**DUKE LAW GUIDELINES AND BEST PRACTICES ADDRESSING CHRONIC FAILURE TO DIVERSIFY LEADERSHIP POSITIONS IN THE PRACTICE OF LAW**

**(FIRST DRAFT PENDING REVISION)**

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1. **What a Judge Can Do to Promote Advancement of Women and Diverse Lawyers.**

Judges in multidistrict litigation are in a unique and powerful position to enhance diversity in leadership positions. The transferee judge presiding over an MDL is tasked with establishing a leadership structure for the plaintiffs and sometimes for the defendants too.[[1]](#footnote-1) The leadership team manages all aspects of the litigation, including coordinating discovery, litigating pretrial issues, drafting and arguing motions, and working with opposing counsel. By wisely choosing diverse and effective counsel, the judge ensures that the case, no matter how large or how complicated, will proceed in an effective and efficient manner.

While it is understandable that, when faced with onerous caseloads and busy courtrooms, judges have a tendency to appoint lawyers who have handled complex litigation in the past, it is vital that the judiciary has the broadest pool of talent available for leadership appointments. Repeatedly appointing the same small group of lawyers in case after case inevitably limits the pool of talent. Sticking with the same attorneys who have been “tested” over decades of appointments also means that the recognized leaders in these burgeoning practice areas is shrinking, as the lawyers with the most experience grow older and retire. Naturally, those lawyers with the greatest amount of experience are more likely to be male, heterosexual, and white.

**Guideline 8:** A judge has broad discretion in deciding the process of appointment and determining the number and types of leadership roles.

The number of lead counsel selected will vary, as with all appointments, based on the type, complexity, and size of the litigation. In selecting the attorneys for these positions, judges have generally focused on experience, cooperative tendencies, and an ability to finance the litigation — factors that favor repeat players.[[2]](#footnote-2) Judges themselves have acknowledged the overwhelming pattern of having repeat players lead MDL litigations.[[3]](#footnote-3) This presents an issue because MDLs affect a huge and presumably diverse group of plaintiffs, whose interests must be adequately represented and protected by class counsel.[[4]](#footnote-4) Thus, appointing diverse lead counsel and committees ensures that the diverse members of the class are fairly and adequately represented.[[5]](#footnote-5) Because the court’s responsibilities are heightened in class action and MDL litigation, the transferee judge should use its discretion to increase diversity in leadership.

Finally, diversity in the appointment of counsel in MDL litigation is important because it reasserts the perception of equality and justice in our legal system. Diversity of appointments shows that individuals from diverse backgrounds can obtain prominent leadership positions and that judges have prioritized diversity. It is critical that the justice system leads on issues of access, equality, and diversity. Promoting diversity in class action and MDL leadership sends the message that judges prioritize and value diversity. Judges should take affirmative steps to promote diversity in class action and MDL appointments.[[6]](#footnote-6)

Best Practice 8A: The transferee judge in an MDL should consider increasing the number of positions available for leadership.

It is the transferee judge’s duty, in appointing counsel, to make sure that efficiency, economy, and fairness are achieved. As part of this responsibility, the transferee judge should consider increasing the number of leadership positions available in a case. Judges should reserve these positions for qualified candidates who would add diversity to the leadership structure. This practice is particularly important where the leadership structure is comprised of many repeat players, as it ensures that the litigation will consider different perspectives.

The transferee judge may also consider using additional positions to help young lawyers, or lawyers without any MDL experience, become familiar with the MDL process and develop the necessary skills to lead an MDL. The judge may choose, for example, to reserve a seat on the steering or executive committee for a young associate, allowing these lawyers to have small roles in the MDL litigation, such as handling a deposition schedule. It is important that transferee judges take a more proactive role in helping young lawyers.

Moreover, judges can make a difference in appointments. MDLs in particular may offer greater flexibility on the issue because they follow the *Manual*, which specifically advises judges to consider whether lead counsel members fairly represent the various interests in the litigation. Judge Kathryn Vratil of the District Court of Kansas has been lauded for her decision to approve the first female-majority plaintiffs’ steering committee in a mass tort MDL.[[7]](#footnote-7) (It should be noted that the MDL involved a device used only in women to remove uterine fibroids.)

“Judges are generally more diverse than the lawyers who appear before them,” said Judge Scheindlin. “They should bear some responsibility to ensure that the lawyers who speak in court are equally diverse.” Indeed, according to the NYSBA report, members of the judiciary also must be committed to ensuring that female attorneys have equal opportunities to participate in the courtroom. When a judge notices that a female associate who has prepared the papers and is most familiar with the case is not arguing the motion, the judge should consider addressing questions to the associate.[[8]](#footnote-8)

The Report encourages judges to appoint more women as lead counsel in class actions and notes that even today, some judges will not appoint a firm to a plaintiff’s management committee “unless there is at least one woman on the team.” Senior counsel can help too by recommending more female litigators to their colleagues and to judges.

Best Practice 8B: The transferee judge should assess the unique dynamics of a case in putting together the leadership structure.

