Letter to Professor Jaime L. Dodge
Re: Proposed MDL Standards and Best Practices
October 7, 2014

ATTACHMENT

The signatories of this letter ask you to consider the following changes (in red font) to the proposed *MDL Standards and Best Practices*:

> **Best Practice 3C: The judge's primary responsibility in the selection process is to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent all plaintiffs, keeping in mind the benefits of diversity of experience, skills, and backgrounds.**
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> **Best Practice 3C(i): The transferee judge should develop a straightforward, efficient, and fully transparent process for counsel to apply for appointment. The process should reflect the need to avoid unnecessary divisiveness, while encouraging professionalism and honesty. The description of the application and selection process should be filed in the public docket in a manner that provides timely notice to all who may be interested in applying.**
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> The transferee judge should encourage applications from a wide range of qualified counsel, including women and minority attorneys,[1] to ensure that he or she has enough information to select counsel who will best represent the diversity and interests of the various litigants and can work together to manage a highly complex proceeding. To obtain the widest pool of candidates, the application and interview process should be formalized and the criteria/qualifications should be made public. The criteria should include the qualifications of each individual applicant, as well as the needs of the litigation, the different skills and experience that each of the lawyers seeking appointment will bring to the role, and how the lawyers will complement one another. Also, judges should advise applicants that, in the event an agreed upon leadership structure is being proposed, that structure should reflect meaningful consideration of qualified women and minority attorneys.[2] There is no single right approach to the application process. The judge need only ensure all interested and qualified attorneys have had an opportunity to apply and that he or she has enough information to make an informed decision.
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> **Best Practice 3C(iv): In appropriate cases, the transferee judge should conduct interviews of counsel that have submitted applications for leadership positions, in order to assess the applicants' demeanor and skills. In exceptional cases, the judge**

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[1] Numerous federal and state court task forces have found that women and minority attorneys "are often excluded from important court appointments." Lynn Hecht Schafran & Norma J. Wikler, *Gender Fairness in the Courts: Action in the New Millennium*, at 123 (2001) *available at* http://womenlaw.stanford.edu/pdf/genderfairness-strategiesproject.pdf; *see also* Supreme Judicial Ct. of Mass., *Report of the Gender Bias Study of the Supreme Judicial Court, as reprinted in* 23 Suffolk U. L. Rev. 575, 652 (1989) [hereinafter *Massachusetts Report*] ("Data collected by the Committee reveal that women are underrepresented across the board, both in the number of appointments and the amount of compensation they receive . . ."); *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, Chapter 8, "*The Court as Appointer,"* at 294, [hereinafter *Pennsylvania Report*], *available at* http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf ("Minorities and women are significantly underrepresented on court appointment lists.").

[2] This precaution is necessary because of the potential for exclusion of women and minorities from established networks that could result in a lack of diversity among the attorneys considered for leadership structure proposals. *See Pennsylvania Report, supra* note 1, at 293, 296.

should consider having a magistrate judge or special master conduct the interviews and provide assessments of the applicants.

Interviews of applicants should probe not only their experience and qualifications but also how they propose to divide responsibility and ensure meaningful participation by other counsel, including women and minority attorneys. Some judges also informally accept input from defense counsel since they often face the same plaintiff's lawyers in multiple cases; however, judges should be appropriately skeptical in assessing defense counsel's opinions. The transferee judge may also appoint lead and liaison counsel first, and then request that they submit a proposal for the membership of any committees the judge has determined will be necessary. When requesting such a proposal, judges should advise lead and liaison counsel that the proposal should reflect meaningful consideration of qualified women and minority attorneys. Regardless of the approach adopted, judges should actively seek broad input to ensure the inclusion of diversity and fresh approaches which can enhance the effectiveness of appointed counsel.[3]

Best Practice 3C(v): The transferee judge should ensure that the selection process is as transparent as possible by providing a general statement of the goals and considerations that guided the selection.

