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

**(FIRST DRAFT PENDING REVISION)**

**MAY 10, 2018**

1. **What the Judicial Conference, Judicial Panel on Multidistrict Litigation, and Federal Judicial Center Can Do to Promote Women and Diverse Lawyers**

**Guideline 9:** Institutional Authorities Have a Responsibility to Promote Diversity in Judicial Appointments.

Judicial Panel on Multidistrict Litigation**[[1]](#footnote-1)**:

Best Practice 9A: The JPML should continue to diversify the composition of appointed MDL transferee judges.

If the compositionof the transferee judges is itself diverse, the likelihood of a diverse pool of applicants and a diverse leadership appointee is increased.[[2]](#footnote-2) The JPML can accomplish this by diversifying the pool of MDL transferee judges.[[3]](#footnote-3) The results of the JPML’s efforts in promoting diversity in the judiciary have already begun to show. For the first time in history, the panel is mostly women—headed by a female chair,[[4]](#footnote-4) and the panel’s recent appointees include an African American man, a South Asian American man, an African American woman, an Asian American woman, and a white woman.[[5]](#footnote-5) The JPML has also provided “rookie” judges the opportunity to manage MDL cases and gain experience.[[6]](#footnote-6)

Best Practice 9B: The JPML should organize panel discussions and programs on MDL practice.

The JPML can organize panel discussionsthat outline the benefits of getting into MDL practice to encourage a larger pool of applicants. The JPML can also collect data on the racial, ethnic, and gender composition of appointments and use this information to encourage diverse judges to become transferee judges. The JPML might schedule training for judges interested in handling MDLs.

Best Practice 9C: The JPML should increase transparency of MDL assignments.

The JPML enjoys wide discretion in deciding the proper federal district and judge for a case based on the circumstances of the case. While there are many factors that the Panel considers in making its determination, these reasons are sometimes not reflected in the transfer orders.[[7]](#footnote-7) The JPML should therefore be more transparent about the reasons for assigning MDLs to certain judges.

Best Practice 9D: The JPML should create and maintain a database of leadership appointment orders.

This database can be a great source of information for judges, particularly first-time MDL judges. The Center can also use this information to create suggested guidelines for judges on how to appoint diverse leadership positions without constitutional conflicts.

Judicial Conference:

Best Practice 9E: The Judicial Conference should consider recommending to the Chief Justice that he establish a committee on diversity that researches and recommends policies to improve diversity.

Based on the results of the diversity committee research, the Conference can set long-term and short-term goals on improving diversity in class action and MDL leadership as well as other judicial appointments and track these goals on an annual basis.

Best practice 9F: The Judicial Conference should issue a model local rule promoting diversity in appointments by judges.

The Judicial Conference Committee on Court Administration and Case Management should consider proposing a model local rule encouraging judges to take into account diversity in making appointments in litigation. Several judges have issued standing orders promoting diversity in their cases. CACM should study these exemplar orders in fashioning a national model local rule.

Federal Judicial Center:

Best Practice 9G: The Federal Judicial Center should continue to strengthen its educational programs training judges to consider diversity in appointing lawyers to leadership positions.

In 2001, Professor Deborah Rhode described the issue of gender inequality in the legal profession as the “‘no-problem’ problem,” referring to the assumption that the longstanding gender gap in the legal profession would eventually work itself out as time passed. [[8]](#footnote-8) Given the glacial pace of change in diversity statistics among the legal profession over the last several decades, a lack of specific goals and timelines for achieving those goals is one of the greatest barriers to change.[[9]](#footnote-9)

The first step in combatting second-generation discrimination is education and training to help people understand the problem.[[10]](#footnote-10) Researchers at the Center for Gender in Organizations note that because second generation gender biases are largely invisible, leaders often mistakenly believe that gender bias no longer exists.[[11]](#footnote-11) Corrective training can and should take place at the law firm level. But it could also take place across firms, among groups of existing MDL and class action leaders, and with judges who preside over such cases, sensitizing them more to the biases they may not realize exist and alerting them to chances to self-correct. That leadership, in turn, could also challenge others within their own ranks to be more aware, self-reflective, and self-correcting.