MDLs often include numerous class actions, hundreds of plaintiffs from all over the country, and multiple defendants across an industry. In selecting counsel for leadership positions, the transferee judge should carefully assess the unique characteristics of a case, paying close attention to the specific nature of the claims.[[9]](#footnote-9) In a litigation that is gender specific and affects women directly, the judge should prioritize the inclusion of female attorneys in leadership roles.[[10]](#footnote-10)

Similarly, judges should consider the unique characteristics of the applicants when making their appointments. There may be circumstances where an attorney’s background or legal experience is more critical to a case than his or her class action or MDL experience.[[11]](#footnote-11)

Best Practice 8C: The transferee judge should be transparent about the appointment process, including the financial arrangements of applicants.

Many attorneys seeking a leadership role in MDL litigation find that there are economic barriers to obtaining leadership positions. Attorneys in MDL leadership roles are responsible for advancing the money to fund the litigation. Mass litigation is expensive, and it may take years to recover the initial investment. Established law firms can generally meet the financial demands of the litigation, so judges often appoint these same firms and lawyers (repeat players) with whom judges are familiar and whose firms can often shoulder the litigation costs.

Increased transparency into the financials of counsel applying for leadership positions would force judges to consider an applicant’s entire financial background, including any available credit lines or third-party funding available to the applicant.[[12]](#footnote-12) Further, where a judge identifies a candidate who, absent financial status, is ideal for a position in the litigation, the judge may nonetheless appoint him or her if the attorney will be part of a larger group of attorneys who are able to provide the financial assistance. This facilitates the entry of new, otherwise qualified attorneys who are often not considered for leadership because they lack the financial resources required.[[13]](#footnote-13)

Best Practice 8D: The transferee judge should require information about the number of current appointments held by an applicant for a leadership position to avoid repeat players “maxing out” their available time.

Requiring information about the number of current appointments held by counsel applying for a leadership position will assist a transferee judge to discern whether the applicant has sufficient time to devote to the position. If the transferee judge concludes that counsel applying for a leadership position lacks sufficient time to devote to the position, the judge may encourage the applicant to support another qualified attorney from his or her firm who has been actively working on the litigation for the leadership position.

The transferee judge should also inquire whether the applicants are working together (or have worked together) in other cases. This addresses the concern relating to the extent to which repeat players who have worked together previously exclude diverse attorneys from their established networks, resulting in a lack of diversity.

Best Practice 8E: The transferee judge should be flexible in creating the leadership structure, including modifying existing appointment procedures.

Transferee judges should consider whether the appointment process they currently use advances the goal of increasing diversity in MDL leadership. The transferee judge should welcome changes to their process that would help accomplish this goal.

The transferee judge may consider holding hearings for applicants in certain cases.[[14]](#footnote-14) This allows judges to evaluate the competence of diverse attorneys who may not have been considered absent the hearing, giving these attorneys an opportunity to state his or her case for selection.[[15]](#footnote-15) This is particularly appropriate when the judge is unfamiliar with the attorneys seeking appointment.

The goal behind these efforts is to penetrate the repeat-player dynamic that restricts diversity in leadership, and judges should be cognizant of modifications that help meet this goal. For example, in cases where holding a hearing may not be possible due to the size or complexity of the litigation, the transferee judge may consider incorporating a period for commentary, allowing submission of confidential objections (supported by documentation).[[16]](#footnote-16)

The transferee judge may also try to increase the diversity in leadership by including different lawyers in the leadership team. The transferee judge may accomplish this by recommending that the steering committee appoint lawyers to subcommittees who are not on the steering committee.[[17]](#footnote-17) Or, when all counsel meet for regular meetings, the transferee judge may give lawyers who are not on any committee an opportunity to express their interest in joining one and relay this information to liaison counsel.

Finally, the transferee judge may consider tailoring the application for certain positions in a case to make the selection process more inclusive as well as able to identify unique traits that may be critical based on the specific nature of the litigation. The judge may then use this information to substitute a repeat player with an equally qualified lawyer who brings a unique skill or trait—and new ideas—to the leadership team.

Best Practice 8F: The transferee judge should proactively include diversity considerations in evaluating candidates for leadership positions.

The bench and bar should move towards a more expansive view of the criteria for appointment by emphasizing factors beyond the most obvious. For instance, one factor that courts could value more is an attorney’s willingness and ability to commit time and effort to the litigation. If a senior lawyer is already stretched too thin with existing appointments, the court could take the opportunity to deploy someone a bit younger who may have fewer competing commitments. Similarly, money is not the only relevant resource a lead lawyer may need to access. An attorneys’ subject matter or technical expertise, individual plaintiffs with relatively stronger cases, and relationships with credible, fresh experts are all valuable resources.

