lead counsel, for years 2015-2017, for comparison.

**Qualitative Data Collection: Interviews**

In order to understand the reasons for the identified substantial gender gap in MDL leadership appointments, in-depth interviews with female practitioners at all stages of their careers were conducted to examine the cultural, structural, and interpersonal factors influencing this gap. Female practitioners were asked to describe
their lived experiences practicing Multidistrict Litigation and vying for the valued court-appointed leadership positions. At the firm level, respondents were asked to discuss their experiences with networking, obtaining meaningful mentorship, promotion, work-life balance, and parenthood ramifications. At the court, or practice level, interviews explored: 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; the division of labor on steering committees once appointed, the role judges play in increasing diversity, whether or not an “application” method of appointment is more beneficial to women and diverse lawyers, and increasing backlash experienced by the women from recent gains women have achieved in the field.

In designing the method of study for this group of women, the researcher decided to utilize in-depth interviews rooted in feminist methodology and standpoint theory, in order to allow this underrepresented and understudied population of female MDL attorneys to voice their own personal experiences practicing with this uniquely structured field (DeVault, 1996; Harding, 1987; Fine, 2003; Smith 1990). Semi-structured interviews with female MDL attorneys and one federal judge were conducted by the researcher over a two year period until responses became redundant confirming their veracity and signaling to the researcher that data collection could cease as saturation has been achieved. Recruitment of interview subjects came from snowball sampling (referrals) as well as the researcher directly contacting some women named as receiving leadership appointments in the statistical analysis docket review utilized in the quantitative portion of this study. After completion of
Protection of Human Subjects and Responsible Conduct in Research training and IRB approval from both Temple University and the University of Delaware, the researcher conducted 27 interviews - 7 were conducted in person at various professional conferences and 20 were conducted over the phone, all with durations between one and two-and-a-half hours. Subjects were informed at the start of each interview that they were welcome to not answer any question that they did not wish to answer and that they were welcome to end the interview at any time they wished. Finding interview subjects proved to be an easy task as many of the women were eager to share their experiences and the research was given credibility based on the funding of the study from both Temple Law and the Women en Mass organization. Additionally, the generous press attention given to an earlier publication of the study’s quantified gender gap in appointments contributed to the perceived credibility of the researcher and the study and led to more women asking to be interviewed.

The topics covered by the interview questions were derived from the exigent literature about women’s experiences practicing law, as well as the information gathered by the researcher through conversations and observation in her attendance at numerous professional conferences for class-action and plaintiff’s lawyers before and during the two years in which the interviews were conducted. Interviews covered a wide range of topics including demographic and career trajectory information, their career experiences in their firms, and their experiences in vying for and participating in multidistrict litigation leadership. Interview questions were adapted to better capture the women’s experiences both during each interview and between interviews as the researcher was made aware of further factors impacting subject’s experiences. Interview questions regarding their experiences with their law firms covered:
mentorship/sponsorship experiences; promotion / performance reviews; business development and networking; trial experience; origination credit; work-life balance; and potentially starting their own firms. Interview questions regarding practicing multidistrict litigation at the institutional level included: their experiences vying for leadership appointments; leadership appointment methods; the role that judges play in the appointment process; the division of labor on leadership; their experience with sexual harassment; backlash received from recent public attention to the lack of diversity in appointments and the progress made in recent years; and what advice they give to other women starting in the field. The semi-structured interview guide is attached hereto as Appendix I. Subjects were also given the opportunity to voluntarily add any of their experiences that were not covered by the researcher’s questions which yielded compelling material that was then incorporated into subsequent interview questioning for further exploration and confirmation.

Due to the pool of women who have actually been appointed to MDL leadership being very small and the potential negative impact on their careers from being honest about their experiences, confidentiality was of utmost concern. This is especially true for the women who identified as women of color, part of the LGBTQ+ community or as other marginalized identities because of the homogeneity of the practitioners in this field – especially the ones who have actually been appointed to leadership. While it is imperative to account for the important and complex experiences of these populations, in order to protect the identities of respondents, the decision to not include race or other qualities in respondent identification descriptions became necessary.
This paper was also distributed to all respondents before any publication in order for them to confirm that their perspectives were captured correctly in the text and whether or not they felt that their confidentiality would remain intact upon publications -- they were not inadvertently identified by anything they mentioned in their told experiences. The initial descriptions of the quotation speakers used pseudonyms; however, due to the limited number of women in the established and veteran leader categories, respondents felt that a reader being able to attribute numerous quotes to the same speaker substantially increased the likelihood that their confidentiality would be compromised. In order to maintain the confidentiality of respondents who risk substantial damage to their career upon exposure, the decision was made to only identify subjects by their experience category -- up and coming leader, established leader, and veteran leader. The researcher acknowledges that the inability of the reader to link together quotes coming from the same respondents, while necessary for confidentiality to remain intact, serves as a limitation by not allowing the reader to observe a more complete experience of individual respondents. However, this protection of participants’ confidentiality also allowed for greater candor from participants and thus richer data. The limited quotes that are attributed to attorneys of color were specifically approved by the subject for publication after they were asked to confirm that their confidentiality would not be compromised. The group of respondents interviewed is well representative of the women vying for lead in current MDL practice and the researcher made sure to include numerous quotes from each respondent, careful to not overly weight the experiences of the more outspoken respondents.
Accordingly, confidentiality concerns led to the decision not to identify respondents by the size of the firm they worked for, years of experience, or number of leadership appointments. Instead, in order to still give some context as to what type of practitioner is quoted, respondents were broken down into three categories: Veteran Leaders, Established Leaders, and Up and Coming Leaders. Veteran leaders are those women who have received numerous appointments to MDL leadership and have done so for a much longer time when compared to their peers. Established Leaders are those women practitioners that have established themselves in the group of practitioners actively vying for leadership positions and have received usually more than two appointments. Up and Coming Leaders are those that are either still working toward their first appointment (regardless of time in the field – some of them have been practicing for 20 years) or have received one or two appointments and are still working to establish themselves as a routine contender for leadership. Of the total 27 in-depth interviews conducted, five respondents were Veteran Leaders, twelve were Established Leaders, and nine were classified as Up and Coming Leaders. In addition, one respondent was a federal judge active in making MDL leadership appointments who agreed to be interviewed on the record, Judge Cynthia Rufe of the 3rd District in Pennsylvania. All of the interview subjects were women, and all of the attorneys interviewed (with the exception of Judge Rufe) work for plaintiff firms.

All of the interviews were recorded by the researcher with interview subjects’ express agreement to be recorded. The audio recordings of the interview were partially transcribed by the researcher and partially transcribed by a computer transcription program that does not allow any human interaction with the file. Upon receipt of the transcribed files using the computer program of transcription, the
researcher listed to the audio recording of the interview and perfected the transcript in places that the computer program had failed to transcribe or transcribed incorrectly to ensure that the transcripts were correct. All audio recordings and subsequent transcriptions thereof were kept password-protected on the researcher’s hard drive with backup copies on an external hard drive. No one else was allowed access to these files in accordance with the study’s IRB protocol in order to protect the confidentiality of the interview subjects.

All transcriptions were coded manually by the researcher using a grounded theory approach (Corbin & Strauss, 2008; Charmaz, 2010), allowing for codes based upon patterns of data to be created from the data itself. Beginning with codes based on themes from the existing research and the researcher’s preliminary interaction with those practicing in the field, new codes were added as different perspectives and factors contributing to women’s disadvantage in their firms and in the field emerged in the interviews. For example, the researcher did not originally anticipate the specific (and common) backlash to their recent gender progress in leadership that many of the interview subjects expressed, and the researcher created a new series of codes to include the perspectives expressed as well as altered the interview schedule to further explore this topic in subsequent interviews. The interviewer then manually pulled data from each interview to organize the data results into categorical themes for an inequality regime analysis. As noted above, the researcher utilized member checking -- by sending the results and analysis to all of the interviewees -- to check the validation and credibility of the results and analysis as well as to ensure that none of the interviewees’ confidentiality had been inadvertently
breached in this paper. This practice also serves to make sure that the subjects feel that their experiences are correctly presented.

**Reflexivity**

Reflexivity on the part of the researcher at every step of a study’s design, implementation, and analysis is essential to control for any potential influence the researcher may have on the research process (Corbin & Strauss 2008). The social identities of the researcher and the funding and origin of this research project all had an impact on how the study was conducted. The researcher’s identity as a female lawyer provided her with credibility for recruitment of potential subjects. For example, there were numerous times in which she was introduced to women MDL practitioners (therefore potential subjects for interviews) by a practitioner or judge where it was noted that “she is a researcher, but also a lawyer.” Her identity as a lawyer was also an asset during the interviews, as subjects would commonly mention “it’s great that you are a lawyer - you understand what I mean.” Being part of an “in-group” in this manner made the researcher feel as if she was trusted by her interview subjects with regard to opening up about uncomfortable and personal topics as well as understanding their unique confidentiality concerns. On the other side of the coin, the researcher had to make sure to consistently check in with herself to make sure that she was not inscribing her own experiences as a female lawyer onto the perspectives of the interview subjects during her coding and analysis of the interview data.

This study was initiated by Temple University’s Beasley School of Law, the Dean of which at the time was a prominent female attorney of color who had an
extremely successful career in part in MDL practice. The researcher was hired as a research fellow to complete this study by Temple Law’s Women in Legal Leadership Project and was led by a very prominent retired female judge who had presided over numerous MDL and class actions during her tenure. The study was majority-funded by the Women en Mass organization as well as numerous individual and firm donors through Temple Law School. The social capital of these actors and organizations lent credibility to the study and the researcher, as well as provided her access as an attendee and speaker at numerous MDL professional conferences, all positively influencing her ability to gather the information necessary to design this study as well as be very successful in recruiting interview subjects. Lastly, the generous press attention\textsuperscript{17} the study and researcher received during and after Temple’s publication of the study’s quantitative parts establishing the gender gap in leadership appointments for the first time, and subsequent speaking engagements at conferences thereon provided the researcher with credibility and access to many willing interview subjects. Due to the funding sources of this project, the researcher made sure to remain cognizant of the potential for overlooking data that did not confirm gender bias, ensuring that this report is an accurate reflection of the data collected.

\textsuperscript{17} See the following website for a complete list of press the study received: https://www2.law.temple.edu/csj/publication/mdl-study/.
Chapter 4

QUANTITATIVE RESULTS

Rates of Appointment

In Phase One, multidistrict litigation dockets filed with the JPML containing leadership appointments from 2012-2017 were coded and analyzed to determine the rates of female appointment throughout the years studied. Due to the initial study parameters established by the Women’s Legal Leadership Project, Phase One of the quantitative data included cases filed with the JPML between July 2011 and 2015 (encompassing the “most recent 500 MDL cases” at that time). Due to the widespread interest for an “update” on the potential gender progress experienced in 2016 and 2017, Phase Two of the quantitative analysis was conducted quantifying the gender gap in cases initiated in 2016 and 2017.

Analysis of the rate of total female appointment (including both Tier One and Tier Two) throughout the Phase One time period 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 (less than the total leadership rate) whereas the average male appointment rate for Tier One leadership positions was 85 percent. Further, 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 positions, usually lead counsel. Only three of the cases examined had women-only lead counsel -- the notable Volkswagen “clean diesel” case that included a substantial steering committee beneath the single female lead, and two other small cases in which the single women leads were the entirety of the leadership roster in their respective cases. Conversely, the average female appointment rate for Tier Two leadership positions was 19 percent (a higher rate than total leadership), and
the average male appointment rate for Tier Two positions was 81 percent. Although still a sizable minority, women were slightly more likely to be included in Tier Two leadership than in Tier One leadership.

Figure 2  Tier One Leadership Rates 2012-2015

Figure 3  Tier Two Leadership Rates 2012-2015
In Phase Two, 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. In the 37 cases, leadership was ordered by a female judge 12 times.

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.

Figure 4 Total Leadership Rates 2016-2017

18 17 cases were initiated in the year 2017, and 20 cases were initiated in 2016.
When broken down into tiered leadership, results again showed that women were less often appointed to “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.

Figure 5  Tier One Leadership Rates 2016-2017
Cases were also coded and analyzed to determine the average rate at which women were appointed to the top leadership positions. 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 were appointed lead counsel at an average rate of 78% in 2016 and 79% in 2017.
Figure 7  Lead Counsel Appointments 2015-2017

Figure 8 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. The 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.
Overall, there is a quantifiable and substantial gender gap in MDL leadership appointments. In every year studied, women were appointed at far lower rates than men in all categories of leadership positions. When appointed, women were consistently more likely to be appointed to the less-prestigious, less powerful, and less-lucrative Tier Two leadership positions when compared to Tier One positions. The results from Phase Two indicated that the gender gap in multidistrict leadership appointments remains substantial. Phase One 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 Phase Two results from years 2016-2017 did not indicate another substantial increase like the notable
gains in 2015, the results did indicate that the increase in 2015 was indicative of a substantial shift in leadership gender diversity that has the potential to keep increasing. The linear trends of the average rates of female appointment over all the years analyzed indicate (albeit slow) consistent and steady progress for female leadership.

While there is a general acknowledgement of increased awareness of this issue among the appointing judges, as evidenced in their orders and actions, 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. Quantifying the gap is the first step in exploring why this gender gap persists. Further qualitative analysis through in-depth interviews was implemented to explore the barriers that maintain this gap at both the firm level and in MDL practice at the institutional level.
Chapter 5

QUALITATIVE RESULTS: IN FIRMS

Introduction

The first assumption is not that you’re someone with a law degree. That’s just a bias that you have to overcome as a female attorney. – Established Leader

I never experienced sex discrimination until I went to law school 20 years ago. I had a male colleague in my class who actually said out loud how mad he was that we were there, meaning the women, that we were taking his spot in the top 10. – Established Leader

Before attorneys can vie for MDL leadership in the courts, they have to be the one within their firm that is up for lead, or leading the case to trial. The women interviewed indicated a variety of cultural factors, structural barriers, and personal interactions that influence their opportunities and experiences at their firms. Certainly not limited to the legal profession or plaintiffs’ firms, the women interviewed for this study shared numerous stories about categorical distinctions based upon gender stereotypes in the various facets of their career. Every woman interviewed for this study shared stories about how women attorneys get “boxed into” certain roles at their firms, from assumptions that women are “good at ordering food and finding restaurants,” or planning office events, to the unconscious bias they experience when
they are routinely mistaken for a paralegal during meetings at their firm or as a court reporter when they go to court. In their firms, women are disproportionately asked to make copies and get drinks. The women widely recalled instances in which male attorneys working under them were assumed to be their boss and the wait staff at business dinners routinely give the check to the eldest man at the table.

In accordance with the established research about the “tightrope” women lawyers experience attempting to balance performing socially-acceptable femininity with the masculine culture found in some firms (ABA et al. 2018), some of the women explained:

It was just a white man’s world in that firm specifically, internally. It was a firm that is loud, and everyone yelled. And I think it is an environment that many women do not feel comfortable in -- yelling to get your point across and that kind of approach. It made it an environment that not many women would be able to succeed in… it was almost impossible to balance being a woman but also succeeding.

– Established Leader

This Established Leader describes her work environment as a white and masculine culture where the behaviors considered necessary to be heard or getting your point across -- certainly important for “claim-making” (Tomaskovic-Devey 2014) -- are outside the socially acceptable realm of behavior for women and therefore creates a strain for women wishing to engage and succeed. Another Established Leader describes the double bind these women attorneys experience in such a masculine culture wrought with gendered expectations of behavior:
I definitely don’t think we can approach things the way that a male trial attorney can. I think if we’re aggressive and pounding the table like they do, then we're considered bitches. I think the same standard for women applies in front of a jury – you have to be aware of that. I think they expect women to be softer, gentler. I don’t think we can be the same bull in a china shop that the guys can be. But at the same time I’m not sure that that's ever been my approach either. That doesn’t suit me. So I think we can be tough. I think we can be assertive. We just have to do it in a way where the perception isn't that we’re this aggressive bitch. I think that that's largely true whether it’s trial work or anywhere else. I think it's pervasive and it's really hard to navigate that. –Established Leader

This Established Leader explains the dominant expectations of women both in their firms as well as in front of a jury in court, but that she also carved out her own way of being a trial attorney within the rigid gendered expectations. It may be that the women who became established leaders had particular success in navigating these expectations.

This double standard policing gendered behavior is not just reinforced by men in the office – it can also be perpetuated by women. One Established Leader reflected that this was the case for her at one of her prior firms with some women supervisors that she had:

The female supervisors evaluated me way more harshly than my male supervisors did. Years when the men gave me glowing evaluations, the women would write on my evaluations that I “need to work on [my] interactions with men” and suggest I read a certain book about it. They wrote that I should be “more guarded with how I present myself” and my clothing. I asked them what they meant by all of this and she said that I shouldn’t be wearing pant suits! She also said she thought it was inappropriate that I went to happy hour with some of the men in the office. They wanted me to act more traditionally female – to be quiet and stay in my place – it was sex discrimination. – Established Leader
This Established Leader’s experience with the women in her office illustrates how women, not just men, make categorical distinctions that limit women -- in this case, these women experienced discomfort when this Established Leader acted outside the lines of what is considered “traditional feminine.” Acting appropriately feminine, in her supervisor’s opinion would also preclude her from informally socially and networking with her male colleagues -- an activity that is consistently shown to be an important factor for success in law firms. Regarding informal social networking with coworkers, a Veteran Leader further explained:

I do feel there’s a bit of an old boys’ network in my firm. The guys at the top watch football games and golf together - all of those things. And there’s a fine line -- of course that’s a fine thing to do with your friends, but that's also where a lot of business gets done and I don't know how to solve that problem because people should be able to socialize. I socialize with women that I work with and we do things that we don't invite men to because we want to go do a girl thing. So I don't know how you solve that problem. I think it's just an issue that's out there. –Veteran Leader

This veteran leader acknowledges the importance of informal social gathering with colleagues as they are often where “business gets done” and how women’s typical and historical exclusion from such events operates as a largely invisible barrier to women’s advancement while at the same time acknowledging that women also enjoy participating in “girl” social events that don’t include men. This seemingly benign and understandable gender segregation of socialization is an example of a common social practice that serves as a hidden barrier for those outside the dominant majority.
Almost unanimously, respondents reported experiencing what the ABA calls “Prove-It—Again Bias” where, because of their gender they have to prove themselves more than their male counterparts in order to be taken seriously (ABA et al., 2018).

As two respondents note:

I will say that I've probably also had to prove myself 100 percent more than a dude. I'm really, really successful at what I do and a man in my position, that has done what I’ve done in their career, would probably have even more power and money than I do at the firm. As I'm saying this, I'm realizing how much I undervalue myself. – Established Leader

When I first started here, I was the only woman at the firm. At first I was less likely to be invited to certain meetings [that young male associates were always invited to] until I proved myself. I just kind of sat in my office and did the work. Then once I kind of fought my way through that, I'd say now I am pretty much treated equally. – Up and Coming Leader

Both leaders identify the extra hurdles women in their positions have to overcome in order to prove themselves. Both are examples of ways in which women are overlooked and undervalued in masculine law firm culture (Sterling & Reichman 2016). Every woman interviewed stated in some form or another that they felt that the masculine culture at their firm and being on the outside of the “boys’ club” was detrimental to their advancement.
Mentorship and Sponsorship

I remember walking into the elevator one day and [my boss – the owner of the firm] was there with a new male associate. My boss was introducing him to people, explaining he was new to the firm, and then stated that he was “taking him to the courthouse to introduce him to the judges and show him how a hearing is done.” He had never done such a thing with any of the women – he wouldn’t even go to lunch with one of us. —Established Leader

In accordance with the research on the importance of adequate mentorship and sponsorship in developing a successful legal career, there was a unanimous sentiment that mentorship is absolutely critical to success in a developing career in MDL. Mentorship and effective sponsorship are not only necessary for honing litigation skills but also for navigating the politics of MDL practice both inside (and especially) outside the firm. For example, an Up and Coming Leader describes the “world” in which she functions,

It's just the way that this world works...people bring other people up. And particularly the way that this business works. Mentorship matters and I don't think that there's going to be ever a case of somebody who was successful but didn't have someone who vouched for them at some point. I mean, even making partner requires somebody to speak up for you. In my firm, somebody has to make a case for you. **I don't think it's possible to succeed without mentors, it's not how this world works.** The mentors that I've had have been pivotal to me in helping me to develop as a lawyer including to develop as a political creature within my firm, which unfortunately is necessary. It helps to gain perspective and strategy with regard to my own career path — where I am going and how I'm getting there. I can also say a lack of mentorship at certain times and in certain situations has definitely held me back. Numerous times not having a buddy or a mentor in certain situations have held me back make it difficult to succeed at a faster rate than I did. —Up and Coming Leader
This up and coming leader highlights two critical elements for advancement: having a mentor with clout to vouch for you and informal knowledge about how to navigate the politics of an organization. Both are well established in the literature as crucial for advancement in firms and both are conditioned upon informal social interactions at work which are steeped in cultural expectations that disadvantage women. Similarly, more established attorneys also recognized the role of mentors who would “talk through” the challenges that arose—a finding that is also well-established in the literature on the informal knowledge crucial to workplace success.

Sometimes it’s not pretty in mass torts and you have to know how to navigate that. It was good to have people who would be honest with me and talk through how to handle various issues that arose in various contexts. So yeah, I think it was critically important, particularly in this practice area because you’re not just dealing with how to take a deposition or did I do well on an oral argument—you’re also dealing with politics, business development, and all sorts of other things that come into play when you have a group of people from different firms trying to work together. —Established Leader

When asked what characteristics make a good mentor, the interview subjects generally agreed that a good mentor is someone who “shows you the ropes” and gives you assignments and career advice. They also explained that sponsorship from a superior with clout is what really plays a pivotal role in positive career progression. Beneficial sponsorship behaviors include giving up-and-coming lawyers “cover” to take risks and “put themselves out there,” being proactive about promoting their sponsoree within the firm in matters of getting onto a trial team, getting court
experience, promotion, and pay. For example, one Experienced Leader describes her mentor that she found to be extremely helpful in her advancement:

He not only gave me the experience to sit in his place [in a court-appointment leadership position], but he gave me authority to make decisions in his place so people eventually started coming to me and they almost became my positions — it was more than shadowing my boss and taking notes like a lot of other women do — it makes you more than the secretary. --Experienced Leader

This established leader explained that being given this exposure, responsibility, and power to practice in her superior’s place led to her being invited to speak at a few conferences as an authority on certain cases, and therefore raised her profile in the field. Numerous women shared stories of being “hidden” behind their male superior as an assistant, rarely getting the opportunity like the one detailed above, in stark contrast to the junior male attorneys. Women that detailed positive mentor experience often included a mentor that treated them as “an equal” and a chance to practice in a lead role. For example:

I honestly can say I think I had the best mentorship experience that any human being could ever possibly have. Professionally, he gave me opportunities that he knew I was ready for that I didn't think I was ready for. He really pushed me sometimes to go outside of my comfort zone and do stuff that I would normally say, oh no, no, no, I'm not ready to do that. He would say “yeah you are and you can and you will and you'll be great at it.” He really took a hands on approach to training me and teaching me and he's where I learned to not just try cases, but how to manage litigation from beginning to end. He treated me completely as a peer despite the fact that I was a 27 year old, fairly inexperienced lawyer. He just professionally gave me every opportunity that I wanted and gave me opportunities that I didn't want.
necessarily, but were really good for my professional development. – Veteran Leader

The most important thing my sponsor has done is giving me the opportunity to actually do stuff, which is huge. They didn't just put me in an office, told me to do research memos and doc review and instead said, "You go out, you argue this, you do this.” That's a really big deal. – Up and Coming Leader

Perhaps the most valuable thing respondents said a mentor/sponsor could do for them is to give them opportunities for trial experience – something very hard to come by as newer MDL lawyers, especially for women. In fact, almost everyone that indicated they were satisfied and that their mentorship relationship enabled them to obtain valuable trial experience and an active role in litigation early in their career, while giving them cover to make mistakes and learn in the process.

