

**INCLUSIVITY AND EXCELLENCE: GUIDELINES AND BEST
PRACTICES FOR JUDGES APPOINTING LAWYERS TO LEADERSHIP
POSITIONS IN MDL AND CLASS-ACTION LITIGATION**

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FOREWORD[†]

For nearly four years beginning in 2016, the Duke Center for Judicial Studies (the Bolch Judicial Institute in 2018) studied diversity and inclusivity issues in the appointment of leadership positions in mass-tort MDLs and class actions. The George Washington Law School James F. Humphreys Complex Litigation Center took over the project in August 2020. The Center gratefully acknowledges Bolch Judicial Institute's permission to assume control over this project and to make use of preliminary work papers addressing best practices.

The Complex Litigation Center has substantially revised earlier drafts of proposed guidelines and best practices and is issuing this final version. It is solely responsible for the contents.

The project's genesis began with four bench-bar conferences on multi-district ("MDL") and class-action litigation hosted by Duke Law School, managed and conducted by John Rabiej, former director of the Duke Center for Judicial Studies and former deputy director of the Bolch Judicial Institute. The conferences identified large numbers of these centralized cases and focused on the absence of uniform procedures or guidelines. Participants in a 2016 conference examined the appointment of plaintiffs' lead and co-lead counsel and steering and executive committees. Several practitioners and judges raised concerns about the small number of women and diverse attorneys appointed to leadership positions in MDLs and class actions. Conference attendees observed that judges historically filled these positions with "repeat players," lawyers they had previously appointed and whose experience the judges knew. These "repeat players" were predominantly white males. The conference attendees reported that this practice was common and continues.

In 2017, Duke held a conference focusing on ways to improve leadership appointments in MDL and class-action litigation. Those attending emphasized that in contrast to the slow pace of change across the legal profession, there has been a marked improvement in the diversity of recent appointments to leadership positions in MDL and class-action cases. The number of

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women appointed to leadership positions rose from 16% in 2011-2016 to 29% in 2015-2016, largely because two judges who had attended the MDL conferences in 2016 and 2017 appointed two majority-female plaintiffs' steering committees. Because the number appointed overall is small, the impact of action by only a few makes a large difference in diversifying leadership roles in MDLs and class actions. If more judges identify diverse lawyers for consideration for leadership appointments, the ripple effect, including on the law firms and corporations involved in these complex litigations, could be significant.

Five teams of 24 practitioners worked for 12 months preparing the first best-practices draft soon after the 2017 conference. It contained three separate segments addressing inclusivity issues pertaining to the judiciary, law firms, and corporations. In June 2018, the center held a bench-bar conference with officials of national women-bar organizations, who reviewed and discussed the draft. It was decided to initially focus on and refine only the segment dealing with the judiciary before addressing law firms and corporations in later publications. Professor Stacy Hawkins served as Reporter and edited the draft. In the ensuing 18 months, the draft was revised to account for comments at the conference and was reviewed and edited by nine judges and Rabiej.

After assuming control of the draft, the Complex Litigation Center published the draft for a three-month public-comment period. More than 35 judges submitted comments, many of whom offered improvements. Other individuals and organizations submitted comments. Every comment was carefully reviewed, edits made, and a revised version was circulated to all those who contributed in drafting it.

The paper has three parts, preceded by a one-page summary; they are intended to represent stand-alone documents. The first part explains and documents the lack of diversity in leadership appointments in MDLs and class actions. The second part builds on the Duke GUIDELINES AND BEST PRACTICES for MDLs and applies them to class actions, establishing guidelines and best practices for ensuring that the lawyers leading these complex and important cases are the best qualified to do so and will continue to be in the years ahead.¹ The third part makes recommendations to the Federal Judicial Center and the Judicial Panel on Multi-District Litigation.

Selecting the best qualified lawyers for leadership roles in MDLs and class actions requires consideration of the full range of excellent lawyers, including those who bring diversity

in all senses to the role. Those best qualified cannot be identified as the leaders of today or trained to be the leaders of tomorrow without including the diverse range of members of the profession, including the large number of women who have made up half of most law-schools classes for several decades. Diversity is important to ensure that appointments meet the Code of Conduct for Judges and other legal standards governing appointments. Diversity in leadership roles often involves the lawyer's and court's understanding of the variety of interests that MDLs or class action may involve. Diversity is important to fair opportunities to participate in these influential appointed positions and to enhance trust in a judicial system perceived as fair.

These GUIDELINES AND BEST PRACTICES are intended to apply broadly to those lawyers who are, or historically have been, underrepresented both in the profession generally and in the appointment process specifically, including but not limited to women lawyers, racial and ethnic minority lawyers, disabled attorneys, and LGBTQ lawyers, among others. Instead of constantly enumerating these groups, the abbreviated reference to “women and diverse lawyers” is used throughout this document. The data used to support these GUIDELINES AND BEST PRACTICES come largely from studies addressing the lack of gender diversity among leadership appointments in MDL and class action cases. As a result, this report overwhelmingly speaks to the lack of diversity from that perspective. However, this should not be construed as an admission that only gender diversity is lacking. People of color, disabled individuals, and LGBTQ lawyers are equally, if not more, underrepresented in these leadership positions. There is simply not comparable data on their underrepresentation among leadership appointments in MDL and class action cases to address this issue specifically, but where possible, reference is made to data about the underrepresentation of minority, disabled, and LGBTQ lawyers in the profession more generally.

ACKNOWLEDGEMENTS

The original draft of the GUIDELINES AND BEST PRACTICES is the work product of over 25 experienced practitioners and experts, who devoted substantial time and effort to improve the law. Six of the practitioners assumed greater drafting responsibility and served as team leaders. Professor Stacy Hawkins, Reporter, generously devoted innumerable hours to substantive and stylistic editing, which markedly improved the document.

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The feedback of the judiciary has been invaluable in identifying best practices, exploring the challenges faced by judges, and assessing the viability of the proposed guidelines and best practices. The ways in which these guidelines and best practices have benefitted from the candid assessment of the judiciary cannot be understated. It is with great gratitude that we recognize the contributions of the nine judges who reviewed drafts and provided comments and suggestions.

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EXECUTIVE SUMMARY

INCLUSIVITY AND EXCELLENCE: GUIDELINES AND BEST PRACTICES FOR JUDGES APPOINTING LAWYERS TO LEADERSHIP POSITIONS IN MDL AND CLASS-ACTION LITIGATION

The importance of inclusivity, as emphasized in these GUIDELINES AND BEST PRACTICES, is not novel. It derives in part from the Code of Conduct for United States Judges, which directs judges to act “in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and “avoid[] unnecessary appointments, nepotism, and favoritism.” These GUIDELINES AND BEST PRACTICES offer concrete suggestions for realizing this goal in the appointment of counsel leading MDL and class-action litigation. Together, these GUIDELINES AND PRACTICES address the judiciary’s responsibility for, and role in, giving lawyers across the profession an equal opportunity to be appointed to MDL and class-action leadership positions.²

INCLUSIVITY IN JUDICIAL APPOINTMENTS

THE JUDICIAL APPOINTMENTS INCLUSIVITY STANDARD: An MDL transferee judge or presiding class-action judge must uphold the integrity of the federal judiciary and demonstrate to parties, counsel, and other participants and stakeholders in the judicial process that invidious discrimination, bias, and exclusion have no place in the federal judiciary.³

GUIDELINE 1: An MDL transferee judge or a presiding class-action judge must exercise the power of appointment fairly and on the basis of merit. The judge should recognize that diversity enhances the quality of the decision-making process and results, and should make appointments consistent with the diversity of our society and justice system.

A judge should avoid an appearance of favoritism when appointing a leadership team for an MDL or a class action made up of a single sex, race, ethnicity, sexual orientation, age range, disability, or similar prohibited basis.

The judge must make a conscious effort to avoid implicit bias and not overlook qualified applicants based on race, color, gender, sexual orientation, or similar prohibited factors.

GUIDELINE 2: An MDL transferee judge or judge presiding over a class action should consult with counsel about the type of administrative structure that will best serve the needs of the case, while ensuring that counsel who are interested in and qualified for leadership are not denied opportunities to perform substantial, meaningful work on account of sex, race, ethnicity, sexual orientation, age, disability, or similar prohibited factors.⁴

GUIDELINE 3: An MDL transferee judge or judge presiding over a class action has an ongoing duty to monitor the litigation to ensure that counsel, especially those serving in court-appointed roles, are performing their assigned duties in a manner that is free from invidious discrimination and bias and that maintains public confidence in the integrity of the judiciary.⁵

JUDICIAL INTEGRITY AND INCLUSIVITY: THE CODE OF CONDUCT IN THE CONTEXT OF MDL AND CLASS-ACTION CASES

PART I

DOCUMENTING THE DIVERSITY PROBLEM, STATING THE JUDICIAL STANDARDS, AND UNDERSCORING THE URGENCY TO ACT

I. The Diversity Problem

Women have been graduating with law degrees at about the same rate and have been entering private firms at similar rates as men, for at least the last 30 years.⁶ In recent years, more women than men have made up the classes in many schools. The number of minorities graduating from law schools and entering private practice has also been rising.⁷ These statistics would appear to ensure that more women and diverse attorneys would be in leadership roles in the legal profession. But they have not.

Women are underrepresented in positions of leadership in the legal profession. In litigation, a 2015 American Bar Association and American Bar Foundation study showed that only 24% of lead counsel in civil cases were women.⁸ Of attorneys describing themselves as trial lawyers, only 27% were women. When researchers segmented the data by case type, they found that the vast majority of lead counsel were men, regardless of whether the case concerned civil rights, intellectual property rights, labor, torts, or other areas of civil practice. In criminal cases, the picture was much the same; only 33% of lead counsel and 21% of trial attorneys were women. The authors concluded that there “is no type of case in which women are more likely than men to be lead counsel.”⁹

Retired federal district court judge Shira A. Scheindlin surveyed federal and state judges in New York about the role that women lawyers played in more than 2,800 proceedings in their courtrooms. The result: women made up barely 20% of lead counsel for private parties at both the trial and appellate levels.¹⁰

In 2016, the American Bar Foundation and the ABA Commission on Women in the Profession published *First Chairs at Trial*,¹¹ confirming that women are consistently underrepresented in lead-counsel positions. In civil cases, men are three times more likely than women to appear as lead counsel and as trial attorneys. Of the lawyers appearing as lead counsel in class actions, 87% are men and only 13% are women, despite the fact that women make up 32% of all the civil-case lawyers.¹² Women are present in courtrooms in sizeable numbers, but

they are not finding leadership opportunities, and they are not getting full recognition for the work they are doing.

Looking specifically at MDL and class-action litigation, the *First Chairs at Trial* study found that 71% of class actions had no women lead counsel. MDL data also reflect a similar pattern. According to a study of MDLs pending in April 2014, men were appointed as lead counsel 11.8 times more often than women from 2000 to 2004, 6.73 times more often from 2005 to 2009, and 3.02 times more often from 2010 to 2014.¹³ Although the gap is narrowing, men continue to secure executive-committee appointments at a rate more than five times than that of women. The Bureau of National Affairs reported in February 2017 that between 2011 and 2015, women made up just 16.55% of all plaintiffs' leadership appointments in MDL cases.¹⁴

In the 2017 publication, *Vying for Lead in the Boys' Club*, author Dana Alvaré documents the underrepresentation of women in leadership in MDLs. Alvaré analyzed MDLs across the country from 2011 to 2016, coding leadership appointments by sex. As in the *First Chairs at Trial* study, she found that men were five times more likely to be appointed to leadership positions than women. The overall rate of women appointments was 16.55%, compared to the appointment rate of 83.45% for men. In contrast to the *First Chairs at Trial* study showing that 71% of class actions had no women in leadership, Alvaré found that 37% of MDLs had none.

The size, complexity, and importance of MDLs and class actions typically require teams—often large teams—of lawyers to work cooperatively. In MDLs and class actions, law firms around the country often pool resources to draft pleadings and responses, review millions of pages of documents and gigabytes of data, handle depositions and other discovery, file and litigate motions, hire experts, negotiate possible resolution, and ultimately try the cases. Organizing all the tasks, lawyers, and witnesses in itself requires effective leadership.

Diversity is important because it maximizes the quality of legal advocacy by utilizing a broader range of ideas and perspectives and affirms the perception of equality and justice in our legal system. Diversity shows that individuals from diverse backgrounds can obtain prominent leadership positions, and that judges are committed to avoiding even the appearance of invidious discrimination.

The decades-long record of appointing lawyers largely from a small group of repeat players, who gained the experience used to justify their role at a time when the most visible members of the profession's leaders consisted of white males, entrenches a favoritism that is

objectionable under Canon 3(B)(3) of the Code of Conduct for United States Judges. The effect of reducing diversity in leadership roles in MDL or class actions is present, whether it results unintentionally from implicit bias or from simple inattention or benign neglect.

As judges become more aware of the repeat-player pattern in complex litigation and of its effects, judges are also becoming more aware of the risks of implicit bias. Education programs are increasingly available to help understand how implicit bias can affect judicial decisions, even unconsciously, and how it can be mitigated, reduced, or avoided.