The transferee judge, for example, may issue orders or guidelines that advocate for the inclusion of young lawyers, women lawyers, and minority attorneys in leadership roles. Where a proposal for leadership will be presented to the court, the judge should advise counsel that the structure should reflect meaningful consideration of qualified women and minority attorneys.[[18]](#footnote-18) It is important that judges communicate the importance of including diverse attorneys in the leadership of the MDL litigation. Notably, some judges have already begun implementing this practice in their court rooms.[[19]](#footnote-19)

The transferee judge may also encourage counsel on the leadership team to provide opportunities for other attorneys in their firms, particularly younger attorneys, to gain MDL experience by assigning them a minor role in the case.[[20]](#footnote-20) For example, the judge may directly inform counsel that the judge will be more inclined to grant a request when a young attorney is the one arguing the motion.[[21]](#footnote-21)

The transferee judge can also take a more proactive approach to ensure that equally qualified diverse attorneys are included in the leadership team by requesting that diverse attorneys be considered in selecting members of a leadership structure[[22]](#footnote-22) and rejecting a committee that lacks diversity.[[23]](#footnote-23)

In the past few years, judges have begun to acknowledge the lack of diversity in MDL leadership and in response have focused their efforts to remedy it.[[24]](#footnote-24) Judges should exercise caution and steer away from affirmatively incorporating diversity into their appointment process, because they may be challenged on a constitutional basis.[[25]](#footnote-25) In such cases, however, the transferee judge may include diversity as an element to consider in appointing members of a steering committee or other leadership positions in accordance with subdivision (g)(1)(B) of Rule 26 of the Federal Rules of Civil Procedure, which provides that the court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interest of the class."[[26]](#footnote-26)

Best Practice 8G: In appointing leadership, the transferee judge should consider favoring the individual application method over the consensus selection method.

There are two general ways in which the transferee judge may receive the proposals for class counsel. [[27]](#footnote-27) One method is the “consensus” method, in which the judge directs the plaintiffs to file a proposed leadership “slate.” In this model, the attorneys first decide amongst themselves who should be on the leadership team and then submit their proposal to the judge for confirmation.[[28]](#footnote-28) The other method is a competitive selection process, or individual application model, under which the court invites individual submissions from attorneys for each of the positions and makes its selection among them.[[29]](#footnote-29) Applicants file directly and publicly with the court, and the court determines who will be on the leadership structure, usually after a public hearing. This process includes the opportunity to object to applications.

In lieu of private ordering, judges have recently turned to the use of individual applications and subsequent evidentiary hearings to allow counsel to state their own case for appointment. This practice is encouraged by the *Manual*, which warns, “Deferring to proposals by counsel without independent investigation examination, even those that seem to have the concurrence of a majority of those affected, invites problems down the line.”[[30]](#footnote-30) The application and hearing method allows judges — not peer attorneys — to evaluate applicants on criteria other than one’s status as a repeat player. Studies have found that application methods of appointment reduce the seniority bottleneck and circumvent repeat-player entrenchment by giving newcomers a fighting chance at obtaining leadership positions, thus potentially leading to a more diverse leadership group.”[[31]](#footnote-31)

Rule 23(g) of the Federal Rules of Civil Procedure, which regulates the courts’ appointment of class counsel and leadership committees, provides a list of criteria that a transferee judge should consider in appointing class counsel

The transferee judge has the discretion to use either model, but should keep in mind that he or she should use a system that promotes diversity in leadership and an equal level playing field for all applicants.[[32]](#footnote-32) The consensus selection system for selecting lead counsel typically excludes new entrants because repeat players dominate the slates presented to the judges.[[33]](#footnote-33) The plaintiff’s bar is small, and reputation and reciprocity therefore matter among the group. As a result, consensus selection leads to “tit-for-tat reciprocity” among repeat players and the “good ol’ boy networks.”[[34]](#footnote-34)

The individualized appointment process, on the other hand, allows the transferee judge to consider, in addition to the core qualifications required of lead counsel, other factors that would positively impact an MDL.[[35]](#footnote-35) This method wrests control from powerful attorneys and invites the judge to consider a wider range of factors—ensuring that counsel has the time, skill, and resources to litigate the dispute zealously but distributing opportunities beyond the usual suspects.[[36]](#footnote-36) The application process blunts the influence of repeat players by placing more control in the judge’s hands. And some judges have demonstrated a willingness to use this discretion to promote diversity[[37]](#footnote-37) By removing the slate system’s barriers to entry, new attorneys have a real chance of obtaining leadership positions through demonstrating their merit to the court. This might potentially lead to a more diverse leadership group.[[38]](#footnote-38)

Best Practice 8H: The transferee judge should look to second-chairs in appointing leadership positions**.**

Attorneys who have been second chair to repeat players in MDL 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 inherent to leadership. Therefore, in making the decision to fill a leadership position, the transferee judge should look to the qualifications and experience of the repeat player’s second chair before appointing the repeat player. Where the transferee judge finds that the second chair is qualified, the judge should appoint the second chair to allow new participants in the MDL process. The transferee judge may also encourage the repeat player to assist the second chair in meeting their obligations.[[39]](#footnote-39)

Best Practice 8I: In appointing lead plaintiffs’ counsel or a plaintiffs’ steering committee in a class action or mass tort, the judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case.