As in other professions, adequate mentorship and sponsorship is critical for advancement in legal and specifically MDL careers; however, women experience certain hurdles to obtaining the mentorship they need. One Established Leader stated that, at the beginning of her career, she and the other women associates at her large firm didn't receive any mentorship and that she had to “figure everything out on her own.” She also relayed the following story:

I remember walking into the elevator one day and [my boss – the owner of the firm] was there with a new male associate. My boss was introducing him to people, explaining he was new to the firm, and then stated that he was “taking him to the courthouse to introduce him to the judges and show him how a hearing is done.” He had never done such a thing with any of the women – he wouldn't even go to lunch with one of us. – Established Leader

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In male dominated professions, it is customary that men are likely to be the ones with the power and influence to more effectively and positively impact someone’s career through sponsorship. Due to the structure of MDL practice, it becomes necessary for women to not only develop relationships within their own firm but with attorneys from other firms in the MDL world as well. As multiple female Established Leaders stated when interviewed, since men are the majority of leadership in firms as well as in litigation, it is extremely helpful for your career to have trusted relationships with these male leaders, especially to “call on and say, ‘Hey can you put in a good word for [me]?’” when the vying for leadership politics are happening.

Women detailed that they find it hard at times to establish a close sponsorship relationship with senior men in their offices for numerous reasons. Barriers to such male-female mentor and working relationships include fear of assumed romantic impropriety, a lack of casual social opportunities to get to know each other, and affinity bias – or the natural default to socializing with, working with, and giving assignments to people like themselves (Sandgrund, 2016). As one Up and Coming Leader notes:

There are a lot of men in power and a lot of them are really great mentors but I think that there’s a challenge when it comes to cross-gender mentoring. I think there is sometimes a hesitation to invite their female associate (or for me, my male associate) out for a drink after the depo because people don't want to give any suggestion of something…but if a senior guy takes his male associate to drink after the depo, that's just celebrating. I think that globally factors in a lot more than we think.
Most of the Established and Veteran Leaders interviewed reflect on their own lack of adequate mentorship and express a focus on mentoring others now that they are in a position to do so. As one Veteran Leader explained about the duty of more experienced leaders to mentor younger women:

> It's really important that those lawyers who have leadership positions have a group of lawyers around them from their own, that they're teaching and mentoring how to be MDL lawyers because they're the ones that are going to take those spots next. I've been doing this now for over 20 years and I have watched, I'm sure people older than me have watched me take on more and more responsibility and then get into a position of more power and I'm watching younger lawyers come up and learn the ropes and take over those positions. So from where I sit, it's really important for me to make sure I have lots of women around me because that's the only way they're going to learn the skills to be invited into leadership.

Many of the Established and Veteran Leaders expressed how positively impactful it would have been to have had a powerful woman mentor early in their career to help them navigate the gender issues -- especially navigating becoming a parent during the earlier stages of their career. A couple of the Up and Coming Leaders interviewed indicated that they’ve benefited greatly from their current women mentors both within their firm and outside of their firm through networking with other women attorneys through professional organizations like Women en Mass.

One Established Leader described the complicated assumptions surrounding the oft-expressed expectation that Veteran Women Leaders would more willingly mentor younger women and the disappointment when they do not.
There's this group of women that came up at a time where there really weren't that many women. I think about how it's been difficult for me in some instances and how much more difficult it almost certainly was for them because they were really by themselves. I'm not by myself. I think not for all women, but for some women there's kind of a sense that the newer generation people that are in their forties now don't understand how good we have it -- or I think there's a group of people that, frankly, they made it to the top and they worry a little bit that there's a limited amount of pie to go around and that if there's another successful woman, it has to be at their expense. That's not universally true, but I think that it's truer than people want to acknowledge.

This Established Leader recognizes that leadership spots, especially for women, can be considered a finite resource. They are only so many leadership spots available for appointment in each case, and women tend to feel that there are even fewer spots available for women — perhaps making it less likely that more established women will mentor up and coming leaders.

Mentorship is absolutely critical to success in a developing career in MDL. Mentorship and effective sponsorship are not only necessary for honing litigation skills but also for navigating the politics of MDL practice both inside (and especially) outside the firm. Interview subjects generally agreed that a good mentor/sponsor is proactive about: promoting their sponsee within the firm; getting them onto a trial team; getting court experience; promotion; and pay. Most of the time, given the current gender makeup of firm leadership, the superiors with the professional capital to propel an up and coming attorney are men. However, the women detailed that they find it hard at times to establish a close sponsorship relationship with senior men in their offices for numerous reasons. Barriers to such male-female mentor and working relationships include fear of assumed romantic impropriety, a lack of casual social opportunities to get to know each other, and affinity bias — or the natural default to
socializing with, working with, and giving assignments to people like themselves. The outside institutional influence of their new-found ability to networking with and receive mentorship from other women attorneys through professional organizations like Women en Mass has proved to be valuable in overcoming some of these barriers.

**Case Takeover**

“You have to always be on guard for those sorts of situations where, you know, they're going to try to come in and edge you out because financially they want to try to take a piece of everybody's case that they claim to have settled…it's an issue” – *Established Leader*

“The excuse was, ‘Well the clients want to see a gray-haired guy on the file…’” – *Established Leader*

As noted earlier, MDL trial experience is tantamount to success in vying for leadership positions in MDL. Therefore, there is enormous competition even at the firm level to become the firm’s lead trial lawyer and representative in upcoming cases that are going to go trial. Almost every female leader interviewed mentioned experiencing what a few called “case takeover” by a male colleague at some point in their career. Respondents explained that when cases they brought into the firm grew over time (amassing numerous plaintiffs) and eventually looked as if it would be consolidated into a large MDL and therefore potentially high profile and lucrative, a more senior male colleague would “take over” the case as their own. Many respondents mentioned that in more traditional firms the “women don’t try cases” and that women are kept in-house at the firm doing the trial prep and research and are
therefore systematically barred from opportunities to participate in the public career building exposure of going to trial. This happens quite often within their respective law firms and many of the female respondents were quick to note that it also happens to some of the up-and-coming men as well – further reinforcing the network of repeat players at the exclusion of people in their own firm. This is especially disheartening when case takeover occurs after someone has worked on a case since its infancy and it is taken from them just before trial or “face-time.” An Established Leader described a particularly negative experience at such a law firm in the earlier part of her career:

The reason I didn’t try a case in that firm is because I have a vagina and breasts. When I worked there I was a good enough lawyer to manage our largest docket of 10,000 plus cases, manage all the associates, 100 contract lawyers, and 60 support staff. I prepared all the motions, did all the briefs. But anytime in my career there that I prepared a case for trial, 30 days to 45 days before trial it was taken and given to a man to try. They would allow me to go pick juries - I picked 10 juries in a year, and wrote all of his cross examination outlines. I could do the exhibit list, I could put the whole thing together. But was never allowed to try a case. And I remember male lawyers younger than I, less experienced or equally experienced, and didn't even know the case - where I knew the case like the back of my hand. Those young male lawyers were literally given cases to try and being told, “you're good, come down to the courthouse with me, I need to train you and mentor you” and I never got any of that despite my consistently speaking up and letting him and the firm know that I wanted to try cases in every one of my evaluations. And then one day when I finally said to him, I want to argue the motion to strike and I argued the motion to strike. He literally looked at me and was like, “Oh my God, you CAN do this.” Still to this day, he will taunt me with “Remember how you were always afraid to go to trial? You never went to trial because you were afraid to do it.”
Another Established Leader detailed a time in her career at a firm where even with substantial trial experience, she was consistently overlooked to try MDL cases:

When it came time for selection of who's going to try the case, although I'd done more than a dozen trials, he would always look to the guys who had equivalent experience as me and say “you guys have to try the case.” And then I had to fight to be able to try the case with them and do the mock and everything else. And so yeah, when it comes time for recognition or something that's a little bit more public, I find that they go to men. That's always been my experience.

These examples of case-taking clearly exemplify two inequality-producing mechanisms found in inequality regimes -- exploitation and opportunity-hoarding. The culturally-accepted categorical distinction that “women don’t try cases” allowed the men to exploit the massive amount of work that the women undertook to build these cases to trial (all while under the impression that they were their cases and would someday take them to trial). Their work was exploited to the benefit of the male attorneys who could then reap the career and monetary benefits from being the public “face” of the trial. Case takeover is also a form of opportunity-hoarding, another mechanism of inequality regimes where the hoarding actors monopolize valuable resources and positions for themselves and those within their social circle or “categorically similar actors” (Tomaskovic-Devey 2014 p. 59). Here, as Tomaskovic-Devey suggests, this exploitation and opportunity hoarding is institutionalized in certain positions in the organizational hierarchy -- “positions then become the basis for opportunity hoarding” (2014, p. 59).

One female Up and Coming Leader detailed a time when she was given an opportunity to be appointed to a specific duty in leadership on a case. After someone
at her firm took the opportunity from her, the firm lost the appointment opportunity because the court intended the appointment to be personal to her. Similarly, another Up and Coming Leader explained a time in which she was fortunate to have a judge assign her a specific task in MDL leadership that would provide her with some “face-time” in court, which is oft-hailed as a great way to get your first leadership appointment and start building your MDL trial team experience for further applications for leadership. When she told her male boss about the opportunity, he told her that he didn’t want her to do it, discouraging her because she would be “too busy.” She explained that she felt he didn’t want her to start building her own trial career, rather stay in his shadow and work directly under him. These women were denied valuable opportunities and felt they were consistently being “put in their place” in the “out-group” because of their gender.

Some women revealed that case takeover even occurred with what were otherwise great mentors:

When something new and shiny came in that was supposed to be my deal, he would say “I’m trying that.” It was bad at one point. I had huge respect for him and I really liked him and I think he gets to the right place in the end. But initially when I started, I asked if I could start filing a bunch of cases [building a case] and he kind of said, “Oh, that’s cute, you can do it.” And then I got us a bellwether [trial] and then it was like he just came in and all of a sudden in terms of projections and numbers, all the cases were in his column. I think it happens across the board, but I think it probably is more likely to happen with females. **The excuse was, well, the clients want to see a “gray haired guy on the file.”** The clients have no interaction with them whatsoever -- they don't even know who he is. —Established Leader
This Established Leader’s interaction with her otherwise supportive mentor -- someone she had a close and trusted relationship with -- shows how this exploitation is routinely embedded in the organizational structure. Her mentor seems comfortable with taking over the cases (and therefore financial credit for them as well) without consulting with or explaining to his female mentee. When asked about his move, he invoked gender and age stereotypes, asserting that clients prefer a culturally-derived notion of the ideal lawyer -- a man of a certain age without mention of expertise -- to lead the case when in reality, the clients in this class action would not ever meet their attorney. In addition to case takeover to go to trial, many of the women interviewed detailed more subtle ways that credit for the work they did was co-opted by a colleague in their firm. As another Established Leader explains:

I’ve experienced not getting credit for the work I’ve done and having to try to figure out how to let the other partners in the law firm know that. To say “No, I was actually the one who negotiated that settlement, not him” and figure out the best way to address it without burning bridges and being difficult. I decided to send an email where I would just set forth what had happened with respect to the negotiations and thank the other person for all their assistance and guidance along the way. I did keep in touch with him during the case and had bounced a few things off of this person but I think he sold it to the other partners as his big settlement. And so I wrote that email just being like “thank you and just want to let you all know the background on this and that.” And I got responses that my email was “so WEM” (Women en Mass). So he was obviously mad that I had gone ahead and you know, self-promoted a little bit and really kept the back straight. I love that WEM is now an adjective.

This Established Leader’s experience is a prime example of how the “claims-making” process takes place within social relationships with various power and status
dynamics (Tomaskovic-Devey 2014). When her male partner tried to exploit her work and take credit for it himself, this Established Leader was faced with the common double-bind of asserting herself while performing appropriate femininity, not wanting to be seen as “difficult” and perhaps negatively affect her career. She chose her words very carefully - making sure to claim her accomplishment while still thanking her male partner for his contributions. And as expected in an inequality regime, her claim making was met with a negative response from the male partner (Tomaskovic-Devey, 2014). His negative response - referring to WEM, the increasingly-powerful women plaintiff’s attorney professional organization - exposes his frustration with outside institutional movement that he may feel threatens his privileged position.

Many respondents were quick to note that case takeover also happens at the case/court level with peers from other firms involved in leadership. For example:

In a recent situation, [case takeover] was actually external. We’ve got thousands of cases on a particular docket and there were two [male attorneys from other firms that represented some of the plaintiffs as well] who decided they wanted to go to defense counsel and see if they could work out a global settlement. And I’ve had to deal with them speaking for me without my consent and trying to negotiate my cases [as part of a global settlement]. I basically had to say to the defense lawyer, when he asked how I was doing, that I was “licking my wounds because I didn't get invited to the party.” He’s like “Oh, no, no. I didn’t exclude you that was all your side [that set the meeting].” So you get the position where the older white male is trying to box you out of the situation. But I have my own relationship with defense counsel and so, you know, I’m not going to allow that to happen. You just have to always be on guard for those sorts of situations where, you know, they're gonna try to come in and edge you out because financially they want to try to take a piece of everybody’s case that they claim to have settled. It’s an issue. –Established Leader
In MDL plaintiff practice, the women practitioners experience “case takeover” both in their home firm organizations as well as at the institutional level while practicing, leading them to feel that they “always need to be on the lookout” for this possibly happening. In firms, exploitation and trial opportunity-hoarding are normalized in the firm’s status hierarchies, influenced by traditionally cultural stereotypes of the ideal lawyer being an elder male and the idea that “women don’t try cases.” These organizational mechanisms disadvantage women lawyers, and women risk negatively affecting their relationships and thus careers in the firm if they attempt to claim the accomplishments or speak up about their cases being taken over. At the structural/practice level, the structure of plaintiff’s work in such large cases (made up thousands of cases that involve attorney’s from other firms) allows for competition and potential takeover of global settlements to occur, unlike in other areas of legal practice, where an attorney is paid hourly by their client.

**Pay and Promotion**

“I think it's just kind of the way of the world that men are judged on their potential and women on their performance” –Established Leader

The experiences with regard to pay and promotion for women interviewed – at all stages of their career – greatly varied depending on where they worked and at each firm, under whom they worked. Regarding promotion, respondents identified two main causes of the gender gap in promotion: lack of a formalized “partner track” universally applied to all employees and a lack of transparency in the process. As one Established Leader noted, “a lot of Plaintiff's
firms don't have a partnership track.” Almost all of the women respondents voiced noticing that women are generally not promoted as quickly for the same work as men and are held to a different standard.

There have been women that I’ve seen that should have been promoted far quicker than they were and I also think they weren't compensated as much as men were. It’s problematic and there's a lack of transparency.

—Established Leader

Every interviewed subject expressed frustration at the lack of clear standards or “tracks” to promotion and raises. They felt that the absence of clear standards made their careers subject to the whims of a handful of powerful men and, in some instances, one person who acted as their superior. Additionally, the women found themselves not privy to the informal information regarding what it “really” takes to be promoted. Many of the subjects described situations in which were led to believe they were on track to be promoted in a certain year but were “shocked” to find that men with lesser experience and tenures at their firm were promoted instead.

A well-established Veteran Leader notes that in her experience, she didn’t feel any gender discrimination in her firm until, after amassing much success and trial experience, she went up for promotion to partner at her firm:

I was typically the only woman in the room – I was so used to being in the minority that it didn’t even register to me at the start of my career. There weren’t women fighting to be noticed so I didn’t even notice it in the beginning of my career. I didn’t feel hindered in my career until it was time for me [to get a significant promotion leading to more control in the firm]. I hit an absolute brick wall [during negotiations] and I can remember being told that it really wasn't fair [for me to be promoted with increased pay] because I had a
husband who also had an income and my partners’ wives were at home.

This example clearly illustrates how culturally infused and enduring expectations of women as homemakers - and not as breadwinners - influences how her male partners and the firm as an organization view the value of her work. She is not entitled to a share of the firm’s pooled resources proportionate to her work because of the structure of her private life. This cultural influence affected what her partners considered to be “fair” and accordingly affected the way in which decisions about her career are made.

This same Veteran Leader goes on to explain:

I just remember thinking it's kind of on me because it was kind of stupid that I hadn't really seen that argument – it had never been said out loud to me. So that made the decision very easy to make a change in my career location. Obviously my partners didn't come upon that concept during the argument with me, they had clearly thought that all along, but it wasn't something that I felt day to day. I wasn't something that I felt like I wasn't ever a part of the team or that I wasn't fairly compensated but when I pushed at it, going up for promotion just like my male colleagues would do, I realized that there was a big wall there.

This Veteran Leader’s experience is a clear example of how inequalities are not always overt -- they can be hidden and not revealed until a claim is made for an organization's pooled resources (Tomaskovic-Devey, 2014). When she made a claim - in the form of her promotion - the previously hidden and bias became apparent. She recognized that “they clearly thought that all along” and blamed herself for not seeing it sooner. Like this Veteran Leader, numerous subjects interviewed stated that they
made the decision to move firms, looking for a more “fair” and “progressive” organizations to work for.

Another female Established Leader explained how structural differences between plaintiff’s firms and large defense firms as well as women’s cultural socialization to be feminine and not too demanding or assertive contributes to this disparity in promotion:

I also think we’re just not assertive in making it clear that we want it. In the plaintiff’s world, we aren’t working for big corporate entities real bonafide HR. There’s a bonafide track of partnership at a lot of defense firms, there’s a much known and well understood track. In most of the firms we’re working for, very boutique firms, I answer to one person. I only have one boss in my life and that is very different. So if I don't impress him, he is the person. He is really essentially this king who decides whether I go forward or not. And I think we as women just don't go up to that king enough and say "I want this. This is what I want and expect." And I think a lot of times as women, we don’t make these demands and we don’t do a lot of ultimats. It seems to be a lot clearer for men...even if it’s wrong, men come across as confident enough.

This Established Leader realized that promotion in firms usually requires someone to make a claim -- assert what they want and that they expect to be promoted or they will possibly leave the firm -- actions that can be considered outside the lines of appropriate feminine socialization, potentially having negative ramifications for women who decide to do so. This Established leader goes on to note:

One year when I found out I was not on the list for partner, I went to my boss and said that I wanted to be a partner here and he said “I didn’t know that you wanted that.” And I thought, that’s ridiculous. But in
fairness, I think it's really important that people are clear with what they want. And I just think as women, we don't say that enough.

This Established Leadership was not aware that she was not awarded the same assumption of desired upward promotion in the firm like the men in her firm. She was not aware that she needed to speak up for herself - in other words, make a specific claim about her intentions. The presumption for her was that she did not want to advance, a presumption that interviewees noted would never be assumed of a male associate.

When it comes to pay, respondents noted that there is even less transparency. Almost all firms – both plaintiff and defense, large and boutique – deal with issues in pay disparity for women and other underrepresented attorneys. However in these boutique plaintiff firms, an almost total lack of compensation structure and standardization has led to significant pay disparity to the detriment of women plaintiff’s attorneys. There is also no public reporting about standard associate salaries like in Big Law. As one respondent noted, “The defense bar has so much out there about how lawyers are paid. The plaintiff’s bar has nothing out there about how we’re paid.” It was widely confirmed that the usual compensation structure at these firms consists of salary and a widely discretionary bonus, thus leading to wide variations in pay for the lawyers at these firms. Two leaders explain:

It is weird in the sense that there's one person, the managing partner, and he has complete discretion over salary and no one else knows anyone else's salary. –Up and Coming Leader
At one point in time when one of my male partners was first becoming partner – he was four years below me - the manager of the department (who likely forgot what I was being paid) came into my office and said, “I think I’m going to offer so and so X amount, for partnership.” I said, “Are you kidding? I’ve been a partner for two years and that's close to my salary.” I think he just didn’t even think about it – just like, “Oh, he’s a dude and I’m going to offer him whatever.” And I think the disparity with bonuses is another one, where they try to keep it all quiet, and hush, hush so people don’t compare. But people figure it out.

– Established Leader

My boss assured me, you’re getting the same bonuses as everybody else, don’t worry. Everybody’s getting the same bonus. And then because there was litigation in which the lawyers on my team were deposed, I found out that my bonus was half of what the guys [of equal position to me] got.” – Established Leader

As an associate in my first Plaintiff’s firm, I was actually told not to tell anyone else at the firm what I made. They pitched it as I was getting paid more money which wasn’t true. I really thought that was weird as I had just come from a defense firm and had that mentality that all associates of same year got the same pay. – Established Leader

I had to speak up at one point because a male associate who was hired basically to help me and work under me – I found out that my boss, whom I am very close to, was paying him more than me. I think my boss didn’t even realize it. We had a frank discussion about equal pay for equal work and then we all got raises. – Up and Coming Leader

The interview subjects had numerous stories like those above -- both where their employers tried to hide that they were paying some women less than their male counterparts (and sometimes subordinates) as well as instances in which they believed that the decisions and processes that led to higher pay for men was largely
unconscious. As described, the literature demonstrates the way unconscious bias values men’s work more and can create a gender pay gap to the disadvantage of women when pay decisions are made in an organization without clear structural standards for pay and promotion.

In sum, interview subjects felt that the absence of standardization and clear promotional standards made their careers subject to the whims of a handful of power men, and in some instances, one person who acted as their superior. Additionally, being outside of the powerful “in-groups” at their firms, women find themselves not privy to the informal information regarding what it “really” takes to be promoted. Regarding pay, in these boutique plaintiff firms, an almost total lack of compensation structure and standardization has led to significant pay disparity to the detriment of women plaintiff’s attorneys. Within an inequality regime analysis, it is important to note how other cultural influences interact with this lack of structure that disadvantage women. For example, culturally infused and enduring expectations of women as homemakers - and not as breadwinners - influenced how male partners and the firm as an organization view the value of women’s work, as well women not being awarded the same assumption of desired upward promotion in the firm like the men in their firms. Overcoming this presumption requires women to be assertive and make a claim — that they expect to be promoted or they will possibly leave the firm -- actions that can be considered outside the lines of appropriate feminine socialization, potentially having negative ramifications for women who decide to do so.

