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Diversity in MDL Leadership: A Field Guide

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DIVERSITY IN MDL LEADERSHIP: A FIELD GUIDE

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I. INTRODUCTION

Multidistrict litigation (MDL) includes some of the most high-profile torts of our day—opioids, talc, and RoundUp, to name a few—but the attorneys who spearhead these proceedings often look a lot like they did fifty years ago, predominately white and predominately male. Courts seem to be missing what businesses, academics, and civil-rights lawyers have long argued: the case for diversity is multi-faceted. As the *Wall Street Journal* explained: "There is a moral case for diversity and inclusion. And there's a business case: long-term value is tied to diversity and diversity is tied to innovation. But the last few years have told us there is a democracy case, too."[1]

Picking the right lawyers to spearhead these proceedings on plaintiffs' behalf is pivotal. Those who preside over and work within MDL must grapple with some of the most pressing, complicated legal problems of our time—from cutting-edge decisions about scientific causation to federal preemption to novel applications of centuries-old public-nuisance doctrines. These questions are difficult not just because they are novel, but because they affect thousands of plaintiffs too. Moreover, because MDL requires only a single common factual question—not that common issues *predominate* as in a Rule 23(b)(3) class action—plaintiffs' interests and goals are likely to be heterogeneous.

But a debate has emerged over whether attorneys best positioned to fill MDL leadership roles are the grizzled repeat players who appear time and again—and who are largely white, older, and male—or newcomers with fresh ideas and energy who may not always look like their predecessors.[2] And if diversity is important—what *kind* of diversity matters?

For most, "diversity" brings to mind category or identity diversity, which includes race, ethnicity, age, gender, physical disabilities, and demographic dissimilarities.[3] Historically, little identity diversity has existed among the regulars selected as MDL leaders: in 2015, only eleven of the top fifty repeat

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[1] Lauren Weber, *How to Expand Diversity in the Workplace*, WALL ST. J. (Jan. 9, 2021, 9:56AM), https://www.wsj.com/articles/how-to-expand-diversity-in-the-workplace-11610204183?st=fvkwfieyx3rxc25&reflink=article_email_share.

[2] *Compare* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017) (advocating for cognitively diverse newcomers) [hereinafter Burch, *Monopolies in MDL Litigation*], *with* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019).

[3] Eden B. King et al., *Conflict and Cooperation in Diverse Workgroups*, 65 J. SOC. ISSUES 261, 267-68 (2009); K.A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Work Groups*, 44 ADMIN. SCI. Q. 741 (1999); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference?: The Promise and Reality of Diverse Teams in Organizations*, 6 AM. PSYCHOL. SOC'Y 31, 41-42 (2005).

players in MDL leadership were women (22%).[4] The years since have seen some improvement—in 2020, 40% of the top thirty lawyers who led three or more MDLs were women.[5]

Judges, too, tend to think of diversity in terms of demographics.[6] For instance, in July 2020, Judge James Donato made headlines when considering appointments for securities class counsel, saying:

> This Court is concerned about a lack of diversity in the proposed lead counsel. For example, all four of the proposed lead counsel are men, which is also true for the proposed seven lawyers for the "executive committee" and liaison counsel. In addition, the proposed counsel appear to be lawyers and law firms that have enjoyed a number of leadership appointments in other cases. While this experience is likely to benefit the putative class, it highlights the "repeat player" problem in class counsel appointments that has burdened class action litigation and MDL proceedings.[7]

Yet, when Judge Harold Baer, Jr. instituted diversity requirements in selecting ERISA class counsel, Justice Alito issued a rare opinion to deny a writ of certiorari, calling into question the constitutionality of Baer's practices:

> I am hard-pressed to see any ground on which Judge Baer's practice can be defended. This Court has often stressed that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." Court-approved discrimination based on gender is similarly objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge.[8]

Although the issue of diversity in counsel selection was not squarely before the Court, Justice Alito's rebuke nonetheless raises important questions about how judges should navigate diversity in leadership selection, both in nonclass MDLs

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[4] Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 93 n.102 (2015) [hereinafter Burch, *Judging MDL Litigation*].

[5] Amanda Bronstad, *There Are New Faces Leading MDLs. And They Aren't All Men*, LAW.COM (July 6, 2020, 10:53 PM), https://www.law.com/2020/07/06/there-are-new-faces-leading-mdls-and-they-arent-all-men/?slreturn=20200915192502.