Transparency and fairness in the selection process are essential.[4] There is often intense competition among counsel for appointment. Not only do lawyers have legitimate concerns about whether their clients' interests will be adequately represented and whether the litigation will be handled effectively, there is usually a direct correlation between a leadership position and compensation. Leadership roles also confer prestige and experience, can increase the lawyer's chance of future appointments, and may help attract future clients. Because the attorneys designated will be responsible for representing the interests of numerous parties who did not select them as counsel, articulating the basis for the appointments will help instill confidence in their leadership. Ensuring that women and minority attorneys are given due consideration for these roles will enhance that confidence.

The transferee judge should require applicants to file their applications in the public docket whenever possible, rather than submitting them in camera, to encourage professionalism and honesty and avoid the appearance of unfairness. Sensitive information, such as counsel's ability to assist with financing the litigation, may be submitted in camera. Some courts find that the interest in allowing for candid discourse with the court and avoiding the creation of ill will and hostile competition favor in camera submissions. If the transferee judge is not familiar with the attorneys who are seeking appointment, a hearing will usually be informative. When there is little or no competition, it may be appropriate to make appointments without a hearing.

[3] *See id.*; s*ee also* Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges* 12 n.14 (Federal Judicial Center 2011) *(citing In re: Avandia Marketing, Sales Practices and Prods. Liab. Litig.*, MDL 1871).

[4] *See Pennsylvania Report, supra* note 1, at 285 ("[T]he manner by which appointers select appointees conveys a strong message about the fairness of the system.").

Best Practice 3C(vi): Even if counsel are able to agree upon a leadership structure themselves, the transferee judge should establish a procedure for the selected lawyers to submit written applications to ensure that they are qualified to lead the litigation and fairly and adequately represent the interests of the class.

Although private ordering among counsel can streamline the selection process, it may be susceptible to abuse. For example, a proposed leadership group may include members who are not fully committed to the litigation but are included because their resumes make the group's application more appealing. Counsel may have also entered into improper arrangements to secure a leadership position. Moreover, the proposed leadership team may exclude lawyers who would bring useful skills or new perspectives to the litigation, such as women and minority lawyers.[5] This risk is exacerbated by the fact that courts presented with stipulations concerning the appointment of class counsel often approve such stipulations without conducting a rigorous analysis.

The judge will therefore still need to take an active role in the formal appointment process. Courts have a fundamental obligation to ensure that the proceedings will be fairly and efficiently conducted, regardless of the private arrangements among the parties. Independent review will ensure the integrity and diversity of the leadership structure. Such review will also help prevent difficulties that could arise later in the litigation if self-appointed counsel become unwilling or unable to perform their duties or incur excessive fees and costs.

MDL STANDARD 4: As a general rule, the transferee judge should ensure that the lawyers appointed to the leadership team are effective managers in addition to being conscientious advocates.

In selecting counsel, different factors may be more important depending on the nature of the litigation. Appointing lawyers with diverse perspectives and experience will create a well-rounded and effective team. At least some of the lawyers the transferee judge appoints should have past experience in leading multidistrict litigation. However, lawyers with a history of impressive positions may have spent more time seeking appointments than doing the actual work in the case. Assessing counsels' commitment to the litigation, their past management successes, and their ability to marshal the resources necessary to effectively prosecute the claims are therefore crucial aspects of the selection process. Standards for assessing these characteristics would bring more transparency and consistency into the process, which could lead to greater diversity among appointed counsel.

Best Practice 4C(iii): The transferee judge may take into account whether counsel applying for leadership roles have worked together in other cases, their ability to collaborate in the past, divide work, avoid duplication, and manage costs.