**Work-Life Balance and the Parenthood Effect**
It really always felt like you cannot at all not be there because you had a kid. To make it, it has to be a nonissue, like it didn't happen. – *Established Leader*

You not only take on being a new parent, you also take on having to reestablish yourself as a competent, skilled, committed lawyer. – *Established Leader*

We know that women lawyers of all races widely report experiencing “Maternal Wall” bias after having children, including: being passed over for promotions, being demoted or paid less, given lower quality assignments, and experiencing significant stigma for taking leave, working reduced hours, and/or working a flexible schedule (Williams, 2000). Additionally, white women consistently report that their commitment to practicing law as well as their competency was questioned after having children (ABA et al., 2018). All groups of lawyers confirm that there is a “flexibility stigma” surrounding leaves of absence and working reduced or flexible hours (ABA, 2018). Interviews with the women MDL plaintiff’s attorneys in this study confirmed that they also experience much of the bias that women lawyers experience after having children. However, the particular structure of MDL practice directly affects the ways in with these women experience, and potentially overcome, the maternal wall.

Practicing law, and certainly litigation, places a high demand on attorneys, known for requiring an “all or nothing employee” who is “free to work long hours” (Sterling & Reichman, 2016). MDL work is particularly demanding due, in part, to its nationwide practice. Leading large scale nationwide litigation requires an intense amount of travel and frequently being away from home for long periods of time. In
the words of one respondent, “You can’t even call it work-life balance because it is frequently out of balance.” Respondents also noted:

This is an itinerant practice. You don't know where the case is going to be. You need to be able to travel anywhere in the United States. Which, which is a very different kind of practice. – Veteran Leader, parent

I acquire 100-150 thousand frequent flyer miles per year. If I am home for ten days, that is a lot. I travel at least every other week, sometimes every week. – Established Leader, parent

You have to go all over the place with the conferences, speaking engagements, and trial. If you want to be on leadership you’ve got to do all that. You got to be out there networking and taking [depositions] as well. So your travel can be insane. It really disrupts the work life balance. I think most of us put our health absolutely last when it comes to the demands of this job which is very unhealthy. – Established Leader, parent

I’ve missed just months and months at a time. There's been some months where I've been home for three days. Just recently, I traveled every week from November until the end of February. I traveled literally every week. – Established Leader, parent

Respondents all agreed that advancements in technology – smartphones and easy access to email at home -- are both a blessing and a curse. They appreciate that they no longer have to be at the office all the time to prove their commitment to their job, but they are never fully disconnected from work. Two of the Veteran Lawyers interviewed said that they actually found it easier to practice before smart phones and
internet because they went to the office every day but were never expected to work at night or on the weekend unless there was a trial coming up.

Pregnancy and becoming a parent in this type of working environment can be major obstacles for litigators. Experiences with pregnancy, parental leave, and the ongoing demands of parenthood varying firm and supervisor. Analogous to the lack of structure for promotion and pay, the absence of uniform policies or structure for pregnancy and parenthood in plaintiff’s firms creates significant opportunities for bias to thrive – negative for women and conversely positive for men steeped in gendered assumptions about parenthood and caregiving.

Every female respondent noted that pregnancy is a lightning rod treated differently within their firm. How they navigated depended on how their immediate superior handled such matters. Mothers unanimously noted that they felt it was necessary to hide their pregnancy for as long as possible to avoid the negative career consequences associated with parenthood. As one Established Leader who hid her pregnancy from all coworkers until she was five months pregnant stated:

Well, it was pretty clear at my firm that as soon as you get pregnant, people think you're disinterested and you're no longer an effective lawyer. Like something takes over your brain and you're like checked out or something and you lose all of who you are and all the passion that you had for practicing law. Those sort of stereotypes that are out there.

A Veteran Leader detailed how her male mentor and direct supervisor helped her navigate pregnancy bias by hiding her pregnancy as well when she worked in a remote office away from the managing partners of the firm:
I was up for partnership when I was very pregnant. The managing partners did not know I was pregnant because I worked in a different office than them. My male boss, with whom I worked very closely, of course knew and he told me to not tell anyone that I was pregnant. He said he would not tell anyone either. He said “I’d like to pretend it doesn’t matter, but it does. And then some people are going to think, oh, let’s kick her over for two more years. Let’s see if she’s really going to come back to work after this baby, let’s see if she can really handle it.” So I didn't tell anyone. He didn't tell anyone. He told everybody in my office not to tell anyone in the managing office. So I made partner and my daughter was born less than 3 months later. We had a partner meeting right before I gave birth where they were going to introduce all of the new partners - I was 35 weeks pregnant and nobody knew. Everyone was like, “what happened here?” It was great advice because it would have affected my partnership and he was determined that me being pregnant would not affect that. I am so grateful to him for that.

This Veteran Leader’s exceptional experience with a male mentor and supervisor who thoroughly recognized how her pregnancy would bias her career advancement went to great lengths to protect her. He recognized that while unfair, that such gendered assumptions would negatively affect her career.

Respondents explained that once they become noticeably pregnant, their male superiors no longer assigned them important work that included travel under the pretense of “helping them” or “not wanting to put them in the position of having to say “no” because they were pregnant. For example:

I know I missed out on a lot of good work because people assumed I wouldn’t want it because I was pregnant and that sucks. – Established Leader
I think sometimes it was paternal instinct and them trying to be helpful when they would say “I'm going to send a guy so you don't have to travel for this case, you know, you've got to take care of being pregnant.” And some of them were not intentionally harmful like that - they're just the stereotypes that we live within our world. But I would always appreciate the opportunity to decide for myself if I wanted to say no. Some people were more devious about it and took the chance to try to take over some of my higher-profile work but these cases are my babies - I put so much into creating this litigation that I'm not going to let someone else take my motion to dismiss. –Established Leader

In this Established Leader’s experience, pregnancy could be used as a justification or an “in” to take over her valuable cases. While some attempt at “accommodating” women’s pregnancy seems to be well-intentioned, it should be recognized that, as many of the interviewees noted, a lot of their firm partners made assumptions about what would be appropriate work for them to be doing while they were pregnant.

Many respondents voiced the same preference as this Established Leader -- to be asked to decide for themselves if they wanted to say no to certain work or travel, after pregnancy and during the time that there are small children at home. For example:

The maternal wall bias is the most entrenched bias in the workplace. It is sometimes benevolent – “I'm not going to ask her to go on a trip because she has young children.” Which is just as bad because then you still don't have the opportunity. You may want to go on that. Let me decide. I love my work and you can be pretty happy as a mom to get a night away with room service and a bathroom to yourself right? – Veteran Leader

The lack of formal parental leave policies at many plaintiff’s firms contributes to the gender gap. Big Law defense firms answer numerous surveys about parental leave that are publicly disclosed and ranked, incentivizing competition between the
firms to create broader and effective parental leave policies. In contrast, many of these smaller plaintiff firms lack formal policies; leaving women and men to individually negotiate time off, often subject to the individual biases and cultural beliefs about gender and caregiving of their superior.

Due to the nature of their practice with long ongoing cases, most attorneys interviewed declared that taking a full three months off for parental leave isn’t feasible, contributing to the case-by-case treatment for attorney’s leaves. For example:

I’ve worked at two different prominent firms and there was never any formal maternity or paternity leave – it was up to your managing partner and what they wanted to give you which wasn’t usually much. – *Established Leader*

I had to beg for time off when I brought my child home from the hospital with serious health conditions that required extensive care. My boss said I could have three weeks, but I had to work from home. He called every morning at 7:00 AM and gave me an assignment that had to be done by the end of the day - that is not exaggerated. – *Established Leader*

There’s so many women practicing in this field now yet there's still almost no maternity leaves. There's no policies in the plaintiff firms. It's unbelievable. I’ve spoken to a lot of women at different firms and it's almost all unpaid. I met one young lawyer that literally gave birth and the next week she had a trial that she was told she had to be at trial do the fourth, fifth chair type work. She got two hotel rooms, brought a nanny and her infant, and she tried the case. When her second baby was born she did the exact same thing. – *Established Leader*
I was sending emails like four days postpartum – *Up and Coming Leader*

This lack of formal leave, justified by the “nature of litigation,” leaves women to go to extreme lengths to keep their jobs as well as their place in their cases — which they may have been working on for years at a time. Additionally, at the institutional/practice level, for women who are appointed to a leadership position during the time that they are going to give birth, they worry that may lose their leadership position if they take time off, creating an additional complication for their leave negotiation. There is no formal mechanism for taking leave during an MDL. Two respondents explain:

The applications for leadership were due right after I had just found out I was pregnant and I had conversations with a few people about whether or not I needed to disclose that because one of the questions on the application was, “Is there any reason that you won't be able to do your work?” I ultimately decided that's really not anybody else's business and I also was newly pregnant and knew I was within miscarriage territory. So I decided I didn't need to tell anyone and I stand by that choice. But you know, it required a lot of flying while I was pregnant. And then the last month I wasn't allowed to get on planes, so I had to do a lot via phone. I missed a couple of depositions and then during my maternity leave that was the only case I really kept working on. I scaled back my work but I didn't check out because you can't afford to do that. So even though I was on official leave from my firm, I didn't have anybody else take over my PSC duties. So I would still jump on phone calls -there were a few times where I was in the middle of a meeting while changing a diaper and getting peed on and the whole thing. – *Up and Coming Leader*

I don't think anybody really gets a true maternity leave and it sounds like I was lucky to have what I got. So I tried to scale back and by then, thankfully the [leadership] team at that point already knew that I was
someone who did good work and that I was going to come back. And so they were supportive. Thankfully my position was there. I don't think anybody wanted to have taken over [my assigned duties] – nobody wants that job so that helped. – *Up and Coming Leader*

Due to the lack of formalized leave from these long trials, women are at the complete mercy of individual ideas about parental leave from those on the appointment leadership team.

Another Up and Coming Leader explained an additional structural issue that causes taking parental leave to be a detriment to your career and income when returning to work. She realized that although her boss was attempting to be respectful by not assigning her to work while she was on leave, she was at a distinct disadvantage when she came back because any new cases assigned to her would not be mature enough for her to really work on until long after she came back, thus negatively affecting her career. She decided to broach this subject with her boss, explaining that in order to get mature work upon her return, she would need to be assigned cases during her leave. Her boss was receptive, not having ever realized this would be an issue.

Although the traditional lack of formal leave policies was widely recognized by respondents, they were also generally in agreement that there has been great improvement in the past ten years. One Established Leader who owns her own small firm stated that she had never written a formal parental leave policy for her firm and that it was actually a male associate desiring to go out on leave in a formal manner (as opposed to the casual piece-meal way they had done in the past) that led to a formal parental leave policy. Although some larger firms are implementing formal parental leave policies that are gender neutral and therefore accommodating to male parents, a
stigma about men who actually take advantage of those policies still exists. As one Up and Coming Leader detailed in her conversation with a male coworker about another male coworker utilizing the firm’s gender-neutral parental leave policy:

I was talking to somebody that I work on a case with and he was saying that although he considers himself a pretty progressive person that he’s “not really down for this guy [their coworker], taking a month off.” He’s like, “I mean I understand for the mother, but I don’t know what this guy is doing. Taking a month completely checked out? That’s ridiculous.” That stigma is definitely a thing.

This story reflects the deeply entrenched and gendered cultural beliefs about parenthood. Women are culturally expected to take leave and suffer negative consequences to their career and men who desire to take leave to care-take after the birth of a child are chastised and potentially disadvantaged for stepping outside the lines of traditional masculinity in which men are breadwinners and leave the caretaking to the mother of their children. These cultural expectations constrain men’s decisions to utilize parental leave afforded by their firm, making them less likely to take leave only reinforcing the idea that parental leave and caregiving is a “women’s issue” in the organization and therefore resists normalization to the detriment of women.

The women interviewed who are now beyond their child-bearing phase of life also expressed the difficulty that quite often the years between law school graduation and when you expect to become a partner in your firm are also likely to be the age range in which women have children. Being less established in your practice during the time in which you may take a parental leave makes it extra difficult to negotiate
leave or a more flexible schedule to accommodate the care of young children. As one Established Leader noted:

Ten years ago when I had kids people were expected to be in the office from eight to seven but I had to leave at five to pick my child up from daycare – that was leaving early then. They let me do it, and I’m so grateful they accommodated that but I could have made more money during that time if I didn’t. Now that I’ve more than established myself, I can do whatever the hell I want. I mean, if I want to work from home forever I can. But it took probably nine, 10 years to get that by outperforming my male counterparts every year by like a bazillion.

– Established Leader

Beyond the parental leave period, every respondent noted that navigating parenthood while practicing law is a tricky balance that comes with lots of cultural assumptions – mostly negative for female parents and mostly positive for male parents – as well as structural barriers to “making it work.” One Established Leader stated that in order to minimize the negative impact that parenthood has on your law career, you have to bend over backwards to make it a “non-issue – like it didn’t happen.” And even with all of that “bending” she was still formally approached by her firm inquiring if she would prefer to be counsel (a non-partner track position) instead of partner “because it would be better for your family” without her ever expressing any interest in taking a step back. As another Established Leader noted, she left her firm after being approached in a similar fashion:

One of the big reasons that I ultimately left [my prominent firm] was because it was a difficult place to make partner. But being on the track that I was, with the kind of experience that I had, and with as hard as I worked I definitely thought I was on track for partnership. Despite all
of this, and making my partnership intentions clear, after having two kids I got a formal approach with you know “maybe you should be a contract attorney or counsel or something because you have a family now.” – *Established Leader*

The vast majority of women interviewed had been explicitly told that having children would be an impediment to their career:

I’ve been in meetings where they’re discussing who to hire and...the partners have said we don’t want any more women of childbearing age because we want to be able to have people that come in and work and are dependable. They said that [about] women of “that age” because they come in and go away for months at a time. – *Established Leader*

In my first year at my firm out of law school, and way before I had kids, my boss told me they were looking to hire another associate and asked if I knew anyone to recommend. He then added that it “needs to be a guy” because they couldn’t afford to have both of his associates take a leave of absence or go part time when they had kids – as if to balance me out. I couldn’t believe he said that out loud. And I thought, wow, this is something they assume about me – it was the first time I realized that decisions were being made based upon the assumption that because I am a woman I am going to have kids at some point and step away from my career at some point -- and that that is considered some sort of liability or negative about me. I just didn’t think that judgement would happen so far before I even got married or pregnant. – *Up and Coming Leader*

These stories go beyond seemingly “friendly” advice from coworkers and expose blatant discriminatory hiring practices based upon cultural assumptions about women and their inevitable motherhood, and inevitable “stepping away” from their carrier to the potential cost to the organization. Another Established Leader provided an
example comparing her and her husband’s career post-childbirth while at the same firm:

I had two children as a senior associate and I actually had women partners say to me, “the best advice I ever got was don't have kids until you make partner.” And “nobody who is serious about their career would do it before.” I was just like, well, you know, I can't plan my entire family planning based upon a possible career at this place. And I know that’s not the type of stuff that men get. My spouse was a lawyer at the same firm, and it was absolutely not his experience. When we would have a baby, it was like he had more job security and whereas I, who had more trial experience than he did, had people saying, “Well maybe you should go of counsel... maybe you should back off.” And that’s tough. I'm working hard and you expect to be a first rate trial lawyer and people are just assuming, well, now you're a mom, you're going to take a step back. I think that’s tough. – Established Leader

The fact that both this Established Leader and her husband worked at the same firm, thus controlling for firm policies and practice structure, shows the strength of the cultural gender assumptions surrounding parenthood. All respondents indicated that it was (and is) extremely hard to juggle an MDL practice and parenthood. Although everyone indicated that they love their work, many of them indicated that in order to “make it work” they had to go to great lengths and “miss” a lot of parenting experiences. Due the heavy travel demands and intense trial periods, it was unanimously expressed that a significant amount of support at home was necessary to accommodate both their family and their career with numerous women indicating that it became necessary for their spouse to stay at home with the kids, work from home, or otherwise have an extremely flexible job.
Prior research has extensively established that in many professions women who become parents encounter a “motherhood penalty” in which, regardless of their efforts, their commitment to their career is questioned (Williams, 2000; Budig & Hodges, 2010; Gough & Noonan, 2013; Reichman & Sterling, 2013; Walsh, 2012). Conversely, men tend to experience a “fatherhood bump” in which, upon becoming a parent, men are assumed to be a more dedicated worker as a “provider.” Almost every female parent interviewed indicated that this stereotype and its assumptions are ever present in this field. Respondents indicated that this disparity is reflected in work assigned, assumptions about your career track, and even explicitly in pay and bonuses awarded. Interview subjects stated that they regularly noticed men receiving a “bump” after becoming a parent:

**Men get a bonus for becoming a parent -- I'm talking financially -- whereas women get attacked, even on the financial level.** Guys who have children suddenly at the end of the year get a bigger bonus, and women who have children, they don't get a raise...and the women without children end up getting out paid over them as well. Just like the very clear statistics -- the daddy bonus and the mommy tax. But also generally just sort of a philosophical perspective that people have -- this idea that you're not able to be committed and you're not able to take on the high profile case because you've got too many other responsibilities as a parent and a mother. I’ve had to fight against it and speak up for myself and articulate that, I still do deserve to work on this case, that this is something that I care about, and that I’ll be committed. – *Established Leader*

As this Established Leader notes, gender roles and stereotypes force women to assert themselves to rebuke the presumption that their commitment to practicing has waned after having children. In fact every mother interviewed described working harder and
putting in more hours after having children in order to “prove” they were committed. For example:

I think [women] have to work harder after [having children] too. You have to work at night after the kids go to bed. I don't know many fathers that ever do that. We have to work on the weekend. We have to be almost closeted parents. I'm continuing to work nonstop despite the fact that I have a baby because now I have to prove something too. So there's no longer a given that you're a committed lawyer even though you put in multiple years, **you now have to prove and reprove that you're still committed despite the fact of all that you've done**. You not only take on being a new parent, you also take on, you know, having to **reestablish yourself as a competent, skilled, committed lawyer**. –Established Leader

Although the attorneys interviewed shared many ways in which they were disadvantaged through pregnancy and becoming a parent, there were also numerous stories of great experiences in navigating pregnancy and balancing parenthood when they had a supportive superior. According to all the women interviewed, your leader – managing partner or otherwise – can “make or break it for you.” For example, one managing partner allowed (and encouraged) women to bring a portable crib and to keep their baby in their office while they worked. One very successful and Established Leader glowingly reported that her mentor and office manager partner’s extraordinary support of her throughout her early years of parenting absolutely saved her career. He ensured she was able to take a real maternity leave yet also kept her place for her in cases so she would have them to come back to, he hired a nanny to travel with them for certain important meetings and depositions so she could bring her baby and participate, and he even babysat her baby himself for certain meetings and “moved heaven and earth” to work out her working remotely. Reflecting back on this
experience, this highly successful practitioner said, “Honestly, he is probably one of the most defining people in my life. If it weren’t for him I would have quit, I would not be doing my job right now.” While these extraordinary managing partners that accommodated this women in such supportive ways are wonderful, they are truly exceptional in providing support for their women attorneys is not provided as an organizational or institutional standard.

On another positive note, respondents unanimously agreed that the profession is changing and that great improvements have been made in recent years. The profession is moving away from the “old school” requirement of requiring a lot of “face-time” in the office, rather accepting electronic communications to signal commitment. Some of the women appreciated the way advances in technology allow them to live a plane ride away from their office and handle almost all of their work electronically—in addition to traveling all over the country of course. Many of the women who navigated birth and parenthood in less-accommodating times recognize and applaud the progress that firms are making in this area—while acknowledging that the plaintiff’s firms are still vastly behind the larger defense firms and corporate America when it comes to family leave.

Interviews with the female MDL plaintiff’s attorneys in this study confirmed that they experience much of the established bias that all women lawyers experience after having children. However, the particular structure of MDL practice directly affects the ways in with these women experience, and potentially overcome, the maternal wall. MDL work is particularly demanding due to long trials and regular nationwide travel. Analogous to the lack of structure for promotion and pay, a common lack of uniform policies or structure for pregnancy and parenthood in
Plaintiff’s firms creates significant opportunities for bias to thrive—quite often negative for women and conversely positive for men steeped in gendered assumptions about parenthood and caregiving. In contrast to the Big Law defense firms who must answer numerous surveys about parental leave that are publicly disclosed and ranked, incentivizing competition between the firms to create more broad and effective parental leave policies, many of these smaller plaintiff firms lack formal policies, leaving women and men to individually negotiate time off, if even possible, subject to the individual biases and cultural beliefs about gender and caregiving of their superiors and fellow appointees on case leadership.

Deeply entrenched and gendered cultural beliefs about parenthood interact with this lack of structure to particularly disadvantage women. Women are culturally expected to inevitably take leave and suffer negative consequences to their career (even before pregnancy), and men who desire to take leave to care-take after the birth of a child are chastised and potentially disadvantaged for stepping outside the lines of traditional masculinity in which men are breadwinners and leave the caretaking to the mother of their children. These cultural expectations constrain men’s decisions to utilize parental leave afforded by their firm, making them less likely to take leave, only reinforcing the idea that parental leave and caregiving is a “women’s issue” in the organization and therefore resists normalization to the detriment of women. Cultural gender roles and stereotypes place women in the position of having to assert themselves and go to great lengths to rebuke the presumption that their commitment to practicing has waned after having children. Conversely, men tend to experience a “fatherhood bump” in which, upon becoming a parent, he is assumed to be a more dedicated worker now that he is a “provider.” This disparity is reflected in work
assigned, assumptions about career track, and even explicitly in pay and bonuses awarded. The lack of formalized policies and structure surrounding leave and caretaking flexibility magnify the effect these common gender stereotypes have on men and women’s careers.
Chapter 6
INTERVIEW DATA: IN PRACTICE

Introduction

“People want leadership positions – particularly the ones where I’ve been appointed by the court are all huge high stakes litigation and that means also the potential for significant recovery by the lawyers. There’s a lot of potential money at stake for the lawyers, and powerful positions that sometimes leverage their ability to get additional clients, so people play hard.” -Established Leader

You’ll see the same person sitting on leadership in five or six different MDLs. You couldn’t possibly actually do the work for that many cases at once. That’s a larger problem – whether its male or female – it’s the same people over and over. –Established Leader

Practicing Multidistrict Litigation is extremely competitive, high stakes, requires constant nationwide travel, and can be very lucrative if you are appointed to the right leadership positions. It is also controlled by a long standing “boys’ club” of white male practitioners otherwise academically referred to as “Repeat Players.” Those who find themselves outside of the “Repeat Player Network” are significantly disadvantaged in their attempts to break into the upper echelons of this practice (Burch & Williams, 2016), widely recognized to be very masculine. As a Veteran Leader explained:
The reality is, and this is not true of everyone of course, but I would say that the general rule is MDLs are dominated by men and men very begrudgingly include women because they have to. It's not all men, but I can say from my own experiences in this business, a lot of the men prefer women who take notes, are quiet, don't engage in the debate, and just write the brief. Sometimes it discourages me because I will sometimes see women who are chosen for a leadership slate because they are the least likely to rock the boat. But if you look at the men that get selected, the men are the most outspoken ones. They're the badasses that go out and try the cases, they're the ones that can be leaders, and the ones that are unafraid to pull their chair right up to the conference room table and offer their opinions. And men are very comfortable with other men that do that. They are not comfortable with women who do that. I am a woman who does that so it's not always easy. I mean I have to steel myself, take a deep breath and dive in, but it's not always particularly well received. And so you end up in this weird position, but it is still absolutely an old boys’ club and you may get a seat but you don't get included in a lot of stuff. It's a double bind and I think it's something that we all struggle with. — Veteran Leader

This Veteran Leader, as well as every other woman interviewed, referred to MDL practice as a “boys’ club” and expressed the double bind that they feel as women trying to “fit in” and work with the men, vying for leadership appointments, but also having to walk the tightrope between asserting themselves in a place where they are not part of the “in group” while also dealing with the negative ramifications of acting outside of accepted femininity.