[6] *See, e.g.*, Pretrial Order #20 at 3, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 9:20-md-2924 (S.D. Fl. May 8, 2020) (hoping that the selected Zantac MDL leaders would "endeavor to build on the diversity of its team"); Ralph Chapoco, *Calls for Lawyer Diversity Spread to Complex Class Litigation*, BLOOMBERG L. (July 30, 2020), https://news.bloomberglaw.com/social-justice/calls-for-lawyer-diversity-spread-to-complex-class-litigation; Alison Frankel, *Judge in Robinhood Class Action Balks at All-Male Class Counsel Team*, REUTERS, July 15, 2020, https://www.reuters.com/article/legal-us-otc-diversity/judge-in-robinhood-class-action-balks-at-all-male-class-counsel-team-idUSKCN24G324; Alison Frankel, *Quoting Lorax and Noting Diversity, N.Y. Judge Appoints Lead Counsel in Deva Product Case*, REUTERS, July 30, 2020.

[7] Order re Consolidation and Interim Class Counsel at 3, *In re* Robinhood Outage Litig., No. 20-cv-01626-JD (N.D. Cal. July 14, 2020) (internal citations omitted).

[8] Martin v. Blessing, 572 U.S. 1040, 1042 (2013) (internal citations omitted).

without firm rules to guide them and in class actions where Rule 23(g) allows judges to consider "any . . . matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[9]

This article counsels judges caught in the middle. By broadening the definition of diversity and focusing the inquiry on a single, pivotal question—how can a plaintiffs' MDL leadership best represent a heterogeneous group of plaintiffs?—courts can navigate this quandary and put the best leadership team in place.

Part I surveys current leadership selection methods and highlights shortcomings in courts' focus on experience, cooperation, and financing abilities, which tend to empower the same attorneys time and again. Part II explains the debate over the "repeat player problem" that Judge Donato identified.[10] Although repeat players bring expertise and knowledge, the tight-knit nature of the MDL bar and the emphasis on cooperation suggest that insiders are unlikely to dissent even when doing so would be in their clients' best interests. It also means that attorney self-dealing may be ignored. Finally, Part III suggests some best practices: courts should consider conflicts of interest that are likely to emerge between plaintiffs and plaintiffs' counsel, encourage dissent and the airing of minority viewpoints, and select leaders based on attorneys' *cognitive* diversity—meaning different knowledge, skills, information, and tool kits. Building a team with diverse perspectives and knowledge steers clear of the constitutional challenges Justice Alito raised while empowering the best composite team.

To be sure, there are a number of MDLs in which normative claims about representation, fairness, and social legitimacy may make *identity* diversity among leaders key—mass torts over trans-vaginal mesh, Mirena, Yasmin/Yaz, Essure, NuvaRing, and OrthoEvra all come to mind.[11] Gender can matter where gender itself is an issue as it is in these proceedings.[12] But identity diversity proponents often argue that diversity likewise improves outcomes. Here, studies are mixed, with some suggesting that when people perceive themselves as belonging to opposing groups, they may tune each other out and that those with privately held information may be less inclined to share it for fear of being mocked or socially ostracized.[13]

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[9] FED. R. CIV. P. 23(g)(1)(B).

[10] *See* Order re Consolidation and Interim Class Counsel at 3, *In re* Robinhood Outage Litig., No. 20-cv-01626-JD (N.D. Cal. July 14, 2020).

[11] *See* Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390 (2010) (citing Charles Cameron & Craig Cummings, *Diversity and Judicial Decision Making: Evidence from Affirmative Action and Cases in the Federal Courts of Appeals, 1971-1999* (paper presented at the Crafting and Operating Institutions Conference, 2003)).

[12] Jenifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005).

[13] Marie-Élène Roberge & Rolf van Dick, *Recognizing the Benefits of Diversity: When and How Does Diversity Increase Group Performance?*, 20 HUMAN RESOURCE MGMT. REV. 295, 297 (2010) (citing studies).

The evidence is more straightforward when researchers consider *cognitive* diversity. Cognitively diverse groups consistently see "bonuses" when group members perform disjunctive, nonroutine, thought-provoking tasks like brainstorming legal strategy or identifying which issues to appeal.[14] And, as we shall see, cognitive diversity and identity diversity can overlap.