Encouragingly, judges, lawyers, and the legal community have started to recognize that the gender gap creates a disservice to our clients and the profession as a whole. From 2011 to 2015, women appointed to MDL leadership has grown from 13.5% to 27.66%, and it appears that this upward trajectory continued through 2016.[[12]](#footnote-12) This dramatic change is likely the result of women challenging the gender gap by finding their voice, organizing, and galvanizing. Women En Mass, an organization of women plaintiffs’ tort lawyers founded by Aimee Wagstaff, is one example of an organization created to facilitate networking and mentoring opportunities to overcome the chicken-and-egg conundrum.[[13]](#footnote-13)

Best Practice 9H: A law school, bar organization, or other related institution should create an award that recognizes judges for commitment to diversity improvement.

A prestigious recognition for promoting diversity may incentive other judges to incorporate the same practices in their courts.[[14]](#footnote-14)

1. The Judicial Panel on Multidistrict Litigation (JPML) is tasked with consolidating related cases so that pretrial issues can be uniformly resolved. *See* 28 U.S.C. § 1407(a) (2012). [↑](#footnote-ref-1)
2. For example, in the *Power Morcellator Litigation* (MDL 2652)Judge Vratil appointed a majority female plaintiff leadership team. *See supra* notes 133 & 149. [↑](#footnote-ref-2)
3. Coleman, *supra* note 148, at 48. [↑](#footnote-ref-3)
4. *See* Panel Judges, Judicial Panel on Multidistrict Litigation, http://www.jpml.uscourts.gov/content/panel-judges (last visited Apr. 6, 2018). [↑](#footnote-ref-4)
5. Coleman, *supra* note 148, at 48–49; Amanda Bronstad, *Meet the Next Generation of MDL Judges*, Nat’l L. J. (Apr. 20, 2017), http://www.nationallawjournal.com/legaltimes/id=1202784167417/Meet-the- Next-Generation-of-MDL-Judges. [↑](#footnote-ref-5)
6. For example, the JPML recently assigned the actions in the *Stryker Orthopaedics Femoral Head Products Liability Litigation* to Judge Talwani, who the JPML acknowledged, had not “yet had an opportunity to preside over an MDL docket.” *See* Transfer Order, *In re* Stryker Orthopaedics LFIT V40 Femoral Head Prods. Liab. Litig., MDL No. 2768 (J.P.M.L. Apr. 5, 2017), http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2768-Initial\_Transfer-03-17.pdf.

In 2016, the JPML transferred cases to 15 first-time MDL judges. *See* Amanda Bronstad, *Rookie Judges Start to Wrangle MDL Dockets*, Nat’l L. J. (Aug. 20, 2017),https://www.law.com/nationallawjournal/almID/1202784158624/. [↑](#footnote-ref-6)
7. Hon. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 32 Litig. 26, 30 (2014),https://law.duke.edu/sites/default/files/centers/judicialstudies/mdl2014/Evaluating\_MDL\_Process.pd. [↑](#footnote-ref-7)
8. The Unfinished Agenda, *supra* note 115; *see also* Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 Hofstra L. Rev. 1001 (2002). [↑](#footnote-ref-8)
9. *See* Stefanie K. Johnson, *What 11 CEOs Have Learned About Championing Diversity*, Harv. Bus. Rev. (Aug. 17, 2017), hbr.org/2017/08/what-11-ceos-have-learned-about-championing-diversity); *see also* NALP 2016 Diversity, *supra* note 10 (noting that representation of women and black/African-American lawyers remains below 2009 pre-recession levels). [↑](#footnote-ref-9)
10. Carter, *supra* note 39. [↑](#footnote-ref-10)
11. Spela Trefault et al., *supra* note 27, at 1. [↑](#footnote-ref-11)
12. Alvaré, *supra* note 50, at 4; Coe, *supra* note 92. [↑](#footnote-ref-12)
13. *See* DIA report (“The first and foremost reason articulated by many was a lack of effective mentoring relationships, not only in learning legal skills but on other issues that have an impact on one’s ability to advance . . . .”). [↑](#footnote-ref-13)
14. *See e.g.*, *Diversity Leadership Award*, Am. Bar Ass’n, https://www.americanbar.org/groups/litigation/diversity\_initiatives/award.html (last visited Apr. 6, 2018). [↑](#footnote-ref-14)