Recent efforts by Judges and other institutional influences to include more diversity in court appointments, while evidencing some success, still must interact with widely accepted cultural stereotypes including categorical distinctions such as gender. One of these issues is the pervasive trope that diversity equals inexperience. One Established Leader recalls a time at a JPML for a recent large, high-profile, and potentially very profitable MDL in which a very high profile male Repeat Player
confirmed this problematic and potentially damaging association between “diversity” and “inexperience.” In her words:

This [male repeat player] was on a panel, and when questioned about how it can be assured that there will be diversity on this panel if it gets consolidated into an MDL, his whole response was that [this MDL was too important] to be used as “a training ground” clearly associating, to me, women and diversity with being inexperienced lawyers. He said “this cannot be a training ground and you’re going to have to bring your wallet to the table.” I mean that’s basically what his response was and I was totally taken aback, but it was really great because the guy sitting next to me, who I don’t even know, said “so that means no women or African American lawyers” and was just as shocked that the [repeat player] had actually said that out loud. – Established Leader

All of the respondents clearly asserted that MDL practice is a “Boys’ Club” from which they are excluded unless you are one of the few women Repeat Players. Those outside of the Repeat Players are considered to be novices or inexperienced. In fact, in cases where women have been appointed to Tier One leadership roles, those interviewed note that their competency is questioned throughout the trial, regardless of proficiency and success in handling the case. For example:

One time I was leading an MDL where there was a significant number of women on leadership and my partner told me that there were actually calls going on behind our backs where people had questions whether we were actually capable of leading an MDL and whether somebody had to “step in” to replace us, which is ludicrous. We successfully ran that MDL like an efficient well-oiled machine. – Veteran Leader
In addition to the inequality regimes that women experience in law firms, MDL practice itself—particularly on the plaintiff side—works as its own inequality regime at an institutional level. The unique structure and procedure of plaintiff MDL practice—including but not limited to the appointment process, the networking and relationship building with attorneys outside of your firm to be appointed, case financing, and divisions of labor on leadership teams—interact with cultural and other institutional influences to particularly disadvantage women and those outside the “repeat player” network in multidistrict litigation.

Vying for Lead

“Trying to get onto leadership is worse than high school peer politics.”

_Established Leader_

Unlike other types of practice where lawyers network with potential clients to obtain their business, Plaintiff attorneys who practice class action and MDL work have to network and go to great lengths jockeying or “making friends” with other attorneys from other firms to “get business.” When an Up and Coming Leader was asked what it takes to get appointed, she responded, “The answer we would all like it to be is to work hard and to do good work, but I think the real answer is to know the right people.” In fact, this sentiment was echoed repeatedly by all respondents.

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 a mutual 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. Research shows that this traditional method of private ordering consistently yields appointments of a very small group of MDL “repeat players” into key leadership positions (Williams et al 2014; Burch and Williams). Leaving the leadership decisions almost entirely up to the attorneys themselves places great emphasis on networking and negotiating with other attorneys from other firms in the practice to get placed on slate. This unique process - being picked by your peers to obtain lucrative career enhancing work -- creates a practice ripe for opportunity hoarding.

A Veteran Leader explains the importance of “personal relationships” involved with getting onto a slate and then trying a large (and usually long) case together:

There’s a huge amount of networking that needs to happen and that's not necessarily a bad thing. I think that in order to get appointments, you know, you're creating a family for a period of time to work on a case. People would rather work with people that they know or known entities. So certainly your track record counts but, but those personal relationships are of paramount importance.

Judge Rufe of the 3rd District in Pennsylvania echoed the importance of putting together a harmonious group in order to manage such “massive litigation.” If the leadership team does not have a good working relationship, according to Judge Rufe, “You risk the case getting disrupted. It could be a divergence in strategy or bad vibes between leaders, and strategy is everything.” This focus on good personal relationships between leaders becomes an overarching theme under which attorneys who desire leadership positions - both men and women – jockey for lead through
networking with each other and making sure others can “vouch” for their ability to work with others. As one established leader noted, the pursuit of these valuable relationships with other attorneys must be constant and really requires “putting yourself out there,” usually at conferences where you can network with other attorneys in the field. It is important to establish a good reputation for yourself within the group. Interview subjects frequently mentioned that the Mass Tort and MDL world is “very small.”

The advent of the application method of appointment, in which attorneys are able to individually apply for appointment with the court and are sometimes given the opportunity in open court to substantiate why they should be appointed, is intended to limit the insularity of the Repeat Player Network resulting from private ordering. However, as one Up and Coming Leader explained, even the application process can require networking and jockeying amongst attorneys:

On a recent leadership application the judge asked “Are there other people that you think would be good for this position?” So we all did some jockeying to make sure that we were all getting recommended by people that we were hoping would be on the PSC with us. I don’t think it was a bad decision on the judge’s part to put that in there because you know, there are occasionally plaintiff’s lawyers who are toxic to the case. That’s really your only chance to tell the judge in a somewhat secret way that that’s the case. But it can also certainly be a double edged sword. I mean, you also could have people sabotage someone who’s very deserving of a position. It’s super competitive.

Respondents vociferously lamented how intensely political the networking and planning for slates can get. As two very Established Leaders explained:
Trying to get onto leadership is worse than high school peer politics. You are politicking and you are showing up at all the pregame events, and then you have to have built the right relationships to get invited to the sacred dinner. The secret meeting before the right dinner for the secret meeting before the meeting. And I'm not kidding. I mean it gets so crazy. And if it is slate against slate which happens when the political plaintiff's group is divided down the middle, there’s so much political infighting. It's like underhanded bipartisan Washington politics – you have the whole backstabbing and talking really bad behind someone's back and influencing this. It gets nasty. It's just a nasty process. – Established Leader

It's very, very competitive and it's just so male-dominated. A lot of times it has to do with creating teams and you support me and then I'll support you in this different case. And who are the people that are up there? They're older white men and women are a nuisance. Especially young. Your age hurts you too. I mean, I think there's a sweet spot because if you're too young, they're like, whatever. So I'm from [a certain geographical location], which hurts me. I also think that there gets to be a point when they think you're too old. So there's kind of a sweet spot, maybe like your upper forties and fifties where you're a serious player. If you're too young or if you're a woman or if you're in the Midwest or something like that- because it's largely dominated by people in the east and west coast - you're at a real disadvantage. So it's just horrible political stuff --making phone calls, calling in favors, all that kind of crap. And I've got children, briefs to write, motions to write, discovery to do, interviews of clients and depositions...but these big shot old white men, have got lots of people working under them. So they just pick up the phone, work the phones, network with their people and get the deal. –Established Leader

This Established Leader explains that those outside of the “in group” or repeat players are not disadvantaged based solely upon gender distinctions, but geographic location and age as well - exhibiting how disadvantages are intersectional. The repeat players have a substantial amount of self-appointed control and influence beginning at the
outset of an MDL, well before leadership is appointed. As one Established Leader explains:

When litigation starts to develop, you’ll see somebody or a couple of people come out in the forefront and those are usually going to be the co-leads. And so those people usually ultimately decide who's on the slate. **You have to have that bravado, to even do that. And be part of the establishment.**  —Established Leader

Most respondents stated that they felt extremely excluded from the networking and slate creation process and, as earlier noted, explained that Repeat Players have private meetings where they negotiate the slate with each other that those outside of the Repeat Player network are not told about. According to respondents, “you have to get to know the right people and get invited to the right dinner. If you don’t, [leadership] is not happening.” Many respondents indicated that this exclusivity in the process is extremely defeating:

All of us women can network all we want, but if all the older white men are in the penthouse dividing up a case, what the hell are you going to do about it? **It is older rich white men dividing up the world and then telling everybody else this is how it's going to be and the court accepts it**, you know, and you don't even get to go to those meetings where they're dividing up the slate, it is brutal.  —Up and Coming Leader

The way in which this lobbying for leadership occurs is a prime example of opportunity hoarding -- when organizational actors monopolize valuable resources and positions for themselves and those within their social circle or “categorically similar actors” (Tomaskovic-Devey 2014 p.59). Opportunity hoarding actors use their status
and/or position to limit opportunities for “out-groups while preserving them for incumbents and socially similar individuals” (Tomaskovic-Devey 2014 p.59). In addition to feeling “outside” of the group that controls MDL practice, every woman interviewed detailed exclusion from literal in-person meetings where decisions are made between attorneys about putting together proposed leadership slates. For example:

The hard part is getting invited to the dinners at all – the dinners where it all gets worked out, being invited to the meeting before the meeting. So that’s hard in the sense that you have to establish relationships with people who have the ability to pull you in. A lot of the people that are in those positions are repeat players who have their friends and people that they would normally pull in. I don’t think you can really elbow your way into those -- you don’t even know those dinners are happening unless you’re in the know. —Up and Coming Leader

The process of making sure your name is on that slate entails going to conferences and other networking events… and sometimes that means stay out till two in the morning, hosting networking dinners and then there’s the official meetings and there’s the secret meetings that aren’t on the calendar. The real trick is getting an invite to the secret meeting because those are all the people who are going to form the PSC before everybody else gets in the public meeting. If you want to be on the PSC, usually that also means showing up to the JPML hearing and then there’s usually a dinner the night before that too, with a bunch of people who are planning on working on the case and making sure that you get an invite to that dinner and that they know that you’re interested, with cases ready to file. —Established Leader
Respondents indicated you have to constantly work on building a “network of your own so that you have people on your “team” or in your “corner” to vouch for you and reach out on your behalf. Two established leaders detail this “lobbying”:

It's hard, it involves building your network and having your network be the right people that are in the position to pull you into those things. And I think that's the part that's hard about it - it’s not really anything you can do in a planned way, it just requires those people to want to include you in things. It's very ingrained and difficult to break that mold. – Established Leader

There are the politics such as the meetings before the meetings and the phone calls you have to make and the calls you ask your friends to make on your behalf. The networking piece comes in a lot at this point in time - it’s a lot of phone calls. It's a lot of people working the phones to try to get themselves a position and a seat at the table. If you don't already have strong relationships with the key players through these conferences, if you haven't made friends, you're not going to have people who make a call for you. So that's where I think the networking piece comes in critically in these things where you can have people who are willing to go ahead and put the word out for you and be supportive of you. – Established Leader

Interview subjects were asked whether they felt that women were disadvantaged in this type of required networking and jockeying for positions on slates and unanimously answered in the affirmative. Many expressed feeling disadvantaged in not being as comfortable as the men seem to be with reaching out to other men and asking for support. An Established Leader explained, “Most women aren't picking up the phone and saying, ‘Hey buddy, will you make a call for me? I really want to be involved in this. Here’s how many cases I’ve got, here’s the experience I have, here’s where I haven't filed.’” Additionally, much like with the social networking within firm
organizations, they explained that they are routinely excluded from a lot of the informal social networking events like golf and other activities that “the men usually do,” for example:

The guys are on the golf course and they're making the deals and then they go to the meeting. I mean, this is true in business as well and they get to the meeting and say, “Oh yeah, it's all been done. **We just negotiated it yesterday while we were drinking beers on the golf course.**” So they negotiated it where we weren't invited or included — so we need our own buddy system — or own women’s network and that's what we've tried to create [with WEM]. —**Established Leader**

These positions don't just appear because they thought of you for it, you know. I do think women are at a disadvantage, particularly younger women, if they don't have those relationships and they don't have those experiences to build off of and they don't have support of their partners. A lot of women don't. I mean it's a small number of people that actually get these positions and men are taking each other out on multiple day hunting trips and boat excursions. We’re not going to get invited to those. —**Established Leader**

In this practice structure that requires such lobbying and social in-group approval to achieve participation and leadership in an MDL, women are particularly disadvantaged by the usual gender-segregation of social events. Many women called for gender integrated social events, such as this Veteran Leader:

What I really wish is that those networking opportunities were more gender diversified. A lot of mass tort vendors will have weekends or sponsor things and it is generally for the men to go golfing altogether and the women get a spa weekend. Some do gender integrated ones and I think those are the best because it can't be all men and it can't be all
women. It has to be gender integrated in some way. And I still think we're trying to figure out how to do that. – Veteran Leader

Many of the respondents noted how particularly challenging navigating the networking necessary at conferences can be. Because Plaintiff’s attorneys need to network and form relationships with those outside of their firm and spread across the country, professional conferences for plaintiff attorneys become one of the main settings for networking and forming this crucial relationships. With regard to these conferences, the women interviewed reported there being a significant double standard where they are expected to be extroverted, socialize and participate in drinking but also recognize that this can also be held against them. Respondents widely reported having trouble being a part of the masculine culture at some of these “necessary” conferences:

I suspect it is both an advantage and a disadvantage to be a woman. I think that while the number of women is certainly growing, we are still in such a minority that you tend to get noticed more which can be a good thing. We don’t just blend into the sea of men in suits. But there are still certainly people that are still doing the old boy stuff – they’re going to strip clubs and you’re usually not going to get invited to that, and if you did get invited then you're in a weird spot. Like, are you too prudish to go do? I’ve called that both ways -- I’ve ended up going to things like that thinking well I guess it’s better to be invited. But do I really want to be here? Probably not, but you want to be in the room where it happens, right? So that can be difficult. I think that women have to pay attention to what they wear and you know, what they drink and all that other kind of stuff in that men just don’t. – Established Leader

Most of the interview subjects agreed that the culture at these crucial conferences is much better and inclusive than they were five years ago; however they are still very
masculine and uncomfortable for a lot of women. Many women detailed sexual harassment they have experienced at conferences. When asked about sexual harassment in her firm, one of the Established Leaders stated, “Oh that’s what happens at the conferences.” Some women stated that they don’t attend certain networking conferences anymore because of the “awkward dynamic” even though it damages their career to not attend because of the missed networking opportunities. When asked about the pervasiveness of sexual harassment the industry, respondents noted:

I think it is pervasive, unfortunately. I’ve had plenty of totally inappropriate, end-of-a-conference-kind of propositions. – Up and Coming Leader

It is very prevalent in this industry. It exists in every single aspect – in firms, at conferences, dinners. It’s real and it hasn’t changed a lot in my opinion. One time at a conference I heard one of my female peers on one of the panels called a “MILF” on stage by one of the men after pretending to fight over who gets to sit next to her on the panel. – Established Leader

It is difficult for women. I have dealt with it since I was a baby lawyer. You deal with a lot of sexual harassment from inappropriate comments to inappropriate touching. But you know, if you are trying to really get out there and network and get on PSC, you know, you have to figure out how to deal with it. It’s very prevalent and if you want to get to where you want to be and get on PSC, you sort of have to shrug it off or come up with the right things to say. – Established Lawyer

Many of the women noted how the sexual harassment they experienced hurt their confidence and made them reluctant to attend conferences and “put themselves out
there” to develop the relationships so necessary for success. In an inequality regime, such bullying and harassment can be a fundamental source of exploitation (Tomaskovic-Devey, 2014, p.67). The women unanimously asserted that you have to come up with strategies to “deal with it.” Numerous Established Leaders referred to having a “buddy system” for attending events at conferences where they anticipate possibly being the only woman at a dinner or meeting, explaining that they will purposely meet up beforehand to attend the event with another woman in an effort to avoid uncomfortable situations with men.

When asked if people “horse trade” and agree to put someone on a slate in one case if they put them on one in another case, an Established Leader said “Absolutely. That's overtly stated. Sometimes it's just understood, you know, somebody is making a request here and they'll either get your back there or you know, you're going to call somebody up and make an offer to them to join your new case because somehow they control your financial future on a different, a previous case. And that happens all the time.” One established leader explained a situation where she missed out on an important leadership appointment in a case in which she was involved from the start and was anticipating a leadership position, for this specific reason:

I had done my phone calls to all the powerful, magical people who had agreed that, “Yes, we absolutely need you there. You’re on the PSC, we can't imagine doing this litigation without you. You're on the slate.” And then it came time for the slate to go in on a Monday. I got a phone call on Sunday afternoon saying, “We're so sorry but [three male repeat players] need to be on the PSC and we don't have enough room. We’re taking you off.” I was furious and told them that was outrageous. And they said they would “see what they could do” about at least giving me discovery lead, but couldn’t make any promises. The next day they put in a slate with 26 white men, they left off everyone else. I scrambled along with several other women, to put in
our own applications on Monday afternoon but it didn't get picked. The judge ended up appointing a mix. He went with most of the people on the slate and then added a couple of others, including [two female Veteran Leaders]. I’m still mad about it. I was told later that the [three male repeat players] that just “had” to be on the slate were going to make their own run with their own slate and they didn’t want the competition so they had to include them. Happens all the time – they don’t want the risk. It undoubtedly 100 percent had something to do with gender, I don't think they would've done that to men. They wouldn't have done that. That never would happen.

This Established Leader’s experience, which was mirrored by other interview subjects as well, is a clear example of opportunity hoarding within an inequality regime. These “repeat players” use their status to limit the opportunities of those outside of their group to directly preserve them for other repeat players, which in turn will come back to them by way of opportunities in other cases extended to them by said repeat players.

Respondents also shared numerous stories in which the politicking and jockeying behind the scenes got particularly “nasty” with attempts of case takeover both inside and outside of the firm, in addition to being overtly threatened by repeat players. For example:

There once was a case I had been leading for years, but nobody else had been. And all of a sudden because of the FDA’s alert, everyone wanted in on it. And those within my own firm and those outside of my own firm, very not-so-politely tried to elbow me out and take the lead positions. I had to fight within my firm and I had to fight outside of my firm very, very strongly to get that position, not because I wasn't qualified for it and not because I wasn't entitled to it, but because, when it turned into a big MDL coming down, you know, let's put the men in charge. They put three men in the supreme positions and we had to sit under them and were told by them that we should
“feel lucky that we got that position.” – Veteran Leader

I filed a petition in one of my cases that was not well received [by repeat-players]. I had people come up to me and say, if you don't, if you don't take down your support for [this petition], we're going to make sure you never work in mass torts again. That's pretty aggressive, right? I mean, they're throwing balls at your head pretty much in the big leagues. It was a big litigation and I think a lot of people appropriately viewed it as something that was going to be very financially significant – and it was. It was an aggressive entire year of political jockeying of one variety or another, some more aggressive than others, some more overt in their threats like, “We're going to take this away from you. It's not your turn, it's not your case. There's too much at stake.” Things like, “you're a baby lawyer, you're a woman lawyer, you can't handle it.” – Established Leader

These examples of verbal harassment and intimidation illustrate the intimidation by actors in an inequality regime of those of lesser status to prevent making claims for pooled resources and opportunities (Tomaskovic-Devey 2014).

While there are clearly many hurdles for women to overcome when trying to network and jockey for lead position within this structure, many women noted some positive progress as well. There are now more women participating in American Association of Justice committees, the AAJ Women’s Caucus, and WEM. These serve as valuable new networks for women, and many women now have the experience necessary to be a respected part of a leadership team. As one Veteran Leader notes, “When putting together a slate, you’re looking for the right skills and it’s not hard to find women who have those skills.” Another veteran leader explains some of these changes:

Women are great at networking with each other and now that there are more of us around, we are able to form our own personal relationships.
with other women — we have the ability to do that way more than you did 10 or 20 years ago. Back then you were kind of out there on your own on an island. And now we have things like WEM and AAJ women trial lawyers and things like that that really help our ability to network. Now, some of my closest friends are people that I work with and travel with and who live all over the country and we like working together and we have friendships we actually enjoy. You look out for your friends, you want to work with your friends, and when you have the ability to appoint people, you reach out to friends that you trust — Veteran Leader.

A lot of it’s changed in the sense that there are a lot more people, younger men and women that are coming up now. I’m in my late thirties and sometimes I still feel like I don’t know what I’m doing, but as time goes on, there are more and more of my counterparts that I’m able to network with and go to these conferences with. But, you know, these older rich people that have worked together for 40 years, they can pick up the phone and get people to listen to them and take their calls. — Up and Coming Leader

Due in part to the establishment and growth of women’s networking organizations, every woman interviewed reported feeling a great sense of relief that they were able to build their own networks of support and resources with other women instead of having to rely solely on trying to break into the already-established and male networks. These women’s associations and their positive effects are an example of how institutional influences can not only perpetuate inequality regimes, but also can have a positive impact, providing tools or decreasing some of the inequality effects experienced. The women also recounted how they have actively fostered “buddy systems” to overcome some of the social discomfort that comes with being a minority at social events:

In terms of the politics of things and the networking... I think we're starting to learn how to strategize around that in terms of meeting up
together in advance and getting together and **having a buddy so that you are not the only woman in the room**, and all of those things. I think we’ve been coming up with creative ideas and solutions to those issues together. –*Established Leader*

The women interviewed also noted that they’ve begun discussing salary and benefits with each other as well as reaching out to each other as resources regarding practice advice.

Respondents agreed that getting to the point where you are able to have some control over whom you work with on leadership is the ultimate goal, and some of the more Established and Veteran leaders voiced that they are starting to be able to do this in certain cases. As two Veteran Leaders explained:

*I don't want to constantly be trying to elbow myself into a party that nobody wants me at.* I'll have my own party and, you know, I work with people who want to work with me and who liked working with me. Including both men and women. I think that in some of the MDLs that I’ve worked on that’s worked out well –*Veteran Leader*

Choosing carefully who I work with outside of my firm is particularly important to me. I think that when I am in a leadership position choosing people to work with or, forming PSCs or slates I try to work with people are fairly egalitarian. I solicit a ton of input. I believe in collaboration. I believe in working together. I believe in getting buy in from people. I do not believe that the dictatorship is an effective way of getting anything done. I have the luxury of choosing the people I work with at this point in my career. I think that includes recognizing not just women, but men who are very comfortable working with women who don't fall within that traditional mindset that you sometimes encounter. And that's, that's really important to me. –*Veteran Leader*
On the other end of the spectrum, it was unanimously recognized how difficult it can be to get your first appointment when you are not yet established as a leader, and especially when you don’t have the connections or relationships with the inner circle directing all of the appointments. Many of the Up and Coming Leaders interviewed expressed how difficult the rejection can be and feeling rather hopeless about putting themselves “out there to try again.” As one Up and Coming Leader who has been practicing for many years but has not yet obtained a court-appointed leadership position explained:

After I went up for leadership and lost, **it felt like such a rejection that I haven't tried again.** The men I know that get rejected seem to not care as much – they can get rejected ten times and just keep trying. Some women, not all women certainly, but a lot that I know in this field get really discouraged from trying again. **It seems impossible, like we’ll never break in.** And it's brutal. So brutal. It's just awful.