Busy judges looking for quick guidance on these matters may find the appendix to *Monopolies in Multidistrict Litigation* useful.[15] It contains a Pocket Guide for Leadership Appointment and Compensation, a Leadership Application Form, a Leadership Applicant Scoring Sheet, and sample orders for suggesting remand and replacing leaders.[16] And those looking for more detail on the ideas summarized here can look to the original works from which I excerpted this article.[17]

II. CURRENT LEADERSHIP SELECTION METHODS

To prevent the chaos that would ensue if all the plaintiffs' lawyers pooled together in an MDL tried to litigate their cases simultaneously, MDL judges appoint a handful of leaders to do all manner of things from coordinating and conducting discovery to negotiating settlements.[18] But the plaintiffs themselves have no say in whom the judge chooses; they cannot fire leaders even if leaders ignore their interests, and plaintiffs regain decision-making control only in the unlikely event that their case is remanded to their court of origin.

To pick leaders, some judges defer to plaintiffs' attorneys' "consensus" slates, where lawyers hash out leadership questions among themselves. Others conduct an open application process and formally select leaders based on attorneys' experience, financial resources, and cooperative tendencies—factors that favor repeat players.[19] The consensus method, too, favors insiders: "[T]he 'good ol' boy' network of intertwined law firms has sought to capture the case and exclude all but the usual cast of characters," explained plaintiffs' attorney Wayne Travell.[20]

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[14] SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES xiv-xv, 325-27 (paperback ed., 2007).

[15] *See* Burch, *Monopolies in MDL Litigation, supra* note 2, at 156-66.

[16] *See id.* at 160-66.

[17] *See* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (Cambridge University Press 2019) [hereinafter BURCH, MASS TORT DEALS]; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017); Burch, *Monopolies in MDL Litigation*, *supra* note 2; Burch, *Judging MDL Litigation*, *supra* note 4.

[18] One study on all MDLs (not just products liability) suggested that "many" orders left leadership duties undefined. David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 464 (2020).

[19] Burch & Williams, *supra* note 17, at 1460-63.

[20] The Williams Plaintiffs' Group's Response to Other Parties' Application to Serve on Plaintiff's Steering Committee at 1, *In re* Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg, Sales Practices & Prods. Liab. Litig., No. 15-md-02627 (E.D. Va. Aug. 3, 2015).

Regardless of the method, however, outside of class actions, few MDL judges focus on adequate representation, preferring to leave those ideals to disempowered individual lawyers.[21] Yet, the Federal Judicial Center's 2004 *Manual for Complex Litigation* recognizes that leadership "[c]ommittees are most commonly needed when group members' interests and positions are sufficiently dissimilar to justify giving them representation in decision making."[22] It suggests courts consider "whether designated counsel fairly represent the various interests in the litigation" and, "where diverse interests exist," "designate a committee of counsel representing different interests."[23]

Moreover, emphasizing cooperation (one of the factors judges do use) can dampen the advantage that insiders' experience confers and further imperil adequate representation; when cooperation is paramount, it may foster a need for attorneys to curry favor with one another to secure lucrative positions in future leadership hierarchies. Attorneys who disrupt the status quo or challenge those in power are unlikely to find themselves with support from other lawyers in new MDL beauty contests or consensus slates.

Emphasizing cooperation thus deters dissent by implicitly labeling it as something that should not be rewarded. Yet, dissent can be pivotal in protecting plaintiffs' diverse interests. With a statutory requirement that MDL cases share only a single, common question of fact,[24] plaintiffs' best interests are unlikely to be uniform. Considering adequate representation in selecting leaders and permitting dissent from non-leaders are crucial safeguards. As psychology Professor Charlan Nemeth explains, when people are afraid to speak up, "[s]ilence then becomes part of the power of the majority."[25] But, "[j]ust one person challenging the consensus can break that power and increase our ability to think independently and resist moving to erroneous judgments."[26]

III. THE DEBATE OVER REPEAT PLAYERS

As courts favor those with pre-existing leadership experience, they tend to empower high-level repeat players. In *Repeat Players in Multidistrict Litigation: The Social Network*, my co-author Margaret Williams and I offered the first (and only) empirical investigation of private plaintiff and defense attorneys' leadership appointments and their effects in MDL.[27] We found that MDL judges regularly

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[21] Burch & Williams, *supra* note 17, at 1460-63.

[22] MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.221, 10.224 (2004) ("[B]ecause appointment of designated counsel will alter the usual dynamics of client representation in important ways, attorneys will have legitimate concerns that their clients' interests be adequately represented.").

[23] *Id.* § 10.224.

[24] 28 U.S.C. § 1407(a).

[25] CHARLAN NEMETH, IN DEFENSE OF TROUBLEMAKERS: THE POWER OF DISSENT IN LIFE AND BUSINESS 29-32 (2018).

[26] *Id.* at 39.