The selection of lawyers who have worked together previously may be desirable, in that they have already developed a working relationship and are both to a certain extent

[5] *See Pennsylvania Report*, *supra* note 1, at 293, 296.

vouching for one another. Moreover, they may have already developed certain systems for handling workflow and comparative advantages that will help expedite the case relative to a leadership committee working together for the first time. Judges should also be attuned to the potential for negative repeat-player dynamics to develop, however. In considering an application by counsel who have previously worked together, the judge may wish to solicit the input of previous MDL judges the proposed counsel appeared before. The judge should also consider the degree to which each of the counsel has individually been involved in the case in a meaningful way, as well as the risk they will form a coalition that minimizes the input or assignments given to other attorneys, or otherwise wield power in a way that is not most favorable to the plaintiffs as a whole or to other plaintiffs' lawyers. Counsel may also have developed personal and professional conflicts and antagonisms with other lawyers that would compromise their abilities to effectively manage or contribute to the present litigation, which should be considered in selection. Inherent in these considerations is a concern about the potential for exclusion of women and minorities from established networks that could result in a lack of diversity among groups of attorneys who have previously worked together.[6]

Best Practice 4E: The transferee judge should take into account whether the leadership team adequately reflects the diversity of legal talent available and the requirements of the case.

MDL cases affect a large and diverse group of people. Our society, litigants, and the legal profession are diverse. Therefore, diversity should be one of the important considerations taken into account by a court in the discretionary exercise of its broad appointment powers. Ensuring the full participation of women and minority lawyers in court appointment roles will demonstrate that the judicial system is truly committed to fairness and equality for all.[7] In cases that involve hundreds of litigants, and include male and female parties from diverse backgrounds, it is particularly important that the appointments of lead counsel, liaison counsel, or members of steering committees, coordinating committees, management committees, or executive committees reflect broad diversity in terms of gender, race, and ethnicity.

While the judiciary has an interest in retaining discretion as to whom to appoint, "this interest must be balanced with the need to overcome the perception (and perhaps the reality) that the system is not accessible to all races, ethnicities and genders."[8] That is why the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System recommended that the Pennsylvania Supreme Court "[e]stablish as a goal increased opportunities for women and minorities to receive judicial appointments and

[6] *See id.*
[7] *See id.* at 285.
[8] *Id.* at 298; *see also* Elizabeth Cabraser, *Where Are All the Women in the Courtroom?* (Feb. 28, 2014), http://www.lieffcabraser.com/blog/2014/02/where-are-all-the-women-in-the-courtroom.shtml ("Women are noteworthy for their relative absence from court appointments to plaintiff leadership roles; the result is that women are far too few in the courtroom, as first or second chair trial attorneys or as oral argument presenters in all phases of litigation."); Roberta D. Liebenberg, *The Importance of Diversity in a Court's Exercise of Its Appointment Powers*, Counterbalance, Fall 2011, at 36 (detailing the need for diversity in court appointments).

employment with the courts."[9] This need is particularly acute in MDL proceedings when the attorneys designated will be responsible for representing the interests of numerous parties who did not select them as counsel.[10] Some judges have already begun to use their appointment powers to advance the goal of promoting diversity in the profession and the justice system.[11]

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, including women and minorities. The court can ensure that arrangements negotiated by counsel do not lead to the exclusion of attorneys who bring valuable skills, resources, or perspectives to the litigation. In multidistrict litigation that is likely to involve the application of multiple states' laws, geographic diversity may be an important consideration as well.

Best Practice 4H: In large cases, the transferee judge should encourage the leadership team to provide work for the common benefit of the cases to other attorneys who are qualified and available to perform the work, unless doing so would create inefficiency in the prosecution of the claims. The transferee judge should inform the leadership team at the outset if it does not want them to assign work to other counsel.

In most cases, courts expressly authorize other counsel to perform work on the case so long as the work has been assigned and is supervised by lead counsel. Even though they are not part of the leadership structure, additional plaintiffs' counsel can bring different and necessary skills and experience to the litigation and provide the support the leadership team needs to accomplish all of the required tasks in the case. When making these assignments, lead counsel should be mindful, whenever possible, to assign work to qualified female and minority attorneys. At the same time, lead counsel must ensure that

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[9] *Pennsylvania Report*, *supra* note 1, at 299.

[10] *See In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007) ("Appointment of class counsel is an extraordinary practice with respect to dictating and limiting the class members' control over the attorney-client relationship and thus requires a heightened level of scrutiny to ensure that the interests of the class members are adequately represented and protected.").

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

distributing work does not lead to inefficiency and unnecessary expense. The number of attorneys participating should not be disproportionate to the needs of the case.