When asked how they were able to obtain that notably hard-to-get first appointment, respondents identified numerous paths. Some say that they worked on a case for so long – sometimes in excess of ten years – making them indispensable to the litigation due to their knowledge of the case and therefore enabling them to at least get on the litigation team in a minor role and parlay that experience into future leadership on other cases. Some credited the newly-formed women networks for enabling them to form relationships with most established women leaders that led to them being considered for positions more than if they did not know any of the key players. Others credited judges’ awareness of the need for more diversity in appointments and their
specific efforts to appoint a more diverse group as giving them opportunities that they would likely otherwise not have. As a now-Established Leader said:

The first leadership position I obtained was because [the judge] wanted to have a more diverse group. The judge said he wanted people on the committees who have not always been appointed. It was so political to get on at that time, so I was really fortunate. I also know it had nothing to do with my own merit or my assertiveness or anything else. My boss, [a very powerful male Repeat Player], told me he was going to put me up for it because I was the only female partner at my firm at the time. It was really him that got me on there – because he was one of “those” people and he put me up – he had to say I could have it. That wouldn’t have happened if I worked for someone with less power. After getting on leadership, I worked my ass off -- people saw how hard I worked and how capable I was. And so that led to leadership with them on other cases. Every appointment after that it was because of me. I think it's very hard to get that first appointment. After that, if you prove yourself and your firm has the financial backing you can parlay it into more appointments.

I worked at a powerful firm at the beginning of my career that has an extremely successful female partner. There was this big case that I was working on that I really wanted to get on leadership. At the time I was still trying to figure out the magic of how you get on a PSC. Slates were still very popular – leadership was determined almost exclusively by slates back then so I made a ton of calls. I networked with everyone I could think of – making calls, meeting up with people at various meetings and conferences and things like that. I made it widely known that I really wanted to work on [this case] and that I was interested in getting into leadership. There were these three particularly powerful [repeat players] that would likely to be in charge of putting together leadership for that case, so I called them directly and point-blank told them that if they happen to know who was putting together a slate, I would like to be included on it. And all three of them asked me, what does [her powerful female partner] think, like the first question out of their mouths was, is this okay with her? And I was able to say yes and I got put on the PSC and it kind of blew my mind. I did not have, case leadership on my resume at that time – instead it was
really [her partner] vouching for me over a couple of phone calls, that’s what opened a door for me which subsequently lead to me getting future leadership positions. So it was just one woman reaching back and helping me up the ladder one notch that changed the trajectory of my career. –Established Leader

While both of the Established leaders illustrate the benefit of having a mentor or sponsor with enough political capital (and firm monetary capital) to vouch for you and get you on a leadership slate, it is important to also recognize that both of these Established Leaders indicated that these powerful people from their firm were considered gatekeepers whose permission was required before the other powerful repeat players would allow them onto leadership. This is another example of a mechanism of opportunity hoarding to the benefit of the dominant group -- they maintain the group boundary by checking with each other before extending invitations into the group.

Another commonly-mentioned way to get leadership appointments was through “finding a niche” or mastering a specific area of litigation that can be considered useful in subsequent cases. Respondents said this “niche” came with one caveat – it is really helpful if it is a job that no one wants, such as managing discovery. Respondents indicated that having such a specific skill set can get you in the door for your first few appointments in roles that are not usually high-profile or sought after, which gets you a seat at the table with the powerful leaders so they can get to know you. Some explained how being known for having a specific skill can then lead to a phone call asking you to be on a slate. As one Up and Coming Leader described her experience:
Nobody wanted to touch that [task] with a 10 foot pole, you know, not a position that anyone really wanted, so I seized that opportunity. I worked my ass off and made it “my thing” – that’s how I’ve gotten the leadership positions that I have.

Unlike other types of practice where lawyers network with potential clients to obtain their business, Plaintiff attorneys who practice class action and MDL work have to network and go to great lengths jockeying or “making friends” with other attorneys from other firms to “get business.” Leaving the leadership decisions almost entirely up to the attorneys themselves places great emphasis on networking and negotiating with other attorneys from other firms in the practice to get placed on slate. This unique and intensely competitive process - being picked by your peers to obtain lucrative career enhancing work – creates a particular practice ripe for opportunity hoarding.

The way in which this lobbying for leadership occurs is a prime example of opportunity hoarding mechanisms in inequality regimes -- when organizational actors monopolize valuable resources and positions for themselves and those within their social circle or “categorically similar actors” (Tomaskovic-Devey, 2014, p.59). Opportunity hoarding occurs in numerous ways during the lobbying for leadership process. For example, the horse-trading that occurs, where repeat players use their status to exclude those outside of their group to include other repeat plays on their cases, which in turn will come back to them by way of opportunities in other cases extended to them by said repeat players. When Up and Coming Leaders are lobbying for a leadership position, they are routinely asked if the power repeat players from their firm have given their permission for them to take a leadership spot — maintaining the group boundary by checking with each other before extending
invitations into the group. At a more extreme end of the spectrum of hoarding mechanisms, women reported being subjected to verbal harassment and intimidation — illustrations of the types of harassment that are sometimes used by actors in an inequality regime to intimidate those of lesser status from making claims for pooled resources and opportunities (Tomaskovic-Devey, 2014).

Further, in addition to feeling “outside” of the group that controls MDL practice, every woman interviewed detailed exclusion from literal in-person meetings where decisions are made between attorneys about putting together proposed leadership slates. As with the social networking within firm organizations, they are routinely excluded from informal social networking events like golf and other activities. In this practice structure that requires such lobbying and social in-group approval to achieve participation and leadership in an MDL, women are particularly disadvantaged by the usual gender-segregation of social events.

Many of the respondents noted how the particular challenges of navigating the networking necessary at conferences. Because Plaintiff’s attorneys need to form relationships with those outside of their firm and spread across the country, professional conferences for plaintiff attorneys become crucial settings for networking. With regard to these conferences, the women interviewed reported a significant double standard: they are expected to be extroverted and to socialize and participate in drinking but that this can also be held against them as not appropriately “feminine.”

Respondents widely reported feeling uncomfortable and having trouble being a part of the masculine culture at some of these “necessary” conferences. Many women detailed sexual harassment they have experienced at conferences and how the sexual
harassment they experienced really hurt their confidence and made them reluctant to attend conferences and “put themselves out there” to develop the relationships so necessary for success. In an inequality regime, such bullying and harassment can be a fundamental source of exploitation (Tomaskovic-Devey, 2014, p.67). Women are significantly disadvantaged when they are expected to socialize and make connections to get on people’s “team” or in people’s “in group” networks in order to succeed in plaintiff’s work in very masculine and sometimes uncomfortable and intimidating settings.

On a positive note, the women noted how outside institutional influences have had a positive impact. Due to the increase of women networking groups and committees through the American Association of Justice and Women en Mass, they’ve been able to create new valuable networks for women. These women’s associations and their positive effects are an example of how institutional influences can not only perpetuate inequality regimes, but also can have a positive impact, providing tools to decrease some of the inequality effects experienced. The women interviewed also noted that they’ve begun discussing salary and benefits with each other as well as reaching out to each other as resources regarding practice advice - to overcome this exclusion from networks and access to information upon which to gauge whether or not they are receiving appropriate pay and benefits.

**Case Financing**

“If you want to be in this business, which is an extremely high stakes, very expensive outlay and a long period of time before there's a payout... I don't know how you fit into that business model if you don't have the financial backing to do it...” – Veteran Leader
“Money is a huge deal and a real issue... How much money are you going to put in, how much money is the entire PSC putting it in and does the firm have the funding to be able to afford it?” – Established Leader

In conducting this research, both men and women -- through casual interactions or in-depth interviews-- were quick to mention how much the ability to “finance a case” is vital to demonstrating whether or not you are a contender for appointment to leadership in MDL cases. Practicing MDL is extremely expensive. While potentially a very lucrative practice if successful -- for example, one experienced leader estimated that she made over $12 million for her firm in her four years – it also requires an extremely high outlay of money throughout the case that may last for many years before only a potential payout if successful in the end.

Individuals and firms make hefty financial commitments to maintain offices and staff, travel all over the country to conduct business, go to conferences to network, and of course try their cases, creating a significant structural barrier to breaking into the Repeat Player group when you are not practicing through a wealthy and established firm. As a Veteran Leader notes:

The money aspect is one of the major ways the old boys’ network gets perpetuated. I think that as you see more women or diverse lawyers start their own law firms, they may not be able to have the financial wherewithal to be lead counsel and you have to take that into consideration. It's a huge investment when you're lead -- you're going to probably pay the largest share of any assessment. And when you look at the average length of these cases -- for example one of ours started in 2004, we tried it in 2013, and we got our fee in 2017. So it's not for the faint of heart or the short haul.
Each case varies greatly in the amount and timing of “assessment calls” for monetary contributions required of those attorneys (and their firms) serving on leadership. These contributions fund the entire trying of the case from the plaintiff’s side which, as in all litigation, is an extremely expensive endeavor. The varying assessment amounts required are officially supposed to be dependent on, including but not limited to, the size of the case (number of plaintiffs), the defendants involved, the experts needed, the court reporters, the platform to host all of the documents, and the projected time to try to case. There is usually an initial cash “buy-in” followed by periodic assessments of varying amounts. As an example, respondents indicate that the periodic assessments alone could be $50,000 or even $100,000 for each assessment throughout the potentially long span of the case.

Being able to afford such funding of a case is universally recognized as one of the most important factors to being considered for a leadership position. It is mentioned in the formal rules and guidelines as a factor for judges to consider for leadership appointments as well as greatly considered by attorneys networking among themselves to create their own proposed trial team or slate. In cases in which judges have asked for individual leadership applications for attorneys, the question of “how does your firm plan on paying for this litigation” is routinely asked. The financial requirement is so critical that firms will sometimes also obtain traditional financing from banks depending on the firm and partners’ credit and assets and sometimes from other “counsel financiers” that can charge exorbitant interest rates like 70 percent.

The financial contributions for litigation costs through assessments can be extremely large – often millions of dollars – so ability to finance is customarily a
consideration to a judge making leadership appointments who wants the case to run smoothly. These high litigation costs expectedly lead to the exclusion of smaller firms outside of the Repeat Player network. A veteran leader and experienced leader explain the judge’s considerations regarding financing as follows:

The leadership and the people that are on the committee have to also have the skill sets that are necessary to fund the case, decide how to fund the case or when or what to fund because that’s the big business component to these cases. **They cost you millions of dollars and you have to have full partner commitment from the partners in your law firm when you are committing four to six million dollars for litigation over four or five years.** You need to have individuals who understand both the legal commitment as well as the financial commitment. – Veteran Leader

I think it’s a real issue and I can kind of see it both ways. I mean, on the one hand, if you’re going to get involved in one of these big cases financing ability is important. I’ve had MDLs where there are five thousand cases with numerous trials. **Even though you try to keep costs down, the firms will still have a couple million dollars in the case with numerous years’ worth of time to be compensated.** So if you’re going to have somebody who’s going to be part of the steering committee, you really do need to make sure that they have the financial wherewithal that they’re going to say, “Okay, yeah, my $75,000 check is in, I’m good for that.” Not just once, but you know, there's going to be cash calls depending on how long the litigation goes on and it is appropriate to make sure that there’s going to be financing there because that’s what our clients need. – Established Leader

Judges don't want to deal with there not being money or deal with that issue. It's easier essentially for the judge to appoint somebody who can afford litigation because you're going to be floating that money for years. One of my cases has been going on for six years and I think the first assessment was 100,000. And we’ve had assessments numerous times since then. When the money gets low, you have to pay more
money and you know there'll be assessment for everybody to pay periodically. - *Established Leader*

This financial requirement for leadership is an institutional influence that greatly strengthen the abilities of repeat players and their firms to hoard leadership opportunities. Further, as noted in the statements above, the financial need is legitimized by the way in which the MDL practice is conducted with firms having to “float” the costs of litigation for many years with hefty periodic assessments along the way. Each Leader above mentioned how the need to consider financial capabilities was “understandable” given the practice. As one Experienced Leader noted, it “bolsters the position of the repeat players that are going in there because they have those war chests. That's why it's harder for the newer people to break in because they may not have the money to be able to do it.”

This business model can be extremely difficult for new or smaller firms to break into; established large and wealthy firms have a very distinct advantage within this structure. Respondents who currently work within one of these established wealthy firms were all quick to recognize the privilege in their experience:

> It is **such an advantage for me that the funding isn’t a question in my firm** – I don’t have to get approval for the financing – it’s just whether or not we think it’s a good case. But it’s a real barrier when you don’t. – *Experienced Leader*

I get a benefit from older rich white men because that's what my firm is. And so I haven't faced this issue personally because **anyone that knows what firm I'm from or what I'm doing knows I have financial backing 100 percent.** It's not an issue, but if you don’t have that, I don’t think you can do it. – *Experienced Leader*
Both of the firms I’ve worked for are very financially blessed. Both of them came with lots of financial heft, so I never ran into problems with not getting appointed because of financing reasons – although I am absolutely sure I would not have gotten any of my appointments if I didn’t have the backing of one of the larger established firms.” – Experienced Leader

Conversely, case financing serves as a well-recognized structural barrier for those outside of the largely white and male Repeat Player network. Many respondents who felt overlooked and undervalued credited case financing as the most significant barrier to starting their own firms in an attempt to achieve full control of their own career. As one experienced leader explained:

I think women stay in bad marriages for financial issues and I think women stay in bad jobs for financial issues. If you can’t pay on the PSC, you can’t do anything. You can’t practice. Money is control...women are socialized to depend on men unfortunately for money sometimes and this one of those cases. -Established Leader

Given that assessment amounts and their timing are determined by the appointed attorney leadership and not subject to judicial approval, some players use high assessments as a way to exclude other firms and attorneys who don’t have the largest “war chests.” As one experienced leaders disturbingly recalls:

I've also seen firsthand people being purposefully excluded by making the initial buy-in really high. The folks in charge of a case my firm was on were like, let's just make the buy in really, really high because some of the people just drop out. And that wasn't specifically targeted only at gender, but it was absolutely targeted at people outside the usual network. Like if you couldn't hang with a 150k buy-in to start you
self-select your way out. One of the lawyers involved in the case actually said, “Let’s just put the buy-in at three million dollars. We’ll just get rid of everybody.” It didn’t happen. But there are certainly people that think that way. - Established Leader

This example shows that litigation costs could be used as a manipulative tool to exclude attorneys and their firms from breaking into the inner network in MDL. This practice goes above and beyond the rationale that high assessments are necessary to cover the high costs of protracted litigation.

The vast majority of attorneys interviewed expressed a desire to achieve increased control over their career by owning their own firm but cited case financing as an insurmountable risk to doing so. The respondents that have successfully left established firms to venture out on their own with both male and female former colleagues all expressed great satisfaction in doing it and “wouldn’t have it any other way” but are keenly aware of the risks and the limitations due to case financing. As two Experienced Leaders explained:

I thought, I could either stay here and not fulfill my entire potential or I could take this risk so I’m going to take this risk.

I love it when I see my name and I see my logo and it’s empowering to death, but it is so scary because I am the breadwinner and I had to put my whole life up as collateral to do it – unless you are independently very wealthy, you have to obtain a significant line of credit in order to be able to put up cash for assessments.
Another Established Leader who started her own firm with a former colleague clearly articulated other structural and circumstantial factors like banking and finance institutional influences that impact whether or not someone is situated to take the risk:

I encourage all women to find their ideal partner and start their own damn firms because that will give you the freedom that we all thrive in. I think that's a challenge because you have to have the financial wherewithal and be enough of a risk taker and have enough risk tolerance, which really isn't about character, it's about situation - do you need to feed kids, am I the primary breadwinner, am I single, am I rich, or am I in the middle? All of those things are important and play into whether you can take the risk and find a way to make it work. We were extremely, extremely lucky that we went out when we did because banks were giving lines of credit more generously at the time so I didn't have to put my house up as collateral, which would have been a huge, huge impediment.

However, even after successfully obtaining the financing necessary to go out on your own and start your own firm, there are certain limitations on your MDL and mass-tort practice that likely need to occur in order to maintain your business. Some of those who have started their own firms explain that in order to keep their firm afloat financially, they need to “stagger” their risky and expensive mass tort work with other types of legal work so that they are not solely dependent upon MDL and other mass-tort case income, which can sometimes not pan out or at minimum can take many years to come in after extensive ongoing costs. Some other respondents explain that owning their own smaller firm absolutely precludes them from the large potentially very lucrative MDL cases with expensive buy-ins:
I can’t go for the big cases anymore [after leaving my firm]. If you’re going for lead counsel and you’re going to have to put in 100,000 dollars regularly and so the litigation is going to cost you three million dollars, yeah, I can’t do that. Can’t do that. But serving on a PSC for a smaller case every now and then where I have to give 25,000, I can do that. We’ve had to kind of shun the system that works on those big volume cases. Someone who wants to do that surely has higher obstacles to financing cases than I do. —Experienced Leader

This financial requirement for leadership is an institutional influence that greatly strengthens the abilities of repeat players and their firms to hoard leadership opportunities to the exclusion of those firms outside of the established network. This evaluation of financing ability is legitimized through the way in which the MDL practice is conducted with firms having to “float” the costs of litigation for many years with hefty periodic assessments along the way. These financial requirements privilege certain firms and greatly disadvantage others, including prohibiting most of the people being exploited by their current law firms who wish to “go out on their own” and start their own firm from doing so.

**Division of Labor in Leadership**

“Within the MDL process there's the people who get appointed and then there’s the people who end up doing the work.” —Up and Coming Leader

“I will say there has never ever been an MDL without many women doing the core of the work that was being done. And I always find that just extraordinary.” —Veteran Leader
In each case, within every leadership structure, the labor, or many tasks, for the plaintiff team must be divided. Respondents widely acknowledged that this was another process through which the gender gap is perpetuated in MDL practice. Many times, Repeat Players who are appointed to leadership act as a figurehead, with the lower tier leadership performing most of the day to day work. As two established leaders noted:

A lot of people get the appointment and then they don't work on the case anymore hardly at all. But other people work on the case that don't have the titles. And that sucks.

In my experience at least, it's about five or six people out of the entire PSC that will wind up doing the majority of the work. It's not everybody.

Due to the fact that the vast majority of lead positions are held by men, as one established leader notes, “Oftentimes the guys will get appointed, but then the women do the work.” It is important that this appointed lead / worker bee division is not only to the advantage of men, but in reality Repeat Players of both sexes. As one Up and Coming Leader eloquently explained about the few women repeat players, “High powered women get appointed and don’t do anything too – it’s not a gendered behavior- I think it’s a powered behavior.”

This division of labor is very impactful because the potential tasks in a case not only differ in prestige with the ability to raise your profile with Judges and in the profession, but are valued significantly differently for compensation purposes at the end-of-case payout. Plaintiff attorneys’ billable work is valued differently and logged
as “common benefit hours” [the entire case’s billable hours] to be paid out proportionally at the end of the case as attorney’s fees. The common benefit fund therefore becomes a literal representation of the type of “resource pooling” creating a limited amount of resources (in this case, money) to be divided among organizational actors, characteristic of inequality regimes (Tomaskovic-Devey, 2014). Such situations are ripe for exploitation and opportunity hoarding.

	Being assigned the more high profile and higher valued work can make a large difference in the fee you take away at the end of a case. One Established Leader explains how Tier One leadership gets to make these decisions with great impact:

If you're on the executive committee versus the plaintiff steering committee, the Executive Committee is doling out the assignments and deciding who they go to. Then from that is your common benefit hours and then from that is your common benefit reimbursement of funds. So at the end of the day it's related to compensation and funds. There are decisions that are made more in favor of keeping the work within the confines of particular firms that might be leading the cause. – Established Leader

The work is actually weighted differently at the end of the litigation. So the face-time work that everyone wants gets you more time with the Judge and gets you more face time with the other side which can lead to you getting your cases resolved quicker. But also, when it's time to dole out all of the money from the litigation and the fees for the PSC, what winds up happening is that sometimes they actually tier what everything is weighted at and doc review and administrative tasks will be weighted less than the depositions, like trial prep, you know that type of work. And so then the people that are doing the administrative stuff are getting paid less for their time versus other people. – Established Leader
This assignment of tasks - mostly controlled by the lead attorneys - determines the division of resources in the common benefit fund, thus reinforcing the incentive to as well as power of lead attorneys to distribute the tasks in a way that continues to benefit them and other Repeat Players. Given this difference in value for the different positions and the fact that men are disproportionately in the lead positions in cases, it is quite often that the Repeat Players give the people they trust within their network the higher profile and higher valued positions, sometimes to the detriment of the women out of the network that are working on the case. As explained by experienced female respondents:

We’re the worker bees. When you're appointed to a PSC, you’ll see the women get appointed more often to administrative tasks, document review management, or whatever and then the guys go out to do the depositions. The leads decide who does what - I do not see that happen as much at all when women are the leads. I don't see that disparity with the work or the money coming out of the backend- Established Leader

I've definitely experienced getting the appointment and then getting sidelined, just left off of conference calls, not invited to the business meetings, not assigned work. And I’ve had that happen in a couple different litigations where I was delighted to have the appointment, but it really meant nothing meaningful in terms of compensation because I wasn't doing any “valuable” work, therefore it wasn't going to get compensated for any common benefit work at the end of the day. - Established Leader

These Established Leaders expose the decisions about the division of labor on case leadership that advantage some groups and disadvantage others. Those looking to break into getting appointment to leadership all commented that “you have to take
what you can get.” If you don’t want to just accept the menial work that is offered to you, a Veteran Leader details what it takes to get the work you want and explains how difficult that can be for women:

I do think that it is just kind of a double bind. **I think in order to get the assignments that you want, you have to be very forceful.** But then being very forceful means, you know, you’re a shrewish bitch and nobody wants to work with you. So it’s like this self-perpetuating thing.  
-Veteran Leader

Here, we again see that women experience a double bind when considering making a claim for better work. When asked whether this typical division of labor was executed differently when women are in lead positions instead of the usual male repeat players, those who had worked on an MDL where there were women in the top positions of leader resoundingly said that there was a difference. As two Established Leader explained:

I do think there is a difference. It's **more of a collaboration as opposed to a dictatorship.** I mean honestly. –Established Leader

**If you don't have a female lead on your committee the female lawyer is likely to be pigeonholed and relegated to what nobody else values** like document review and privilege log review, even though I think they can be the most important parts of the case. You're definitely not qualified to take a deposition. And it's difficult. Now, if you've proven yourself and you've got good advocates there for you and other strong females that are on the committees are leading the committees, then your door opens for you. But you, but you have to really work at it. Otherwise, you get what they would call the non-valuable work. –Established Leader
Decisions about the division of labor on case leadership are another level that is ripe to advantage some groups and disadvantage others. This division of labor is very impactful because the potential tasks in a case not only differ in prestige with the ability to raise your profile with Judges and in the profession, but are valued significantly differently for compensation purposes at the end-of-case payout. Plaintiff attorneys’ billable work is valued differently and logged as “common benefit hours” [the entire case’s billable hours] to be paid out proportionally at the end of the case as attorney’s fees. The common benefit fund therefore becomes a literal representation of the type of “resource pooling” creating a limited amount of resources (in this case, money) to be divided among organizational actors, characteristic of inequality regimes (Tomaskovic-Devey, 2014). Such situations are ripe for exploitation and opportunity hoarding.

Women and those outside the repeat player network are often assigned administrative tasks that are less valuable at pay out and do not provide as much career-boosting face-time for the appointee, thus reinforcing the incentive to distribute the tasks in a way that continues to benefit them and other Repeat Players. Women experience a double bind when considering making a claim for better work, potentially suffering being denoted as being “difficult” or a “bitch.”

