



October 7, 2014

Professor Jaime L. Dodge
The University of Georgia School of Law
313 Hirsch Hall
225 Herty Drive
Athens, GA 30602-6012

Re: Proposed *MDL Standards and Best Practices*

Dear Professor Dodge:

We, the undersigned Members of the Consortium for Advancing Women Lawyers, write concerning the proposed *MDL Standards and Best Practices*. We believe that the *MDL Standards and Best Practices* should include more specific guidance regarding the manner in which court appointments may be made to promote gender, race, and ethnic diversity.

The Consortium for Advancing Women Lawyers is a national coalition of organizations and thought-leaders who are committed to the advancement of women in the legal profession. The Consortium is convened by the Center for Women in Law at The University of Texas School of Law. Consortium members conduct research, author practice manuals, and implement educational programs at state and national levels with the goal of developing a diverse and inclusive profession. The Consortium reflects the views of a wide range of lawyers from all segments of private practice, academia, not-for-profit organizations, and bar associations.

Women continue to be underrepresented in leadership roles throughout the legal profession, notwithstanding the fact that women and men have been graduating from law schools in approximately equal numbers for nearly three decades. Even though women and men have been entering private practice at about the same rate, women are just 4% of managing partners and 17% of equity partners in private firms. The situation for women of color is even worse. Only 2% of law firm partners are women of color.¹

Court appointments can and should play a crucial role in changing this trend.² Numerous federal and state court task forces have found that women and minority attorneys “are often excluded from important court appointments.”³ The landmark report issued by the

¹ Moreover, there is a long-standing gender pay gap in law firms, which increases with seniority and is most pronounced at the equity partner levels.

² See generally Roberta D. Liebenberg, *The Importance of Diversity in a Court’s Exercise of Its Appointment Powers*, Counterbalance, Fall 2011, at 36 (detailing the need for diversity in court appointments).

³ Lynn Hecht Schafran & Norma J. Wikler, *Gender Fairness in the Courts: Action in the New Millennium*, at 123 (2001) available at <http://womenlaw.stanford.edu/pdf/genderfairness-strategiesproject.pdf>; see also Supreme Judicial Ct. of Mass., *Report of the Gender Bias Study of the Supreme Judicial Court, as reprinted in 23 Suffolk*

Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System found that women and minorities were significantly underrepresented on court appointment lists.⁴ As you recognize in the discussion of Best Practice 3C(v) of the proposed *MDL Standards and Best Practices*, a court appointment heightens the visibility and stature of the appointed lawyer:

There is often intense competition among counsel for appointment. Not only do lawyers have legitimate concerns about whether their clients' interests will be adequately represented and whether the litigation will be handled effectively, there is usually a direct correlation between a leadership position and compensation. Leadership roles also confer prestige and experience, can increase the lawyer's chance of future appointments, and may help attract future clients.

Thus, a court appointment, in and of itself, improves prestige, compensation, and opportunities for future appointments. Conversely, the inability of women to secure their fair share of court appointments hinders their advancement in their law firms and their ability to participate fully in the profession.⁵

While the judiciary has an interest in retaining discretion as to whom to appoint, "this interest must be balanced with the need to overcome the perception (and perhaps the reality) that the system is not accessible to all races, ethnicities and genders."⁶ That is why the Pennsylvania Report recommended that the Pennsylvania Supreme Court "[e]stablish as a goal increased opportunities for women and minorities to receive judicial appointments and employment with the courts."⁷ This need is particularly acute in MDL proceedings where the attorneys designated will be responsible for representing the interests of numerous parties who did not select them as counsel.

Moreover, Rule 23(g) of the Federal Rules of Civil Procedure allows a judge, among other things, "to consider any other matter pertinent to counsel's ability to fairly and adequately

U. L. Rev. 575, 652 (1989) [hereinafter *Massachusetts Report*] ("Data collected by the Committee reveal that women are underrepresented across the board, both in the number of appointments and the amount of compensation they receive. . ."); *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, Chapter 8, "The Court as Appointer," at 294, [hereinafter *Pennsylvania Report*], available at <http://www.pa-interbranchcommission.com/pdfs/FinalReport.pdf> ("Minorities and women are significantly underrepresented on court appointment lists.").

⁴ *Pennsylvania Report*, *supra* note 3.

⁵ *See id.* at 296 ("The underrepresentation of female attorneys and minority attorneys in court appointments reduces their opportunities to gain the experiences necessary to further their careers."); *see also* Elizabeth Cabraser, *Where Are All the Women in the Courtroom?* (Feb. 28, 2014), <http://www.lieffcabraser.com/blog/2014/02/where-are-all-the-women-in-the-courtroom.shtml> ("Women are noteworthy for their relative absence from court appointments to plaintiff leadership roles; the result is that women are far too few in the courtroom, as first or second chair trial attorneys or as oral argument presenters in all phases of litigation.").

⁶ *Id.* at 298; *see also Massachusetts Report*, *supra* note 3, at 576 ("The courts cannot maintain the credibility necessary to perform their historic role if their actions and decisions are, or are perceived as being, tainted by gender or racial bias.").

⁷ *Pennsylvania Report*, *supra* note 3, at 299.

represent the interests of the class.”⁸ Appointing diverse lead counsel and committees ensures that the diverse members of the class are fairly and adequately represented. Recognizing this imperative, some judges have already begun to use their appointment powers to advance the goal of promoting diversity in the profession and the justice system.⁹

The *MDL Standards and Best Practices* provides an important opportunity to emphasize to judges that, in exercising their broad, discretionary appointment powers, they should consider qualified women and minority attorneys and the need to make appointments that are consistent with the goal of inclusiveness. The Editorial Board’s decision to include Best Practice 4C in the proposed guidelines demonstrates the Board’s understanding of the benefits of diverse leadership in MDL proceedings. However, without specific guidance regarding the manner in which court appointments may be made to promote gender, race, and ethnic diversity, this best practice is unlikely to produce the desired result. Accordingly, the attachment to this letter offers suggested changes to the proposed *MDL Standards and Best Practices*.

We urge you to include more specific guidance regarding the manner in which court appointments may be made to promote gender, race, and ethnic diversity in the *MDL Standards and Best Practices* by adopting the recommended edits detailed in the attachment. We would welcome an opportunity to discuss these recommendations further with you or the members of the Editorial Board.

Sincerely,

Linda Bray Chanow

Executive Director, Center for Women in Law
Convener, Consortium for Advancing Women Lawyers

Roberta D. Liebenberg

Past Chair, ABA Commission on Women in the Profession (2008-2011 and 2013-2014)
Partner, Fine, Kaplan and Black

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⁸ Fed. R. Civ. P. 23(g)(1)(B).

⁹ See e.g., Corrected MDL Case Management Order No. 4 at n. 1, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14-C-1748, MDL 2545 (N.D. Ill. Aug. 1, 2014), ECF No. 244 (declining to accept the withdrawal of a female counsel’s application for her male partner and appointing her to the steering committee); *In re Oil Spill by Oil Rig “Deepwater Horizon”*, 295 F.R.D. 112, 137-38 (E.D. La. 2013) (noting that diversity in gender, racial, and geographic terms was particularly important to the appointment of the Plaintiff Steering Committee members); Transcript of Initial Pretrial Conference at 42, *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, No. 07-MD-01871, MDL 1871 (E.D.P.A. April 8, 2008), available at <https://www.paed.uscourts.gov/documents/MDL/MDL1871/HT1.pdf> (stating that diversity is “an important issue” when making court appointments); *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007) (noting the importance of evidence of diversity in terms of race and gender in appointed class counsel); Stanwood R. Duval Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 La. L. Rev. 391, 393 (2014), available at <http://digitalcommons.law.lsu.edu/lalrev/vol74/iss2/6> (noting that “diversity in gender, racial, and geographic terms” is one factor considered by the judges in the Eastern District of Louisiana when choosing counsel in MDL cases).

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