A transferee judge in an MDL or a judge presiding over a class action is in a unique and powerful position to eliminate invidious discrimination and bias, while enhancing diversity within the leadership of the profession. MDL transferee judges and presiding judges in class actions are tasked with establishing a leadership structure and team for plaintiffs that manages the litigation. By wisely choosing diverse and effective counsel, the judge helps ensure that the case, no matter how large or how complicated, will proceed in a fair, effective, and efficient manner. Although judges infrequently appoint defendants to leadership positions in MDLs,¹⁵ a judge should encourage defense counsel to take diversity into account when making work assignments.

II. The Standards for Judges Making Leadership Appointments in MDLs and Class Actions

The standards governing leadership appointments in MDLs and class actions are drawn from four sources, including the Code of Conduct for United States Judges, the *Manual for Complex Litigation*, Federal Rule of Civil Procedure 23, and the Bolch-Duke GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS.

There are significant differences between MDLs and class actions. In a class action, the court appoints one or more plaintiffs' representatives to represent the interests of absent class members. Absent class members' claims rise or fall together with those of the class representatives. In an MDL, by contrast, while some aspects of the claims may be litigated on behalf of a large group or "inventory" collection of plaintiffs, each plaintiff must prove his or her claim separately, and each plaintiff has counsel. As a result, it is usually both possible and desirable to appoint a smaller number of lead counsel in a class action than in an MDL, which may involve hundreds or even thousands of individual claims.

MDL litigation “emerges when an event or series of related events injure a large number of people or damage their property.”¹⁶ Unless the action qualifies for class-action certification, no federal rule requires the judge to appoint lead counsel or a committee of counsel to manage an MDL.¹⁷ An MDL may, of course, include one or more class actions, as well as collections of individual cases. In class actions, by contrast, a court may appoint interim class counsel before class certification and must appoint class counsel when it certifies the class, unless a statute provides otherwise.¹⁸ Rule 23(g) sets out the appointment criteria. Class counsel must “fairly and adequately” represent the interests of the class,¹⁹ and the court “may consider any . . . matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.”²⁰ When more than one counsel seeks appointment and is adequate under Rule 23(g)(1) and (4), the court “must appoint the applicant best able to represent the interests of the class.”

A. The Code of Conduct for United States Judges

The Code of Conduct for United States Judges establishes bedrock principles for the discharge of judicial duties. Canon 1 states: “A judge should uphold the integrity and independence of the judiciary.” This is essential to public confidence in the impartiality and fairness of the judiciary. Canon 3 states that “[a] judge should perform the duties of the office fairly, impartially and diligently,” and Canon 3(B)(3) brings this obligation to appointments by telling judges to “exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism.”

These canons, particularly Canon 3(B)(3), remind judges of the importance of exercising their appointment powers fairly and on the basis of merit, specifically noting the importance of avoiding nepotism and, in particular, “favoritism,” which includes avoiding exclusively choosing members of a single race, ethnicity, sex, or sexual orientation---such as white males.

B. The *Manual for Complex Litigation*

The *Manual* recognizes that counsel play an essential role in the success of any complex litigation.²¹ At the outset, the *Manual* recognizes that in appointing counsel, the number of past leadership appointments an individual or firm has held is less important than the skills required to work effectively with the court and other attorneys.²² Focusing solely on experience continues the cycle of appointing only repeat players, who historically are much less diverse than current members of the profession. “[E]xperience in similar roles in other litigation” is only one consideration. The *Manual* advises judges to consider whether lead counsel fairly represent the

various interests in the litigation. MDLs and class actions can bind large and diverse groups and impact policy for many more. Filling leadership roles with diverse counsel, who bring a broad range of experiences, background, and perspectives to their tasks, helps ensure that the diverse interests of those affected will be, and will be perceived as being, fairly, adequately, and justly represented. Increasing diversity in MDL and class-action leadership positions enhances the quality of the leadership in those cases and the perceived legitimacy of the procedures and results.

The *Manual* also encourages courts to probe the quality of the experiences reported. For example, an attorney with a reputation for ruthlessness who creates needless disputes with other counsel may, despite a long list of past appointments, deserve to be passed over in favor of another attorney with less experience but no history of animosity among the peers she is tasked with leading. Looking beyond paper credentials in determining which attorneys will provide the necessary collegial, skillful, and steady leadership also allows judges to consider the values that diversity in leadership serve, as the *Manual* encourages.²³

C. Federal Rule of Civil Procedure 23(g)

In 2003, Rule 23 was amended to expand and clarify guidance for judges in appointing, supervising, and compensating class counsel in class actions.²⁴ Rule 23(g) sets out considerations for judges exercising their “broad discretion” to determine who will fairly and adequately represent the interests of the class, and, when there is competition, to select the counsel who will best represent those interests. Counsel appointments under Rule 23(g) are subject to an abuse of discretion standard of review,²⁵ and appointing diverse counsel to leadership roles can be important to fulfilling that obligation. Judges have a fiduciary role to absent class members.²⁶

Although there is no rule in MDLs corresponding to Rule 23(g) for class actions, MDLs may often include class actions. Even if class actions are not involved, judges have a practical obligation and a self-interest to select the best counsel to manage each case.

D. The Bolch-Duke MDL Guidelines and Best Practices

In 2013, Duke Law School held a conference on MDLs to identify consensus positions that could be developed into guidelines and best practices for efficient and effective MDL litigation. The STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS (*renamed*

“Duke GUIDELINES AND BEST PRACTICES”) emerged from that conference,²⁷ with the input of numerous federal and state judges and prominent defense and plaintiff practitioners.

Chapter 2 of the Duke GUIDELINES AND BEST PRACTICES on the selection and appointment of leadership in MDLs has three Guidelines.²⁸ It recommends that the transferee judge eschew private ordering in favor of a competitive-selection process requiring individual applications. This not only reduces the repeat-player pattern, which is an obstacle to the appointment of diverse lawyers, but it also gives those who are otherwise not in the pool an opportunity to place their experience and qualifications before the judge. It urges judges to “be mindful of the benefits of diversity of all types.”²⁹

Duke BEST PRACTICE 4E of the GUIDELINES AND BEST PRACTICES recommends that 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.”³⁰ This best practice was revised to reach class actions in addition to MDLs,³¹ as well as to enlarge the scope of the guidance and best practices targeting diversity in leadership appointments specifically. Part II of this report offers new and expanded guidance and best practices.

III. Underscoring the Need for Diverse Leadership in Complex Litigation

“Justice is a search for truth. That search will fail if a court does not incorporate a wide array of experience, facts, and perspectives into its decision-making.”³² The concern is not that judges are intentionally abusing their appointment power by engaging in favoritism or bias. Instead, the concern is that the long habit of appointing repeat players, whom the judges know and know to have the necessary abilities and qualifications, will effectively reduce diversity and exclude other qualified members of the profession from appointment. Another concern, supported by social science and psychological studies, is that leadership appointments may reflect unintentional implicit bias, both by lawyers putting forward a proposed pool or slate and by judges making appointments. Implicit bias is recognized as an influence to unknowingly favor one group over others. And the practice of appointing white males exclusively, or nearly exclusively, may be viewed reasonably as a form of favoritism, which may be inconsistent with the Code of Conduct for United States Judges.

The judicial system is always subject to scrutiny, and it should be. Maintaining confidence in, and respect for, the judicial system requires vigilance. Any judicial lapse threatens that confidence and respect. In an increasingly diverse country and profession, the integrity of the

justice system is strengthened by reflecting that diversity and embracing inclusivity in these most public of judicial appointments.³³ Participants in the justice system—plaintiffs, defendants, witnesses, absent class members, and jurors—must know that the system serves all.³⁴ Facilitating the appointment of diverse lawyers to the leadership roles in some of the most impactful and high-profile cases is important to making the system be, and appear to be, fair, impartial, and just.

A. Diversified Leadership Enhances the Administration of Justice

Studies also show the value of diversity in improving decision-making.³⁵ Diversity in leadership teams helps avoid the “group think” that can creep into homogenous teams. Creativity increases with cognitive heterogeneity.³⁶ Considering the benefits of diverse leadership teams in MDLs and class actions neither promotes quotas nor condones box-ticking. A person’s gender, race, sexual orientation, age, ethnic background, national origin, or disability, does not alone determine that person’s value to a leadership team. But there are benefits to considering a robust and expansive notion of diversity, encompassing the variety of experiences in life and in the practice of law, and all the aspects and richness of demographic diversity across the United States. Those benefits often include better and more creative decision-making, enriched by new and varied perspectives and experiences,³⁷ and by a better understanding of the diverse interests the MDL parties and absent class members may have.

The Code of Conduct requires judges to appoint lawyers on the basis of merit and avoid favoritism. Rule 23(g) and the *Manual* similarly hold judges to a high standard in selecting the best lawyers to appoint. Because diverse teams tend to bring more innovative approaches and can result in more robust decision-making processes and results, taking the benefits of diversity into account in the appointment process, is consistent with, and critically supported by, the Code of Conduct and other obligations on judging.

The benefits of, and need for, increased inclusivity in judicial appointments is well-recognized. In 2016, the National Association of Women Judges (NAWJ) adopted a “Resolution on Diversity in Trial Court Appointments.” The Resolution acknowledges that trial courts have not appointed women lawyers, diverse lawyers, or lawyers in small firms in numbers commensurate with their representation in the legal profession generally, as small as that is. The Resolution urges both federal and state trial courts to “be mindful of the importance of diversity and [of] appointments that are consistent with the diversity of our society and the justice

system.” This Resolution has been adopted by the American Association for Justice, the Defense Research Institute, the Federation of Defense and Corporate Counsel, the Association of Defense Trial Attorneys, the Hispanic National Bar Association, and, most notably, the Conference of Chief Justices.³⁸

B. Barriers

Many thought that the gender and diversity gap would eventually work itself out as more women and minorities entered the profession and rose through the ranks. Recent years have made clear that the passage of time is not effecting the expected change. Understanding why women and diverse lawyers are not attaining MDL and class-action leadership positions requires examining the barriers preventing it.

A diverse pool from which judges make appointments is the critical precondition to diverse appointments. Lawyers have the primary role in creating the pool, but judges can play an important role by demanding a diverse pool of lawyers who will best lead the representation of complex, often unwieldy, cases.

These barriers include the bar and bench reliance on the repeat player, which can present systemic roadblocks to inclusivity in the appointment process. So can questions about the legal considerations guiding the exercise of judicial discretion in making appointments. Finally, the role of implicit bias or influence may unintentionally affect the pool of lawyers present and the appointment judges make. Together or separately these factors can unintentionally work to exclude diverse and extremely qualified lawyers from leadership roles.

1. The Impact of Repeat Players

Many researchers have observed that historically, private ordering created a “boys’ club,” a very small group of MDL and class-action repeat players, mostly experienced white, male attorneys, who were appointed to key leadership positions again and again.

The leadership-appointment system in MDLs and class actions continues to limit opportunities for women and diverse lawyers by the appointment-system preference for repeat players, who tend to represent the historic elite—and often almost the only members—of the profession—white men. The effect is a system tending to favor homogenous-leadership teams, that leave left scant opportunity for newer, more diverse attorneys to get experience and visibility and the credibility they bring.³⁹

The *Manual for Complex Litigation* suggests some factors that judges may use in selecting MDL and class-action leaders. Two of the most important and frequently cited are “knowledge and experience” in the type of litigation, and access to sufficient resources.⁴⁰ Being able to say, “I’ve done this many times before” and “I can put a lot of money into this” counts for a lot, but only those who have seniority and an established track record can credibly make those claims.⁴¹ Both of these criteria tend to favor exclusively appointing “the usual suspects.”

A transferee or presiding judge often receives leadership proposals by either the “consensus” or “private-ordering” method, or a competitive-selection individual-application method.⁴² In the first, the judge directs the attorneys to file proposed leadership slates. The attorneys decide among themselves who should be on the leadership teams and submit their proposal to the judge for confirmation.⁴³ The *Manual* urges courts not to rubber-stamp these proposed leadership slates, but to take an active part in deciding which attorneys are appropriate for which roles, whether as liaison counsel, lead counsel, a committee member, or other role.⁴⁴ Despite the *Manual*’s recommendations, many transferee judges adopt the proposed slates wholesale. The consensus or private-ordering method allows attorneys, often repeat players themselves, to present a leadership slate.

In the competitive approach, the court invites applications for each position and selects from among those applicants.⁴⁵ Applicants file directly and publicly with the court, which may hold a public hearing and determine who will be on the leadership structure. A noticeable shift to the competitive-selection process appears to have occurred in recent years. But even if a judge uses a competitive-selection process, the leaders they choose are often repeat players selected for the stated reason that they have the most experience and are more likely to do the quality of work needed. The repeat players who are selected themselves serve on leadership roles in subcommittees, and they too tend to select repeat players. Even in a competitive-selection process, repeat players can endorse and vouch for each other’s abilities.⁴⁶

This entrenched status quo inhibits the appointment of qualified women and diverse attorneys.⁴⁷ It disserves not only the excluded lawyers, but also the parties, including absent class members, because research shows that homogeneous working groups are less innovative than heterogeneous working groups.⁴⁸ It disserves the judiciary by placing it in the improper and uncomfortable position of using an appointment method that tends to favor one racial, ethnic, and gender group over others.

Although repeat players in MDLs and class actions can bring knowledge and significant resources to the litigation, the judges and the repeat players should seek to include qualified diverse lawyers who have not racked up long lists of prior appointments in complex cases and who may have fewer financial resources to contribute. Inviting less experienced and more diverse leaders to the MDL and class-action table can enhance the quality of representation and improve the decision-making process, while demonstrating to the parties and the public that discrimination, bias, and exclusion have no place in the federal judicial system. It also provides the opportunity to train future leaders, permitting the system to work well in the years to come.