**Slates vs. Applications**

The advent of the individual application process implemented by some MDL judges has been credited as being a major institutional influence in the recent increase in women getting appointed to leadership. There are a lot of negative aspects to the
slate process—especially considering the jockeying that goes on behind the scenes to the exclusion of those outside of the Repeat Player network, as detailed earlier. Respondents were asked whether what they thought about the two processes—slates versus individual applications—and whether there was still a place for slates. Overwhelmingly, although concerns were unanimously expressed about the traditional method of private ordering with slates negotiated amongst attorneys then presented to the judge, the majority of respondents believed there was still a “place for slates,” with certain caveats.

The application process implemented by some judges, where anyone seeking a leadership position can submit an application and supporting memorandum to the court detailing why they should be appointed, sometimes accompanied by a time to speak in court on their own behalf, were generally regarded as a positive development in the appointment process. This change in procedure has made some of the women vying for lead feel that the process is more “democratic,” especially the Up and Coming Leaders interviewed. As one Established Leader described her first time participating in open applications for leadership:

I am a huge proponent of and a big fan of the individual application process, which is also kind of ironic because the last time I did it I didn't get on, but it felt really affirming to have a federal judge listen to me for two minutes, to be taking notes, to be paying attention, to be complimentary and pleasant and civil and to be recognized by my peers. I got some really good feedback and that was really good for my ego. It probably helped my standing in the community in some small way because I was there and I wasn't afraid. And it felt democratic. —Established Leader
However, some acknowledged that a full-application appointment method is not a perfect solution to overcome the challenges to getting a chance at leadership. Some expressed that a downside of an all-individual application process is that you cannot choose who you are going to work with and may end up with a few attorneys that do not work well with everyone else, yet others lamented that the traditional slate process can sometimes create leadership teams that are all politically motivated with people only including attorneys they have worked with before, to the exclusion of newcomers. While neither process can be considered perfect, some of the women interviewed were quick to explain that neither process is particularly great for women outside of the repeat player network. One Up and Coming Leader explained:

I think they both suck. I mean reasonably. It's hard because the most powerful people will create a powerful slate and if they won't take your phone call or take you seriously, you don't have a chance, and it's really scary to go through. The application process is terrible too. It's a really competitive process where you have to put yourself out there -- you go up there, you're way younger than everyone. Maybe you're from the middle of the country. It's really scary and it's a huge time commitment. If you've got young children at home and you don't want to fly out to California and tell some judge that doesn't even know where you're from, that she should take a chance on you and appoint you to leadership in this enormous case, it's like, screw it, I've got enough cases to work on, I don't need to go get that rejection. —Up and Coming Leader

While acknowledging the hurdles for those outside of the Repeat Player Network, respondents with substantial leadership experience noted the positive aspects to using slates. A Veteran Leader explained that she “believes slates can still work” as a useful tool for lawyers to create a team of people who work well together and can
address the cases’ needs, as long as it is accompanied by a fail-safe that “there's nothing stopping the judge, if he sees a slate that’s not what is needed, he can say ‘there's something wrong here’ or ‘I don't think you've got enough gender, racial, or geographic diversity.’” An Up and Coming Leader explained how the slate method can actually benefit a new player:

I used to be totally anti-slate. But I also think that sometimes slates can provide a platform for a new person to come in. I’ve seen that happen in a couple of other situations when because it's part of a slate, they feel more comfortable putting [a new woman]. They aren't afraid that their firm is going to be excluded by not putting in their heavy hitter because it's part of this package deal. I've seen that happen. So I’m not as anti-slate as I used to be. –Up and Coming Leader

The vast majority of respondents were still open to the idea of using slates, but with certain caveats. Most preferred that the method of appointment remain open and flexible to be applied as necessary for the needs of a case. For example:

Yes, I actually believe in slates with a large asterisk and caveat. I don’t believe that throwing 15 random people together and saying you're in charge of an MDL is a particularly effective way to do things. I liken it to family - we can squabble behind the scenes, but publicly we have to be unified in what we do. I think that you can't do that if you're just randomly throwing people together. The giant asterisk is that we have to work on better integrating what those teams are. So it's not just the same group of people over and over and over and over again, that always work together on the same cases and go forward, which effectively precludes other people from joining in. And I think that we’ve got to figure out how to do that. –Veteran Leader
If we have a judge that doesn't want to go through the interview process and reviewing everybody's separate applications or if you just really have a cohesive group that has already worked it out, you know, then maybe there's still a place for [slates]. **Even in those circumstances though, I do feel that the court should also leave it open to have additional individual applications so that there is no disadvantage** – *Established Leader*

The discussion surrounding whether slates or individual applications should be utilized for appointment illustrates how an institutional or organizational process can influence the outcome of an inequality regime (Tomaskovic-Devey, 2014). Interview subjects evaluated the usefulness of slates as a tool to produce a cohesive leadership group while also explaining the advantages or disadvantages of each appointment method. The slate method, while shown in this data to operate as a major tool for repeat players to opportunity hoard, can also be an avenue for an attorney new to leadership appointments to be appointed as part of an established group. It was generally agreed upon that individual application methods, while coming with their own challenges (such as requiring travel), gives previously marginalized attorneys outside of the repeat player network another avenue through which to “take a shot,” or engage in claim-making on behalf of themselves. As the Established Leader noted, it feels “democratic” unlike the traditional slate-only method of appointment where the only avenue to appointment is through lobbying with the in-group network. Appointment method is an institutional influence that can influence the opportunities that actors have to exploit and opportunity hoard. The ever-increasing use of a hybrid approach -- where the judge asks for a slate to consider, as well as takes individual applications upon which to make their decision, allowing the judge to appoint a combination of the two if they see fit to address the needs of the case -- seems to be a
popular choice among the women interviewed for limiting the disadvantage experienced by women outside of the repeat player network while also allowing attorneys to create legal teams that can successfully work together.

**Role of Judges**

As noted earlier, in the past five years, certain judges – both male and female -- have attempted to increase diversity in appointed leadership. Some judges now state in court that they expect the suggested leadership to have some diversity, some say so in case management orders, and some judges explicitly state that they expect up and coming MDL attorneys – those who work under the high-profile partners - to argue some substantive motions during the litigation in order to open that experience to people outside of the Repeat Player network.

Judge Cynthia Rufe of the 3rd District in Pennsylvania is one of the judges who has taken such actions and has a reputation for being outspoken about the need for more diversity in appointments. Judge Rufe agreed to be interviewed on the record and explained how she approaches the gender diversity issue:

I don't believe I deserve anything because I'm a woman, but a chance. That's all. You've got to show me something because we have a lot of difficult work to do here. That's how I pick leaders in the MDL. Show me your credentials. And if you haven't had a chance to establish them because you're always sitting in the back doing the work, then I want to know about that too. Tell me what you've been doing. I'll find a job for you if it's good work -- I want to keep promoting that. I pick on qualifications first and if I can give an opportunity to someone who is as qualified or more than others may have done it just a little bit longer, then I'm doing my thing to improve the practice of law because there's good lawyers entering an arena where their
services and expertise and skills are needed. I don’t see how that’s a downturn in anything. I can’t see the downside to that. There are no negatives to doing that. If opportunity comes with being deserving of it.

Here, Judge Rufe directly confronts the trope noted earlier (mentioned by the white male repeat player at the JPML hearing) that diversity equals inexperience or a lack of ability, and explains how the court’s goals of both appointing someone deserving of appointment with the right skills as well as increasing diversity can happen at the same time. She believes that women deserve a “chance” to make a claim for themselves and put themselves up for appointment.

Judge Rufe relayed how her first experience presiding over an MDL made her aware of the gender and diversity gap on the Plaintiff’s side and what motivated her to start an open application process that surprised many in the profession at that time:

On the defense side I saw a woman representing [the defendant] but on the plaintiff’s side, I see a lot of hopefuls for leadership but I only see a few women. I see no African Americans…no one diverse. I see young men and old men and they're all the same. Okay, something's wrong here because I know that this is a big case and there are women out there that do complex litigation. I may not know who they are yet, but maybe I can find some. So I said I'm going to establish a protocol. I'll put in an order and I would like everyone to apply and file your application online or in person. I will review those applications and anyone who wants to apply is welcome to interview. My interviews will be held in court on the record. I just figured, how would I pick? Well, I used to have interviews for people I wanted to hire, I'm going to treat it like a business. So I said they're going to have to come in and talk to me and I've had some pushback. I thought I needed to know who they were. I needed to see who I would want to work with and I needed to give others a chance because if I accepted a slate as I was asked to do, I would never know who the others were.
Judge Rufe recognizes how the usual court process for making appointments -- accepting a pre-negotiated private slate put together by prominent plaintiff’s attorneys -- was producing a homogenous group and decided to make a change to the process in order to see if she could produce a more diverse outcome without sacrificing the quality of the candidates.

When asked if she thought there was “still a place for slates” in MDL appointments, Judge Rufe explained:

No, I don’t. I do not. I don’t see how there could be, because slates are created by parties and parties have their own agendas which are not necessarily the courts’ management agendas. I do not approve of that practice. Even if a proposed slate looks good to me, I will still do interviews in open court because of transparency, and I still might accept their recommendations with tweaking here and there because not everybody that is deserving to be appointed is on a slate that’s presented. I just don’t. But if it works for someone else, congratulations.

Judge Rufe’s preferred appointment method -- taking a slate into consideration but also holding individual interviews with applicants who wish to put themselves up for leadership -- is analogous to the general consensus voiced by the interviewed women attorneys. Judge Rufe acknowledges that the attorneys “have their own agendas” when creating a slate -- agendas that in her opinion have no bearing on who is best for leadership. These “agendas” most likely include some of the mechanisms that perpetuate inequality regimes like exploitation and opportunity hoarding to the benefit of the powerful repeat players.

With regard to other judges’ interest in increasing diversity and continued use of slates, she noted:
I see many other judges being open to and actively practicing diversity appointments. I also see enough judges doing the same thing that's more comfortable for them. That is hard to change. That is traditional thinking that is comfortable for certain judges that may never change. And in time there will be a different majority practice. I feel badly that so many deserving diverse lawyers will miss out in that interim. And that interim should not be allowed to be very long. I have seen however, judges who once scoffed at holding public court interviews now doing so, and I know a lot of judges have moved away from just accepting a full slate without substitutions. I've had a lot of judges chastise me for “making lawyers prance around” by doing open court interviews and “making waves” – especially at conferences when I talk about this, but I don't care. I have a lifetime appointment.

Here Judge Rufe acknowledges how long standing processes and cultural beliefs can be slow to change. While considering diversity in the appointment process is becoming more and more common in the field, there are still many judges who are resistant. Judge Rufe has also experienced significant backlash for her - what some consider to be revolutionary - changes to the long-standing and accepted process for appointing leadership in MDLs. The backlash she’s experienced is further detailed in the next chapter.

Overwhelmingly, when respondents were asked whether they thought that judges have had an impact on the increasing diversity of appointed leadership, practitioner respondents expressed that judges have an “enormous impact” and agreed that the recent increase in female appointments can be largely attributed to the efforts of certain judges. All the interview subjects agreed that the judges play a pivotal role in alleviating some of the disadvantages women and minority attorneys experience in
MDL practice due to their “unique power to put incentives on the plaintiff’s bar that will change their behavior.” As an Established and Up and Coming Leader noted:

Judges are a huge factor. If the judge demands it, it’s very difficult to not listen to what the judge is demanding. Even just extending it to outside of the repeat players, maybe they don’t have to be partners. When a judge says “I want to see junior people arguing substantive motions,” it makes a huge impact. –Experienced Leader

I think that yes, 100 percent the judge has a huge impact. I think that if a court did say that it encourages young people and women, people from all over to apply I might go for it -- if I know that a judge will seriously consider me and it might be considered an advantage that I am all of those things rather than a negative. I might think “this is a more friendly situation” -- I may not get it, but at least I’m not just being set up to waste time, I would be more open to taking that risk and going for it. And I know that some judges have done that before. Seeing the orders where it’s like, I want minorities to apply. I want women to apply. I want people from different areas of the country to apply. I want young people to apply and I’m going to appoint somebody from all of these categories or give them serious consideration then I would. –Up and Coming Leader

This Up and Coming Leader explains that this institutional influence -- a judge calling for less-experienced and women attorneys to apply for leadership -- eliminates some of the essential barriers that those outside of the in-group network experience to claims-making, one of the four organizational mechanisms that reinforce disadvantages in inequality regimes (Tomaskovic-Devey, 2014). She notes that the usual methods of appointments make her feel as if she is “being set up to waste time” - - echoing the pessimism about the process and their chances for appointment voiced by most of the Up and Coming Leaders in the interviews. Many of the interview
subjects indicated that they can attribute their first appointment to leadership to judges’ concerted efforts to open up the process to those outside of the repeat player network.

I got my first appointment because a male judge was looking to appoint a more diverse group. So they can absolutely make a difference – and this change we are starting to see came 100% from the judge saying I want more diversity. It was the impetus. Whether that was diversity for women, whether that was anything -- it was just like we can't have the same old people always on these places. So that's really how it started, with the intent that it would not be the same white men who are always leadership. I don't believe his intent was just having more women, as opposed to just not being all the usual players. I was appointed with a lot of the same players, but there were a few more women sprinkled in. – Experienced Leader

In the [prominent MDL] case, when the judge was considering leadership appointments, he looked at the proposed slate and point-blank said, I will not accept this slate unless there is a woman on it. Although not on the men’s’ slate, [Experienced Female Leader] was in the room and the judge appointed her right there – and that was a great appointment to get. All because the judge made it clear that I am not going to approve of this unless there’s, you know, a woman. So I think the judges maybe don't realize their ability to really make a difference. – Experienced Leader

What is great about [these judges] is that they want the best lawyers representing the class, but they also understand that juries are not just made up of white men and that the class is not just made up of white men. Therefore, to really represent the best interests of the class, you need some diversity. With the fact that the legal talent is there – they're not going to appoint someone just because of gender -- the legal ability is a given. And I think the other thing that was important in some of these orders, and an example of this is Judge Rufe’s appointment order, they explicitly recognized as part of the order that she wanted to make sure that younger lawyers – or less experienced -
which would include more both women and diverse lawyers -- would have the opportunity to lead committees and make arguments, recognizing the pipeline. -Veteran Leader

Here, this Veteran Leader nods to Judge Rufe’s recognition of the “pipeline” - referring to the notion that lawyers “coming up” the ranks of the plaintiff’s bar need to be given experience to continue their advancement.

Many respondents also had stories about judges not only calling for more diversity in the leadership appointment process, but replacing senior attorneys with their young associates to participate on the spot. One Up and Coming Leaders explains a specific time she this happen:

A lot of times men and women take these PSC positions for the face-time but then assign all of the work to their associates. One thing that I heard [male federal judge] do was -- there was senior partner who was going to get up and argue a motion and the judge could immediately tell that he didn't write it. There were some young associates sitting in the back of the courtroom and the judge said to one of the associates “you wrote this brief, didn't you?” The associate said yes, and [the judge] said, all right, get up here. You're going to argue this because you know this better than your partner.” -Up and Coming Leader

In this case, the judge interrupted the common and legitimized exploitation in law where an associates prepares an entire case, including writing all of the briefs and motions and hands them off to a senior attorney to conduct the prestigious face-time duties in front of the judge. This exploitation is legitimized in the status differentials between positions associates and senior partners. The judge, as a powerful
institutional influence, is able to ensure that the young associate gets to be the one to perform the valuable public presentation of his work.

Although quite controversial at its start, Judges are now increasingly calling for more diversity on leadership appointments. Due to the power and status of Judges in an MDL case, they are in a unique position to have meaningful impact on the processes of MDL work that perpetuate inequalities to the detriment of women and diverse attorneys. By incorporating open application processes for attorney to put themselves forward for leadership appointment consideration, Judges remove the traditional barriers to claims-making that have traditionally hindered those outside of the repeat network from being considered for these prestigious and lucrative appointments. They have also at times effectively disrupted the routine and legitimized exploitation of younger associates who are doing the heavy lifting behind the scenes, giving them a chance to show their work in court.

**Progress, Tokenism, and Backlash**

“We're going to face insults and we're going to face devaluation for a long time coming, but we can't change things until we get the damn appointment.” – Established Leader

I feel like we're also getting this backlash of people who are so aggravated and irritated and it is okay. I'm okay with people being irritated that you have to address this issue now. I'm fine with that. It's very hard to change somebody in their eighties who has grown up their entire life seeing women in various subservient positions. – Established Leader
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 issue. Particularly in the last five years, we have seen increased awareness and discussion of the lack of diversity in court appointments. Respondents noted that they are seeing some positive changes:

I think it's starting to happen, but it's very slow and it depends on the judge. One time when the judge was presented an all-male slate, the judge said “Hey, I think you’re missing something.” And he appointed a female there in the room. – Up and Coming Leader

I think that things have changed a lot even in the last five years where there's really, especially in MDL practice, there is this kind of consciousness about it where there are a number of judges in particular that are paying attention to it. So I think that there are some women then, and I've certainly been one of them, who've had opportunities, partially because judges have their eyes open to this and they're thinking, oh, I want to make sure that I have some gender and hopefully racial and other diversity on these kinds of plaintiff steering committees said that I set up. – Established Leader

Like many of the interview subjects, these leaders cited the role of judges demanding more diversity on leadership as the most significant factor in the increasing diversity of appointments. Increased awareness and discussion -- significantly through the leading legal publications -- about the profound gender gap in litigation in general and MDL leadership appointments was also credited for having an institutional influence. Many subjects also noted that increase in female networking through organizations as a powerful influence on the progress:
I do think that the women mass tort lawyers are being very supportive of one another and really making a push to get more women in leadership and you can see the results. You really can see the results. – Established Leader

In addition to the roles judges and female networking are playing in enabling more diverse leadership groups, a Veteran Leader notes that an increased demand for diversity in the defense bar, often mandated by their corporate clients, in also having a positive effect for the plaintiff bar’s diversity issue:

In the last 20 years, the defendant corporations have been able to have much more say over the diversity of their defense trial team or who they’re going to hire as defense lawyers. I saw, early on, a big push to have women on defense teams and that has really helped us as well because it not only sets an example, but it puts pressure on our side to look more balanced – diversity-wise – in front of the jury. Obviously the plaintiff’s bar is not set up the way the defense is with corporate clients demanding diversity – it happens, but it is rare that you have a plaintiff [in these large cases] say you know, “I was looking for a woman to represent me,” but that doesn't really help in the context of these mass cases. But once you started to see lots of women on the defense side, it helped balance on our side. – Veteran Leader

This Established Leader’s observation about increased diversity on the defense side’s representation (often mandated by their corporate clients requiring that their representative trial teams be more diverse) having an influence on increasing diversity on the plaintiff’s side is another nod to the strength of outside institutional influences on changing the inequalities characteristic of inequality regimes.

With the increase of female appointments, women will hopefully be able to parlay this experience into future positions. As one Veteran Leader notes:
Right now women are deeply involved in leading what might be the most complex, largest case we've ever faced here in the United States. There are a lot of women on this case doing great things and learning the ropes in such a complicated case. They are going to come out and be fabulous leaders in any MDL. The entire support team of lawyers is almost all women, living away from home for months at a time trying those cases. **There are a lot of skilled women out there that are ready to take significant positions and there'll be invited to do so because everyone appreciates and understands what they can do.**

Many of the women who are now appointed to higher profile leadership positions also feel that appointment to more powerful positions furthers their abilities to have a positive influence on increasing diversity. As one Established Leader notes, “On cases where I can call the shots – I now feel comfortable saying, ‘We need more women on slate.’” Others noted that the increased visibility of more women vying for leadership has had an impact as well:

I think primarily it's a visibility issue. The real power brokers who are always there will always have cases. They are predominantly white men. And we know in-group bias encourages one when sitting down and making a list of colleagues he can think of who should be working on this litigation are inevitably more likely to look like him. And so **I think the strongest negative influencer for us is our invisibility. It's important that people know we are out there.** For so long we've just been behind our desks with our heads down, slaving away, and we're invisible when we do that. We're incredibly valuable to those firms where we were invisible. And so when we show up in those big giant numbers, people go, oh wait, maybe I should rack my brain a little bit harder. Maybe I can think of a woman of color who I can add to the PSC. – Established Leader

This Established Leader explains how the increased visibility of women leads to progress by overcoming another barrier that women lawyers in this work have faced.
Cultural beliefs that “if I just put my head down and work hard enough someone will notice me” expressed by so many of the interview subjects, as well as the entrenched role division of women taking “supportive roles” as women in litigation, have largely kept them out of the “limelight” or court settings where the powerful litigators are making all of the decisions. As more women get appointed and are in court, that barrier of invisibility weakens.

Women-centered trial lawyer (plaintiff) conferences and groups have also seen a rise in activity in recent years. For example, Women en Mass (WEM), a conference for women mass tort attorneys, had its seventh annual networking conference in 2019 and the American Association of Justice, a leading Plaintiff trial lawyer organization, has a very active Women Trial Lawyers Caucus. Respondents unanimously voiced appreciation for these groups, noting the positive impact that they have had on their professional career. They have allowed women to create their own network of referrals and support, as well as enabled women to discuss compensation and other issues where bias has traditionally thrived due a lack of transparency and knowledge of others’ experience. Some respondents acknowledge that it was necessary to create their own networks “like the men have had for years on the golf course.” As two WEM members note:

The communication between all of us [women] through WEM is constant. “I need this, has anybody got this briefing, has anybody got a good expert, how do you deal with this issue”… and we’ve even raised some money. Let’s do some good and congratulate each other and amplify each other. –Established Leader

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19 See http://www.womenenmass.com/
WEM is really important – I think people feel a sense of community that empowers them to find their voice. They know that they are not alone. That’s what happened with Me Too and Times Up as well. Women have been discriminated against for all of time. The only people shocked about that are men. Through that movement women feel a sense of empowerment – just like with WEM- you feel stronger and more willing to step outside your comfort zone and go for a leadership slate. If you know you have the backing of a larger group. –Up and Coming Leader

This Up and Coming Leader is expressing how this feeling of empowerment derived from the support of a female network, can support the claims-making that is routinely repressed in disadvantaged groups. All but one Repeat Player Veteran Leader mentioned that they have observed and experienced a significant backlash from the noticeable surge of gender progress and awareness in the last five years. This influx of women, and people talking about diversity, has led to suspicion and retaliation from some men in the practice. For example:

I’ve had men say “I know I’m not a woman, but can I get a thought?” at meetings. It is presented in jest but they are very aware of the current dynamic. They’re very cognizant that women are stepping up and wanting their seat at the table. They’re aware of it. - Established Leader

When this Established Leader says that “women are stepping up and wanting their seat at the table,” she is referring to women engaging in claims-making, which is likely to cause a backlash when initiated by someone of perceived lower social status in an organization (Tomaskovic-Devey, 2014). They are making claims for a share of the
finite pooled resources of the case -- in this case, lucrative leadership appointments and influence on how the case and its monetary settlement is conducted and divided among the attorneys, thus not surprisingly subject to backlash.

The women noted that some of the repeat player men have seemed “suspicious” of the women’s groups and ask the women, “What are you guys up to?” As expected, much of the backlash directed at the women from men questions their capabilities. As some of the interviewed leaders noted:

[A high-profile case] was referred to as the “Girl MDL” -- not by everyone of course, but some of the men in leadership-- they were just obsessed that there was this MDL out there that was led by two women and just assumed it could not possibly be doing what it was supposed to be doing. –Veteran Leader

There's an active backlash when a woman loses a case, like “Ha! There's proof women aren't really good enough to do this.” You know, tons of men lose cases too. And when women win a case, it’s a fluke.