Best Practice 4E of the Duke Law “Standards and Best Practices for Large and Mass-Tort MDLs” addresses appointment of lawyers to leadership positions in MDLs. Best Practice 8I is new, expanding the reach of the MDL Best Practice to class actions.

The commentary to Best Practice 8I below is based on the commentary following MDL Best Practice 4E, showing changes in underlining and strike-throughs.

Mass-tort MDL and class action cases can potentially affect a large and diverse group of people, and ensuring diversity in the leadership of the cases can enhance public trust in the courts and improve the likelihood of consideration of diverse ideas and perspectives.[[40]](#footnote-40). Yet historically, women and minority lawyers have not been appointed to leadership positions at rates proportionate to their representation in the plaintiffs’ bar generally. It cannot be said that there are not enough talented individuals with the education, background and experience to effectively lead MDL and class action litigation to permit greater diversity.

In order to increase diversity across MDL and class action leadership, the judge should consider employing a competitive application process instead of adopting the parties’ private ordering proposal.[[41]](#footnote-41) Taking into account the diversity of legal talent available and the requirements of the case, the court should bear in mind the value of diversity as a component of obtaining the best possible representation for plaintiffs.[[42]](#footnote-42) [[43]](#footnote-43)In those instances in which the court requests individual lawyer appointments, counsel may consider diversity in deciding which individuals from the firm should seek appointment.[[44]](#footnote-44) Counsel who are proposing a slate of multiple law firms should also consider diversity in selecting the slate.

In those cases in which it is appropriate to appoint a larger leadership structure, in addition to demographic diversity, the judge should be mindful of creating a team with diversity of experience, balancing the benefits of selecting leadership members who have worked well together in the past with the benefits of having a leadership team that brings different experiences that can be brought to bear in the litigation. The judge should also seek to ensure a variety of skill sets within the leadership team and the need for heightened financial resources in the executive committee. Judges should also seek ways to help increase the opportunities for young lawyers to participate actively in court proceedings. In recent years, for example, some judges have issued standing orders guaranteeing oral argument on motions if a young lawyer argues, or relaxing the one-lawyer-per-witness rule to allow young lawyers opportunities to examine witnesses at trial.[[45]](#footnote-45) Other courts have specifically instructed counsel in the lead counsel order to provide opportunities to younger lawyers.[[46]](#footnote-46) Providing opportunities for young lawyers to participate actively in court and in the MDL or class action will increase the opportunities for women and minorities to achieve lead counsel positions.

Given the lack of commonality requirements in MDLs that are not class actions, substantially different claims may all be included in the same MDL. In these cases, particularly when there are significant differences among identifiable groups of plaintiffs, the judge should ensure that the leadership is comprised of attorneys that reflect these variations in claims. In multidistrict litigation that is likely to involve the application of multiple states’ laws, geographic diversity may be an important consideration as well.

By taking early control of the process through which counsel are appointed to leadership positions and clearly communicating the criteria for appointment, the court can ensure that composition of the plaintiffs’ leadership team reflects the needs of the case and the available talent from a diverse pool. The court should ensure that slates or, later in the litigation, formation of committees or allocation of work assignments, do not lead to the exclusion of attorneys who bring valuable skills, resources, or perspectives to the litigation.

Best Practice 8J: The transferee judge should be more proactive in ensuring that appointed counsel fulfill their duties.

The transferee judge may choose to require that counsel personally fulfill their leadership duties. For example, the judge may ask that counsel obtain leave of court before delegating their responsibilities in a case to other lawyers or staff.[[47]](#footnote-47) Alternatively, if the judge becomes aware that all the briefing in a case is being done by an attorney who is assisting but is not on the leadership team, the judge may reassign positions on the team and include attorneys who are contributing their efforts and completing the work.

Notwithstanding the above, however, the transferee judge should be careful that this practice does not cause younger attorneys to be shut out from the litigation and thereby hinder their development. To encourage the inclusion of younger attorneys, for example, the transferee judge may require that counsel in the steering committee attend monthly conferences, while allowing additional attorneys to join them in attending. Given the large number of repeat players who are, at any given time, in leadership positions in many different cases, requiring that attorneys in these positions fulfill their responsibilities themselves may encourage repeat players to step down from a position and support a “new player” instead.

Best Practice 8K: The transferee judge should actively monitor appointments to ensure that diverse attorneys have meaningful work and opportunities to advance.

After establishing the leadership structure, the transferee judge should actively monitor the appointments and the distribution of assignments within the committees, paying close attention to the attorneys assigned to particular roles. Keeping track of the assignments allows the transferee judge to analyze whether minority lawyers, women attorneys, and young attorneys are being given opportunities to advance through meaningful work.  This also helps protects these attorneys from being marginalized by repeat players after appointment.[[48]](#footnote-48)

Best Practice 8L: The transferee judge should identify low- to mid-level lawyers doing much of the groundwork and give them a formal role.

