

# A blueprint for cracking the MDL diversity barrier

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MDL leadership opportunities for diverse attorneys have been slow in coming, but judicial awareness and development opportunities could help “break the barrier.”

As we celebrate Black History Month, it is important to reflect on the strides made by the legal profession over the last 15 years to address diversity and inclusion issues. But, in terms of the leadership representing plaintiffs in large multidistrict litigations (MDLs), progress has been slow.

As a co-founder of Shades of Mass, alongside Ben Crump, it is my honor to have been appointed as the first plaintiff-side Black woman to serve as co-lead in a significant MDL, the *In re Abbott Laboratories* NEC baby formula litigation, related to the safety of one of the pharmaceutical giant’s baby formula products.<sup>1</sup>

In the last 18 months, in addition to this appointment, as well as *In re: Social Media Adolescent Addiction* and *In re: Paraquat Products Liability Litigation*, several founding board members of Shades of Mass, including Navan Ward Jr., Ron Austin, Jose Rojas, Marlon Kimpson, Shreedhar R. Patel, LaRuby May and other attorneys of color have been appointed, reflecting a hopeful shift in practices.<sup>2</sup>

## Judicial acknowledgement of the need for diverse leadership

Increasingly, judges recognize that plaintiffs in MDLs are incredibly diverse and should be represented in the demographic composition of the litigation’s leadership.<sup>3</sup> In 2013, Judge Carl J. Barbier (Eastern District of Louisiana) made diversity in gender, race, and geography a core consideration in appointing counsel to the plaintiffs’ steering committee to lead the Deepwater Horizon oil spill MDL.<sup>4</sup>

Two years later, Judge Kathryn H. Vratil (District of Kansas) informed counsel that she sought “a leadership team that adequately reflects the diversity of legal talent available and the requirements of the case.”<sup>5</sup>

In 2021, U.S. Court of Appeals Judge for the D.C. Circuit, J. Michelle Childs, cited the diversity of individuals impacted by a data breach as influential in her decision to appoint eight women to a leadership team of 12 attorneys — many of whom were people of color — in the *In re: Blackbaud* MDL.<sup>6</sup>

And, last year, Judge Brian Martinotti (District of New Jersey) appointed an MDL leadership slate comprised of close to 75% women in the Elmiron drug litigation.<sup>7</sup>

Courts have also emphasized the benefits in performance and results that diverse leadership teams provide. Judge Edward Davila (Northern District of California) appointed 14 attorneys — seven women, four people of color, two LGBTQ+, and four young attorneys with less than six years’ experience — to an executive committee to lead two MDLs against Apple and Google for hosting online gambling games on their app stores.

Such a “diversity of viewpoints,” he wrote, “could prove instrumental in effectuating the best outcome for the Plaintiffs.”<sup>8</sup>

## Challenges in achieving diverse leadership

Unfortunately, understanding the importance of diversity in MDL leadership doesn’t make it easier to achieve. Diverse candidates seeking to enter the MDL game typically encounter several barriers in securing leadership positions.

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In addition to significant issues of implicit bias, entry into a tightly knit community of traditional mass tort law firms is challenging, if not impossible, for many. As a result, attorneys without MDL leadership experience often face an insurmountable obstacle in securing that valuable first appointment compared to those favored for leadership because of their prior MDL experience, history of collaboration with one another, and significant resources they can contribute.

This not only results in homogenous, like-minded leadership, but also leads to leadership structures that don’t accurately reflect the demographic, ethnic, racial, and gender diversity of an MDL’s plaintiffs.

While people of color are already under-represented in the legal profession, new and diverse entrants to MDL practice are also disfavored by the requisite credentials for MDL leadership. MDLs

affect the claims of huge populations of people and businesses, involve complex procedural rules and unique questions of law, and require extensive financial and personnel resources to adequately staff and finance.

The sheer size, complexity, and cost of an MDL demand an experienced and efficient attorney leadership team. Indeed, most orders appointing leadership in MDLs emphasize these factors as influential for leadership selections — and, in class action MDLs, Federal Rule of Civil Procedure 23(g) actually mandates it. Deep pockets and impressive resumes with prior MDL experience are primarily in the realm of senior law firm positions.

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American Bar Association research found that 90% of all lawyers with leadership positions in law firms are white, 70% are white men, and 20% are white women. In fact, only 7% are men of color and a mere 3% are women of color.

The legal community has acknowledged the significant issues associated with a lack of diversity but progress has been stagnant until recently. A primary concern is that younger and more diverse generations of attorneys are excluded from the kind of meaningful MDL participation that provides the foundation to lead tomorrow's MDLs.

Additionally, many fear that the lack of diversity among this group hampers innovative thinking. As Duke Law School's Guidelines and Best Practices explains, diversity in MDL leadership "promotes discussion of novel concepts raised by those who historically have not been in leadership," which, in turn, "enhances creativity and innovation [and] leads to better decision making and problem solving[.]"<sup>9</sup>

Perhaps most importantly, several judges and scholars warn that MDL leadership structures that do not reflect the demographic composition of its plaintiffs will hurt public perception of the courts and the legal profession.

### Best practices

Rule 23(g) of the Federal Rules of Civil Procedure aims to ensure that courts appoint the most qualified and effective counsel to represent absent class members in class actions, and to provide safeguards for minority members whose interests will be represented by class counsel. Yet, despite the many similarities between class actions and MDLs, the rules governing MDLs provide no such safeguards. In the absence of formal rules establishing

the criteria and process for appointing leadership in MDLs, experts across the legal profession have actively developed new strategies aimed at increasing diversity.

### 1. Expressly emphasize that diversity will be considered in selecting leadership.

Courts should specify that they seek a leadership team that is diverse in both viewpoints and identity. In their initial case management hearings and written orders, the court should reference individual identity traits like race, gender, ethnicity, sexual orientation, and religion to encourage attorneys from those categories to apply. Likewise, diverse attorneys and slates competing for leadership positions should state that they are diverse and emphasize how their diversity will add value to the litigation and its leadership.

Judges have profound influence over the composition of MDL leadership slates. The way a court defines the word "diversity" often correlates with the demographic composition of the attorneys and slates seeking appointment.

For example, when Judge Martinotti expressly called for leadership in *Elmiron* to reflect the diversity of the class of largely female plaintiffs, plaintiffs' counsel proposed a consensus slate where 18 out of 25 steering committee members, five of seven executive committee members, and two of the three co-lead counsel were women.

Notably, women of color were represented in some of the senior-most positions, with Parvin Aminolroaya, a first-generation American born to Guatemalan and Iranian parents, appointed as one of the three co-lead counsel, and Chirali Patel, an American of Indian descent, appointed as plaintiffs' liaison counsel.

It's worth noting, however, that the role of identity diversity has also been met with some criticism and concern. In particular, U.S. Supreme Court Justice Samuel Alito called the constitutionality of requiring identity diversity in complex litigation leadership into question in 2013.<sup>10</sup>

To avoid these constitutional challenges, courts and attorneys alike must emphasize how diverse identities contribute to the "diversity of viewpoints" among leadership. These diverse viewpoints inform their decisions, guide their approaches, and shape their view of the world.

### 2. Using a competitive process to select leadership.

Judges should adopt a competitive process for selecting counsel for leadership. Ensuring that individual attorneys — and not just proposed slates — are able to seek leadership appointments in MDLs is the most effective manner to increase Black and Brown lawyers' chances for appointment.

Courts vary in the processes they use to select plaintiffs' leadership. Some encourage plaintiffs' counsel to reach a consensus as to who to appoint and what positions to appoint them to, subject to the court's approval. Alternatively, some courts solicit applications from attorneys, either individually or as part of a slate, while others use a hybrid of the two.

Several concerns arise when attorneys are encouraged to confer amongst themselves to reach a consensus for leadership structure. As MDLs increase in size and prominence, so too have the influence of attorneys and law firms that lead MDLs. As such, penetrating the culture of larger firms is a challenge for a diverse attorney operating outside of these larger structures.

If, however, counsel reach a consensus for leadership — whether independently or as urged by the court — the court should review the appointments and provide an opportunity for objections to ensure that leadership is balanced, effective, and diverse. Consensus slates do not always produce homogenous results, however.

For example, counsel consensus produced the team of 18 women and seven men, many of whom were people of color, in the *Elmiron* litigation. The same was true in the *Apple* and *Google* MDLs, which featured some of the most diverse leadership slates in history.

Considering concerns with consensus slates, some courts have swung the pendulum the other way by requiring individual applications for MDL leadership positions.

For example, Judge Nancy Rosenstengel, Chief Judge of the United States District Court for the Southern District of Illinois, indicated in *In re: Paraquat* that applications would only be for individual appointments.<sup>11</sup> She sought a “balanced leadership team that reflect[ed] diversity of all types” to lead the litigation brought by agricultural workers exposed to an herbicide and now suffer from Parkinson’s disease.

“I do not inten[d] to solicit slates,” she said at the initial status conference. “I will pick the leadership, and everyone selected is expected to work well together.” After interviewing 41 attorneys out of 80 individual applicants, she appointed 16 attorneys to leadership — including 11 women and four people of color.

By contrast, Judge Childs invited counsel seeking leadership positions for the *Blackbaud* MDL to submit applications individually or as part of a slate. She received applications from 19 attorneys — some of whom applied individually, while others applied as members of two competing slates.

Ultimately, Judge Childs fashioned her own structure by appointing lawyers from both slates and three others who applied individually, resulting in a team of eight women and four men, several of whom were people of color<sup>12</sup>.

As these examples illustrate, judicial flexibility in the MDL leadership application process provides courts with greater ability to assemble a balanced team and give diverse attorneys leadership experience.

### 3. Leadership development committees.

When practicable, every MDL leadership structure should provide opportunities for new and diverse attorneys to gain meaningful experience performing leadership-type work. Leadership development committees (LDCs) have emerged as an innovative response to concerns over the lack of new and diverse players at the MDL table.

Attorneys appointed to this committee should have little or no experience in MDL leadership and be diverse in all regards, including identity. Committee members should work directly under executive or steering committee members and should meaningfully participate in all phases of the MDL.

Judge Rosenberg was the first to create an LDC when she appointed five young attorneys with little-to-no experience leading MDLs to an LDC as part of the leadership structure for the *Zantac* heartburn medication MDL.

She stated: “The Court believes these attorneys will benefit from the mentorship and experience gained from participation in a large and complex MDL, and that the MDL will equally benefit from their enthusiasm and fresh perspective. The attorneys appointed to the LDC, most of whom have not previously been appointed to an MDL steering committee, shall be mentored by and work with those attorneys appointed to the P[laintiffs’] S[teering] C[ommittee (PSC)]. It is the Court’s expectation that the PSC members will actively mentor and work closely with the attorneys appointed to the LDC, so they can 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.”

The LDC experiment has shown incredibly positive results, as just this year Judge Rosenberg elevated the five *Zantac* LDC members to the PSC.<sup>13</sup> In their stead, she appointed 12 new lawyers to replace them on the LDC. Others have followed in Judge Rosenberg’s footsteps, with Judge Joy Flowers Conti (Western District of Pennsylvania) recently appointing 15 young attorneys to LDCs in separate MDLs involving CPAP medical devices.<sup>14</sup>

Judge Rosenberg’s creation of the LDC is a model component for future MDLs. Requiring the inclusion of new faces in leadership not only provides opportunities for diverse and young attorneys to gain valuable experience, but it also dilutes the concentration of leadership appointments among the homogenous group of repeat players by expanding the pool of qualified candidates.

Judges can continue to facilitate the growth of diverse attorneys by encouraging leadership teams to have new players argue issues and motions in the courtroom, in addition to attending regular steering committee strategy meetings. Senior lawyers can also facilitate the growth of junior attorneys as well.

As Aminolroaya explained, “[a]ttorneys don’t just become ready for MDL leadership positions on their own. Firms must cultivate them. Junior lawyers need to be given work [and] given opportunities to develop skills in a variety of areas in a case so that they’re prepared to tackle whatever a case throws at them.”<sup>15</sup>

The approach to increasing diverse and representative leadership is two-fold. The first initiative lies within the judiciary’s power to define the MDL’s leadership structure by emphasizing diversity among its selection criteria as a vital component of effective leadership, structuring the selection process in a way that allows diverse candidates to compete, and, ultimately, selecting diverse attorneys to lead the MDL.

The second lies with the legal profession’s duty to correct the underrepresentation of Black and Brown people and other

minorities at all levels of the field, especially among senior positions in law firms. Creative initiatives like Judge Rosenberg’s LDCs open the door to new and diverse talent at all levels. As one lawyer said, “[l]awyers are a risk-averse bunch, but for those willing to step off the traditional path for new ventures, there are rewards.”

We are not there yet in terms of diversity, but we are making progress and continued growth requires intention and strategy.

## Notes

<sup>1</sup> See *In re: Abbott Lab’s, Preterm Infant Nutrition Prods. Liab. Litig.*, MDL No. 3026, Master Docket No. 22-cv-00071 (N.D. Ill.).

<sup>2</sup> Navan Ward, Jr., Shades of Mass founding executive committee member, was also the first plaintiff-side Black man to serve as co-lead in a significant MDL, *In re Biomet M2a metal on metal hip litigation*, along with his appointment to the plaintiffs’ executive committee in the *In re Proton Pump Inhibitor* MDL litigation. In addition, founding board members Larry Taylor, Gregory Cade, MJ Blakely, Courtney French, Khaldoun Baghdadi, Carl Solomon, CK Hoffler and Priscilla Jimenez continue to pave the way in MDL and complex litigation diversity.

<sup>3</sup> See *Guidelines and Best Practices for Large and Mass-Tort MDLs (Second Edition)*, Bolch Jud. Inst., Duke L. Sch. (2018), <http://bit.ly/3K7ObWd> (“The transferee judge should designate lead counsel who will act for all parties whom they are appointed to represent and are responsible for the overall management of the litigation.”).

<sup>4</sup> See Stanwood R. Duval, *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 La. L. Rev. 391, 393 (2014) (“There should be diversity in gender, racial, and geographic terms.”) (citing Judge Barbier’s decision appointing leadership in *In re: Oil Spill by Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, MDL No. 2179, 2013 WL 144042 (E.D. La. Jan. 11, 2013)).

<sup>5</sup> *In re Ethicon, Inc., Power Morcellator Prods. Liab. Litig.*, MDL 2652, Prac. & P. Order (D. Kan. Oct. 16, 2015) (highlighting importance of achieving “diversity with respect to gender, race, national origin, geography, years of practice, age and other relevant factors.”).

<sup>6</sup> Amanda Bronstad, *MDL Judge Taps ‘Most Diverse Leadership Team Ever’ in Data Breach Class Action*, Law.com (Mar. 3, 2021), <http://bit.ly/3S13i5y>.

<sup>7</sup> See *In re: Elmiron (Pentosan Polysulfate Sodium) Prods. Liab. Litig.*, MDL No. 2973, MDL Case Mgmt. Order No. 2 (ECF No. 8) (D.N.J. Jan 15, 2022). See also Alison Frankel, *‘The Needle is Moving’: Another MDL Judge Cites Diversity in Lead Counsel Appointments*, Reuters (Jan. 25, 2021, 2:24 PM), <https://bit.ly/3K8iX1i>.

<sup>8</sup> See *In re: Apple Inc. App Store Simulated Casino-Style Games Litig.*, MDL No. 2985, Amended [Proposed] Order Granting Unopposed Mot. for Pretrial Consolidation & App’t of Interim Lead Counsel & Pls.’ Exec. Comm. [ECF No. 29] (N.D. Cal. Sept. 23, 2021); Hannah Albarazi, *Edelson Nabs Interim Lead in Tech Giant Gambling App MDL*, Law360 (Sept. 23, 2021, 8:12 PM EDT), <http://bit.ly/3YwST42>.

<sup>9</sup> *Guidelines and Best Practices for Large and Mass-Tort MDLs*, *supra* note 2, at 46.

<sup>10</sup> See *Martin v. Blessing*, 572 U.S. 1040, 1042 (2013) (“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.”).

<sup>11</sup> See *In re: Paraquat Prods. Liab. Litig.*, MDL No. 3004, Case Mgmt. Order No. 1 (ECF No. 16) at \*7 (S.D. Ill. June 20, 2021).

<sup>12</sup> Shades of Mass Board member Marlon Kimpson was appointed as Co-Lead of Blackbaud.

<sup>13</sup> Amanda Bronstad, *The Next Generation of MDL Leaders Has Expanded: 12 Lawyers Join Zantac Plaintiffs’ Team*, Law.com (Mar. 20, 2022, 5:54 PM), <http://bit.ly/3YuYRCH>.

<sup>14</sup> See *In re: Phillips Recalled CPAP Bi-Level PAP, & Mech. Vent. Prods. Liab. Litig.*, MDL No. 3014, Pretrial Order No. 8 (ECF No. 395) at \*11-13 (W.D. Pa. Feb 15, 2022); *In re: SoClean, Inc., Mktg., Sales Pracs. & Prods. Liab. Litig.*, MDL No. 3021, Pretrial Order #5 (ECF No. 51) (W.D. Pa. Apr. 27, 2022). See also Amanda Bronstad, *Judge Conti Creates ‘Leadership Development Committee’ in SoClean MDL*, LAW.COM (Apr. 27, 2022, 1:18 PM), <http://bit.ly/3xl9DzL>.

<sup>15</sup> John Ryan, *Lawyer Limelight: Parvin Aminoloroaya*, LAWDRAGON (July 19, 2021), <https://bit.ly/3xkez7N>.

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