– Veteran Leader

As expected, the backlash these women Leaders have encountered involves language indicating that women have stepped outside of their “socialized feminine” roles into more powerful and assertive positions – traits that are valued for men but sometimes penalized for women. Interview subjects recalled being called “Amazon women” and the all-too-common label of “bitch” when they display the same amount of assertiveness as their male counterparts. Two very experienced leaders explain:

Once you get there [on leadership] you become a force, right? You are a strong, talented female trial lawyer. You're aggressive with your views and you're telling your opinions. And even women that have

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proven themselves, they've gotten huge verdicts. What you hear from
the male lawyers sometimes is "Oh she's a bitch" or that they can't
get along with her because of this and that. And they don't get the
respect. I could name five or six women that I know that have gotten
million dollar, billion dollar verdicts settled in MDL and I will literally
hear men disapproving them and not giving them the credit they
deserve – **credit that would certainly be given men if they had done**
it. So even once you bust your ass, you give up your life, you get there,
you don't get the same respect. I see that all the time with [names two
Veteran Leaders] – they’re looked at as token women and don’t get the
same respect. And I know this happens even inside their own firms, so
it's not just outside the firm. I can name like at least ten women I know
that have dealt with that. – **Established Leader**

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Oh god, yes. I get backlash from my own appointments. I cannot begin
to tell you. There are some men whose noses are really out of joint
about it and what they do is they undermine women or undermine me
on my competencies. There’s one gentlemen in particular – **I am not**
what a woman is supposed to be in his eyes. I am way too
outspoken. I will take him on. I don't think I'm ever rude to him,
but I don't go along if I don't think it is right. So he started to tell
people, behind my back, including stupidly for him, people who I was
very friendly with that I was stupid and lazy. I confronted him on that
and I said, look, I know that you're saying this about me. And I said,
here’s the deal, if you're trying to undermine my confidence, you need
to pick something that I actually might be insecure about. I know I'm
really smart and I know I'm not lazy. I actually work way too much. So
you’ve got to pick what you’re going to say here because this one
doesn’t fly. And **he was horrified.** He could not believe that I would
confront him on this and that I would do it in such a way – **Veteran
Leader**

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Many of the women interviewed stated they’ve experienced a significant
amount of backlash from older men in the repeat player network. As one Veteran
Leader stated, “It's just hard to get beyond the older [male] generation... they're really
not comfortable with women in these positions...this is not what they grew up with
and they don't know how to deal with it and they're not good with it.” Unfortunately,
some respondents also noted that they have even noticed some backlash and exasperation from some of the men who have traditionally been real allies in support of women in the practice, during these past five years:

It’s similar to the backlash to affirmative action. It's really great that these things happened and then there’s the stigma. You have people who are really wonderful people and people who are allegedly informed, woke, all these things – like [male firm owner known for being supportive of women attorneys] who is really great, I think he really believes in women and diversity but he said the other day that he’s now afraid to tell his secretary that’s worked with him forever that her hair looks nice. Which is clearly ridiculous. You get some of the men wanting to stay away from “the issue” and saying, “I’m just going to take men with me on these trips because it’s a lot easier.” They’re acting like we’re the ones being sensitive. There’s a real backlash now. It’s like, “Oh my God, here they come again.” And an irritation now -- feeling like, “Oh come on, we have to get a woman on this? Really?” And I feel like that is happening from people who were always more supportive, like they are tired of it… and I’m trying to figure out, how do you deal with that? - Established Leader

Unfortunately, the backlash referred to by the Established Leader above -- about not wanting to take women associates on trips -- is analogous to the fear-based overcorrection seen in response to the #MeToo movement, as many respondents noted. This type of backlash can unfortunately create new barriers to women forming crucial relationships and gaining experiences tantamount to success in their practice.

However, respondents unanimously agreed that this backlash was to be expected and voiced being “ok” with waiting this period of time out, noting that it would be all worth it eventually. Many of the respondents seemed to be very aware of
the power dynamics and attributed the backlash to men not wanting to give up their privilege. As two leaders note:

I feel like we're also getting this backlash of people who are so aggraved and irritated and its okay. I'm okay with people being irritated that they have to address this issue now. I'm fine with that. It's very hard to change somebody did in their eighties who has grown up their entire life seeing women in various subservient positions. – Established Leader

There's, there's no doubt in my mind, but there's a backlash because men feel threatened. They think that the more that women get, that means the less that they get and who's ever been in a position of privilege and power and wants to give that up to create equality? No one. So these people are in this position of privilege and power and our goal is equality. It's not to make them less than us, but to be equal to them compromises their ability to be privileged and in power. They don't like it, so of course there's a backlash. – Veteran Leader

This Veteran Leader’s assertion that the repeat players in MDL feel threatened by women’s continued advancement because “they think that the more women get, that means the less they get” clearly illustrates Tomaskevic-Devey’s “resource pooling” as an essential inequality producing mechanism in inequality regimes. The finite resources of prestigious and lucrative appointments are the basis upon which claims are made, and exploitation and opportunity hoarding occur.

Respondents addressed the issue of being appointed as a “token” female to help the male Repeat Players “check the diversity box” in order to accommodate the judge's desire for more diverse leadership slates. Many of the respondents resented this:
I certainly think that, you know, male colleagues are more apt to think, well, well you're only appointed because you're a woman or whatever else. I do think that there's a bit of a stigma, at least for some people. I've heard men joke about it being some sort of token appointment – they refer to women getting appointment as just a “WEM appointment.” I love that WEM is now an adjective – 

Established Leader

I have literally been told that I have gotten trial appointments because they needed a woman, and to tell somebody that is so demeaning to their legal abilities, like you've got this because of your gender but you didn't deserve it. I've gotten a couple calls like that where they'll say, “Well we decided we need a woman.” And I'm like, “What man would you pick over me? What man do you want to have the position over me? What do you think he brings to the table? What are his skills that I don't have?” Because I don't want to get into the position ever of being some token female potted plant sitting at the table because the jury has to see a woman somewhere. I just will not put myself in that position. – Veteran Leader

Despite the fact that I have a lot of confidence in my abilities to try a case, there are still some people out there that will say that when I get a good trial assignment, I got it because they needed a woman on the case not because I'm a really good lawyer. Like, “You're a girl who can try cases, so congratulations, you can have this role.” But I don't want someone to pick me because I'm a woman, and I don't want someone to not pick me because I'm a woman. People should pick me just because I can do a really good job and that does not happen. – Veteran Leader

One of the few women of color interviewed was very aware of the fact that she “checks two boxes” when she is put on leadership, perhaps even being a benefit to her career when diversity has been made such a focus in appointments. As she states:
I'm not naive enough to believe that’s not a factor. I check more than one box. But I think that it has its drawbacks too. Are you picking me because you just want to fill some kind of quota or are you really picking me? But I don't care how I get it. I know I'm qualified. –Established Leader

Other women exposed that while an increased number of women are getting appointed, their male superiors in their firms continue to exploit them - this time using their gender identification as a bonus when applying for leadership. An Up and Coming Leader explained:

Some of the firms are naming women from their firm [in their applications for leadership] just so that they get a spot and then tell the woman, “but you're not doing anything on the docket. Just, you know, I'm really in charge of this.” They’re going to be the ones to show up to all the showy things. –Up and Coming Leader

However, even with this exploitation and tokenism, numerous respondents also acknowledged that getting appointment for “diversity reasons” still has the ability to eventually “move the needle.” As one Up and Coming Leader noted:

I know there are people who are like, oh, that's awful. Like I don't want to get picked for that reason. “I want you to pick me on my merits.” I think, who cares? You got picked now you can show them what you could do. Before you didn't have an opportunity to show them. Yes, everything should be on the merits. Of course it should, but that’s just not how it works. There’s times that I’m sure these guys only let me in to this thing, because I’m from [a powerful firm] and we were strong arming them but partially also because it gives them a woman on their slate so they can look like they care about diversity. I don't care. That’s fine because I'll work on this and I'll do a good job and this
Judge and other powerful people on this case will say good things about me going forward.

This Established Leader echoes what many others have said, including Judge Rufe, that “all they want is a shot.” The “claim” they wish to make is for a fair chance for a seat at the table that controls the pooled resources - and the vast majority of the leaders interviewed felt very confident about their skills, optimistic that they could prove themselves worthy if given the chance - regardless of how they got there.

Notable efforts and progress have been made with regard to increasing the diversity in leadership appointments. The role of judges demanding more diversity on leadership is universally recognized as the most significant factor. Increased awareness and discussion -- significantly through the leading legal publications -- about the profound gender gap in litigation in general and MDL leadership appointments was also credited for having an institutional influence. Many subjects also noted that increase in female networking through organizations as a powerful institutional influence. Respondents unanimously voiced appreciation for these groups, noting the positive impact that they have had on their professional career. They allow women to create their own network of referrals and support, as well as enable women to discuss compensation and other issues where bias has traditionally thrived due a lack of transparency and knowledge of others’ experience. The empowerment derived from the support of these female networks, supports the claims-making ability of women that is routinely repressed in disadvantaged groups. Additionally, the positive impact of the increased diversity on the defense side’s representation (often mandated by their corporate clients requiring that their representative trial teams be more diverse) on increasing diversity on the plaintiff’s
side is another nod to the strength of outside institutional influences on changing the inequalities characteristic of inequality regimes.

Cultural beliefs that “if I just put my head down and work hard enough someone will notice me” expressed by many of the interview subjects, as well as the entrenched role division of women taking “supportive roles” as women in litigation, have largely kept them out of the “limelight” or court settings where the powerful litigators are making all of the decisions. As more women get appointed and appear in court, that barrier of invisibility weakens. Women are increasingly engaging in claims-making, which is likely to cause a backlash when initiated by someone of perceived lower social status in an organization (Tomaskovic-Devey, 2014). They are increasingly making claims for a share of the finite pooled resources of the case -- in this case, lucrative leadership appointments and influence on how the case and its monetary settlement is conducted and divided among the attorneys, thus not surprisingly subject to backlash. The finite resources of prestigious and lucrative appointments are the basis upon which claims are made, and exploitation and opportunity hoarding occur. A lot of the backlash these women leaders have encountered involves language indicative of their feeling that women have stepped outside of their “socialized feminine” roles into more powerful and assertive positions – traits that are valued for men but sometimes penalized for women.
Chapter 7
DISCUSSION AND CONCLUSION

This study analyzes how the organizational processes at both the firm and practice level interact with interactional processes and institutional influences to perpetuate the persistent gender gap in MDL leadership appointments. The experience of Plaintiff MDL attorneys is ripe for study not only because MDL comprises over half of the entire federal caseload (Simpson, 2019), but because it is structured in a very unique way when compared to other forms of litigation, allowing us to examine specifically how such a gender gap is perpetuated. Utilizing an inequality regime framework allows us to examine the specific and nuanced ways in which organizational structures and their mechanisms, culture, complex identities, and outside institutional influences like history, culture, intersectionality, politics, social movements, and organizational fields interact and relate to each other to produce and reproduce inequalities. As Tomaskovic-Devey astutely points out, because these interactional mechanisms create and recreate inequalities, they are also the grounds at which to look for “dismantling” existing inequalities (2016, p.67). The findings in this study aim to contribute to the literature about how inequality regimes work as well as more deeply inform future efforts and initiatives for women’s advancement in court-appointed leadership and the legal profession as a whole.

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 (ABA, 2019; Sterling & Reichman, 2016).
When compared to their male counterparts, existing research establishes that 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. While it is widely acknowledged by practitioners that a serious gender gap exists in MDL leadership appointments, prior research had not yet quantified the discrepancy or explored the ways in which the varied and specific procedural, structural, and cultural factors unique to this type of practice contribute to this discrepancy.

The vast majority of research about women and minority attorneys in the legal profession examine their experiences practicing within large private law firms, at the exclusion of smaller and boutique firms, where more “Plaintiff” firms would be categorized. Large corporate defense firms, which are commonly on the “other side” of plaintiffs suits as they represent corporate entities, are constantly surveyed and publicly rated for their promotion and retention of women and diverse lawyers, as well as their salaries, leave policies, “family-friendliness,” and treatment of women. There is also significant pressure from their corporate clients to put together diverse working teams. Plaintiff’s firms have not been not examined as a specific group at all, making them ripe for study to determine how the unique structures and cultures of their firms and the MDL court processes potentially contribute to the substantial gender gap in MDL leadership appointments. As in all professions, and certainly in the law, the experiences of women attorneys in multidistrict litigation and the reasons for the lack of gender diversity in MDL leadership are complex and varied. Therefore, a mixed-methods approach enables full examination of these issues.
The first step in this study’s attempt to explain the persistent disadvantaging of women in MDL leadership appointments was to quantify the gender gap. In order to do so, multidistrict litigation dockets filed with the United States Judicial Panel on Multidistrict Litigation containing leadership appointments from 2012-2017 were coded and analyzed to determine the rates of female appointment through the years studied. Overall, women are appointed at far lower rates than men in all categories of leadership positions at 25% of all appointments in 2017, increasing from 17% in 2012. When appointed, women were consistently more likely to be appointed to the less-prestigious, less powerful, and less-lucrative Tier Two leadership positions when compared to Tier One positions. The linear trends of the average rates of female appointment over all the years analyzed indicate slow progress for female leadership. However, the relatively static nature of the rates shows the strength of the existing structures and culture that maintain this gap. These quantitative findings establish a significant gender gap in MDL leadership appointments, thus serving as the basis for further exploration of the institutional, structural, cultural, and interpersonal factors that contribute to this discrepancy through in-depth interviews with practitioners.

Data gathered from in-depth interviews with 26 women practitioners and one federal MDL judge were analyzed using an inequality regime framework. Sterling and Reichman suggested that legal scholars move toward utilizing a framework of relational inequality, to “integrate prevailing frameworks of gender disadvantage and map them onto an organizational process to develop a more robust understanding of women’s quite durable disadvantage” (2016, p.387). Utilizing an inequality regime framework allows us to examine the specific and nuanced ways in which organizational structures and their mechanisms, culture, complex identities, and
outside institutional influences like history, culture, intersectionality, politics, social movements, and organizational fields interact and relate to each other to produce and reproduce inequalities.

At the firm level, this study’s qualitative interview data confirms that women in plaintiff MDL firms experience the same bias experienced by women in all private law firms – including the larger firms that are the subject of most surveys and research. Working in a largely masculine work environment, the women interviewed experience the “Tightrope Bias” that most women lawyers experience while attempting to balance performing socially-acceptable femininity with the masculine culture found in some firms. They also report experiencing “Prove-It—Again Bias” where, because of their gender they have to prove themselves more than their male counterparts in order to be taken seriously (ABA et al., 2018).

Meaningful mentorship and effective sponsorship are not only necessary for honing litigation skills in MDL practice, but also for navigating the politics of the practice both inside (and especially) outside the firm. Interview subjects generally agreed that a good mentor/sponsor is proactive about: promoting their sponsoree within the firm; getting them onto a trial team; getting court experience; promotion; and pay. Most of the time, given the current gender makeup of firm leadership, the superiors with the social capital to propel an up-and-coming attorney are men. However, women find it hard at times to establish a close sponsorship relationship with senior men in their offices for numerous reasons. Barriers to such male-female mentor and working relationships include fear of assumed romantic impropriety, a lack of casual social opportunities to get to know each other, and affinity bias – or the natural default to socializing with, working with, and giving assignments to people
like themselves. The outside institutional influence of their new-found ability to networking with and receive mentorship from other women attorneys through professional organizations like Women en Mass has proved to be valuable in overcoming some of these barriers.

The examples of “case takeover” experienced by many women in their firms clearly exemplify two inequality-producing mechanisms found in inequality regimes -- exploitation and opportunity-hoarding. The culturally-accepted categorical distinction that “women don’t try cases” allowed the men to exploit the massive amount of work that the women undertook to build these cases to trial (all while under the impression that they were their cases and would someday take them to trial). Their work was exploited to the benefit of the male attorneys who could then reap the career and monetary benefits from being the public “face” of the trial. Case takeover is also a form of opportunity-hoarding, another mechanism of inequality regimes where the hoarding actors monopolize valuable resources and positions for themselves and those within their social circle or “categorically similar actors” (Tomaskovic-Devey, 2014 p. 59). Here, as Tomaskovic-Devey suggests, this exploitation and opportunity hoarding is institutionalized in certain positions in the organizational hierarchy -- “positions then become the basis for opportunity hoarding” (2014, p. 59).

In their practice, the women practitioners reported experiencing “case takeover” both in their home firm organizations as well as at the institutional level while practicing, leading them to feel that they “always need to be on the lookout.” In firms, exploitation and trial opportunity-hoarding are normalized in the firm’s status hierarchies, influenced by traditionally cultural stereotypes of the ideal lawyer being an elder male and the idea that “women don’t try cases.” These organizational
mechanisms disadvantage women lawyers, and women risk negatively affecting their relationship and thus careers in the firm if they attempt to claim the accomplishments or speak up about their cases being taken over. At the structural/practice level, the structure of plaintiff’s work in such large cases (made up thousands of cases that involve attorney’s from other firms) allows for competition and potential takeover of global settlements to occur, unlike in other areas of legal practice, where an attorney is paid hourly by their client.

Regarding pay and promotion, interview subjects felt that the absence of standardization and clear promotional standards made their careers subject to the whims of a handful of powerful men, and in some instances, one person who acted as their superior. Additionally, being outside of the powerful “in-groups” at their firms, women find themselves not privy to the informal information regarding what it “really” takes to be promoted. Regarding pay, in these boutique plaintiff firms, an almost total lack of compensation structure and standardization has led to significant pay disparity to the detriment of female plaintiff’s attorneys. An inequality regime analysis emphasizes how other cultural influences interact with this lack of structure that disadvantage women. For example, culturally infused and enduring expectations of women as homemakers - and not as breadwinners - influenced how male partners and the firm as an organization view the value of women’s work, as well women not being awarded the same assumption of desired upward promotion in the firm like the men in their firms. Overcoming this presumption requires women to be assertive and make a claim — that they expect to be promoted or they will possibly leave the firm — actions that can be considered outside the lines of appropriate feminine socialization, potentially having negative ramifications for women who decide to do so.
Interview data also confirmed that women MDL attorneys experience much of the well-established bias that female lawyers experience after having children. However, the particular structure of MDL practice directly affects the ways in which these women experience, and potentially overcome, the maternal wall. MDL work is particularly demanding due to long trials and regular nationwide travel. Analogous to the lack of structure for promotion and pay, a common lack of uniform policies or structure for pregnancy and parenthood in Plaintiff’s firms creates significant opportunities for bias to thrive – quite often negative for women and conversely positive for men steeped in gendered assumptions about parenthood and caregiving.

Big Law defense firms must answer numerous surveys about parental leave that are publicly disclosed and ranked, incentivizing competition between the firms to create broader and effective parental leave policies. In contrast, many of these smaller plaintiff firms lack formal policies, leaving women and men to individually negotiate time off, subject to the individual biases and cultural beliefs about gender and caregiving of their superiors and fellow appointees on case leadership.

Deeply entrenched and gendered cultural beliefs about parenthood interact with this lack of structure to particularly disadvantage women. Women reported that they feel culturally expected to take leave and suffer negative consequences to their career (even before pregnancy due to the assumption of inevitable parental leave and potential future reduced hours) and men who desire to take leave to care-take after the birth of a child are chastised and potentially disadvantaged for stepping outside the lines of traditional masculinity in which men are breadwinners and leave the caretaking to the mother of their children. These cultural expectations can constrain men’s decisions to utilize parental leave afforded by their firm, making them less
likely to take leave only reinforcing the idea that parental leave and caregiving is a “women’s issue” in the organization and therefore resists normalization to the detriment of women. Cultural gender roles and stereotypes place women in the position of having to assert themselves and go to great lengths to rebuke the presumption that their commitment to practicing has waned after having children. Conversely, the women interviewed felt that the men in their firms experienced a “fatherhood bump” in which, upon becoming a parent, they are assumed to be a more dedicated worker now that they are “providers.” They perceive this disparity in work assigned, assumptions about career track, and even explicitly in pay and bonuses awarded. The lack of formalized policies and structure surrounding leave and caretaking flexibility can magnify the effect these common cultural gender stereotypes have on men’s and women’s careers.

Next, the data collected from the Practice portion of this study gives the opportunity to examine how gender dynamics play out within the unique culture and structure of MDL litigation. Practicing Multidistrict Litigation is extremely competitive, high stakes, requires constant nationwide travel, and can be very lucrative if you are appointed to the right leadership positions. It is also controlled by a long standing “boys’ club” of white male practitioners otherwise academically referred to as “Repeat Players.” Those who find themselves outside of the “Repeat Player Network” are significantly disadvantaged in their attempts to break into the upper echelons of this practice (Burch & Williams 2016). This particular practice is widely recognized, by those who work in it, to be very masculine. Accordingly, the women interviewed expressed the double bind that they feel as women trying to “fit in” and work with the men, vying for leadership appointments, but also having to walk the
tightrope between asserting themselves in a place where they are not part of the “in group” while dealing with the negative ramifications of acting outside of accepted femininity. The unique structure and procedure of plaintiff MDL practice — including but not limited to the appointment process, the networking and relationship building with attorneys outside of your firm to be appointed, case financing, and divisions of labor on leadership teams, interact with cultural and other institutional influences to particularly disadvantage women and those outside the “repeat player” network in multidistrict litigation.

Unlike other types of practice where lawyers network with potential clients to obtain their business, Plaintiff attorneys who practice class action and MDL have to network and go to great lengths jockeying or lobbying with other attorneys from other firms to “get business.” Leaving the leadership decisions almost entirely up to the attorneys themselves places great emphasis on attorneys networking and negotiating with other attorneys from other firms in the practice to get placed on slate. This unique and intensely competitive process - being picked by your peers to obtain lucrative career enhancing work -- creates a particular practice ripe for opportunity hoarding.

The way in which this lobbying for leadership occurs is a prime example of opportunity hoarding mechanisms in inequality regimes -- when organizational actors monopolize valuable resources and positions for themselves and those within their social circle or “categorically similar actors” (Tomaskovic-Devey, 2014, p.59). Opportunity hoarding occurs in numerous ways during the lobbying for leadership process. For example, the horse-trading that occurs, where repeat players use their status to exclude those outside of their group to include other repeat players on their
cases, which in turn will come back to them by way of opportunities in other cases extended to them by said repeat players. When an Up and Coming Leader is lobbying for a leadership position, they are routinely asked if the power repeat players from their firm have given their permission for them to take a leadership spot — maintaining the group boundary by checking with each other before extending invitations into the group. At a more extreme end of the spectrum of hoarding mechanisms, women reported being subjected to verbal harassment and intimidation — illustrations of the types of harassment that are sometimes used by actors in an inequality regime to intimidate those of lesser status from making claims for pooled resources and opportunities (Tomaskovic-Devey, 2014).

Further, in addition to feeling “outside” of the group that controls MDL practice, every woman interviewed detailed exclusion from in-person meetings where decisions are made between attorneys about putting together proposed leadership slates. Much like with the social networking within firm organizations, they explained that they are routinely excluded from a lot of the informal social networking events like golf and other activities. In this practice structure that requires such lobbying and social in-group approval to achieve participation and leadership in an MDL, women are particularly disadvantaged by the culturally-normalized gender-segregation of social events.