2. Legal Questions About the Exercise in Judicial Discretion to Avoid Favoritism in Appointments

Judges well understand that they cannot make decisions, including selecting lead counsel teams, based on invidious considerations like race, sex, or age.⁴⁹ Judges may, however, question the precise standard to use in enhancing diversity in making those selections decisions.

As noted, judges have long-standing obligations to avoid bias and favoritism in appointments. Stating that judges should make appointments that are consistent with the diversity of our society and the justice system is wholly consistent with these obligations. It does not impose or suggest a quota or the use of race, sex, or any other factor as determinative.⁵⁰

The case law is clear that appointments cannot be made solely on diversity grounds.⁵¹ But affirmative efforts to promote diversity are appropriate in merits-based evaluations, as recognized by NAWJ, Conference of Chief Justices, and other bar organizations. These efforts are necessary when appointing a team of lawyers to lead a mass-tort MDL, because it improves the decision-making and enhances the administration of justice. And they cannot be ignored when appointing single, class-action lead counsel, inconsistent with Canon 3(B)(3)'s obligation to avoid favoritism, especially because many judges have historically appointed exclusively white males.

GUIDELINE 1 is similar to other guidance in urging judges to be “mindful of the importance of diversity and ... make appointments that are consistent with the diversity of our society and the justice system.” The GUIDELINE is also consistent with guidance on the appointment of United States magistrate judges,⁵² and with the research recognizing that diversity can enhance the quality of decision-making in MDL and class-action proceedings.

3. Implicit Biases

Implicit biases contribute to “work cultures and practices that appear neutral and natural on their face,” yet reflect the values and life situations of those who have been dominant in the development of traditional work settings.⁵³ While overtly expressed biases against women and diverse lawyers are uncommon, reports of harassment, incivility, or disparagement continue in the practice and in the judiciary itself.

Implicit bias is increasingly recognized as a basic cognitive function by social scientists. Today, leadership opportunities may be limited or foreclosed by this subtle obstacle, which may influence even those with declared and honestly held commitments to impartiality.⁵⁴ Because implicit bias may lead individuals to relate most easily to those like them,⁵⁵ individuals may unconsciously favor those of the same sex, sexual orientation, race, religion, or ethnicity, unwittingly giving them more favorable evaluations and opportunities.⁵⁶

Implicit bias can be exacerbated by the desire to maximize cooperation and build consensus. In the MDL and class-action context, internal discord is one of the greatest concerns of a leadership committee tasked with “herding the cats” among their own ranks, as well as meeting the challenges of vigorous opposition. This may influence the recommendation or selection of team members who are perceived as most likely to get along with each other and less likely to undermine the decision-making authority of the leaders. Embedded assumptions that diverse teams are more prone to conflict and less prone to consensus may unintentionally operate to disadvantage women and diverse lawyers in getting into the MDL and class-action leadership-team pool and in gaining appointments.⁵⁷

Confirmation bias is related to implicit bias and may also affect how candidates are evaluated for leadership. People are more likely to recall information that confirms their biases about others and include that information in evaluations.⁵⁸ For example, attorneys who assume that working mothers are less committed to their careers tend to remember the times mothers left early, rather than the nights they stayed or worked late remotely.⁵⁹ Even when women receive positive evaluations, those evaluations may be unwittingly shaded by gender stereotypes. A female employee may be praised as supportive and encouraging (characteristics that conform to a set of perceived female strengths) rather than as a tough negotiator.⁶⁰ If what is remembered and praised about younger or less experienced lawyers does not align with the most valued complex-litigation leadership skills, these lawyers— many of them women and diverse members

of the profession—may be unfairly disadvantaged in the pool-selection and appointment process.

Studies also show that for both men and women, speaking or acting in ways that violate stereotypes or highlight attributes (including strengths) that are viewed as atypical of their sex or background may lead to a loss of status in a professional context.⁶¹ Behavior valued in a white male may be criticized if displayed by someone else. A woman may be criticized for being overly aggressive when the same words or conduct by a man would be praised as good advocacy. It also means that women and diverse candidates who do make it onto leadership teams may be consigned to subordinate roles that fit social and cultural stereotypes about what they can and cannot do well.

C. Examples of Judicial Exercises of Appointment Powers

Judges have taken multiple approaches to enhance diversity in their appointments and to ensure that the judicial process is free from invidious discrimination, bias, and exclusion. Most often, judges at conferences and other meetings with counsel express their expectations orally that counsel give diversity serious consideration when they propose candidates for appointment. But there are notable examples when judges express their expectations in written minutes or orders. These include minutes of a conference in which the judge requested counsel to consider adding a woman attorney to the plaintiffs' executive committee, because it lacked diversity.⁶² Other judges have explicitly included diversity among the criteria in their orders appointing lawyers to leadership positions.⁶³ Still others include a provision in their orders requiring an assurance from appointed counsel as a condition of appointment that they consider diversity when they employ or designate other counsel to carry out the functions and tasks of their appointment.⁶⁴

By far the most prevalent order issued by judges concerning diversity involves orders that provide opportunities to allow young lawyers to argue motions and examine witnesses in court.⁶⁵ Not only do these types of orders benefit younger lawyers, but they also benefit the newer generation of women and diverse lawyers.

PART II

GUIDELINES AND BEST PRACTICES

The best practices to implement the guidelines build on the Code of Conduct for United States Judges, underscoring the Code's explicit proscription against any form of favoritism in appointments. Most of the best practices are drawn from existing court orders and reflect the judiciary's leadership in promoting and ensuring diversity and inclusiveness. Directing these best practices to judges and judicial actors does not ignore the fact that the bar shares responsibility for remedying the lack of diversity within the leadership of the profession in general, and in litigation in particular.⁶⁶

THE JUDICIAL APPOINTMENTS INCLUSIVITY STANDARD: An MDL transferee judge or presiding class-action judge must uphold the integrity of the federal judiciary and demonstrate to parties, counsel, other participants and stakeholders in the judicial process, and to the public, that invidious discrimination, bias, and exclusion have no place in the federal judiciary.

GUIDELINE 1: An MDL transferee judge or a presiding class-action judge must exercise the power of appointment fairly, transparently, and on the basis of merit. The judge should recognize that diversity enhances the quality of the decision-making process and results, and should make appointments consistent with the diversity of our society and justice system.

A judge should avoid an appearance of favoritism when appointing a leadership team for an MDL or class action made up of a single sex, race, ethnicity, sexual orientation, age range, or similarly prohibited basis. The judge must make a conscious effort to avoid implicit bias and not overlook qualified applicants based on race, color, gender, sexual orientation, disability, or similar prohibited factors.

Increasing Transparency in the Appointment Process

BEST PRACTICE 1A: An MDL transferee judge or judge presiding over a class action should be fair and transparent in the appointment process, including in considering the financial resources of applicants for leadership positions. When a judge identifies a diverse candidate well suited for a leadership position, but who lacks the necessary financial resources, the judge should nonetheless consider appointment if the attorney will be part of a larger group that is able to provide financial assistance or who can be assigned a limited-leadership role.

MDL and class-action litigation are expensive. Attorneys in MDL and class-action leadership roles are responsible for advancing the money to fund the litigation, and it may take years to recover the initial investment. The judge should make these financial commitments clear and, to the extent possible, provide estimates to candidates during the application process.

Established law firms are generally able to meet the financial demands of the litigation, another reason that judges cite in appointing repeat players whose firms can shoulder the litigation costs. But many otherwise qualified attorneys who seek leadership roles may not have adequate financial resources to satisfy the financial requirements. The judge has several options in these circumstances.

As a first step, a judge should request information during the application process about an applicant's financial resources in confidence, including credit or third-party funding available to the applicant, to make an informed decision.⁶⁷ When a judge identifies a diverse candidate well suited for a leadership position, but who lacks the necessary financial resources, the judge should nonetheless consider appointment if the attorney will be part of a larger group that is able to provide financial assistance. In a growing number of instances, moreover, smaller-sized law firms have entered into arrangements pledging funds on behalf of a single lead-counsel candidate. These options facilitate the entry of new, otherwise qualified attorneys who are often not considered for leadership solely because they lack financial resources others may have available.⁶⁸

BEST PRACTICE 1B: In deciding whether to choose either the individual-application or consensus-selection method, the MDL judge or judge presiding over a class action should consider among other considerations which method will likely result in a more diverse pool of candidates.

Judges have increasingly turned to the use of individual applications and evidentiary hearings to allow applicants to make their case for appointment. The *Manual for Complex Litigation* encourages this practice, warning that: “[d]eferred to proposals by counsel without independent investigation [or] examination, even those that seem to have the concurrence of a majority of those affected, invites problems down the line.”⁶⁹ The application and hearing method allows judges — not peer attorneys — to evaluate applicants on criteria other than one's status as a repeat player.⁷⁰ Studies have found that application methods for appointment reduce the seniority bottleneck and repeat-player entrenchment by giving talented newer members of the profession a real chance to obtain leadership positions, potentially leading to a more diverse group of applicants as well as those selected.⁷¹ Under this selection method, an applicant should be asked for demographic information as part of the applicant's background presentation with an explanation of the purpose, so that the judge can take diversity into account.

The consensus-selection method typically excludes new entrants because repeat players dominate the slates presented to the judges.⁷² The pertinent bar is often small, enhancing the role of reputation and reciprocity in creating the slate that becomes the judges' pool. Consensus selection can lead to "tit-for-tat reciprocity" among repeat players and perpetuate the entrenched role of the homogeneous-repeat player in leadership roles.⁷³ On the other hand, there are instances when the consensus-selection method proposes a diverse slate of candidates. If a judge adopts the consensus-selection method, the judge should make appropriate inquiries, particularly in situations when the proposed slate is not diverse.

Transferee and presiding judges should consider whether the appointment processes they use increases the obstacles to greater diversity in MDL and class-action leadership appointments. If so, the transferee or presiding judge might consider holding hearings for applicants.⁷⁴ This allows judges to better evaluate the competence of women and diverse attorneys by giving them an opportunity to explain their case for selection.⁷⁵ This is particularly appropriate when the judge is unfamiliar with the attorneys seeking appointment. Judges should be alert to modifications to the selection process that help meet this goal.⁷⁶ For example, when a hearing may not be possible due to the size or complexity of the litigation, the transferee or presiding judge may consider incorporating a period for comment, or allowing confidential objections supported by documentation before making leadership appointments.⁷⁷

Making Appointments Based on Merit and Diversity

BEST PRACTICE 1C: In considering appointing lead counsel, a steering committee, liaison counsel, or a subcommittee, the MDL transferee judge or the judge presiding over the class action should take into account whether the prospective leadership team adequately reflects the diversity of legal talent available and whether those appointed are best able to serve the needs of the case, particularly when the candidates have little, or no, diversity.

MDLs and class-action cases affect a large and diverse group of people, often involve large amounts of money, can be highly visible, and sometimes impact national policy. Promoting diversity in the leadership of these high-profile cases can enhance public trust in the courts and expand the ability of counsel and the judge to consider diverse and innovative ideas and perspectives.⁷⁸

In trying to increase diversity in the leadership of MDLs and class actions, some considerations the transferee or presiding judges should take into account include how diversity

might impact the representation, the ability of counsel to effectively discharge their leadership responsibilities, and the potential to elevate second chairs to new leadership roles.

- *Diversity*

Diversity has many dimensions. In addition to demographic diversity, the judge should be mindful of diversity of experience, balancing the benefits of leadership that has worked well in the past with the benefits of leadership that brings different experiences to bear in the litigation.⁷⁹ MDLs often include numerous class actions, hundreds or thousands of plaintiffs from all over the country, or multiple defendants across an industry. Beyond the need for counsel to have access to the financial resources needed for the litigation, the judge should seek to ensure that the leadership team includes the variety of skills needed to manage the litigation in the best interests of those who will be bound by the results. The MDL transferee judge and the judge presiding over the class action should carefully assess each applicant and the needs of the specific case. In some circumstances, an attorney's background, language abilities, or general legal experience may be more critical for effective representation than his or her prior MDL or class-action experience.⁸⁰

Given the lack of commonality requirements in MDLs that are not class actions, substantially different claims may be included in the same MDL. In these cases, particularly when identifiable groups of plaintiffs have significantly different interests, the judge should ensure that the leadership is composed of attorneys best able to effectively understand and explain the various claims and claimants. In an MDL that involves multiple states' laws, geographic diversity may be a consideration as well. Similarly, a judge should consider an attorney's subject-matter or technical expertise, representation of individual plaintiffs with relatively stronger cases, or relationships with credible experts, in considering each attorney's ability to manage the action.

- *Workload*

To avoid repeat players overcommitting themselves and squeezing out other qualified lawyers, a judge should consider requiring information about the number of current appointments held by an applicant for a leadership position. Requiring this information will allow an MDL transferee judge or judge presiding over a class action to ensure that the applicant has sufficient time to devote to the position sought. If a lawyer is already stretched thin with existing appointments, the court could take the opportunity to appoint someone who may have

fewer competing commitments. In that circumstance, the judge may encourage the applicant to support another qualified attorney from his or her firm who has been actively working on the litigation.

