



A Milestone in Gender Equality

Last November, Judge Kathryn Vratil of the District of Kansas approved the first female-majority plaintiffs' steering committee (PSC) in multidistrict litigation involving the Ethicon, Inc. power morcellator—a surgical device commonly used to remove uterine fibroids that allegedly spreads a deadly form of cancer in women's bodies. Trial talked to PSC coleads [Aimee Wagstaff](#) and [Paul Pennock](#) about their joint efforts to reach this long-overdue milestone, the importance of greater diversity in the legal profession, and what attorneys can do to encourage equality.

INTERVIEW BY DIANE M. ZHANG

Q Let's talk about the process behind forming a plaintiffs' steering committee. How is a PSC organized?

A **PAUL PENNOCK:** The lawyers organize among themselves and try to come to some consensus. Whether you've been able to organize one group or whether there are several groups, the judge typically issues an order sua sponte requiring everyone to submit individual applications—it's a lawyer appointment, not a law firm one. Based on the application, the judge will decide whether the person is appointed. In some instances, you'll have 150 applications and 20 people appointed.

This PSC is composed of 18 lawyers—11 women and 7 men. How did this specific team of lawyers come about?

AIMEE WAGSTAFF: In 2014, Paul reached

out to me when some of the first morcellator cases began to show up around the country. We discussed the litigation, found out who was working on the cases, and started to self-organize, meeting at various conferences and working together in an informal structure long before an MDL was formed. By the time the MDL was created, we had been organizing and meeting for almost a year.

PP: That informal structure that Aimee describes was crucial here. We were engaging in teamwork to develop the foundation for being ready to pursue the MDL, if and when it was created. We were fortunate to have a lot of good people following our lead, allowing us to be completely ready once the MDL was created.

Why do you think there were more women in this PSC? Was this

something you sought out, or did it develop organically?

PP: From the first telephone conversation we had, Aimee and I decided that this was a long-overdue milestone, so it was entirely deliberate. Throughout the process, Aimee and I emphasized the importance of this milestone to the plaintiff bar—including the added value to our clients and the historic nature of the appointment. We jointly focused our efforts and communications to galvanize lawyers to ensure that this milestone occurred—and people were receptive to it.

How did each of you get involved with this litigation?

PP: We both had people reaching out to us—clients or family members of injured people and other lawyers who wanted to know if we would be

interested in handling the case.

AW: The injuries in this litigation are devastating and deadly. Often, unsuspecting women in their 40s or 50s—after having a routine hysterectomy or fibroid removal—are diagnosed with an aggressive form of end-stage cancer and sometimes given less than a year to live. The terrible part is that this would have been entirely preventable if the manufacturers had put safety before profit. Once I learned the liability story and read about the causation, I felt compelled to help these women.

How can lawyers improve gender equality and diversity? What can male lawyers do in particular?

AW: Although the tide is starting to turn, gender equality and diversity is not the default composition of a PSC. I think that if people are more mindful of promoting and supporting qualified lawyers who are actually doing the work, then gender equality and diversity will become the norm in more instances.

Since our appointment last November, I've seen several great appointments that have moved the ball a little farther down the road, especially Judge Charles Breyer's appointment of Elizabeth Cabraser as sole lead counsel in the Volkswagen emissions MDL. Judges are in a unique and powerful position to create

gender equality and diversity in leadership positions.

PP: Those in a position to help achieve milestones should aim for not only gender diversity but greater diversity in general. It needs to be an explicit focus in our minds—not just in PSC leadership but in everything we're doing within our practices. The fact that it took two lawyers making a conscious, deliberate effort to get a female-majority PSC—that it did not just happen organically—tells me there needs to be a more explicit effort on all of our parts.

Why did it take so long to reach this milestone? Is it symptomatic of female underrepresentation in law or trial work in general—or does it go beyond that?

AW: I think it's both. If you look at the history of the male-to-female ratio on PSCs, women have always been underrepresented in relation to how many female attorneys are in the mass tort arena. Increasing diversity and gender equality on MDLs allows for different viewpoints, strengths, and weaknesses. You want everyone on there so you can have a diverse PSC that allows you to represent your clients in the best way possible.

The judiciary is in a powerful position to help effectuate change, and several

judges have stepped up to the task, including—in this instance—Judge Vratil. Not only did Judge Vratil appoint the first female-majority PSC, but her initial pretrial order required a diverse leadership proposal with respect to gender, race, national origin, geography, years of practice, age, and other relevant factors.

Another example comes from Minnesota, where Judge John Tunheim rejected the proposed leadership of the Fluoroquinolone MDL because its executive committee lacked gender diversity. Time will honor these judges as leaders and champions in this movement.

Power morcellators affect only women. How will a female-majority PSC help as litigation moves forward? Does it bring a viewpoint to the case that a male-majority PSC may not?

AW: A male-majority PSC could still bring an understanding and thoughtful viewpoint. But having women involved in a tort that is specific to the female body is very crucial in litigation—not only for the viewpoints that women bring but also for talking about and understanding their clients' injuries.

It is important to understand that gender diversity can be achieved *without* excluding men. Some of our best team members on the morcellator PSC are men, but I also believe that our team's many women is one of this MDL's best and most powerful assets.

PP: I agree completely. I would only add that seeing the female-majority PSC in this particular case has impacted Ethicon's mindset. Aimee and I believe that the defendant realized it was confronting a PSC that was passionate about this case—and that this passion and dedication were not only going to show in our work product but would earn the court's respect.

Are MDLs involving mass torts that exclusively affect women treated

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differently from ones that affect a broader swath of the population?

AW: They aren't. But, obviously, that goes to a much broader question as to why medical companies continue to use women's bodies as guinea pigs.

PP: I have seen case after case when it seemed that the recklessness was greater when the drug or device was going to be a female-only product. I was deeply involved in the silicone breast implant litigation in the 1990s—that was my baptism by fire. As a young lawyer, I was astounded by the disregard that the companies had with respect to these devices. Their manufacture was sloppy, and their marketing was insulting. They disregarded the injuries these devices caused from the mid-1960s until trial

lawyers such as Denise Dunleavy—one of my mentors—took them on. I agree with Aimee: There's something that's been endemic.

A lot of these drugs and devices often result in injuries that the plaintiffs are reluctant to talk about. How do you develop an open and trusting relationship in which they can be frank and honest with you?

AW: Listen, be sensitive, and make yourself vulnerable. Try to understand and appreciate what they're saying. Often, you're calling someone you've met only once or twice—and people are nervous to talk to lawyers to begin with. Remember that you're both human beings and that they're going through

a very difficult time in their lives.

PP: Most of us are extremely passionate about what we do. Clients see it. They know we're not just putting on a story for them, but that we are doing this because we—like them—feel that a grievous wrong has occurred, and we want to be part of fixing it. □

Aimee Wagstaff is a partner at Andrus Wagstaff in Lakewood, Colo.

Paul Pennock is an attorney at Weitz & Luxenberg in New York City.

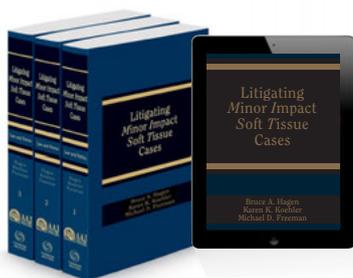
Editor's Note: At the time of publication, the parties had settled most of the MDL cases and filed a motion to dissolve the MDL and remand the remaining four suits.

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