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A Prescription for Overcoming Gender Inequity in Complex Litigation: An Idea Whose Time Has Come

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Date : December 11, 2017

Brooke D. Coleman, *A Legal Fempire?: Women in Complex Civil Litigation*, 93 **Ind. L.J.** (forthcoming), available at [SSRN](#).

If ever there was a right time to discuss gender inequity in the legal profession, it is now. With a daily deluge of examples of how women are objectified, degraded, and undervalued in the workplace, Brooke Coleman's [A Legal Fempire?: Women in Complex Civil Litigation](#) comes at a perfect time. It is a welcome and timely exposé of how a slice of the legal profession—the Multi-District Litigation (MDL) world—illustrates the acute and ongoing systemic problem of gender inequity and the modest progress that has been made over time to address it. Coleman does an excellent job of shining a light on this serious contemporary issue without sugarcoating or whitewashing it, while simultaneously crediting the Gender Bias Task Force movement for its historical contributions and making proposals for going forward.

Coleman's article was an easy pick as a work I loved reading and one I highly recommend to law teachers, law students, and the legal profession in general. Her work reaches into many corners—complex litigation, feminism, employment law, ethics, social science—and is accessible in its content and tenor. She navigates the topic of gender inequity in the legal profession with both sensitivity and unapologetic dissatisfaction with the current state of affairs. In sum, Coleman's article should be required reading for 1Ls today, as a part of the prescription for attacking gender inequity in the legal profession.

Coleman's article mines data collected from Gender Bias Task Forces, which were created in the 1980s by the National Organization for Women and the National Association of Women Judges to examine gender discrimination in the legal profession. Coleman takes a sample from more than forty available studies, choosing a slice that cuts across state and federal courts, representing seven states and two federal circuits. My only critique is that I wish the article could have covered even more.

To Coleman's credit, she recognizes upfront that her work focuses on an elite, privileged few and that the data and analysis upon which she relies is in many ways under-inclusive. She concedes that much of this limitation was by design—with task-force leaders choosing essentialism over recognizing intersectionality—and that her work, while valuable, perpetuates this flaw to some degree. With this insightful confession behind her, the article goes on to make an invaluable contribution.

Although the Gender Bias Task Force studies varied in approach and scope, they all spotlighted two attributes in the legal profession: (1) acute female underrepresentation and (2) "rampant sexism."

Despite an inspiring history of female "firsts," the Gender Bias Task Forces revealed a significant female gap up to the mid-1990s, when their work primarily ended. Twenty years later, the statistics paint a similarly bleak picture. While women comprise almost half of law students today, women are woefully underrepresented in the most powerful and elite positions of the legal profession. Women make up only a quarter of federal and state judges, and 21% of law firm partners. Those who do make partner earn only 44% of what their male counterparts earn. Female lawyers are also tracked into lower-income practice areas. Although women make up 40% of law professorships, they hold only 28% of deanships. These numbers are even direr for women of color. Although they comprise 20% of the population, they make up only 8% of state and federal judges, less than 3% of all law firm partners, 7% of tenure/tenure-track professorships, and 8% of deanships.

Of course, the numbers tell only one part of the story. Not only is the legal profession dominated by men, it is rife with boorish and sexist conduct toward its female members. The Gender Bias Task Force studies “generally found ... women lawyers often suffered gross discrimination, and female parties and staff were regularly mistreated on the basis of gender.” The extent to which this remains the case is unclear. However, if the current [#MeToo](#) movement is any indicator of the American workplace climate overall, there is much about which to be concerned. The fact that this movement has spread like wildfire across industries as varied as entertainment, politics, media, and professional athletics suggests that gender discrimination is systemic and endemic.

Coleman does a deft job of recognizing the positive contributions of the Gender Bias Task Force movement, identifying its shortcomings, and building from this base with proposals of her own. She tips her hat to the pioneers of the movement, highlighting their positive recommendations for change, including gender bias and civility educational programs for judges, law students, and lawyers; changes to the rules of professional conduct; recruitment efforts for female lawyers and judges; judicial election and appointment process reforms and training; and standardization of judicial qualifications. Coleman hits the nail on the head, however, in asking where we are twenty years after the efforts of the Task Forces largely subsided. With over half of all law students being female since 1996, what does the legal profession have to show for this equalization?

Coleman cleverly selects the world of complex civil litigation, specifically MDL, to illustrate the ubiquity of gender inequity in the legal profession. This exemplar is a microcosm of the larger endemic problem of discrimination against female lawyers and judges.

Not surprisingly, the history of multi-district litigation is one of gender exclusion with respect to (1) the judges appointed by the Chief Justice to serve on the Judicial Panel on Multidistrict Litigation, (2) the judges chosen by the panel as transferee judges in MDL cases, and (3) the lawyers selected as plaintiffs’ lead counsel in MDL cases. In 1968, the first MDL panel was comprised of seven white men. The first white woman was appointed to the panel in 2000. Slowly, more were added: one in 2004, one in 2010, and then four more by 2014. Over the almost fifty years of the MDL panel’s existence, there have been fifty judges appointed to the panel, only seven of them women. There has never been a woman of color appointed to the panel, although they represent 27% of the federal bench. Today, for the first time in its history, there is a majority of women on the panel, including a female chair. While there has been progress, Coleman rightly concludes that “[t]he lack of racial diversity and the paucity of women on the [MDL panel] is quite discouraging.”

The same is true for the selection of transferee judges. While 33% of active federal district court judges are women, they represent only 25% of transferee judges. Not surprisingly, the lawyers selected by those transferee judges as lead counsel are primarily white men. Women comprised only 16% of the MDL leadership appointments from 2011 to 2015, although that figure has increased to over 27%. Even those women selected for MDL leadership are stratified in lower-level leadership positions.

One of the insidious problems of diversifying multi-district litigation is the pipeline problem. To be considered for the MDL panel and as transferee judges, women must be federal judges. Yet presidents—particularly Republican administrations—have been stingy in appointing women to the bench. Almost 20% of President George H. W. Bush’s judicial appointees were women, while 22% of George W. Bush’s were women. President Bill Clinton was the first president to exceed 20% women with his nominees, at 28%. President Barack Obama appointed more women to the bench during his first five years in office than Presidents Reagan, H.W. Bush, and W. Bush combined; 42% of his nominees in eight years were women. Trump’s legacy has yet to be determined, but Coleman suggests that if his Cabinet appointments are any hint, the number of women nominees will wane.

Not only does Coleman do an excellent job of illustrating the gender disparity in complex civil litigation, she also makes a compelling argument that the disparity should be eradicated. While this would seem to be an obvious normative conclusion, Coleman supports it with four distinct undeniable pillars. First, gender diversity is important because the best decision-making occurs when a group is heterogeneous. This is backed by scientific studies that demonstrate the

harms of conformity and lack of dissent. Second, participation by women not only changes outcomes, but improves them. A nice example of this is the corporate literature that reveals a 66% increase in profits for Fortune 500 companies having the highest percentage of females on their boards of directors. Third, gender diversity in complex litigation legitimizes the legal system. Stakeholders' meaningful participation in the legal system signals fairness in the process, which in turn engenders confidence in the outcomes. Fourth, because the legal system itself has created and perpetuated subordination of women, it has a duty to correct it. This is only fair, especially for an institution that purports to promote justice as its job.

Finally, Coleman builds on the work of her Gender Bias Task Force predecessors with her own prescriptive measures for the future. Coleman gives an appropriate shout-out to the pioneers, contextualizing their contributions and appreciating their progress. After this brush clearing, she sets forth her own proposals.

First and foremost, Coleman contends that it is time to rip off the Band-Aid and “confront base sexism and change social norms.” She sums up what has been dripping out of the news on the daily: “As the events of the past year and the results of the national election demonstrate, there is a foundational sexism and misogyny that underlies our culture.” Coleman’s examples are perfect, showcasing how appearance—including African-American women’s hair, Muslim women’s hijabs, and all women’s bodies—has been used to discredit women in the legal profession. There are no easy answers, but there are many answers: “[a]wareness, education, movements, and overt action by allies,” to name a few.

Second, Coleman emphasizes the importance of retaining and elevating women in the complex-litigation world. To rectify the pipeline problem, law firms must do a better job of hiring, mentoring, and promoting women through the ranks. White women and women of color are leaving law firms in droves because of structural and cultural barriers built into the law firm environment that replicate white male control and success.

Third, Coleman suggests that MDL practices be restructured to address the gender inequity in plaintiffs’ leadership committees and in selection of MDL transferee judges. Coleman recommends that MDL judges move away from using slates of repeat players and instead affirmatively consider diversity in their leadership appointments. She also recommends that MDL panels dole out the opportunity of serving as a transferee judge to rookies, so as to open up the pipeline.

Finally, Coleman closes with the sobering observation that overcoming gender inequity in the legal profession is daunting, but worth it. I wholeheartedly agree, and suggest that we start by reading her important and timely article.

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