The transferee or presiding judge should also ask whether the applicants are working together (or have worked together) in other cases. This helps address the concern raised by private ordering, in which repeat players also rely on repeat players from established networks to work with them, exacerbating the lack of diversity and opportunities to get experience in these leadership positions.

- *Opportunities for Second Chairs*

Attorneys who have been second chair to repeat players in MDL and class-action litigation often have developed the experience required for a leadership position. Many times, these second chairs have developed critical expertise but have lost the opportunity for appointment to a first-tier leadership position due to other concerns, such as the attorney's ability to meet the financial requirements or staffing obligations needed to lead a complex litigation. Before reappointing a repeat player, the transferee or presiding judge should look to the qualifications and experience of the repeat-player's second chair.

If qualified second chairs have not applied, the judge should consider discussing with the repeat player whether the second chair should be selected to allow new leaders to gain leadership experience in an MDL and class-action litigation. The transferee or presiding judge may also encourage repeat players to assist second chairs in meeting their obligations as lead counsel.⁸¹ This is similar to judges, who on noticing that a younger or diverse associate who has prepared the papers and is most familiar with the case is not arguing a motion, invite the argument to be made by the associate rather than, or in addition to, lead counsel.⁸²

By taking early control of the process through which counsel are appointed to leadership positions in MDLs and class actions and by clearly communicating the criteria for appointment, the court can ensure that the leadership teams reflect the needs of the case, the diversity of available talent, and the merits of individual applicants.

Promoting Fairness in the Appointment Process

BEST PRACTICE 1D: The MDL transferee judge or judge presiding over a class action should consider issuing orders or guidelines that direct leadership counsel to take into account diversity among the factors considered when assigning duties.

A judge should be mindful that lead counsel typically appoint lawyers to chair committees and subcommittees. In recent years, judges have begun to acknowledge the lack of diversity in MDL and class-action leadership and have focused on remedial efforts, promoting diversity in these lower-tiered appointments.⁸³

One approach is to communicate explicitly the importance of including diverse attorneys on committees and subcommittees in MDL and class-action cases. Particularly in appointments based on private ordering, in which counsel present the judge with a proposed structure and slate for leadership, the judge should advise counsel that they should provide meaningful opportunities for participation by qualified diverse lawyers.⁸⁴ A judge may also look to the prospective lead counsel law-firm's commitment to promoting diversity, which may provide useful insights on the candidate's future assignment of duties. Good examples of law firms who have adopted practices and policies promoting diversity and inclusivity within their firm, include those who adhere to the Mansfield Rule, which calls for at least 30 percent diverse lawyers to be considered for leadership and equity-partner promotions.

Several judges have directed counsel to consider diversity in proposing members of the leadership teams.⁸⁵ Some judges have rejected proposals that show inadequate consideration of the values more diverse leaders could bring.⁸⁶ Other judges have encouraged the leadership team to provide opportunities for relatively junior attorneys to gain MDL and class-action experience by assigning them roles in the case.⁸⁷ Still other judges give lawyers who are not on the steering committee or a subcommittee an opportunity to express interest in joining when all counsel convene and relay this information to liaison counsel.

BEST PRACTICE 1E: If there is little or no evidence of diversity in the pool of applicants presented to the court for an MDL or class-action leadership position, a judge should probe whether and how diversity was taken into account in the application or selection process.

As part of the Code of Conduct for judges, an MDL transferee judge or judge presiding over a class action must uphold the integrity of the federal judiciary. Recognizing this responsibility and opportunity does not require a judge to impose a quota system or mirror the parties' or absent class members' demographics in the leadership selected for a case. Instead, a judge may make clear the court's expectations

that the pool of applicants be diverse. And if the pool of applicants for a leadership position has little or no diversity, a judge should ask whether the application process was open and inclusive, and if there are appropriate ways to enhance those qualities.

The bar can also take the initiative. For example, a lawyer might challenge a leadership-selection process as discriminatory in its effects—intentionally or not—or inadequately diverse in application by filing a motion with the judge describing his or her qualifications to serve as lead counsel and alleging that he or she was not given a fair opportunity for consideration in the selection process. This motion could include circumstantial as well as direct evidence of discrimination.⁸⁸ If the motion includes a sufficient showing of discrimination in the selection process or results, those involved in designing or implementing the process should have an opportunity to proffer a neutral justification. As with *Batson* challenges in the jury-selection context, this procedure could itself provide an incentive for repeat players to consider including diverse lawyers on leadership slates in MDLs and class actions. And while sufficient evidence of discrimination may be unavailable, the *Batson* approach offers remedial mechanism in cases of demonstrable discrimination. Even if this procedure is infrequently invoked, its existence—together with BEST PRACTICE 1D encouraging transferee and presiding judges to issue orders or other guidance reminding counsel about the need to consider diversity in the selection of lead counsel—could support diversity and inclusivity in the appointment and selection process.

BEST PRACTICE 1F: As a matter of district-wide policy, judges should look for and encourage efforts to create a more diverse pool of applicants for leadership positions.

To increase applications from diverse candidates, a court can engage in targeted outreach to women and diverse attorneys. The court can coordinate with state and local bar associations, as well as affinity bar associations, to create opportunities for attorneys interested in leadership positions in future MDLs and class actions to meet with judges.⁸⁹ These efforts can expand the pipeline to the pool of interested lawyers and result in a more diverse source of applicants for MDL and class-action leadership roles in future cases. Individual judges can also participate in educational seminars and workshops on MDLs and class actions held by bar associations, young lawyer associations, and other groups.⁹⁰ These are some examples of how judges may improve diversity in MDL and class-action leadership.

Structuring the Leadership Team to Enhance Diversity

GUIDELINE 2: An MDL transferee judge or judge presiding over a class action should consult with counsel about the type of administrative structure that will best serve the needs of the case, while ensuring that counsel who are interested in and qualified for leadership are not denied opportunities to perform substantial, meaningful work on account of race, color, gender, sexual orientation, age, disability, or similar prohibited factors.

A judge has broad discretion in deciding the process of appointment for lead counsel and determining the number and types of leadership roles in MDLs and class actions, as well as in managing these lawyers throughout the litigation process. A judge should use this discretion in determining the number and types of leadership roles to appoint and in managing the administration of the litigation, to ensure that lead counsel is sufficiently diverse to best serve the interests of the parties or absent class members in the MDL or class action.

Judges can make a difference in leadership appointments. The New York State Bar Association report encourages judges to appoint more women as lead counsel in complex litigation and notes that some judges will not appoint a firm to a plaintiffs' management committee "unless there is at least one woman on the team." Senior counsel can help by encouraging female and minority members of their litigation departments, sections, or firms to get experience and exposure in complex cases and recommending them to colleagues and judges for leadership appointments.

In developing diverse teams that are also productive, a single woman or diverse lawyer can be marginalized. To leverage the benefits of diversity on decision-making, the "power of three" supports having at least three members of the nondominant group for deliberations among a group (whether it be a litigation steering committee, a corporate board, or a governance committee). Three or more women or diverse professionals are less likely to be marginalized and to feel able to speak up, particularly with dissenting views, both important to better decision-making processes and results.

BEST PRACTICE 2A: If the proposed number of leadership positions in an MDL or class action is limited, the judge should consider increasing that number if doing so would enhance diversity.

In appointing lead counsel, the judge must make sure that efficiency, economy, and fairness are achieved. Diversity enhances efficiency, economy, and fairness by bringing

additional relevant perspectives into decision-making processes. As part of the appointment responsibility, if an MDL or class action requires multiple leadership positions, the judge should consider increasing the number of positions if doing so would enhance diversity and fairness. This practice is particularly helpful when it is important to have some repeat players for their institutional knowledge and experience, by also providing opportunities for other qualified and diverse lawyers and the perspectives they offer. Adding positions is a useful way to help lawyers without significant MDL or class-action experience become familiar with, and develop the necessary skills to lead, future MDLs and class actions. For example, the judge may provide a seat on the steering or executive committee for an associate or new partner, with the expectation that the lawyer will have not only a role in the litigation, such as handling deposition schedules, but will gain experience and the confidence of the lawyers already recognized as leaders in MDL and class-action practice.

BEST PRACTICE 2B: A transferee or presiding judge should ask about the litigation team supporting lead counsel and how substantive work will be assigned to enhance the benefits of diversity in that team.

MDL and class-action lead counsel often rely on teams of lawyers in their firm, section, department, or in other firms to perform meaningful, substantive work. The opportunity to increase diversity extends beyond appointing lead counsel to appointing high-ranking lieutenants who shoulder key responsibilities. The judge should advise lead counsel of the expectation that meaningful work will be assigned to qualified women and diverse lawyers.⁹¹

Effectively Managing a Diverse Leadership Team

GUIDELINE 3: An MDL transferee judge or judge presiding over a class action has an ongoing duty to monitor the litigation to ensure that counsel, especially those serving in court-appointed roles, are performing their assigned duties in a manner that is free of invidious discrimination and bias and that maintains public confidence in the integrity of the judiciary.

Notwithstanding a judge's efforts to appoint diverse leadership, lead counsel who are not repeat players may be effectively marginalized by those who are. As a practical and prudential matter, court oversight of the leadership's management is limited. An MDL transferee or presiding judge should keep open lines of communication with leadership counsel and encourage

counsel to bring any issues of perceived bias or discrimination among leadership or within committees directly to the judge.

BEST PRACTICE 3A: The transferee or presiding judge should remain vigilant that appointments and work assignments made throughout the litigation take diversity into account.

After establishing the leadership structure, the transferee or presiding judge should remain vigilant that work assignments are done without bias or discrimination consistent with Best Practice 2B, paying close attention to which attorneys are assigned to particular roles. The judge should rely on a dependable process to monitor the litigation, gain accurate information about its progress, and ensure that the appointed leaders are assigned and actually perform meaningful, substantive work. Counsel should be advised of such monitoring and its purposes.

For example, a judge should consider restructuring the Common Benefit Fund in a mass-tort MDL in a way that enables the judge to regularly review individual lawyers' time to ensure that the workload is fairly shared, and if it is not, encourage the participation of a more diverse group of lawyers. The review of fee applications can be used to analyze whether new and diverse lawyers are receiving opportunities to advance through meaningful work and to protect these lawyers from being marginalized by repeat players after appointment.⁹² Judicial oversight of this nature can help to prevent or dispel any appearance of bias or favoritism in the allocation of common benefit work.

Annual reappointments of lead counsel also offer the judge another opportunity to examine work assignments. If the judge becomes aware that duties are being performed by an attorney who is not formally assigned to the leadership team but is a member of a leadership firm, the judge may consider reassigning positions on the team to include attorneys who are making efforts and completing work without formal recognition of their leadership contributions.

Lawyers who are repeat players often assume speaking roles in court even when other attorneys—usually less-experienced attorneys who are more likely to include women or minorities—are more familiar with the case.⁹³ A judge can help increase diversity among the leadership in MDL and class-action litigation by encouraging more experienced attorneys to allow the newer members of their teams to argue an issue or motion—particularly when they have done the bulk of the work.⁹⁴ This gives newer players opportunities to gain valuable courtroom experience that they could not otherwise acquire.⁹⁵ These opportunities can assist in

cultivating a more diverse set of attorneys with the experience and skills needed to apply for leadership appointments in future MDLs and class actions.

To encourage the inclusion of newer attorneys in the litigation, the transferee or presiding judge may also consider allowing them to join counsel at scheduled or impromptu steering committee conferences, while still requiring lead counsel to attend. Given the large number of repeat players in leadership positions in many different MDLs and class actions, requiring attorneys in these positions to personally fulfill their responsibilities may encourage repeat players to step aside in favor of supporting a new player.

BEST PRACTICE 3B: The MDL transferee judge or judge presiding over a class action should consider revisiting leadership appointments periodically or reminding the lawyers of the opportunity to do so if circumstances change.

A one-year or other set-term appointment allows the transferee or presiding judge to assess every appointed lawyer's effectiveness and determine whether lead counsel are diligently performing tasks in the litigation and making regular financial contributions.⁹⁶ The transferee or presiding judge may use this annual or periodic review to evaluate the operation and efficacy of the existing leadership structure, including requiring counsel to list the hours worked on the case or describe the work completed. This may be particularly useful if regular workflow reports are not required, as suggested in BEST PRACTICE 3A. In particular, the judge can consider revisiting leadership appointments to ensure meaningful participation among diverse lawyers. In doing so, the judge should consult with leadership counsel and committee chairs, if any, to ensure that work is assigned on a fair and nondiscriminatory basis.

A judge should keep in mind that leadership needs may change as the litigation progresses. A one-year or set-term appointment also allows the judge to reassess the needs of the case and revise the leadership structure as necessary.⁹⁷ For example, the judge may reassign leadership positions or appoint additional lawyers to a committee. This practice increases opportunities for attorneys who may not have been initially considered for a leadership role, but who have demonstrated a capacity for leadership, to obtain a formal leadership position later in the litigation.

While revisiting appointments periodically may increase the chances that new lawyers, including women and diverse lawyers, can obtain positions on the leadership team, a judge should also carefully assess each situation to ensure that lead counsel do not misplace the

fiduciary obligations to their clients in trying to avoid losing their leadership positions by displeasing the judge.

BEST PRACTICE 3C: On request and at the conclusion of the litigation, the MDL transferee judge or judge presiding over the class action should consider offering lawyers appointed to leadership positions, including lead counsel, an opportunity to receive feedback on their performance.

If the transferee or presiding judge has made affirmative efforts to ensure that newer, less experienced attorneys receive opportunities for meaningful participation in MDL and class-action cases, including in leadership positions, the judge may consider offering those attorneys the opportunity to receive feedback on how they did. The transferee or presiding judge may inform counsel, particularly those who are in front of the court for the first time, that on request, the judge is willing to provide constructive feedback on their in-court performance.⁹⁸ The judge may also ask other members of the appointed leadership to provide constructive criticism to the less experienced lawyers on the team. These steps can provide opportunity for improvement and eventual appointment to leadership in future MDL and class-action cases. The feedback may also increase the probability of future leadership appointments in MDLs and class actions, particularly by judges who see these attorneys in their own courtrooms.

BEST PRACTICE 3D: A transferee or presiding judge should insist that counsel treat other lawyers with dignity and respect and make clear that discriminatory or abusive behavior will be subject to appropriate discipline.

Studies on gender bias in the legal profession, including by the “Gender Bias Task Forces,”⁹⁹ have found a culture of incivility based on gender within the profession.¹⁰⁰ Female attorneys reported experiencing humiliating and demeaning sexual remarks, patronizing terms, offensive comments about their appearance, off-color jokes, being mistaken for a nonlawyer, or being ignored, all on the basis of their gender.¹⁰¹ There is similar data on bias in the legal profession based on race and other diverse characteristics.¹⁰² Although the rules of professional conduct mandate civility and nondiscrimination by and among lawyers, sanctions under these rules often require the filing of a complaint with the professional licensing or disciplinary board. Even absent this kind of complaint, judges should be alert for, and take steps if they observe or receive reliable reports of, demeaning, disrespectful, or dismissive conduct toward other lawyers based on gender, race, ethnicity, sexual orientation, disability, or similar prohibited factors, if it occurs in the course of litigation.¹⁰³

A strong judicial response reinforces the message that this behavior is unacceptable and will not be tolerated. Women and diverse lawyers are more likely to enter the MDL and class-action practice and compete for leadership positions in these cases if they know that they have the support of the judiciary in eliminating improper and disrespectful behavior.

PART III

ADDITIONAL SUGGESTIONS TO PROMOTE INCLUSIVITY IN THE APPOINTMENT OF LEAD COUNSEL IN MDLs AND CLASS ACTIONS

SUGGESTION 1: The Judicial Conference should consider issuing a model local rule or other guidance promoting inclusivity in appointments by judges.

The Judicial Conference Committee on Court Administration and Case Management (“CACM”) should consider proposing a model local rule or other guidance encouraging judges to take diversity of experience, viewpoint, and background into account when making leadership appointments in MDL and class-action litigation consistent with the diversity of society and the justice system. The proposed rule or other guidance could direct judges to take steps to ensure that diverse lawyers are included in the pool from which the ultimate selection is made. Several judges have issued standing orders along these lines.¹⁰⁴ CACM could study these exemplar orders in fashioning a model local rule for consideration of individual district courts to adopt. The model local rule as well as these guidelines and best practices should be included as part of the program for every biennial judicial circuit conference held under 28 U.S.C. § 333. Individual judges should be encouraged to invite minority members to these conferences.

SUGGESTION 2: The Judicial Panel on Multidistrict Litigation has appointed diverse MDL transferee judges and should continue to do so.¹⁰⁵

If transferee judges themselves are diverse, the likelihood of diverse leadership appointments in MDL cases increases.¹⁰⁶ The JPML can accomplish this by maintaining and expanding its current practice of diversifying the pool of MDL transferee judges.¹⁰⁷ The JPML’s existing efforts to promote diversity in the judiciary have already begun to generate positive results. For the first time in history, the panel itself is both mostly women and headed by a female chair.¹⁰⁸ The panel’s recent transferee-judge appointments include many diverse

judges.¹⁰⁹ The panel has also provided “rookie” judges the opportunity to manage MDL cases and gain invaluable MDL experience.¹¹⁰ In making its appointments of transferee judges, the panel should also consider which MDL transferee judges would appoint diverse counsel to leadership positions in their future appointments.

SUGGESTION 3: At its annual transferee-judge program, the JPML should include programs promoting diversity in appointments to leadership positions.

The JPML can organize regularly-scheduled discussions at its annual transferee-judge program that focus on the judiciary’s interest in inclusivity and outline the benefits of diversity in leadership positions.

SUGGESTION 4: The JPML should share its database of leadership-appointment orders publicly either on its website or as part of the annual reports disseminated by the Administrative Office of United States Courts.

In an effort to collect data on the demographic composition of the leadership appointments in MDL cases, the JPML should share its database of leadership appointments publicly either on its own website or as part of annual reports disseminated by the Administrative Office of United States Courts. This database can be a valuable source of information for judges, particularly first-time MDL judges. The information gleaned will provide more effective guidance for judges on how to increase diversity in the appointment process.

SUGGESTION 5: The Federal Judicial Center should continue to provide educational opportunities for judges to recognize the value of diversity in appointing lawyers to leadership positions, maintaining vigilance to avoid implicit bias.

In 2001, Professor Deborah Rhode described gender inequality in the legal profession as the “‘no-problem’ problem,” referring to the assumption that the longstanding gender gap would work itself out over time.¹¹¹ The slow pace of change in the diversity of lawyers appointed to leadership positions within law firms, corporations, and government offices over the last several decades is itself a barrier to the greater diversity of those lawyers chosen for leadership roles in the most impactful litigations.¹¹²

The first step in combatting the type of second-generation discrimination that remains common in the profession is education and training about the problem itself.¹¹³ Researchers at the Center for Gender in Organizations note that because second-generation discrimination and implicit biases are largely invisible, it is tempting and easy to believe that gender and other forms

of discrimination no longer exist.¹¹⁴ Educational and corrective training is occurring at many law firms and corporate and government offices. But it could also take place across the practice, among groups of existing MDL and class-action leaders, and with judges who preside over these cases, increasing awareness of the risk of implicit biases affecting decisions about which lawyers the judge has confidence in. That training could also allow judges to be aware of and guard against any influence from implicit bias.

SUGGESTION 6: The Judicial Panel on Multidistrict Litigation should consider transmitting a copy of this report to every newly appointed MDL transferee judge.

Most MDL transferee judges have had little experience with managing large MDLs before appointment. A copy of this report should be among the materials the JPML provides or makes available to transferee judges.

CONCLUSION

The bench cannot do as much as the bar itself to elevate women and members of minorities to positions of leadership. But the bench shares responsibility.¹¹⁵

Progress in making diverse appointments is slow and inconsistent with the judiciary's commitment to fairly and equitably fulfill its duties, including avoiding appointments based on favoritism or improper considerations.¹¹⁶ The JUDICIAL INCLUSIVITY STANDARD and the accompanying GUIDELINES AND BEST PRACTICES are intended to implement the existing obligations imposed by the Code of Conduct and by the need to support the integrity of, and respect for, the judiciary, by suggesting ways for judges to exercise the discretion the rules and case law provide in making appointments. Judges presiding over MDLs and class actions have a distinct responsibility and opportunity to enhance the quality of decision-making in these high-profile cases, to support the profession's work to realize the promise of equal opportunity, and to enhance the perception of the courts as the fair and equitable institution it must be.

END NOTES

¹ GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS, Bolch Judicial Institute, Duke Law School, (Second Edition 2018) [hereinafter Duke MDL GUIDELINES AND BEST PRACTICES]. The Duke GUIDELINES AND BEST PRACTICES focus on MDLs (only some of which are class actions) and, in particular, on “large and mass-tort MDLs.” *Id.* at vi–ix.

² The underlying principles of the GW GUIDELINES AND PRACTICES can apply equally as well to other appointments, including membership on an administrative committee, or an office such as referee, commissioner, special master, receiver, or guardian.

³ Canon 2(A): “*Respect for Law*. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Code of Conduct for United States Judges.

⁴ Commentary to Canon 3(A)(3): “The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge’s activities, including the discharge of the judge’s adjudicative and administrative responsibilities.” Code of Conduct for United States Judges.

⁵ Canon 3(A)(3): “A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge’s control, including lawyers to the extent consistent with their role in the adversary process.” Code of Conduct for United States Judges.

⁶ ABA Required Disclosures for 2016, J.D. Enrollment and Ethnicity (academic year), AM. BAR ASS’N, <http://www.abarequireddisclosures.org/> (last visited Mar. 26, 2018); see also Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES, Dec. 16, 2016, at B4, available at www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html. Data from the American Bar Association (ABA) put the number of women studying for a juris doctor degree at 55,766 nationally, compared with 55,059 men. Women comprised 50% of first-year students.

⁷ See NALP Bulletin, www.nalp.org/minoritieswomen (Feb. 2018); see also Total minority JD enrollments longitudinal minority law school enrollment, www.americanbar.org/groups/legal_education/resources/statistics/; see also Amanda Bronstad, *Despite Diversity Efforts, Fewer Than 10% of MDL Leadership Posts Are Going to Attorneys Who Are Not White*, The National Law Journal, (August 17, 2020) <https://www.law.com/nationallawjournal/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white/> (last visited August 19, 2020).

⁸ STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, AM. BAR ASS’N, FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 10 (ABA 2015), https://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf.

⁹ *Id.*

¹⁰ N.Y. STATE BAR ASS’N, TASK FORCE ON WOMEN’S INITIATIVE, IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS IN THE COURTROOM AND IN ADR 14 (2017), www.nysba.org/WomensTaskForceReport [hereinafter NYSBA REPORT].

¹¹ SCHARF & LIEBENBERG, *supra* note 8.

¹² *A Current Glance at Women in the Law*, published in January 2017 by the ABA’s Commission on Women in the Profession, explains that women comprise 36% of all lawyers and 33% of federal district court judges. AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW 2, 5 (2017).

¹³ Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 Emory L.J. 329, 363 (2014).

¹⁴ Julie A. Steinberg, *More Women Plaintiffs’ Lawyers Becoming Complex Litigation Leaders*, BLOOMBERG (Feb. 3, 2017), www.bna.com/women-plaintiffs-lawyers-n57982083338/.

¹⁵ The best practices in this section relate primarily to the process of appointing counsel for the plaintiffs’ side. At least one study has shown that defense lawyers in multidistrict litigation are slightly more diverse than those for plaintiffs. Additionally, unlike for plaintiffs, whose counsel is appointed by the transferee judge, in most cases, it is the defendant, and not the judge, who appoints its lawyers.

¹⁶ MANUAL FOR COMPLEX LITIGATION § 22.1 (2004) (quoting ADVISORY COMM. ON CIVIL RULES AND WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 10 (Feb. 15, 1999)). Related cases can be aggregated in a single federal judicial district pursuant to 28 U.S.C. § 1407(a), in a single state court pursuant to state coordination rules and statutes, or coordinated across state and federal courts (usually informally). In all of these situations, courts typically appoint lead counsel to coordinate discovery and other pretrial preparation.

¹⁷ There are several reference sources, however, the most important of which is the *Manual*, which recommends such appointment. The *Manual* states:

Where several counsel are competing to be lead counsel or to serve on a key liaison committee, the court should establish a procedure for attorneys to present their qualifications, including their experience in managing complex litigation and knowledge of the subject matter, their efforts in researching and investigating the claims before the court, and the resources that they can contribute to the litigation. Often counsel will agree among themselves as to who should serve as lead counsel or assume responsible positions on counsel committees; but the judge must be satisfied that counsel can perform the assigned roles and that they have not entered into improper arrangements to secure such positions. Including plaintiffs' attorneys with different perspectives and experience in lead or liaison counsel or as committee members can be helpful. Consider also including counsel handling significant numbers of state cases to facilitate coordination among state and federal cases. Section 20.31 discusses steps that judges can take in organizing counsel to help coordinate cases among state and federal courts, emphasizing the need to include attorneys involved in cases needing coordinated efforts.

MANUAL FOR COMPLEX LITIGATION § 22.64 (footnote omitted).

¹⁸ FED. R. CIV. P. 23(g)(1). When this document refers to "class actions" it refers to both class actions that are consolidated and coordinated in MDLs as well as class actions that are filed in a single district court. Appointments to leadership in both circumstances are governed by Federal Rule of Civil Procedures 23. When it refers to "MDLs" it is referring exclusively to mass tort MDLs. While Rule 23(g) by its terms applies at the class certification stage of the litigation, federal courts almost invariably appoint lead counsel – referred to as "interim lead counsel" – much earlier, usually before the consolidated complaint is filed.

¹⁹ FED. R. CIV. P. 23(g)(4) (emphasis added).

²⁰ FED. R. CIV. P. 23(g)(1)(B). A court "**must** consider:

- (A)(i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- (iii) counsel's knowledge of the applicable law; and
- (iv) the resources that counsel will commit to representing the class."

²¹ MANUAL (FOURTH), *supra* note 16, § 10.2. The role of counsel is so essential, in fact, that the *Manual* places it up front in its overview of "General Principles."

²² The *Manual* explains that the "added demands and burdens of complex litigation place a premium on attorney professionalism, and the judge should encourage counsel to act responsibly." *Id.* at § 10.21. Among the valued traits highlighted by the *Manual* is attorneys' ability "to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court." Indeed, counsel "need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible." And as the *Manual* emphasizes, "[e]ven where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute." *Id.*

²³ MANUAL (FOURTH), *supra* note 16 at § 10.224.

²⁴ See Hurwitz, *infra* n. 51 at 322.

²⁵ See Mortazavi, *infra*, n. 34. Mortazavi suggests that this broad discretion and deferential review mean that challenges to judicial appointment of class counsel are "doomed to fail." This latitude may permit judges to consider diversity in the appointment of class counsel in a manner that is largely shielded from review, unless there is evidence of abuse.

²⁶ See Mortazavi, *infra* n. 34 at 19.

²⁷ See *supra* n.1.

²⁸ *Id.* ("GUIDELINE 2: In an MDL action with many parties with separate counsel, the transferee judge should establish a leadership structure for the plaintiffs, and sometimes for the defendants, to promote the effective management of the litigation."); *id.* at 27 ("GUIDELINE 3: The transferee judge should select lead counsel, liaison counsel, and committee members as soon as practicable after the JPML transfers the litigation."); *id.* at 34 ("GUIDELINE 4: As a general rule, the transferee judge should ensure that the lawyers appointed to the leadership team are effective managers in addition to being conscientious advocates."). *Id.* at 42.

²⁹ *Id.* at 46.

³⁰ *Id.* at 45.

³¹ The Duke GUIDELINES AND BEST PRACTICES focus on MDLs (only some of which are class actions) and, in particular, on "large and mass-tort MDLs." *Id.* at vi–ix. Some practices appropriate for large mass-tort MDLs, such as, for example, large leadership structures with multiple levels and numerous committees, are often not suitable for certain kinds of class actions. In *Vioxx Products Liability Litigation*, for example, there were ten plaintiff lawyer

committees. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 87 & n.70 (2015) [hereinafter Burch, *Judging Multidistrict Litigation*]. In most class actions, by contrast, it may be preferable to appoint one or a small number of lead counsel. See Duke MDL GUIDELINES AND BEST PRACTICES, *supra* note 1, at 35 (“Sometimes a fairly simple structure, consisting of a lead counsel and a liaison counsel, is all that is required. Consumer, securities fraud, and employment class actions in which the plaintiffs generally assert the same or similar claims often fall into this category.”). In federal antitrust class actions, for example, courts typically appoint much smaller leadership structures, usually appointing one to three firms as lead or co-lead counsel, and sometimes additionally appoint a plaintiffs’ executive or steering committee.

³² See, e.g., POUND CIV. JUST. INST., *THE WAR ON THE JUDICIARY, CAN INDEPENDENT JUDGING SURVIVE?* (2013) (discussing attacks on the judiciary).

³³ *Securities & Exchange Commission v. Adams*, No. 3:18-CV-252-CWR-FKB, at 6 (order establishing receiver selection process) (June 1, 2018).

³⁴ See Melissa Mortazavi, *Blind Spot: The Inadequacy of Neutral Partisanship*, 63 UCLA L. REV. DISC. 16 (2015); see also Judicial Conference of the United States, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, Issue 4: “The judiciary can retain public trust and confidence and meet workload demands only if it is comprised of a diverse complement of highly competent judges, employees, and CJA attorneys.” (September 2020) The Plan adds a new Core Value of Diversity and Respect, described as: “Diversity and Respect: a workforce of judges and employees that reflects the diversity of the public it serves; an exemplary workplace in which everyone is treated with dignity and respect.” <https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary>; see also Hon. Anna Blackburne-Rigsby, *Ensuring Access To Justice For All: Addressing the “Justice Gap” Through Renewed Emphasis on Attorney Professionalism and Ethical Obligations in the Classroom and Beyond*, 27 GEO. J. LEGAL ETHICS 1187 (2014). See also, Victoria Pynchon, *Juror Attitudes to Women in the Courtroom*, FORBES (Feb. 15, 2012, 11:11 AM), www.forbes.com/sites/shenegotiates/2012/02/15/juror-attitudes-to-women-in-the-courtroom/. See also DAVID B. WILKINS, BRYON FONG, & RONIT DINOVTZER, HARV. L. SCH. CTR. LEGAL PROF., *THE WOMEN AND MEN OF HARVARD LAW SCHOOL: PRELIMINARY RESULTS FROM THE HLS CAREER STUDY* 37–38 (2015).

³⁵ See Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/>.

³⁶ Some researchers go so far as to posit that women are better decision makers. See Therese Huston, *Are Women Better Decision Makers?*, N.Y. TIMES (Oct. 17, 2014), <https://www.nytimes.com/2014/10/19/opinion/sunday/are-women-better-decision-makers.html>. Others suggest they make better leaders. See Jack Zenger & Joseph Folkman, *Are Women Better Leaders Than Men?*, HARV. BUS. REV. (Mar. 15, 2012), <https://hbr.org/2012/03/a-study-in-leadership-women-do>; Rochelle Sharpe, *As Leaders, Women Rule: New Studies Find That Female Managers Outshine Their Male Counterparts in Almost Every Measure*, BLOOMBERG (Nov. 20, 2000, 12:00 AM), <https://www.bloomberg.com/news/articles/2000-11-19/as-leaders-women-rule>. An added bonus to appointing more women is that, on average, women work longer hours than men. See Wilkins, Fong & Dinovtzer, *supra* note 34; see also Scott Westfahl, *More Women Means More Success*, HARV. L. TODAY (Jun. 17, 2015), <https://today.law.harvard.edu/from-the-women-lawyers-journal-more-women-means-more-success/>.

³⁷ See Jena McGregor, *More Women at the Top, Higher Returns*, WASH. POST (Sept. 24, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/09/24/more-women-at-the-top-higher-returns/?utm_term=.c4fe9d02ff68; see also Jacqueline Bell, *What Happens At Law Firms When Women Take Charge*, LAW360 (Apr. 20, 2016, 9:28 PM), <https://www.law360.com/articles/786736/what-happens-at-law-firms-when-women-take-charge>; Solange Charas, *A Mathematical Argument for More Women in Leadership*, FAST COMPANY (Sept. 30, 2014), <https://www.fastcompany.com/3036365/a-mathematical-approach-to-appointing-more-women-to-your-board>; Daniel Victor, *Women in Company Leadership Tied to Stronger Profits, Study Says*, N.Y. TIMES (Feb. 9, 2016), <https://www.nytimes.com/2016/02/10/business/women-in-company-leadership-tied-to-stronger-profits.html>.

³⁸ As of October 2016, the following organizations were considering the resolution: the National Bar Association, the American Board of Trial Advocates, and the American Bar Association, Judicial Division. See *NAWJ Monthly Update October 2016*, NAT’L ASS’N WOMEN JUDGES (Oct. 3, 2016), <https://www.nawj.org/blog/newsroom/post/nawj-monthly-update-october-2016#resolution>.

³⁹ See Amanda Bronstad, “Good Ol’ Boys Club” in MDL, *The National Law Journal* (Sept. 28, 2015), www.nationallawjournal.com/id=1202738239700/Good-Ol-Boys-Club-In-MDL (last visited Sept. 11, 2017); Meredith Hobbs, *Women Plaintiffs Lawyers Fight to End MDL “Boys’ Club”* (Apr. 7, 2017)(last visited Sept. 11, 2017); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players In Multidistrict Litigation: The Social Network*, 102 Cornell Law Review 1445 (2017); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*,

70 Vanderbilt Law Review 81-84 (2017); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. Rev. 71 (2015).

⁴⁰ MANUAL (FOURTH), *supra* note 16, § 10.22.

⁴¹ Nationwide, only 17 percent of equity partners are women. Deborah Chang & Sonia Chopra, *Where Are All the Women Lawyers? Diversity in the Legal Profession in California: 2015*, FORUM 18, 19 (2015), <http://www.njp.com/wp-content/uploads/article/article36.pdf>. Not only do those women earn less than their male counterparts, but as non-equity partners, they often lack the clout to steer significant money and time to a MDL. *See id.* *See* NALP Bulletin, data on minority parties, *supra* n. 7.

⁴² *See* MANUAL (FOURTH), *supra* note 16, § 10.22 (2004).

⁴³ *See* Burch, *Judging Multidistrict Litigation*, *supra* note 31, at 93.

⁴⁴ In appointing counsel, the *Manual* *supra* note 16, § 10.224 (emphasis added) advises that “[i]t is important to assess the following factors”:

- “qualifications, functions, organization, and compensation of designated counsel”;
- “whether there has been full disclosure of all agreements and undertakings among counsel”;
- “would-be designated attorneys’ competence for assignments”;
- “whether there are clear and satisfactory guidelines for compensation and reimbursement, and whether the arrangements for coordination among counsel are fair, reasonable, and efficient”;
- “whether designated counsel *fairly represent the various interests in the litigation — where diverse interests exist* among the parties, the court may designate a committee of counsel representing different interests”;
- “the attorneys’ resources, commitment, and qualifications to accomplish the assigned tasks”; and
- “the attorneys’ ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court — experience in similar roles in other litigation may be useful, but an attorney may have generated personal antagonisms during prior proceedings that will undermine his or her effectiveness in the present case.”

⁴⁵ *See* Burch, *Judging Multidistrict Litigation* *supra* note 31.

⁴⁶ Burch & Williams, *Repeat Players In Multidistrict Litigation*, *supra* note 39.

⁴⁷ DANA ALVARÉ, *VYING FOR THE LEAD IN THE “BOYS’ CLUB”: UNDERSTANDING THE GENDER GAP IN MULTIDISTRICT LEADERSHIP APPOINTMENTS 4* (Temple Univ. Beasley School of Law 2017), www2.law.temple.edu/cs/cms/wp-content/uploads/2017/03/Vying-for-Lead-in-the-Boys-Club.pdf; Aebrá Coe, *Female Lawyers Are Still Struggling to Land Lead MDL Roles*, LAW360 (Mar. 16, 2017), www.law360.com/articles/899783/female-lawyers-are-still-struggling-to-land-lead-mdl-roles; *see also* DODGE, EMORY 64 EMORY, L.J., 363-364, *supra* n. 13.

⁴⁸ Burch, *Judging Multidistrict Litigation*, *supra* note 31, at 86, 120 (“Outsiders aren’t smarter—they’re just novel and different. They add value by offering a fresh perspective, challenging the status quo, and injecting new information into the discussion.”).

⁴⁹ When the government takes action based on race or gender, it is subject to heightened scrutiny. The strict scrutiny standard requires that government actions or decisions based on race be supported by a compelling interest and narrowly tailored to achieve that interest. Government actions or decisions based on gender are subject to intermediate scrutiny, which requires that gender classifications be substantially related to the achievement of important government interests. *See Craig v. Boren*, 429 U.S. 190 (1976). Assuming *arguendo* that the compelling interest and substantial relation to important government tests apply, focusing on the higher of these two standards applicable to racial classifications, there are several possible compelling interests that might be served by the consideration of race in the appointment of class counsel in class actions and MDLs, including remedying past discrimination within the legal profession. The Supreme Court has refused to find that remedying past societal discrimination is a compelling interest that can justify the government’s use of race. So while remedying discrimination in the legal profession generally is unlikely to satisfy strict scrutiny, remedying past discrimination in leadership appointments in MDLs and class actions might satisfy strict scrutiny. *See City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989). Moreover, increasing the diversity of class counsel in MDLs and class actions might be said to enhance the representation of class members, or even to improve integrity in the judicial system overall. *See Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978). Under this equal protection analysis, the consideration of race in the appointment of counsel must also be narrowly tailored. Proving that the consideration of race in the appointment of counsel in class actions and MDLs is narrowly tailored might be difficult.

⁵⁰ The views expressed by Justice Samuel Alito in *Martin v. Blessing* on appointments of lead class counsel do not apply to the concept of diversity the GUIDELINES adopt. In *Martin*, Justice Alito objected to the trial court judge’s practice that required lawyers appointed as lead counsel in a class action to “fairly reflect the class composition in

terms of relevant race and gender metrics.” Rule 23 permits a judge to consider “any matter pertinent to the counsel’s ability to fairly and adequately represent the interests of the class.” Justice Alito found that it was “farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race and gender of counsel mirror the demographics of the class.” The proposition Justice Alito found objectionable – that lead counsel must mirror the class – is far different from the concept of diversity urged here: not to select counsel for leadership positions to mirror class composition, but to include in the selection process a broad consideration of diversity, one of several goals in a merits-based appointment process.

⁵¹ Race is subject to the most rigid scrutiny and poses the most constitutional challenges in this regard. Concerns that might arise in this regard include whether the use of race is ever necessary, and whether race-neutral considerations might equally serve the government’s compelling interests? This is a particularly important concern if the interest is in realizing the problem-solving benefits of diversity, which rests not on race or gender diversity *per se*, but on diversity of experience and background. See Michael H. Hurwitz, *Judge Harold Baer’s Quixotic Crusade for Class Counsel Diversity*, 17 CARDOZO J. L. & GENDER 321 (2011)(observing “if [the] true concern is with ensuring that counsel is able to fairly and adequately represent the interests of the class . . . then shouldn’t the inquiry go beyond race or gender to the experience or background that counsel shares with the class?”). Additional considerations of narrow tailoring might include whether there ought to be any durational limits on the consideration of race in the appointment of class counsel, and whether the measure of racial diversity needed to achieve the asserted interest(s) is proportionate representation, a “critical mass” of diverse attorneys, or some other measure? These questions have posed a considerable challenge for the Supreme Court in other cases adjudicating the constitutionality of governmental uses of race, and they are likely to continue to raise important constitutional concerns in this novel context. Nevertheless, it is worth noting that the Supreme Court has repeatedly sustained race-consciousness in at least one context – higher education admissions – and it remains possible for other such uses of race (and gender) to prove constitutionally defensible as well.