Many of the respondents noted how particularly challenging navigating the networking necessary at conferences can be. Because Plaintiff’s attorneys need to network and form relationships with those outside of their firm and spread across the country, professional conferences for plaintiff attorneys become one of the main settings for networking and forming this crucial relationships. With regard to these
conferences, the women interviewed for this study reported there being a significant double standard where they are expected to be extroverted, socialize and participate in drinking, but also recognize that these behaviors can also be held against them as not appropriately “feminine.” Respondents widely reported feeling uncomfortable and having trouble being a part of the masculine culture at some of these “necessary” conferences. Many women detailed sexual harassment at conferences and how it made them reluctant to attend conferences and “put themselves out there” to develop the relationships so necessary for success. In an inequality regime, such bullying and harassment can be a fundamental source of exploitation (Tomaskovic-Devey, 2014, p.67). Women are significantly disadvantaged when they are expected to socialize and make connections to get on people’s “team” or in people’s “in group” networks in order to succeed in plaintiff’s work in very masculine and sometimes uncomfortable and intimidating settings.

On a positive note, the women noted how outside institutional influences have had a positive impact. Due to the increase of women networking groups and committees through the American Association of Justice and Women en Mass, the women feel they’ve been able to create new valuable networks for women. These women’s associations and their positive effects are an example of how institutional influences can not only perpetuate inequality regimes, but also can have a positive impact, providing tools to decrease some of the inequality effects experienced. The women interviewed also noted that they have begun discussing salary and benefits with each other as well as reaching out to each other as resources regarding practice advice - to overcome this exclusion from networks and access to information upon which to gauge whether or not they are receiving appropriate pay and benefits.
The financial requirements to participate in a leadership position is an extremely powerful institutional influence that greatly strengthens the abilities of repeat players and their firms to hoard leadership opportunities to the exclusion of those firms outside of the established network. This evaluation of financing ability is legitimized through the way in which the MDL practice is conducted with firms having to “float” the costs of litigation for many years with hefty periodic assessments along the way. These financial requirements privilege certain firms and greatly disadvantage others, including prohibiting most of the people being exploited by their current law firms who wish to “go out on their own” and start their own firm from doing so.

Further, decisions about the division of labor on case leadership advantage some groups and disadvantage others. This division of labor is very impactful because the potential tasks in a case not only differ in prestige with the ability to raise your profile with Judges and in the profession, but are valued significantly differently for compensation purposes at the end-of-case payout. Plaintiff attorneys’ billable work is valued differently and logged as “common benefit hours” [the entire case’s billable hours] to be paid out proportionally at the end of the case as attorney’s fees. The common benefit fund therefore becomes a literal representation of the type of “resource pooling” creating a limited amount of resources (in this case, money) to be divided among organizational actors, characteristic of inequality regimes (Tomaskovic-Devey, 2014). Such situations are ripe for exploitation and opportunity hoarding. Women and those outside the repeat player network are often assigned administrative tasks that are less valuable at pay out and do not provide as much career-boosting face-time for the appointee, thus reinforcing the incentive to distribute
the tasks in a way that continues to benefit them and other Repeat Players. Women experience a double bind when considering speaking up and making a claim for better work, risking being denoted as being “difficult” or a “bitch,” which can hinder their ability to be chosen by their colleagues for future slates.

The discussion surrounding whether slates or individual applications should be utilized for appointment illustrates how an institutional or organizational process can influence the outcome of an inequality regime (Tomaskovic-Devey, 2014). Interview subjects evaluated the usefulness of slates as a tool to produce a cohesive leadership group while also explaining the advantages or disadvantages of each appointment method. The slate method, while it certainly has been shown in this data to operate as a major tool for repeat players to opportunity hoard, can also sometimes be an avenue for an attorney new to leadership appointments to be appointed as part of an established group. It was generally agreed upon that individual application methods, while coming with their own challenges (requiring extensive travel just to apply being one of them), gives previously marginalized attorneys outside of the repeat player network another avenue through which to “take a shot,” or engage in claim-making on behalf of themselves. As the Established Leader noted, it feels “democratic,” unlike the traditional slate-only method of appointment where the only avenue to appointment is through lobbying with the in-group network. The appointment method is an institutional influence that can influence the opportunities that actors have to exploit and opportunity hoard. The ever-increasing use of a hybrid approach -- where the judge asks for a slate to consider, as well as takes individual applications upon which to make their decision, allowing the judge to appoint a combination of the two if they see fit to address the needs of the case -- seems to be a popular choice among
the women interviewed for limiting the disadvantage experienced by women outside of the repeat player network while also allowing attorneys to create legal teams that can successfully work together.

The role of judges and their impact on diversity in leadership appointments are another illustration of how an institutional or organizational process can influence the outcome of an inequality regime (Tomaskovic-Devey, 2014). Although quite controversial at its start, judges are now increasingly calling for more diversity on leadership appointments. Due to the power and status of Judges in an MDL case, they are in a unique position to have meaningful impact on the processes of MDL work that perpetuate inequalities to the detriment of women and minority attorneys. By incorporating open application processes for attorney to put themselves forward for leadership appointment consideration, judges remove the traditional barriers to claims-making that have traditionally hindered those outside of the repeat network from being considered for these prestigious and lucrative appointments. They have also at times effectively disrupted the routine and legitimized exploitation of younger associates who are doing the heavy lifting behind the scenes, giving them a chance to show their work in court.

Notable efforts and progress have been made with regard to increasing the diversity in leadership appointments. The role of judges demanding more diversity on leadership is universally recognized as the most significant factor in the increasing diversity of appointments. Increased awareness and discussion -- significantly through the leading legal publications -- about the profound gender gap in litigation in general and MDL leadership appointments was also credited for having an institutional influence as a social movement. Many subjects also noted that increase in female
networking through organizations as a powerful institutional influence on the progress we’ve seen. Respondents unanimously voiced appreciation for these groups, noting the positive impact that they have had on their professional career. They allow women to create their own network of referrals and support, as well as enable women to discuss compensation and other issues where bias has traditionally thrived due a lack of transparency and knowledge of others’ experience. The feelings of empowerment derived from the support of these female networks, support the claims-making ability of women that is routinely repressed in disadvantaged groups. Additionally, the positive impact of the increased diversity on the defense side’s representation (often mandated by their corporate clients requiring that their representative trial teams be more diverse) on increasing diversity on the plaintiff’s side is another nod to the strength of outside institutional influences on changing the inequalities characteristic of inequality regimes.

Cultural beliefs that “if I just put my head down and work hard enough someone will notice me” expressed by so many of the interview subjects, as well as the entrenched role division of women taking “supportive roles” as women in litigation, have largely kept them out of the “limelight” or court settings where the powerful litigators are making all of the decisions. As more women get appointed and are in court, that barrier of invisibility weakens. Women are increasingly engaging in claims-making, which is likely to cause a backlash when initiated by someone of perceived lower social status in an organization (Tomaskovic-Devey, 2014). They are increasingly making claims for a share of the finite pooled resources of the case -- in this case, lucrative leadership appointments and influence on how the case and its monetary settlement is conducted and divided among the attorneys, thus not
surprisingly subject to backlash. The finite resources of prestigious and lucrative appointments are the basis upon which claims are made, and exploitation and opportunity hoarding occur. A lot of the backlash these women Leaders have encountered involves language indicative of their feeling that women have stepped outside of their “socialized feminine” roles into more powerful and assertive positions – traits that are valued for men but sometimes penalized for women.

Lastly, large defense firms (the customary adversary of the plaintiff’s firms in MDL cases) have to answer to the demands of their corporate clients who have certain social and diversity standards that they apply to their hired counsel. This has undoubtedly encouraged and enforced the defense firms to put forth more diverse trial teams. The lack of institutional oversight of Plaintiff’s firms by either their clients or professional organizations due to their size and “niche” work, means that no one is publishing their salaries, the gender ratio of their promotions each year, female retention, ranking their family-friendly policies, or by any other measures that defense firms are customarily subject to publicly evaluate their treatment of women. The lack of oversight on this practice can allow gender discrimination and sexual harassment go unchecked when compared to other types of firms.

In sum, Plaintiff MDL practice functions as an inequality regime to the detriment of women lawyers at both the firm level as well as the institutional-practicing level. Utilizing an inequality regime framework allows examination of the specific and nuanced ways in which organizational structures and their mechanisms, culture, complex identities, and outside institutional influences like history, culture, intersectionality, politics, social movements, and organizational fields interact and relate to each other to produce and reproduce inequalities. It is through examination of
this interaction and relational nature that we can more thoroughly analyze the persistent disadvantage of women in the practice of law, incorporating and moving beyond the traditional frameworks for evaluation and program design that have not moved the needle. As Tomaskovic-Devey astutely points out, because these interactional mechanisms create and recreate inequalities, they are also the grounds at which to look for “dismantling” existing inequalities (2014, p. 67). It is intended that analysis as a relational inequality regime will better inform future initiatives for practical and effective ways to remove barriers to women’s advancement in court-appointed leadership, and hopefully to women in law at large.

**Research Contributions and Recommendations**

This study contributes to the literature calling for further investigation into how structural changes can decrease the seemingly insurmountable gender gap in law. Further, it expands upon the growing literature about inequality regimes by applying it to a particular organizational structure — exhibiting how such an analysis can expose the complex ways in which inequalities are produced and reproduced within organizations, thereby informing efforts to reduce such persistent disadvantages.

Findings from this study indicate that structural and procedural changes are necessary to move the needle on gender diversity in MDL leadership appointments. The existing structures greatly advantage those already within the Repeat Player network. According to Acker, potentially successful changes to inequality regimes include efforts that; “target a limited set of inequality-producing mechanisms”; combine “social movement and legislative support outside the organization with active support from insiders”; and “often involve coercion or threat of loss” (2006, p.459).
An example of structural change that has made a positive impact on gender diversity is through the efforts of some of the federal judges. The judges’ explicit statements and orders asking for MDL leadership to include more diversity and more attorneys from outside of the Repeat Player network, or even simply the perception that a judge *may* care about diversity (even when they haven’t explicitly said so), creates a change in procedure and structure that everyone adapts to. In order to be successful in this new structure, players alter their behavior by seeking out other attorneys that have traditionally been marginalized – including gender, race, inexperience in leadership, and geographical location. Further involvement - or buy in - from judges regarding diversity in MDL appointments should prove to be particularly coercive due to their unique position of power over proceedings and the division of attorney’s potential pooled resources. In line with what Acker (2006) asserts, the drastically increased public attention about the lack of diversity in leadership appointments influenced some judges to change their methods of appointment, and established diversity in leadership as an important factor in leadership decisions. This study’s data suggests that further publicity about the rate of female appointments in MDL as well as stronger efforts by Judges to make diversity a focus in their appointments would serve to continue the progress seen of late in decreasing the gender gap in appointments. This could be encouraged by a yearly analysis and publication of the gender gap in appointments noting potential yearly progress.

Perhaps the two most powerful structural factors with the greatest influence on gender inequality in the practice is the reliance on case financing for leadership decisions and leaving the decisions with regard to leadership slates and division of labor on leadership almost entirely up to the attorneys themselves, thereby placing
great emphasis on attorneys networking and negotiating with other attorneys from other firms in the practice. This unique and intensely competitive process - being picked by your peers to obtain lucrative career enhancing work -- creates a particular practice ripe for opportunity hoarding and exploitation. Modification to both of these structural factors, however, would require not just procedural but significant structural overhaul to MDL practice. Short of amending the way in which class-action practice is conducted — currently requiring plaintiff’s firms to extend massive amounts of money to “float” litigation until it is resolved — future initiatives should consider ways in which the requirements for financing plaintiff’s MDL cases can be minimized as a factor for appointment.

Continued increased judicial involvement in the application process, perhaps moving away from rubber-stamping attorney-created slates as a matter of course, and providing realistic opportunities for those outside of the usual repeat player network to get a chance to vie for leadership should also prove to be effective. Additionally, increased oversight (perhaps judicial) about the division of labor on leadership teams would limit the opportunity hoarding currently so common on leadership teams. A few judges -- like Judge Rufe -- have begun to make their leadership orders very specific in assigning detailed leadership responsibilities. Finally, it may be effective to require applicants for leadership to include a “diversity statement” of some sort in their applications for leadership, analogous to what defense firms are now commonly required to submit with their pitches for business with corporations, a practice that has created competition between defense firms to be more committed to diversity than other firms. These diversity statements commonly include a statement about the firm’s commitment to diversity and its associated programming, as well as disclosure
of the firm’s statistics with regard to women and minority partner numbers and the like. Having this requirement - either informally or formally - come from the judges would provide a strong institutional influence that could not otherwise be achieved through client demand in MDL plaintiff’s practice as their clients are grouped into large classes that lack agency over who represents them, participates in the litigation, or settles their cases.

Within the plaintiff law firm organizations, increased structure with clear guidelines for promotion, pay, and parental leave and flexibility, could potentially diminish the strong influence that gendered cultural assumptions about women have on these organizations’ processes. Less standardized, more subjective processes are ripe for the influence of biases that perpetuate the disadvantaging of certain groups (NAWL, 2018; Harts, 2005). Providing systems with clear expectations and guidelines in these areas where women are traditionally kept “out of the loop” on important informal knowledge about progress in their firms, due to their position outside of the controlling group, cannot eliminate the influence of cultural gendered assumptions, but they will create entitlements upon which women can feel more comfortable to make claims, as well as relieve them from the current mercy of their superior’s cultural ideas about women and work. Further, the persistent issue of case take-over could be mitigated by the introduction of a more systematic approach to credit allocation and litigation experience. Akin to the call for more standardized origination credit systems in firms (ABA et al., 2018), implementation of a system for claiming ownership of cases and trial opportunities with procedures in place for settling disputes thereon would create an organizational structure that may alleviate
some of the ways in which women are routinely disadvantaged with regard to case and litigation takeover.

Limitations and Directions for Future Research

A key limitation to this study is the inability to provide a more thorough analysis about how intersectionality - as an important interactional process identified by Tomaskovic-Devey - plays a role in these inequality regimes. Due to the lack of a racially diverse pool of women in the field to be interviewed as well as the inability to assess racial or other self-identified status through firm biographies, this study could not evaluate gaps beyond the gender gap. Future research, perhaps through a survey where respondents can self-identify, should examine how intersecting identities, including gender, race, sexual orientation, disability, social class, geographic origin, and law school attended, play a role in inequality regimes, enabling a deeper understanding of the ways in which these mechanisms interact to promote inequality. Additionally, in-depth interviews should be expanded to include more federal judges making MDL appointments, as well as the men both inside and outside of the repeat player in-group. It would be particularly informative to interview non-white men that practice MDL to examine how these existing structures and procedures that exclude those outside of the largely white-male group interact with cultural ideas different than those ascribed to women. Doing so would lead to a more nuanced understanding about how these unique structures and processes in plaintiff MDL disadvantage those outside the repeat player network. There is also more work to be done to examine the potentially different experiences of the leaders – Up and Coming, Experienced, and Veteran – as cohorts. During data collection, there was preliminary evidence to
suggest that the women’s experiences varied greatly in part because of the time in which they first attempted to vie for leadership positions. Some of the Veteran Leaders indicated that they did not experience any overt backlash or discrimination in their everyday practice when they were first starting out and were quite often the “only woman in the room.” Many of the Experienced Leaders, in their late forties, detailed experiencing significant and obvious barriers to advancement and appointment for their entire career as well as significant backlash for the current gender diversity progress in appointments. Further research should delve further into this potential influence on their gendered experiences and perhaps continually examine this influence as increased attention to diversity in appointments continues.

Due to the “small world” that is MDL plaintiff practice, confidentiality concerns limited the researcher’s ability to present some of the more explicit - and therefore identifying - data in the analysis, such as specific incidents of sexual harassment. Future study design should include ways to represent the lived experiences of both men and women in the field, in their own words, without compromising confidentiality. Further, while larger and “defense” firms who represent corporations have been the subject of numerous studies about gender and other potentially disadvantaging identities in the practice of law, future research should qualitatively analyze the experiences in those structures using an inequality regime analysis. The established and ongoing research available about the practice of law in “Big Law” is rich with statistics about pay, the impact of parenthood and flexible schedules on promotion and retention, 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. While this research is certainly plentiful, progress is still happening at a
glacial pace in the profession. Analysis of other areas of the profession as inequality
regimes can yield a better understanding of the specific and nuanced ways in which
their organizational structures and processes interact with culture, complex identities,
and outside institutional influences to produce and reproduce inequalities. This would
also enable comparison of inequality regimes within the law informing potentially
more successful initiatives aimed at dismantling the existing inequalities in the
profession as a whole.

This research also expands our understanding of the ways in which intersecting
identities, cultural understandings, structures, and processes relate to each other to
create both advantages and disadvantages in work outside of the legal profession.
Existing research on gendered work organizations valuably focuses on how certain
work processes and structural factors, legitimized by their gender-neutral appearance,
interact with cultural underpinnings about gender to create distinct disadvantage and
disparate outcomes for women such as pay and promotion (Koskinen Sandberg, 2017;
Bobbitt-Zeher, 2011). This study contributes to the current literature about gendered
work organizations by exposing the value in utilizing an inequality regime framework
to examine not only how the internal work processes of a work organization interact
with cultural assumptions about gender, but also the potentially strong influence of
outside professional influence (in this case, judges) and social awareness on the
strength of gender disadvantage in the workplace. A multi-faceted in-depth analysis
into a single professional setting allows researchers to more fully examine how the
complex and intersecting factors and mechanisms - both inside and outside of the
organization – interact with each other to produce complex inequalities. This
approach better enables the discovery of potential effective solutions and policies to interrupt the persistent gender gap in work organizations.
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Vizio, Inc., Consumer Privacy Litigation, No. 8:16-ml-02693 (C.D. Cal.).


Appendix A

INTERVIEW QUESTION GUIDE

*** remind subject periodically that they may skip a question at any time without giving a reason, as well as may stop the interview if they no longer wish to continue.

1. Personal Background
   1.1. As what gender do you self-identify?
   1.2. As what race do you self-identify?
   1.3. What is your age?
   1.4. How long have you been practicing law?

2. Education History
   2.1. Where did you go to law school?
   2.2. What was your approximate class rank?
   2.3. What year did you graduate?
   2.4. Were you on law review in law school?

3. Employment / Firm - General
   3.1. Please detail your employment history since law school.
   3.2. Are you currently employed? Where?
   3.3. What size firm?
   3.4. What is your position at your firm or current place employment?
3.4.1. What are your future career goals?

3.5. What type of law do you practice?

3.6. In what capacity are you involved with MDL?

3.7. What is the gender makeup of your firm?

3.7.1. partners, associates

4. Experiences within firm

4.1. Please explain your mentor experiences as a mentee (if any) in your career.

4.1.1. Were you assigned a mentor?

4.1.2. Please explain the relationship.

4.1.3. Do you feel you received adequate mentoring?

4.1.4. How helpful was your mentorship experience?

4.1.5. Please describe the gender of available mentors, your experience with both (if applicable) or any reluctance on either genders’ part to mentor you.

4.2. Have you served as a mentor to any newer attorneys?

4.2.1. Please describe that relationship - how it started, how productive it is/was, and any challenges you experienced.

4.3. As a woman, what has been your experience networking within your firm and outside of the firm recruiting clients?
4.4. Have you ever experienced “case takeover” by male partner -- in which a male partner takes over your MDL case after a significant number of plaintiffs are assembled? Please explain.

4.5. Are there any other ways that you would say gender is impactful or an issue in the workplace?

4.5.1. How about your relationship with support staff?

4.5.2. How about work life balance?

4.5.3. Parental leave?

4.5.3.1. Policies / formal leave in place?

4.5.3.2. Allowances for men as well? Do they use it?

4.5.3.3. Do you feel that employers and colleagues make assumptions about parents (both men and women)?

4.5.3.4. Is there such a thing as a mommy track?

4.5.3.5. Are flexible work schedules offered? Do they work?

4.5.4. Personal balance of acting masculine and feminine appropriately?

4.6. Please describe your job requirements:

4.6.1. travel?
4.6.2. hours?

4.6.3. billables / contingent fees?

4.6.4. How would you describe your work/life balance?

4.6.5. Are there different work expectations for M/F?

4.6.6. Is there a difference between genders with regard to assigning administrative tasks in addition to billable hours?

4.6.7. Requirements for promotion / making partner?

5. **Are you now or have you ever “gone out on your own” and started your own firm?**

5.1. If so, please describe that experience.

5.2. What are the barriers to doing so?

6. **Experience in MDL world**

6.1. What is your experience practicing MDL?

6.2. What types of cases do you work on?

6.2.1. Plaintiff or defense?

6.2.2. Subject matter?

6.3. Please describe the different ways in which leadership appointments are made.

6.3.1. Which methods of appointment seem to promote more diversity in your opinion?
6.3.2. Which method of appointment do you feel is the most fair?

6.3.3. In your opinion, how does gender interact with leadership appointments? Please explain.

   6.3.3.1. Our docket review shows that men are more likely than women to be appointed to the lead positions within the leadership group - is this your experience?

   6.3.3.2. Our docket review also shows that the ratio of women to men on a leadership panel increases for every additional leadership position a judge adds to the potential leadership group, suggesting that women are more likely to be appointed when the leadership group is very large as opposed to very small leadership panels. Is this your experience?

7. **Experiences with MDL / Mass Tort organizations**

   7.1. Do you feel that the mass tort organizations (AAJ, etc) represent the needs of female MDL practitioners?

   7.2. Do you feel that the mass tort organization conferences held each year are gendered in any way?

      7.2.1. Do you address the needs of women MDL practitioners?

8. Do you feel that your practice of MDL is advocating for a cause? Please explain.
9. Research and responses tell us that women are often in the position of “second chair” to a male lead who conducts the arguments in court (the “face” of the litigation”). Has this been your experience at all?

9.1. Please explain.

9.2. In your opinion, why does this occur?

9.3. In your opinion, what would change this custom?

10. In your opinion, how can judges promote diversity in leadership appointments?

11. In your opinion, how can firms promote diversity in leadership appointments and promotions within the firm?

12. Recently, there have been a few leadership appointments making the news for women lead counsels and gender equality on plaintiff steering committees. What efforts and by whom encouraged these developments?
Appendix B

UNIVERSITY OF DELAWARE IRB APPROVAL
DATE: September 29, 2016

TO: Dana Alvare, JD, MA
FROM: University of Delaware IRB (HUMANS)

STUDY TITLE: [960489-1] Gender and Leadership Appointment in Multidistrict Litigation

SUBMISSION TYPE: New Project

ACTION: DETERMINATION OF EXEMPT STATUS

DECISION DATE: September 29, 2016

REVIEW CATEGORY: Exemption category #2 (2)

Thank you for your submission of New Project materials for this research study. The University of Delaware IRB (HUMANS) has determined this project is EXEMPT FROM IRB REVIEW according to federal regulations.

We will put a copy of this correspondence on file in our office. Please remember to notify us if you make any substantial changes to the project.

If you have any questions, please contact Nicole Farnese-McFarlane at (302) 831-1119 or nicolefm@udel.edu. Please include your study title and reference number in all correspondence.

cc: