

## **THE IMPORTANCE OF DIVERSITY IN A COURT'S EXERCISE OF ITS APPOINTMENT POWERS, by Roberta D. Liebenberg**

Much attention has been focused on the efforts by law firms and corporate legal departments to promote diversity and provide greater opportunities for women and minority lawyers. There has been far less discussion of whether courts have done enough to promote diversity through the exercise of their discretionary appointment powers. This is a significant issue because federal and state court judges routinely appoint lawyers to a number of important positions, such as lead counsel in class actions; special masters; receivers; trustees; hearing officers; referees; mediators and arbitrators; guardians; and as counsel for criminal defendants.

Numerous federal and state court gender, racial and ethnic bias task forces have examined how women and minorities are faring in our nation's courts. They have found that women and minority attorneys "are often excluded from important court appointments."<sup>1</sup> For example, the landmark Report issued by the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System found that women and minorities were significantly underrepresented on court appointment lists.<sup>2</sup> This underrepresentation in court appointments "reduce[d] their opportunities to gain the experiences necessary to further their careers."<sup>3</sup> Moreover, women and minority attorneys "perceive that they are excluded from receiving court appointments because they are not members of the 'old boys' network' of white male attorneys and judges."<sup>4</sup> The Report stressed that although 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."<sup>5</sup> Therefore, it was recommended to the Pennsylvania Supreme Court that it "[e]stablish as a goal increased opportunities for women and minorities to receive judicial appointments and employment with the courts."<sup>6</sup>

The ABA Commission on Women in the Profession recently created a Committee which will further shine a spotlight on the ability of courts to promote diversity through their appointment powers. The Committee is comprised of a number of prominent women judges, and is chaired by Justice Nan Duffly of the Massachusetts Supreme Judicial Court, a former president of NAWJ.<sup>7</sup> The Committee intends to educate judges

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<sup>1</sup>Lynn Hecht Schafran and 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>.

<sup>2</sup> 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. Report available at <http://origin-www.aopc.org/NR/rdonlyres/EC162941-F233-4FC6-9247-54BFE3D2840D/0/FinalReport.pdf>

<sup>3</sup> *Id.* at 296.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 298.

<sup>6</sup> *Id.* at 299.

<sup>7</sup> The Committee includes Judges Margaret McKeown (9<sup>th</sup> Circuit); Martha Daughtrey (6<sup>th</sup> Circuit); Norma Shapiro (E.D.Pa.); Barbara Lynn (N.D. Tex.); Nancy Atlas (S.D.

around the country about the need to make appointments which are inclusive of women and minorities. We believe that, by securing such appointments, women and minority lawyers will also become better positioned to advance within their law firms and perhaps enhance their prospects of becoming judges themselves. Our society and legal profession are diverse, and thus it is imperative that women and minority lawyers be afforded an equal opportunity to secure court-appointed positions.

One federal district court judge who has taken the lead in the effort to promote diversity in judicial appointments is Judge Harold Baer of the Southern District of New York. Judge Baer became concerned by the lack of female and minority lawyers at law firms, and concluded that he could help address that problem by taking diversity into account in making appointments of lead counsel for plaintiffs in class actions. For example, Judge Baer entered an order in a securities class action last Fall directing the two plaintiffs' firms serving as Co-Lead Counsel for the class to "make every effort to assign to this matter at least one minority lawyer and one woman lawyer with requisite experience." *In re: Gildan Activewear Inc. Securities Litig.*, 2010 U.S. Dist. LEXIS 140619 at \*3 (S.D.N.Y. Sept. 20, 2010). Judge Baer emphasized that "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." *Id.* Indeed, Judge Baer has demonstrated his strong commitment to diversity in the appointment of class counsel in several other cases as well.<sup>8</sup>

With respect to the appointment of class counsel, the Manual on Complex Litigation and various Circuit Courts have endorsed the use of "private ordering" among plaintiffs' counsel in order to secure agreement as to who should serve as lead counsel for the class.<sup>9</sup> However, although it may be desirable to avoid competing lead counsel applications, there is a risk that women and minority lawyers may be shortchanged in the "private ordering" process. 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.<sup>10</sup>

At the Federal Bench Bar Conference held in June, 2011 in Philadelphia, Judge Cynthia Rufe of the United States District Court for the Eastern District of Pennsylvania spoke

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Tex.); Bernice Donald (W.D. Tenn.); Nancy Gertner (D. Mass.); and Elizabeth Stong (Bankruptcy Ct. E.D. N.Y.). Justice Nan Duffly is NAWJ's ABA Delegate and was appointed a commissioner on the ABA's Commission for Women in the Profession.

<sup>8</sup> *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D. N.Y. 2007); *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 95 n. 23 (S.D.N.Y. 2010); *In re Dynex Capital, Inc. Securities Litig.*, 2011 U.S. Dist. LEXIS 22484 at \*25 (S.D.N.Y. March 7, 2011) ("diversity is a factor of critical importance" in the appointment of class counsel.)

<sup>9</sup> Manual for Complex Litigation Fourth §21.272 (2004); *See e.g.*, Report of the Third Circuit Task Force, Selection of Class Counsel, 208 F.R.D. 340, 345 (2002).

<sup>10</sup> *See* Robert H. Klonoff, *Multi-Jurisdictional and Cross-Border Class Actions: Symposium Issue: The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 Mich. St. L. Rev. 671, 673 (2004).

about the importance of diversity in the appointment of counsel for a plaintiff class. She discussed her selection of the Plaintiffs' Steering Committee in the *Avandia Marketing, Sales Practices and Products Liability Litigation*, MDL No. 1871. In that class action, Judge Rufe emphasized to Plaintiffs' counsel that she wanted qualified women and minorities to be well represented on Plaintiffs' Steering Committee, that all appointments would be made by the Court through an open application process completed by on-the-record interviews, and that the Court would not be restricted to recommendations based on an "old boys' network" of plaintiffs' lawyers. As a result, the Steering Committee that she appointed was inclusive and diverse, with women attorneys placed in leadership positions based on their experience and qualifications. *See, e.g.*, April 9, 2008 Order in MDL No. 1871.

Courts can and should utilize their appointment powers to advance the salutary goal of promoting diversity in the legal profession and the justice system. Ensuring the full participation of women and minority lawyers in court-appointed roles will demonstrate that the judicial system is fully committed to fairness and equality for all, not just in words, but also in deeds.

*Roberta D. Liebenberg is a senior partner at Fine, Kaplan and Black in Philadelphia. She is Chair of the ABA Commission on Women in the Profession. She was also Co-Chair of the Friends Committee for the 2007 NAWJ Annual Conference in Philadelphia. Ms. Liebenberg was Chair of the ABA Standing Committee on the Federal Judiciary 2006-07.*