⁵² “An affirmative effort will be made to give due consideration to all qualified applicants without regard [i.e., showing favoritism] to race, color, age (40 and over), gender, religion, national origin, disability, or sexual orientation.” Standard federal district court vacancy announcement for United States magistrate judge position.

⁵³ Spela Trefault et al., *Closing the Women’s Leadership Gap: Who Can Help?*, CGO INSIGHTS (Apr. 2011), www.simmons.edu/~media/Simmons/About/CGO/Documents/INSights/Insights-32.ashx?la=en.

⁵⁴ Although implicit bias is hidden, its existence is provable. Harvard University created Project Implicit, a non-profit organization and international network of researchers investigating implicit social cognition, or “thoughts and feelings outside of conscious awareness and control.” PROJECT IMPLICIT, www.projectimplicit.net/index.html (last visited Sept. 5, 2017). The goal of Project Implicit is “to educate the public about hidden biases and to provide a ‘virtual laboratory’ for collecting data on the Internet.” *Id.* One part of this education is the project’s online Implicit Association Test, which measures the embedded attitudes and beliefs that people are either unwilling or unable to report. *Id.*

⁵⁵ Anne Jaffee et al, *Retaining and Advancing Women in National Law Firms* 6 n.15 (Stan. L. Sch. 2016); see Williams, Multhaup, Li, Korn, *You Can’t Change What You Can’t See, Interrupting Racial & Gender Bias in the Legal Profession*, ABA Commission on Women in the Profession and the Minority Corporate Counsel Association (2018).

⁵⁶ *Id.*

⁵⁷ See Lisa Burrell, *We Just Can’t Handle Diversity*, HARV. BUS. REV. (2016), <https://hbr.org/2016/07/we-just-cant-handle-diversity>.

⁵⁸ JAFFEE ET AL., *supra* note 55 at 20.

⁵⁹ *Id.*

⁶⁰ SHERRIE BOURG CARTER, HIGH OCTANE WOMEN: HOW SUPERACHIEVERS CAN AVOID BURNOUT 43 (2011).

⁶¹ Victoria L. Brescoll, Opinion, *What Do Leaders Need to Understand About Diversity?* YALE INSIGHTS (Jan. 1, 2011), <http://insights.som.yale.edu/insights/what-do-leaders-need-to-understand-about-diversity>; see *You Can’t Change What You Can’t See*, *supra* note 55.

⁶² *In Re: Fluoroquinolone Prod. Liability Litig.*, No. 15-2642 JRT (D. Minn. March 15, 2016), minutes posted at http://www.mnd.uscourts.gov/MDL-Fluoroquinolone/Orders_Minutes/2016/2016-0315-minutes.pdf.

⁶³ See Practice and Procedure Order Upon Transfer Pursuant to 28 U.S.C. § 1407(a), *In re Ethicon, Inc., Power Morcellator Prods. Liab. Litig.*, MDL 2652, (D. Kan. Oct. 16, 2015), <http://www.ksd.uscourts.gov/practice-and-procedure-order-upon-transfer-pursuant-to-28-u-s-c-%24-1407a-doc-2/> where Judge Vratil included the following as criteria for a position as plaintiffs’ lead counsel or to plaintiffs’ steering committee: “achieving a leadership team that adequately reflects the diversity of legal talent available and the requirements of the case and achieves diversity with respect to gender, race, national origin, geography, years of practice, age and other relevant factors.”; see also Judge

Baer, who required that lawyers in class action cases in his court be “diverse.” In an ERISA and age discrimination case, Judge Baer stated the following:

The proposed class includes thousands of Plan participants, both male and female, arguably from diverse racial and ethnic backgrounds. Therefore, I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint. A review of the firm biographies provides some information on this score. Here, it appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in the case. Co-lead counsel has met this Court's diversity requirement—i.e., that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter.

In re J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007), amended by 255 F.R.D. 130 (S.D.N.Y. 2009).

⁶⁴ See *Securities & Exchange Commission v. Adams*, No. 3:18-CV-252-CWR-FKB at 7-8 (order establishing receiver selection process) (June 1, 2018) (“The Court will require the Receiver to take steps to guarantee that its hiring practices are as inclusive as possible, ensuring the participation of those who have traditionally been excluded from legal work in America. Applicants are encouraged to commit to bold and creative steps involving recruiting, retaining, hiring, and other staffing concerns in their applications. Through their fulfillment, those steps may aim for – though may not guarantee achievement of – targets for billable hours performed by those underrepresented in the legal profession.”). See also, *In Re: MDL No. 1871, In re Avandia Marketing, Sales Practices and Products Liability Litigation*, where Judge Rufe from the Eastern District of Pennsylvania was proactive in considering qualified women and minorities for leadership positions, and specifically directed the plaintiffs’ steering committee to do so in carrying out its various responsibilities.

⁶⁵ See the standing orders collected at www.NextGenLawyers.com, which direct parties to provide opportunities to allow young lawyers to argue motions and examine witnesses in court. For example, if a lawyer of “four or fewer years out of law school will conduct the oral argument or at least the lion’s share, then the Court will hear oral argument, believing that young lawyers need more opportunities for appearances than they usually receive.” (Alsup, J., N.D.C.A.). These orders also “strongly encourage[e] parties to permit less experienced lawyers to examine witnesses at trial and to have an important role at trial.” (Koh, J., N.D.C.A.).

⁶⁶ The 2016 Duke Conference on MDLs and class actions generated helpful ideas for how these other institutional actors, including law firms, corporate law departments, and bar associations, can also promote greater diversity within the leadership of the profession. Including those recommendations and best practices is beyond the scope of the current project, which focuses specifically on judicial efforts to promote diversity in the appointment of lead counsel in MDLs and class actions. However, those broader recommendations and best practices will be addressed in a later publication. In the meantime, we refer those who might be interested to existing best practice guidance for the profession more generally, such as the National Conference on Women’s Bar Associations’ GOOD Guy’s Toolkit, or the ABA Commission on Women in the Profession’s Grit Program Toolkit. For now, this guidance focuses attention on what judges and other judicial actors can do to increase the number of women, diverse, and LGBTQ lawyers appointed to positions of leadership in MDLs and class actions. See, *supra* note 55, *You Can’t Change What You Can’t See*, which provides “two cutting-edge toolkits, one for law firms and one for in-house departments, containing information for how to interrupt bias in hiring, assignments, performance evaluations, compensation, and sponsorship.”

⁶⁷ Judges should keep in mind that in reviewing third-party funding options, they have the obligation to ensure that the third-party financier is not improperly entangled in the litigation, such as including itself in the settlement process.

⁶⁸ Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 393 (2014).

⁶⁹ MANUAL (FOURTH), *supra* n. 16 § 10.224 (2004).

⁷⁰ The “repeat player” dynamic has been blamed for much of the lack of diversity in MDL leadership appointments. See, e.g., Burch, *supra* note 31. Much of that criticism, however, is focused on non-class MDL actions, in which judicial oversight of counsel appointments, settlements, and counsel fees is not governed by the strict requirements of Rule 23. See, e.g., Burch, *supra* note 31 at 78-79 (comparing non-class MDLs to Rule 23 class actions, in which “certification offered transferee judges a dizzying array of judicial powers to appoint class counsel, ensure a fair settlement, and award fees, all of which helped prevent counsel from exploiting absent class members.”), at 88. (“Yet, unlike selecting that class counsel, judges seem to pay little attention to *Amchem*-like adequate-representation concerns in multidistrict litigation.”) Moreover, avoiding the appointment of “repeat players” risks excluding from consideration the most experienced and qualified counsel. Given the high quality of the lawyers that typically represent defendants in large MDLs and class actions, a broad presumption against “repeat players” may not be in the best interests of plaintiffs. It also could potentially conflict with the requirements of Rule 23(g)(2), including the

requirement that in a leadership contest, the court must appoint the counsel “best able to represent the interests of the class.” A better option is to utilize a competitive process to appoint leadership, because it is typically in the context of consensual slates that long-standing networks and alliances operate to exclude women and minorities. See Amanda Bronstad, “Good Ol’ Boys Club” in MDL, *The National Law Journal* (Sept. 28, 2015), www.nationallawjournal.com/id=1202738239700/Good-Ol-Boys-Club-In-MDL (last visited Sept. 11, 2017); Meredith Hobbs, *Women Plaintiffs Lawyers Fight to End MDL “Boys’ Club”*, *Law.com* (Apr. 7, 2017), <http://www.law.com/sites/almstaff/2017/04/07/women-plaintiffs-lawyers-fight-to-end-mdl-boys-club/> (last visited Sept. 11, 2017); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players In Multidistrict Litigation: The Social Network*, 102 *Cornell Law Review* 1445 (2017); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 *Vanderbilt Law Review* 81-84 (2017); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 *N.Y.U. L. Rev.* 71 (2015).

⁷¹ ALVARÉ, *supra* note 47, at 4.

⁷² Brooke Coleman, *A Legal Fempire?: Women in Complex Civil Litigation*, 93 *IND. L.J.* 617, 2018.

⁷³ Burch, *Judging Multidistrict Litigation*, *supra* note 31, at 93; see also ALVARÉ, *supra* note 47, at 4 (“[The] traditional method of private ordering consistently yields appointment of a very small group of MDL ‘repeat players’ into key leadership positions.”) (footnote omitted).

⁷⁴ See ROTHSTEIN & BORDEN, *infra* note 80, at 13 n.15 (noting that in the Hip Implant MDL, Judge Katz conducted a three-and-a-half hour hearing and each appearing applicant was allotted two minutes to speak in support of his or her application).

⁷⁵ Burch, *Judging Multidistrict Litigation*, *supra* note 31, at 126.

⁷⁶ *Id.* at 125.

⁷⁷ Duval, *supra* note 68, at 393.

⁷⁸ By definition, classes require significant commonality. Fed.R.Civ.P. 23.

⁷⁹ In the Toyota unintended acceleration litigation, during a very competitive selection process, a prominent and established female attorney, Jayne Conroy, argued to the court that more than half of Toyota buyers were women and therefore the committee should reflect those demographics. After establishing that she had the resources and skills required to be on the steering committee, Ms. Conroy insisted that the failure to appoint any women would lead to a disconnect between the majority-female plaintiffs and their male representatives. The court ultimately appointed Ms. Conroy to the steering committee. See *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10-ml-02151 (C.D. Cal. May 14, 2010), ECF No. 169. See also, *In re Ethicon Inc. Power Morcellator Product Liability Litigation*, which involved allegations that Ethicon’s power morcellators, medical devices used in uterine surgeries, caused women to develop an aggressive form of cancer. This was the first time that women were the majority in a leadership committee in a consolidated MDL proceeding. Co-lead counsel Aimee Wagstaff noted the significance of having women on the committee: “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.” See Elizabeth A. Fegan, *An Opportunity or Landmine: Promoting Gender Diversity from the Bench*, *FED. LAW.*, at 38 (May 2016); see also Diane M. Zhang, *A Milestone in Gender Equality*, *TRIAL* 45, 46 (Am. Ass’n Justice 2016), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/panel_3-zhang_qa_july.pdf.

Similarly, in the Mirena IUD litigation, where plaintiffs alleged they were injured by the defendant’s birth-control device, plaintiffs’ counsel urged Judge Cathy Seibel of the Southern District of New York, to appoint female lawyers to the leadership team because it would benefit the female plaintiffs to have qualified female attorneys who could relate to their struggle as well as promote empathy to the jury, particularly because the lead lawyer for the defendant was a woman. See *Judge Calls for More Female Lawyers for Mirena IUD Litigation*, PINTAS & MULLINS LAW FIRM (May 23, 2013), <https://www.pintas.com/our-blog/2013/may/judge-calls-for-more-female-lawyers-for-mirena-i/>.

⁸⁰ See BARBARA J. ROTHSTEIN & CATHERINE BORDEN, *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES* 13 (Federal Judicial Center 2011) (“While prior MDL experience is valuable [to one’s ability to succeed as lead counsel], each case requires different talent . . . consider including attorneys who may bring new perspectives.”).

⁸¹ Dodge, *supra* note 13.

⁸² See NYSBA REPORT, *supra* note 10, at 23.

⁸³ For example, in Pretrial Order # 20 in *In re: Zantac (Ranitidine) Prods. Liab. Litig.*, MDL 2924 (May 8, 2020), Judge Rosenberg said that “The Court also sought to appoint a diverse leadership team that is representative of the inevitable diversity of the Plaintiffs in this case, and a team that affords younger and slightly less experienced attorneys an opportunity to participate in a leadership role in an MDL....The Court hopes and assumes that counsel appointed

to leadership positions will take full advantage of the range of talent among other counsel, whether through the formation of appropriate subcommittees or otherwise – and that other counsel, including those who applied for leadership positions, will provide assistance as appropriate” See also *Deepwater Horizon* litigation, where Judge Barber noted that diversity-related considerations were relevant in selecting counsel for the plaintiffs’ steering committee. See *In re Oil Spill by Oil Rig Deepwater Horizon*, MDL No. 2179, 295 F.R.D. 112, 137–38 (E.D. La. Jan. 11, 2013) (noting that the committee was composed of a group of firms that was diverse in a number of ways, including geographically, in the range of litigation expertise and expertise, and in the representation of the claims in the litigation). For a list of law firms certified as complying with the Mansfield Rule see <https://www.diversitylab.com/mansfield-rule-4-0/>.