Often, lawyers who are repeat players assume the speaking role in court proceedings even though another attorney — usually a younger or female attorney — is more familiar with the case.[[49]](#footnote-49) The transferee judge can help increase diversity in MDL litigation by incentivizing senior attorneys to step down and allow junior attorneys to argue the issue or motion before the court — particularly where they have done the bulk of the work.[[50]](#footnote-50) This gives these lawyers, who would normally only brief a senior lawyer or repeat player on an issue, the opportunity to argue the motion and gain valuable courtroom experience that would otherwise not be gained.[[51]](#footnote-51) These opportunities can assist in producing a more diverse group of attorneys equipped with the experience that is needed to apply for a leadership appointment.

Best Practice 8M: The transferee judge should encourage participation in oral arguments in court by multiple lawyers.

The transferee judge should invite arguments by multiple lawyers, particularly by those who are not in front of the court regularly.[[52]](#footnote-52) Limiting court appearances of repeat players gives other lawyers, including young lawyers and women and minority lawyers, the opportunity to be at the forefront of the case.[[53]](#footnote-53)

Best Practice 8N: The transferee judge should consider revisiting appointments annually or at least explicitly remind the lawyers of the opportunity to do so at any time if circumstances change**.**

A one-year appointment allows the transferee judge to assess the lawyers’ effectiveness and whether counsel in leadership positions are diligently performing tasks in the litigation and making regular financial contributions.[[54]](#footnote-54) The transferee judge may require counsel to list the hours worked on the case or describe the work completed.

Judges should keep in mind that the leadership needs may change as the litigation progresses, and thus, a one-year appointment also allows the judge to reassess the needs of the case at that moment and edit the leadership structure as necessary.[[55]](#footnote-55) For example, the judge may find it necessary to reassign leadership positions or appoint additional lawyers to a committee. This practice provides a great opportunity for attorneys who may not have been considered for a leadership role initially, but who have been dedicated to the litigation, to obtain a formal leadership position.

While revisiting appointments annually may increase the chances that a young attorney or female attorney can obtain a position on the leadership team, judges should also carefully assess each situation to ensure that lead lawyers do not misplace their fiduciary obligations to plaintiffs in trying to avoid losing their positions by displeasing the judiciary. If the transferee judge is concerned that there may be a potential conflict of interest, the transferee judge may choose to ask that non-lead lawyers submit requests to the court for substitution or addition of counsel where the lead lawyers are not adequately representing the plaintiffs.[[56]](#footnote-56)

Best Practice 8 “O”: The transferee judge should invite lower-level attorneys to in-chambers sessions both prior to and after MDL hearings.

The transferee judge may try to meet with lower-level attorneys, particularly those who are in front of the court for the first time, prior to an MDL hearing to encourage them and then after the hearing to review their performance in court and provide feedback.**[[57]](#footnote-57)**  This provides the attorneys who are inexperienced in MDL litigation (generally, minority lawyers and female lawyers) with the best source for improvement. The feedback they receive from the judge will help them develop their careers and thereby increase the probability of future leadership appointments in MDL cases.

Best Practice 8P: A judge should develop a system that holds lawyers accountable for improper and inappropriate behavior toward diverse attorneys.

Studies on gender bias in the legal profession, including the “Gender Bias Task Forces,”[[58]](#footnote-58) have found that there is a culture of incivility based on gender.[[59]](#footnote-59) Amongst other behaviors, female attorneys have experienced humiliating and demeaning sexual remarks, patronizing terms, offensive comments about their appearance, off-color jokes, and been mistaken for a non-lawyer or been completely ignored on the basis of gender.[[60]](#footnote-60) Judges should develop a system through which lawyers are sanctioned for demeaning, disrespectful, or dismissive conduct toward other lawyers based on their gender (or race, age, etc.).[[61]](#footnote-61)

A strong response is necessary to reiterate the message that this behavior is not acceptable and will not be tolerated in the legal profession. Further, female lawyers, young lawyers, and minority lawyers will be more empowered to enter the MDL practice and apply for leadership positions if they know that they have the support of the MDL judges in eliminating improper and disrespectful behavior.

Best Practice 8Q: To police discriminatory conduct occurring during the selection of lead counsel, transferee judges should consider “Batson”-like motions from attorneys who are denied leadership positions.

A judge might consider creatively employing the framework of *Batson v. Kentucky* to override discriminatory conduct by a law firm that forecloses leadership positions to its diverse attorneys.[[62]](#footnote-62) Such a process would allow racial minority and women attorneys to challenge a discriminatory leadership selection process. The attorney would file a motion with the judge describing her qualifications to serve as lead counsel and alleging that she was not selected due to purposeful discrimination. This motion would include “circumstantial and direct evidence” of discriminatory intent.[[63]](#footnote-63) If the attorney can make a sufficient showing, the plaintiffs’ group has an opportunity to proffer a race or gender neutral justification for its selection.

Although the *Batson* showing is a high hurdle, this tool could provide powerful incentives to repeat players to seriously consider including diverse attorneys in leadership slates. And while sufficient evidence of intentional discrimination will likely be unavailable in most cases, the *Batson* approach offers a swift remedial mechanism in egregious cases of overt discrimination. Even if this litigious practice is not frequently employed, the existence of this tool incentivizes inclusivity and might disrupt the current balance of negotiating power within the plaintiff’s bar.

Best Practice 8R: A judge should invest in pipeline-building efforts to create a more diverse pool of applicants for leadership positions**.**

A judge should build a pipeline that will encourage diverse attorneys to apply for a leadership position in a class action or MDL. The judge can do a targeted outreach to specific groups of attorneys (e.g. women, minorities) to increase the applications from these candidates. The judge can coordinate with bar associations and local groups to schedule opportunities for attorneys interested in obtaining a leadership position to meet with the judge.[[64]](#footnote-64) These efforts will result in a more diverse pool of applicants for MDL and class action leadership. The judge should also try to participate in educational seminars and workshops on class actions and MDLs held by minority bar associations, young lawyer associations, and other groups. The judge can utilize this opportunity to encourage applications.

Best Practice 8S: A judge should participate in workshops addressing the status and importance of diversity in class action and MDL leadership.[[65]](#footnote-65)

All judges should participate in workshops that help bring awareness to this issue.[[66]](#footnote-66) The judge may accomplish this through judicial education programs on bias, programs that address gender-biased behavior, or educational programs on gender and civility issues.[[67]](#footnote-67) A transferee judge may also take a more proactive approach and establish a committee dedicated to the improvement of diversity in MDL leadership.[[68]](#footnote-68)

Judges should also consider attending implicit bias trainings to help mitigate biases. These trainings will help judges recognize implicit bias and develop a proper response.[[69]](#footnote-69) This helps guarantee that the appointment process is as free from bias as possible.

1. The best practices in this section relate primarily to the process of appointing counsel for the plaintiff’s 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. [↑](#footnote-ref-1)
2. *See* Burch, *Judging Multidistrict Litigation*, *supra* note 81, at 84. [↑](#footnote-ref-2)
3. Judge Duval, who sits on the Eastern District of Louisiana observed, “I often see the same attorneys appointed to all such committees. This repetition is not necessarily a good thing. The committee should not be an ‘exclusive club.’ The appointment of a different attorney can lead to new approaches and innovations, as well as achieve fundamental fairness.” Stanwood R. Duval Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 La. L. Rev. 391, 392–93. [↑](#footnote-ref-3)
4. *See e.g. An Opportunity Or Landmine Promoting Gender Diversity From The Bench*, Elizabeth A. Fegan, *supra* note **Error! Bookmark not defined.**, at 39 (“[A]ppointing class counsel requires a heightened level of scrutiny to ensure that the interests of the class members are adequately represented and protected.”). [↑](#footnote-ref-4)
5. *See e.g.* Class Action Order at 1, *In re* Gildan Activewear Inc. Sec. Litig., No. 08-civ-05048 (S.D.N.Y. Sept. 20, 2010) (“WHEREAS this proposed class includes thousands of participants, both male and female, arguably from diverse backgrounds, and it is therefore important to all concerned that there is evidence of diversity, in terms of race and gender, in the class counsel I appoint”). [↑](#footnote-ref-5)
6. Of course, each MDL case is unique in its characteristics and challenges and some of the best practices may be difficult to implement given the size, claims involved, or other considerations. The practices should be modified as necessary to fit the needs of each case. [↑](#footnote-ref-6)
7. *See, e.g.*, Melinda Vaughn, *A Milestone for Diversity in MDL*, 100 Judicature 1 (2016). [↑](#footnote-ref-7)
8. *See* NYSBA Report, *supra* note 3, at 23. [↑](#footnote-ref-8)
9. 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. [↑](#footnote-ref-9)
10. Judge Kathryn Vratil has exemplified this practice. In 2015, she set the precedent when she appointed eleven female lawyers to a 20-lawyer Plaintiff’s Steering Committee in the *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* Fegan, *supra* note **Error! Bookmark not defined.**; *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/. [↑](#footnote-ref-10)
11. *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.”).  [↑](#footnote-ref-11)
12. 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. [↑](#footnote-ref-12)
13. Duval, *supra* note 126, at 393. [↑](#footnote-ref-13)
14. *See* Rothstein & Borden, *supra* note 134, 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). [↑](#footnote-ref-14)
15. Burch, *Judging Multidistrict Litigation*, *supra* note 81, at 126. [↑](#footnote-ref-15)
16. *Id.* at 125. [↑](#footnote-ref-16)
17. Duval, *supra* note 126, at 393. [↑](#footnote-ref-17)
18. *See* MDL Standards and Best Practices, *supra* note 77, at 58. [↑](#footnote-ref-18)
19. In his “guidelines for trial and final pretrial conference[s],” Judge William Alsup of the Northern District of California provides, “The Court strongly encourages law firms to permit young lawyers to examine witnesses at trial and to have an important one.” *See* *Judicial Orders: Providing/Encouraging Opportunities for Junior Lawyers*, NextGenLawyers, https://nextgenlawyers.com/wp-content/uploads/2017/02/JudicialOrdersRegardingNextGen.docx-2.pdf [hereinafter *Judicial Orders*]. Judge Indira Talwani of the District of Massachusetts notes in her “standing order, “Recognizing the importance of the development of future generations of practitioners through courtroom opportunities, the undersigned judge, as a matter of policy, strongly encourages the participation of relatively inexperienced attorneys in all courtroom proceedings including but not limited to initial scheduling conferences, status conferences, hearings on discovery motions, and examination of witnesses at trial.” *Id.* In 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. *See* Rothstein & Borden, *supra* note 134, at 12. [↑](#footnote-ref-19)
20. *See supra* note 142.

    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 142. [↑](#footnote-ref-20)
21. For example, the Honorable Judge Barbara Lynn of the Northern District of Texas advised counsel “…In those instances where the Court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing. The Court believes it is crucial to provide substantial speaking opportunities to young lawyers, and that the benefits of doing so will accrue to young lawyers, to clients, and to the profession generally.” *See* Order Setting Hearing, Velasco v. Blue Cross Blue Shield of Texas, No. 3:15-CV-615-M (Nov. 12, 2015). [↑](#footnote-ref-21)
22. 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* Class Action Order, *supra* note 128, at 1. [↑](#footnote-ref-22)
23. Judge John Tunheim from Minnesota, for example, rejected the proposed leadership of in Fluoroquinolone MDL because the executive committee lacked gender diversity. *See* Zhang, *supra* note 133. The late Southern District of New York district court judge, Harold Baer Jr., 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). [↑](#footnote-ref-23)
24. For example, in the *Deepwater Horizon* litigation, Judge Barber noted that diversity-related considerations were considered in selecting counsel for the plaintiff’s 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). [↑](#footnote-ref-24)
25. *See e.g*., Brooke Coleman, *A Legal Fempire?: Women in Complex Civil Litigation*, 93 Ind. L.J. (forthcoming 2018) (manuscript at 47–48), https://dx.doi.org/ (noting that Justice Alito questioned/criticized Judge Baer’s approach in requiring that MDL counsel be diverse, stating, “[c]ourt-approved discrimination based on gender is ... objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge.”). [↑](#footnote-ref-25)
26. In the *Ethicon, Inc., Power Morcellator Products Liability Litigation*, Judge Vratil included the following as criteria for a position as plaintiffs’ lead counsel and/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/. [↑](#footnote-ref-26)
27. Federal Rules of Civil Procedure rule 23(g) provides:

    Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court: (A) must consider: (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; [and] (B) may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class. [↑](#footnote-ref-27)
28. *See* Burch, *Judging Multidistrict Litigation*, *supra* note 81, at 93 [↑](#footnote-ref-28)
29. *See id.* at 84. [↑](#footnote-ref-29)
30. Manual (Fourth), *supra* note § 10.224 (2004). [↑](#footnote-ref-30)
31. Alvaré, *supra* note 50, at 4. [↑](#footnote-ref-31)
32. Coe, *supra* note 92 (“the inequality in MDL leadership is influenced in a big way by the processes used to select lead counsel”). [↑](#footnote-ref-32)
33. Coleman, *supra* note 148, at 45–46. [↑](#footnote-ref-33)
34. Burch, *Judging Multidistrict Litigation*, *supra* note 81, at 93; *see also* Alvaré, *supra* note 50, 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). [↑](#footnote-ref-34)
35. Coleman, *supra* note 148, at 46. [↑](#footnote-ref-35)
36. *See* Hon. Michael Baylson & Cecily Harris, *Equal Opportunity*, 101 Judicature 65, 67 (2017). [↑](#footnote-ref-36)
37. *See id.* at 68 (discussing, among other things, Judge Baer’s practice of “requir[ing] a certain level of racial and gender diversity among class counsel”). [↑](#footnote-ref-37)
38. Elizabeth Cabraser, who was solo lead counsel in the Volkswagen “Clean Diesel” MDL litigation has stated that the individual application process for selecting lead counsel “promotes diversity naturally, without discounting merit, because it simply eliminates the barriers to entry that a slate system can subconsciously impose.” Coleman, *supra* note 148, at 46. [↑](#footnote-ref-38)
39. Dodge, *supra* note 92. [↑](#footnote-ref-39)
40. By definition classes require significant commonality. Fed.R.Civ.P. 23. [↑](#footnote-ref-40)
41. The “repeat player” dynamic has been blamed for much of the lack of diversity in MDL leadership appointments. *See, e.g*., Burch, *supra*. 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* 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.”), 88 (“Yet, unlike selecting 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), ww.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*, forthcoming, 102 Cornell Law Review \_\_\_\_ (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). [↑](#footnote-ref-41)
42. It often is neither feasible nor desirable to appoint large leadership structures in class actions. The prior version suggested that the court should make numerous appointments in order to ensure diversity. [↑](#footnote-ref-42)
43. The reference to diversity in “prior experience and skills” and “age” is confusing and arguably inapplicable in a class action context, in which the court is required to consider the experience level of applicants. While judges and law firms should seek out ways for young and inexperienced lawyers to gain the necessary skills to ultimately be considered for lead counsel, Rule 23 and respect for the interests of plaintiffs argues against that being a consideration for lead counsel. Committee appointments in large MDL leadership structures, on the other hand, may well be a good place for younger lawyers to gain experience. *See, e.g*., Elizabeth A. Fegan, “An Opportunity or Landmine: Promoting Gender Diversity from the Bench,” 63 May Fed. Law. 38 (2016), at 6-7. [↑](#footnote-ref-43)
44. Appointing individual lawyers (as opposed to law firms) to leadership positions can provide the judge with direct accountability and also allow the judge to more precisely advance diversity goals. However, a risk-averse law firm may be more likely to put up its most experienced lawyer for an individual appointment, instead of a slightly less seasoned women or minority lawyer. Another approach increasingly being used by judges is to require law firms in their applications to identify the members of the team that will litigate the case, and/or appoint both individuals and law firms, as Judge Cynthia Rufe did in *In re Generic Pharmaceutical Pricing Antitrust Litigation*. [↑](#footnote-ref-44)
45. See the standing orders collected at [www.NextGenLawyers.com](http://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). [↑](#footnote-ref-45)
46. In *In re Generic Pharmaceutical Pricing Antitrust Litigation*, for example, Judge Cynthia Rufe appointed two very experienced women lawyers and their law firms as co-lead counsel and appointed 12 lawyers and their law firms to the Plaintiffs’ Steering Committee, and stated in her order: “the Court expects that the leadership will provide opportunities for attorneys not named to the PSC, particularly less-senior attorneys, to participate meaningfully and efficiently in the MDL, including through participation in any committees within the PSC and in determining which counsel will argue any motions before the Court.” [↑](#footnote-ref-46)
47. *Id.* at 372. [↑](#footnote-ref-47)
48. 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 126, at 392–93. [↑](#footnote-ref-48)
49. Scheindlin, *supra* note 24. [↑](#footnote-ref-49)
50. For example, the Honorable Judge Barbara Lynn of the Northern District of Texas has specifically mentioned to litigations: “…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.” Citation. [↑](#footnote-ref-50)
51. In the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ litigation, 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 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* Scheindlin, *supra* note 24 (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 [↑](#footnote-ref-51)
52. Judge Rufe has directed litigants to partner in this initiative:

    The court expects that the leadership will provide opportunities for attorneys not named to the plaintiff's steering committee, particularly less-senior attorneys, to participate meaningfully and efficiently in the MDL, including through participation in any committees within the plaintiff's steering committee and in determining which counsel will argue any motions before the court.

    *In re* Generic Digoxin and Doxycycline Antitrust Litig., No. 2-md-02724 (E.D. Pa. Aug. 5, 2016) [↑](#footnote-ref-52)
53. Feuer, *supra* note 174. [↑](#footnote-ref-53)
54. *See* Rothstein & Borden, *supra* note 134, 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.”). [↑](#footnote-ref-54)
55. MDL Standards and Best Practices, *supra* note 77, at 27. [↑](#footnote-ref-55)
56. Burch, *Judging Multidistrict Litigation*, *supra* note 81, at 128. [↑](#footnote-ref-56)
57. 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. [↑](#footnote-ref-57)
58. “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 148, at 13–21. [↑](#footnote-ref-58)
59. *Id.* at 18. [↑](#footnote-ref-59)
60. *Id.* [↑](#footnote-ref-60)
61. 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/. [↑](#footnote-ref-61)
62. This novel application of *Batson* was advanced in a recent article by Judge Michael Baylson and Cecily Harris. *See* Baylson & Harris, *supra* note 159. 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. [↑](#footnote-ref-62)
63. *See Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252, 266 (1977)). [↑](#footnote-ref-63)
64. *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). [↑](#footnote-ref-64)
65. *See e.g.*, NYSBA Report, *supra* note 3, 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.”). [↑](#footnote-ref-65)
66. For example, the U.S. District Court for the Northern District of Illinois coordinated with the Chicago Bar Association to host a symposium in 2016, “Women Lawyers in the Courtroom.” Chief Judge Ruben Castillo noted: “I encouraged the study to determine whether there is gender equality in our Courtrooms…Our symposium was held to focus more attention to this pressing issue.” *See* Camille Khodadad, *Taking the Lead*, Chi. Law. Mag. (Mar. 7, 2017),http://www.chicagolawyermagazine.com/archives/2017/03/women@work-march17*.* [↑](#footnote-ref-66)
67. Coleman, *supra* note 148, at 19 (listing recommendations provided by the Eighth Circuit Task Force). [↑](#footnote-ref-67)
68. *See* *id.* (noting that some federal circuit courts have suggested the establishment of Circuit-level committees dedicated to the study and attention to gender bias). [↑](#footnote-ref-68)
69. *See Implicit Bias Initiative*, Am. Bar Ass’n, https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html (last visited Apr. 6, 2018). [↑](#footnote-ref-69)