[27] Burch & Williams, *supra* note 17, at 1470. One later study on all MDLs (not just products liability) suggested that "many" orders left leadership duties undefined, which is likewise troubling. David L.

appoint the same lead attorneys: on the plaintiffs' side, repeat players held 62.8% of available leadership positions, with a mere fifty attorneys occupying nearly 30% of all plaintiff-side leadership; on the defense side, where leadership appointments are rarer, the same defense firms nevertheless occupied 82.3% of all leadership roles.[28]

We used social-network analysis to reveal repeat actors' connections to one another.[29] No matter what measure of centrality we used, a key group of only *five* high-level repeat players (Richard Arsenault, Daniel Becnel, Jr., Dianne Nast, Jerrold Parker, and Christopher Seeger) consistently occupied the most powerful positions, and they seemed to have far more impact on settlement design than did the total number of repeat players.[30] This matters considerably because lead lawyers control the proceeding and negotiate settlements,[31] freeing them to bargain for what matters to them most: defendants want closure and finality, and plaintiffs' lawyers want to recover for their clients and receive high fee awards along the way.[32] Lead attorneys with few clients can benefit considerably from common-benefit fees—taxes imposed on plaintiffs' individual attorneys for work that benefits the collective.

Whether courts' reliance on repeat players is a net positive or negative development, however, has been the subject of much debate.[33] On one hand, repeat players' experience can generate positive developments that further pretrial efficiency.[34] They can capitalize on economies of scale, acquired knowledge and expertise, and benefit from a ready-made infrastructure (from discovery vendors to claims administrators).[35] Certain firms are known to intensively investigate their cases before suing, and their decision to sue, along with their reputation, may encourage others to recruit clients and prompt claims to settle more quickly than they otherwise might.[36] With previous intel about settlement values, insiders may

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Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 464 (2020).

[28] Burch & Williams, *supra* note 17, at 1470-72.

[29] *Id.* at 1530.

[30] *See id.* at 1496.

[31] *Id.* at 1445.

[32] *Id.*

[33] *Compare* Burch & Williams, *supra* note 17 (empirically examining data on repeat play and concluding "[b]ased on the evidence available to us, we found reason to be concerned that when repeat players influence the practices and norms that govern multidistrict proceedings—when they "play for rules," so to speak—the rules they develop may principally benefit them at the expense of one-shot plaintiffs"), *with* Bradt & Rave, *supra* note 2 ("Although the risks they pose are real, we argue that repeat players add significant value when they represent one-shotter plaintiffs, and that value may be worth running the risks.").

[34] Burch, *Monopolies in MDL Litigation*, *supra* note 2, at 85-86.

[35] *Id.*

[36] *Id.*

also help insulate clients from defense attempts to wield information asymmetries against them.[37]

On the other hand, concerns about repeat players can be broken into three categories. First, cronyism among a tight-knit bar that competes for the lucrative common-benefit fees that accompany leadership roles suggests that insiders are unlikely to dissent even if doing so is in their clients' best interests—at least if it undermines insiders' ability to play the long game. Although my off-the-record conversations with MDL attorneys suggest threats of social and financial sanctions are prevalent, those occurrences are nevertheless difficult to assess quantitatively. The best evidence is silence. Objectors rarely speak up during leadership selection, even though being chosen generates significant fees above and beyond what a lawyer receives from her own clients. Nor do most attorneys object when lead lawyers ask the judge to increase their common-benefit fees midway through the litigation, even though it reduces individual attorneys' profits.[38]

Second, when the same plaintiffs' attorneys work with the same defense attorneys time and again, self-dealing concerns can arise. Scholars like Jack Coffee have long observed that repeat play tends to regress our adversarial system from its confrontational roots toward a state of cooperation.[39] And Professor Jerome Skolnick has explained, when both sides work together routinely, those relationships can become problematic when they reach a "tipping point where cooperation may shade off into collusion, thereby subverting the ethical basis of the system."[40]

In our study, Margaret Williams and I examined the publicly available MDL settlements that repeat players designed and we identified settlement provisions that one might argue principally benefit those insiders.[41] Considering deals struck over a fourteen-year period, we were unable to find any that did not feature at least one closure provision for defendants, and likewise found that nearly all settlements contained some provision that increased lead plaintiffs' lawyers' common-benefit fees.[42]

Perhaps most telling was that in 88.8 percent of the settlements, plaintiffs' leadership negotiated some aspect of their own common-benefit attorney's fee directly with the defendant.[43] Bargaining for attorneys' fees with one's opponent is a troubling departure from conventional contingent-fee principles, which are

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[37] Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1599-1600 (2005).

[38] While 36.6 percent of the proceedings in our study included at least one objection, that number is somewhat misleading, for the most objectors were either lead lawyers complaining about common-benefit fund allocations or attorneys concerned about taxing state cases. Burch, *Monopolies in MDL Litigation, supra* note 2, at 108.

[39] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1366 (1995).

[40] Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 69 (1967).

[41] Burch & Williams, *supra* note 17, at 1445.

[42] *Id.*

[43] Burch, *Monopolies in MDL Litigation*, *supra* note 2, at 108.

supposed to tie lawyers' fees to their clients' outcome.[44] When a defendant controls what opposing counsel is paid, "the defendant can offer 'red-carpet treatment on fees' in return for favorable terms elsewhere," note Professors Charlie Silver and Geoffrey Miller.[45] Yet, in nonclass MDLs, these exchanges receive no formal judicial review, nor is there a built-in process for objecting. Thus, based on the evidence available to us, we worry that when repeat players influence the practices and norms that govern MDLs, the rules they create and perpetuate may principally benefit them—at the expense of one-shot plaintiffs.[46]

Third and related, repeat players raise concerns about whether they will optimally represent plaintiffs' diverse interests. This broaches the subject of outcomes and how plaintiffs fare in MDLs, but unfortunately, data on who receives what (and why) is scarce in both class actions and nonclass MDLs. We did, however, find one illustration for which payout data was available—*Propulsid*. *Propulsid* appears representative of other deals: it was the earliest publicly available settlement in our dataset and its steering committee declared that it would be replicating its model in all future MDLs.[47] We were able to demonstrate that settlement designers did indeed incorporate some aspect of that deal in every subsequent settlement within the data.[48]

In *Propulsid*, 6,012 plaintiffs dismissed their lawsuit to enter into the settlement program.[49] But only thirty-seven of them (0.6 percent) recovered any money through the rigorous physician-controlled settlement process, and collectively they received little more than $6.5 million.[50] *Propulsid*'s lead lawyers negotiated their common-benefit fees directly with Johnson & Johnson (the defendant), receiving $27 million.[51] The bulk of the $84-$105 million settlement fund then reverted back to Johnson & Johnson.[52]

In sum, while repeat players can offer plenty of upside through expertise and knowledge, concerns about self-dealing and adequate representation plague MDLs. Few checks exist to police these potential pitfalls—appeals are rare in

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[44] Burch & Williams, *supra* note 17, at 1445.

[45] Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 133 (2010).

[46] Burch & Williams, *supra* note 17, at 1445.

[47] *Propulsid*'s leaders stated:

> Never before in the history of multidistrict litigation, have counsel achieved a global resolution of this proportion in the unique manner by which this Settlement Program resolves the litigation without resort to complex joinder devices or Class Certification. This remarkable approach to resolution of 'mass tort' litigation promises to become the template for similar resolution of future litigations of this kind.

Memorandum in Support of Plaintiffs' Steering Committees Motion for Award of Attorney's Fees and Reimbursement of Costs at 1, *In re* Propulsid Prods. Liab. Litig., No. 00-md-1355 (E.D. La. May 3, 2005).

[48] Burch & Williams, *supra* note 17, at 1508.

[49] BURCH, MASS TORT DEALS, *supra* note 17, at 2.

[50] *Id.*

[51] *See id.* at 39.

[52] *Id.* at 39 (providing details on where the money went). For more information on common-benefit fees, both in *Propulsid* and in other MDLs, see *id.* at 35-42, 187-207.

MDL, and in nonclass proceedings, judges do not approve settlements as fair, reasonable, and adequate. Without formal counterweights and accountability, the costs to appointing a leadership roster comprised principally of repeat players seem to outweigh the benefits.

IV. CHOOSING WISELY: A RECOMMENDED APPROACH TO LEADERSHIP SELECTION

Looking beyond the usual suspects raises the need to diversify the leadership roster—but how? What traits should courts value and what procedures best effectuate those values? This final section recommends procedural techniques that are likely to diversify the applicant pool, proposes specific questions to ask applicants to empanel a cognitively diverse team that best represents a heterogenous group of plaintiffs, and concludes with methods for harnessing the benefits of outsider dissent as a failsafe.

The touchstone for any appointment that usurps a plaintiff's chosen counsel should be whether appointed counsel will adequately represent her designated constituency, whether it is the whole group or some subset thereof.[53] In class actions, due process requires separate representation when structural conflicts of interest exist.[54] Structural conflicts are those that "present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves."[55]

Nonclass MDLs should demand no less. Judges routinely empower a few to speak on behalf of many: negotiating global settlements, developing and executing a discovery strategy, responding to *Daubert* and preemption motions, and designating bellwether trials all impact each plaintiff, and each requires adequate representation. Otherwise, attorney self-interest and investment strategy may mean sacrificing the interests of the minority for those of the majority. Thus, when structural conflicts exist between plaintiffs within a given proceeding, each group should have its own voice at the leadership table.

A. Procedural Techniques

Appointing temporary counsel and giving the litigation a few months to develop before selecting leaders may give judges a better idea as to the potential

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[53] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 627 (1997); Hansberry v. Lee, 311 U.S. 32 (1940).
[54] *Amchem*, 521 U.S. at 627; *In re* Literary Works in Electr. Databases Copyright Litig., 654 F.3d 242, 252 (2d Cir. 2011).
[55] PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1)(B); *Amchem*, 521 U.S. at 627. Separate representation matters less in certain leadership positions, like liaison counsel. Liaison counsel disseminates information and acts more as a conduit than a decision maker. But adequate representation is critically important in conducting discovery, choosing bellwether cases, and negotiating settlement.

fault lines between plaintiffs. Waiting can also expand the leadership applicant pool. Researchers at the Federal Judicial Center found that super repeat players who appeared in thirty or more MDLs tend to enter a proceeding an average of seventy-three days after centralization, whereas most attorneys do not appear until an average of 419 days post-centralization.[56] This gives insiders the upper hand early on because judges often select leaders quickly.

Although it requires more time, courts should employ a competitive process to select lead lawyers rather than rely on consensus slates or even competitive processes that resemble de facto popularity contests.[57] Application forms can be tailored for specific positions to solicit wide-ranging information on pertinent data points, shifting the inquiry away from whether attorneys will all play well together in the sandbox, and toward whether they offer diverse skills and knowledge.[58] For example, it is helpful for judges to know applicants' involvement with past (and concurrent) proceedings, including their leadership roles, work performed, the type of proceeding, the overall outcomes, their clients' outcomes, and their common-benefit fee requests versus their common-benefit recovery. That information conveys whether the applicant has time to devote to the new proceeding, how well her clients fared in previous suits, how much compensation the lawyer or firm received for past leadership service, and her experience—bearing in mind that many attorneys can have experience in the MDL trenches even if they have never been given a leadership opportunity. In some respects, these questions also serve as an indicator of client care. In the trans-vaginal mesh litigation, for instance, some firms took on an excess of 5,000 clients—a volume that made it impossible for them to complete discovery on those cases, much less prepare them for trial.[59]

For the proceeding at hand, applicants should identify the injuries and claims of their firm's current clients, likely conflicts that will arise among the plaintiffs, financing arrangements (in camera), and any relationships they or their firm have with third-party vendors or third-party funders.[60] This type of information prompts attorneys to consider possible conflicts among their clientele, take care to gain informed consent, and take steps to safeguard the rights of clients in a minority position. It likewise unearths potential conflicts between attorneys

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[56] Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 166-67 (2012).

[57] In *Volkswagen*, the court used a competitive selection process requesting the traditional criteria, but allowed applicants to indicate others' support. *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig., MDL No. 15-md-02672-CRB (N.D. Cal. Dec. 22, 2015) (Pretrial Order No. 2). Those selected essentially won the popularity contest with the support of sixty-seven other lawyers. BURCH, MASS TORT DEALS, *supra* note 17, at 93.

[58] For a sample form, see Burch, *Monopolies in MDL Litigation*, *supra* note 2, at 162-64.

[59] Letter from Shanin Specter to Rebecca A. Womeldorf on Proposed Amendments to the Federal Rules of Civil Procedure on Multidistrict Litigation, Dec. 18, 2020, https://www.uscourts.gov/sites/default/files/20-cv-hh_suggestion_from_shanin_specter_-_mdls_0.pdf.

[60] For a sample leadership application form and scoring sheet, see Burch, *Monopolies in MDL Litigation*, *supra* note 2, at 162-64.

and outsiders, from funders to discovery service providers, to claims administrators.

Finally, applicants should disclose any skills or traits that might uniquely situate them to serve in a leadership role. Perhaps they are the attorney who discovered the defective product in an individual lawsuit, maybe they were a doctor or nurse in a previous professional life, or perhaps they have personal connections to the suit in some way. The list here is limitless and distinguished only by the characteristics of the particular lawsuit. But the idea, as explored below, is to create a team with members whose talents and knowledge make them uniquely situated to spearhead a particular proceeding.

B. Leadership Traits

The case for diversifying leadership appointments is multifaceted. There are, of course, strong moral arguments for including women and persons of color. Among other important lessons, the Black Lives Matter movement has demonstrated the need for equal opportunity and equal treatment in a sustainable democracy. And then there are the business arguments, with some workforce studies showing that diverse teams can outperform non-diverse teams[61] and others showing more mixed results.[62]

Whatever the rationale, the best leadership group for any proceeding is unlikely to be a collection of the most experienced, white-haired men who have enjoyed the role in the past. It's not that experience isn't important—it *is*—it is just not the *only* thing that's important. Think of it this way: when likeminded folks approach a problem in the same manner, they are likely to get stuck at the same point.[63] But a group with members who have unique tools and skills, who frame the problem differently, might solve it in a way that no one else considered.[64]

When courts consider applications, they should aim to compile the best team—not the best individual lawyers. In doing so, they should keep size and skills in mind. As to size, even though some circumstances will demand larger groups, empirical studies consistently show that from a decision-making standpoint, groups with five or six members are optimal.[65] As to skills, the goal is to appoint a small, cognitively diverse group whose members possess different information (aligning with clients' diverse interests and injuries), knowledge, and tools. Just as teams of doctors need skeptics to make accurate diagnoses and successful corporate boards require assertive members who are not overly deferential to the

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[61] Dieter Holger, *The Business Case for More Diversity*, WALL ST. J. (Oct. 26, 2019, 9:00AM), https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200?st=4b7yskwxgyn6gx1&reflink=article_email_share; David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV., June 26, 2019.

[62] Roberge & van Dick, *supra* note 13.

[63] *See* PAGE, *supra* note 14, at 157.

[64] *See id.*

[65] Susan A. Wheelan, *Group Size, Group Development, and Group Productivity*, 40 SMALL GRP. RES. 247, 257-58 (2009, No. 2).

CEO,[66] leadership groups in MDL need lawyers with mixed perspectives who are not afraid to openly disagree on matters of substance.

As noted, there has been a recent push for judges to appoint more women and minorities to leadership positions.[67] But gender, race, age, physical abilities, economic status, and sexual orientation are all types of *identity* (or descriptive) diversity. *Cognitive* diversity, on the other hand, considers whether people have diverse knowledge and expertise stemming from training, experiences, and, yes, identity.[68] Identity can play a role by creating experiential differences that prompt contrasting analytic tools to develop[69] even though physical characteristics alone may tell us little.[70]

As Professor Scott Page explains, "by mapping people into identity groups," "we lump a recent immigrant from Nairobi, Kenya, a grandson of a sharecropper from the Mississippi delta, and the daughter of a dentist from Barrington, Illinois, into the same category: African Americans."[71] We also "place the granddaughter of a miner from Copper Harbor, Michigan, a son of Gloria Vanderbilt (that would be Anderson Cooper), and a recently married former au pair from Lithuania into the box labeled non-Hispanic white."[72] But each lump, if disaggregated, would prove cognitively diverse.[73]

As best they can then, judges should strive to compile cognitively diverse leadership teams by seeking members whose knowledge, skills, information, and tools differ.[74] Although soliciting and assessing the relevant information I identified earlier gets judges closer to the mark, assembling a cognitively diverse group is not an exact science. It involves a bit of guesswork and warrants added safeguards.

C. Harnessing Dissent

Newcomers with relevant expertise "may be a rich source of ideas for improving group performance," explain psychologists, because they "lack strong personal ties to other members that inhibit their willingness to challenge group orthodoxy," are not already "committed to the group's task strategy," and "bring

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[66] CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE, 147-48 (2009); Jeffrey A. Sonnenfeld, *What Makes Boards Great*, HARV. BUS. REV. (Sept. 2002).

[67] *See* Chapoco, *supra* note 6; Frankel, *supra* note 6.

[68] PAGE, *supra* note 14, at 7-8, 302-12; Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference?: The Promise and Reality of Diverse Teams in Organizations*, 6 AM. PSYCHOL. SOC'Y 31, 41-42 (2005).

[69] *See* Abby L. Mello & Lisa A. Delise, *Cognitive Diversity to Team Outcomes: The Roles of Cohesion and Conflict Management*, 46 SMALL GRP. RES. 204, 204-05 (2015).

[70] *See id.*

[71] PAGE, *supra* note 14, at 363.

[72] *Id.*

[73] *Id*. at 364.

[74] These criteria are linked to adequate representation and thus avoid the constitutional challenge that Justice Alito raised to race and gender-based appointments in class actions. *See* Martin v. Blessing, 571 U.S. 1040, 1042 (2013).

fresh perspectives gained in other groups."[75] Yet, given the lengthy nature of many MDLs and the fact that heterogeneous groups can lose their edge as their thinking converges with repeated interaction, there is value in building in additional protections.[76]

The key—as uncomfortable and irritating as it may be—is to appoint a mix of cognitively diverse people, all with the relevant expertise and skills (but perhaps some with less leadership experience) *and* prize dissent. Permit and embrace it at every turn.

Dissenters can add value in three ways. First, they unravel the power of a majority's consensus and subject it to scrutiny and questioning.[77] Second, they stimulate divergent thinking. For example, studies on juries show that when there is a dissenter present and jurors must deliberate until they reach a consensus, they consider more evidence, explanations, and alternative possibilities.[78] Finally, dissenters may introduce (and prompt others to divulge) new information. As psychologists Charlan Nemeth and Jack Goncalo—two of the world's leading experts on group decisions—explain, minority views are critical "not because they may be correct but because *even when they are wrong* they stimulate thinking that on balance leads to better decisions. It stops the rush to judgment by providing a counter to the majority view."[79] Put simply, dissent staves off hastened judgment, prompts majorities to seek multiple problem-solving strategies, stimulates original thinking, and can encourage more creative solutions to emerge.[80]

MDL judges can find dissent from two sources: (1) cognitively diverse leaders who represent subgroups with structurally conflicting interests, and (2) outsiders, the bevy of nonlead lawyers on the sidelines who have much to lose or gain for their clients. As plaintiffs' aims and preferences vary, dissenters can challenge the status quo and inject previously undisclosed information into the discussion. Still, it helps to be specific about who is in charge of raising concerns on behalf of certain plaintiffs. This is where subgrouping for structural conflicts can help tremendously. When groups fail to elicit and use all of the information that each member holds privately, it is often because no one sees himself or herself as the designated expert.[81]

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[75] John M. Levine & Hoon-Seok Choi, *Minority Influence in Interacting Groups: The Impact of Newcomers*, *in* REBELS IN GROUPS 73, 78 (Jolanda Jetten & Matthew J. Hornsey eds., 2011).
[76] PAGE, *supra* note 14, at 157.
[77] NEMETH, *supra* note 25, at 29-32, 39.
[78] Charlan Nemeth, *Jury Trials: Psychology and the Law*, *in* 14 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, 309 (Leonard Berkowitz ed., 1981).
[79] Charlan J. Nemeth & Jack A. Goncalo, *Rogues and Heroes: Finding Value in Dissent*, *in* REBELS IN GROUPS: DISSENT, DEVIANCE, DIFFERENCE, AND DEFIANCE 17, 23 (Jolanda Jetten & Matthew J. Hornsey eds., 2010).
[80] *Id.* at 22; Stefan Schulz-Hardt et al., *Dissent as a Facilitator: Individual- and Group-Level Effects on Creativity and Performance*, *in* THE PSYCHOLOGY OF CONFLICT MANAGEMENT IN ORGANIZATIONS 149, 150-54, 162-63 (Carsten K.W. De Dreu & Michele J. Gelfand eds., 2008).
[81] *See* Garold Stasser & William Titus, *Hidden Profiles: A Brief History*, 14 PSYCHOL. INQUIRY 304, 310 (2003).

The goal is not to empower a bunch of cantankerous contrarians whose interpersonal conflict brings the group to a standstill. Rather, it is to foster dissent and debate over how to best approach the complex, novel legal issues that face judges and lawyers alike in MDLs. On critical issues, welcoming conflict from insiders on leadership committees as well as outsiders by opening the docket to supplemental briefing or disagreement allows judges to harness dissent's value: more information, more critical thinking, and more representation.[82]

V. CONCLUSION

Selecting cognitively diverse leaders and welcoming dissent and the information that it generates allows judges to build in additional safeguards for plaintiffs—many of whom receive little contact from their chosen attorneys. Judges may be the last line of defense, but if they are not armed with the facts, they are handicapped. Incentivizing those who hold that information—other plaintiffs' attorneys—to disclose it, wield it to their clients' benefit, and hold leaders accountable is crucial.

[82] *See* Nemeth & Goncalo, *supra* note 79, at 27-28.