⁸⁴ See Duke MDL GUIDELINES AND BEST PRACTICES, *supra* note 1, at 58. See also Judicial Conference of the United States, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, Goal 4.1b: “Strengthen the judiciary’s commitment to workforce diversity, equity, and inclusion by expanding diversity program recruitment, education, and training; identifying barriers to recruitment of a diverse workforce; ensuring all recruitments are designed to attract and consider a diverse pool of applicants; and ensuring screening and hiring committees consist of diverse members.” (September 2020) <https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary>.

⁸⁵ For example, Judge Baer from the Southern District of New York instructed that, because the proposed class included thousands of participants, both male and female and from diverse backgrounds, class counsel had to “make every effort to assign . . . at least one minority lawyer and one woman lawyer.” See also, *Ethicon, Inc., Power Morcellator Products Liability Litigation*, where Judge Vratil included the following as criteria for a position as plaintiffs’ lead counsel or to plaintiffs’ steering committee: “achieving a leadership team that adequately reflects the diversity of legal talent available and the requirements of the case and achieves diversity with respect to gender, race, national origin, geography, years of practice, age and other relevant factors.” See Practice and Procedure Order Upon Transfer Pursuant to 28 U.S.C. § 1407(a), *In re Ethicon, Inc., Power Morcellator Prods. Liab. Litig.*, MDL 2652, (D. Kan. Oct. 16, 2015), <http://www.ksd.uscourts.gov/practice-and-procedure-order-upon-transfer-pursuant-to-28-u-s-c-§-1407a-doc-2/>.

⁸⁶ Judge John Tunheim from Minnesota, for example, rejected the proposed leadership slate in Fluoroquinolone MDL because the executive committee lacked gender diversity. See Zhang, *supra* note 79. Judge Baer, regularly and quite controversially required that lawyers in class action cases in his court be “diverse.” In an ERISA and age discrimination case, Judge Baer stated the following:

The proposed class includes thousands of Plan participants, both male and female, arguably from diverse racial and ethnic backgrounds. Therefore, I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint. A review of the firm biographies provides some information on this score. Here, it appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in the case. Co-lead counsel has met this Court’s diversity requirement—i.e., that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter.

In re J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007), amended by 255 F.R.D. 130 (S.D.N.Y. 2009).

⁸⁷ See Pretrial Order # 20 in *In re: Zantac (Ranitidine) Prods. Liab. Litig.*, MDL 2924 (May 8, 2020), where Judge Rosenberg formed a special Leadership Development Committee (LDC) to address “concerns raised in recent years about the challenges faced by less experienced attorneys in obtaining leadership appointments in MDL proceedings.” The judge expected that PSC members “will actively mentor and work closely with the attorneys appointed to the LDC so they have the opportunity to play a meaningful role in various aspects of this MDL, including subcommittee assignments, and thereby gain further experience in preparation for future service on steering committees.” Similarly, the Honorable Judge Christopher Burke of the District of Delaware has provided an incentive for senior lawyers to have young lawyers argue a motion. In his procedures regarding oral argument on pending motions, Judge Burke provides that, where a party alerts the court that a newer attorney will argue the motion (or part of the motion), Judge Burke will “strongly consider allocating additional time for oral argument beyond what the Court may otherwise have allocated, were a newer attorney not arguing the motion” and “permit other more experience counsel of record the ability to provide some assistance to the newer attorney who is arguing the motion.” See *Judicial Orders*, *supra* note 65.

⁸⁸ This novel application of *Batson* was advanced in a recent article by Judge Michael Baylson and Cecily Harris. See Hon. Michael Baylson & Cecily Harris, *Equal Opportunity*, 101 JUDICATURE 65, 67 (2017). Although the constitutional law underpinnings are beyond the scope of these best practices, analogizing to *Shelley v. Kramer*, the authors identify the district judge’s authority to appoint class counsel (or MDL lead counsel) as the state-action hook. *Id.* at 66. To safeguard the judge from enforcing the product of a discriminatory process, the judge may

entertain motions—like she would from a criminal defendant in the *Batson* context—challenging the exclusion of counsel (analogized to the racially-motivated juror strike in *Batson*) as impermissibly discriminatory. *See Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

⁸⁹ *See e.g., MentorJet*, NAT'L ASS'N OF WOMEN JUDGES, <https://www.nawj.org/catalog/community-outreach-programs/mentorjet> (last visited Apr. 6, 2018).

⁹⁰ *See, e.g., NYSBA REPORT*, *supra* note 10, at 23 (“All judges and lawyers should consider participating in panels and roundtable discussions to address these issues and both male and female attorneys should be invited and encouraged to attend such events.”).

⁹¹ *See Securities & Exchange Commission v. Adams*, No. 3:18-CV-252-CWR-FKB at 7-8 (order establishing receiver selection process) (June 1, 2018) (“The Court will require the Receiver to take steps to guarantee that its hiring practices are as inclusive as possible, ensuring the participation of those who have traditionally been excluded from legal work in America. Applicants are encouraged to commit to bold and creative steps involving recruiting, retaining, hiring, and other staffing concerns in their applications. Through their fulfillment, those steps may aim for – though may not guarantee achievement of – targets for billable hours performed by those underrepresented in the legal profession.”).

⁹² Stanwood Duval Jr. notes: “The appointment of a different attorney can lead to new approaches and innovations, as well as achieve fundamental fairness. A judge should try to deal with this issue by strongly suggesting that the steering committee appoint subcommittees comprised of attorneys who are not on the steering committee.” Duval, *supra* note 68 at 392–93.

⁹³ NYSBA Report, *supra* note 10.

⁹⁴ For example, the Honorable Judge Barbara Lynn of the Northern District of Texas has specifically mentioned to litigants: “...The Court strongly encourages litigants to be mindful of opportunities for young lawyers to conduct hearings before the Court, particularly for motions where the young lawyer drafted or contributed significantly to the underlying motion or response.” Order Setting Hearing, *Velasco v. Blue Cross Blue Shield of Texas*, No. 3:15-CV-615-M (Nov. 12, 2015).

⁹⁵ In response to Judge Lucy H. Koh’s instruction encouraging inexperienced lawyers to argue motions before her in court, the plaintiffs allowed two junior associates to participate in court. *See Huynh v. Karasz*, Case No. 14-CV-02367-LHK, PLAINTIFFS’ NOTICE OF ARGUMENT BY JUNIOR ATTORNEYS (April 13, 2016) (“Plaintiffs respectfully notify the Court that they intend to have first year associate Holly K. Victorson and second year associate Emily Petersen Garff argue the upcoming summary judgment motions. Ms. Victorson and Ms. Garff were the primary drafters of Plaintiffs’ briefing, and were involved in taking much of the discovery Plaintiffs relied upon in their motion. Given the gravity of the issue before this Court, Plaintiffs respectfully request that more experienced counsel be able to assist in the argument should the need arise.”).

See also NYSBA Report, *supra* note 10 (stating that judges “should bear some responsibility to ensure that the lawyers who speak in court are equally diverse” and thus, to help achieve gender diversity in the legal profession, judges should “suggest that the lawyer who wrote the brief or prepared the witness should be the one to argue”). Judge Weinstein’s revised rule sheet now says that “junior members of legal teams” are “invited to argue motions they have helped prepare and to question witnesses with whom they have worked.”). Alan Feuer, *A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule.*, N.Y. TIMES (Aug. 23, 2017), <https://www.nytimes.com/2017/08/23/nyregion/a-judge-wants-a-bigger-role-for-female-lawyers-so-he-made-a-rule.html?smid=fb-nytimes&smtyp=cur>

⁹⁶ *See ROTHSTEIN & BORDEN*, *supra* note 80 at 13. (2011) (“While prior MDL experience is valuable, each case requires different talent. Consider including attorneys who may bring new perspectives. It is also helpful to appoint steering committee members for one-year terms, and invite them to reapply for appointment along with any new applicants. This practice ensures continued dedication to their duties.”).

⁹⁷ Duke MDL GUIDELINES AND BEST PRACTICES, *supra* note 1, at 27.

⁹⁸ District of Oregon’s Judge Michael J. McShane’s standing order provides an example: “After the conclusion of a case, Judge McShane will be available to meet with any young lawyers who wish to receive feedback in regards to their in-court appearances.” *See* District Judge Michael McShane’s Standing Order, Opportunity for Young Lawyers (last updated June 19, 2017), <https://www.ord.uscourts.gov/index.php/court-info/judges/judge-mcshane>.

⁹⁹ “The Gender Bias Task Forces” was a movement that began when the National Organization for Women partnered with the National Association of Women Judges with the aim of providing insight into the treatment of women within the legal profession. *See Coleman*, *supra* note 72, at 13–21.

¹⁰⁰ *Id.* at 18.

¹⁰¹ *Id.*

¹⁰² *You Can't Change What You Can't See*, *supra* note 55.

¹⁰³ For example, in January 2016, U.S. Magistrate Judge Paul S. Grewal for the Northern District of California sanctioned lawyer Peter Bertling for his behavior towards plaintiff's lawyer Silvia Guersenzvaig during a deposition. Specifically, Mr. Bertling made long speaking objections, coached and spoke for witnesses, and, at times, cut them off. When Ms. Guersenzvaig asked him not to interrupt her, he responded that it is not "becoming of a woman or an attorney" to raise her voice during a deposition. See Debra Cassens Weiss, *Lawyer Sanctioned for Telling Opposing Counsel It's "Not Becoming of a Woman" to Raise Her Voice*, ABA J. (Jan. 14, 2016), http://www.abajournal.com/news/article/lawyer_sanctioned_for_not_becoming_of_a_woman_remark_discovery_conduct/. See also Judicial Conference of the United States, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, Goal 4.3a: "Educate all judges and employees on standards of appropriate and inappropriate conduct, with continuing education on a regular basis, including as related to the codes of conduct and judicial conduct and disability procedures." (September 2020) <https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary>.

¹⁰⁴ See *Judicial Orders*, *supra* note 65.

¹⁰⁵ The Judicial Panel on Multidistrict Litigation (JPML) is tasked with consolidating related cases so that pretrial issues can be uniformly resolved. See 28 U.S.C. § 1407(a) (2012).

¹⁰⁶ See Kate Perry, *Building a Diverse Bench: Selecting Federal Magistrate and Bankruptcy Judges*, Brennan Center for Civil Justice and American Bar Association Judicial Div. (August 7, 2017). For example, in the *Power Morcellator Litigation* (MDL 2652) Judge Vratil appointed a majority female plaintiff leadership team. See *supra* note 79.

¹⁰⁷ Coleman, *supra* note at 72.

¹⁰⁸ See Panel Judges, Judicial Panel on Multidistrict Litigation, <http://www.jpml.uscourts.gov/content/panel-judges> (last visited Apr. 6, 2018).

¹⁰⁹ Coleman, *supra* note 72, at 48–49; Amanda Bronstad, *Meet the Next Generation of MDL Judges*, NAT'L L. J. (Apr. 20, 2017), <http://www.nationallawjournal.com/legaltimes/id=1202784167417/Meet-the-Next-Generation-of-MDL-Judges>.

¹¹⁰ For example, the JPML recently assigned the actions in the *Stryker Orthopaedics Femoral Head Products Liability Litigation* to Judge Talwani, who the JPML acknowledged, had not "yet had an opportunity to preside over an MDL docket." See Transfer Order, *In re Stryker Orthopaedics LFIT V40 Femoral Head Prods. Liab. Litig.*, MDL No. 2768 (J.P.M.L. Apr. 5, 2017), http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2768-Initial_Transfer-03-17.pdf. In 2016, the JPML transferred cases to 15 first-time MDL judges. See Amanda Bronstad, *Rookie Judges Start to Wrangle MDL Dockets*, NAT'L L. J. (Aug. 20, 2017), <https://www.law.com/nationallawjournal/almID/1202784158624/>.

¹¹¹ THE UNFINISHED AGENDA, *supra* note; see also Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001 (2002).

¹¹² See Stefanie K. Johnson, *What 11 CEOs Have Learned About Championing Diversity*, HARV. BUS. REV. (Aug. 17, 2017), hbr.org/2017/08/what-11-ceos-have-learned-about-championing-diversity; see also NALP 2018 DIVERSITY REPORT, *supra* note 7 (noting that representation of women and black/African-American lawyers remains below 2009 pre-recession levels).

¹¹³ Carter, *supra* note 60. See also Judicial Conference of the United States, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, Goal 4.1b: "Strengthen the judiciary's commitment to workforce diversity, equity, and inclusion by expanding diversity program recruitment, education, and training; identifying barriers to recruitment of a diverse workforce; ensuring all recruitments are designed to attract and consider a diverse pool of applicants; and ensuring screening and hiring committees consist of diverse members." (September 2020) <https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary>.

¹¹⁴ Spela Trefault et al., *supra* note 53, at 1.

¹¹⁵ The literature includes fewer studies and much less data on diverse and LGBTQ lawyers than women in general. But the studies and data, which are available, clearly show that diverse and LGBTQ lawyers are more underrepresented than women.

¹¹⁶ Canon 3 goes further and says: "A judge should perform the duties of the office fairly, impartially and diligently." And Canon 3(B)(3) states: "A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism."