

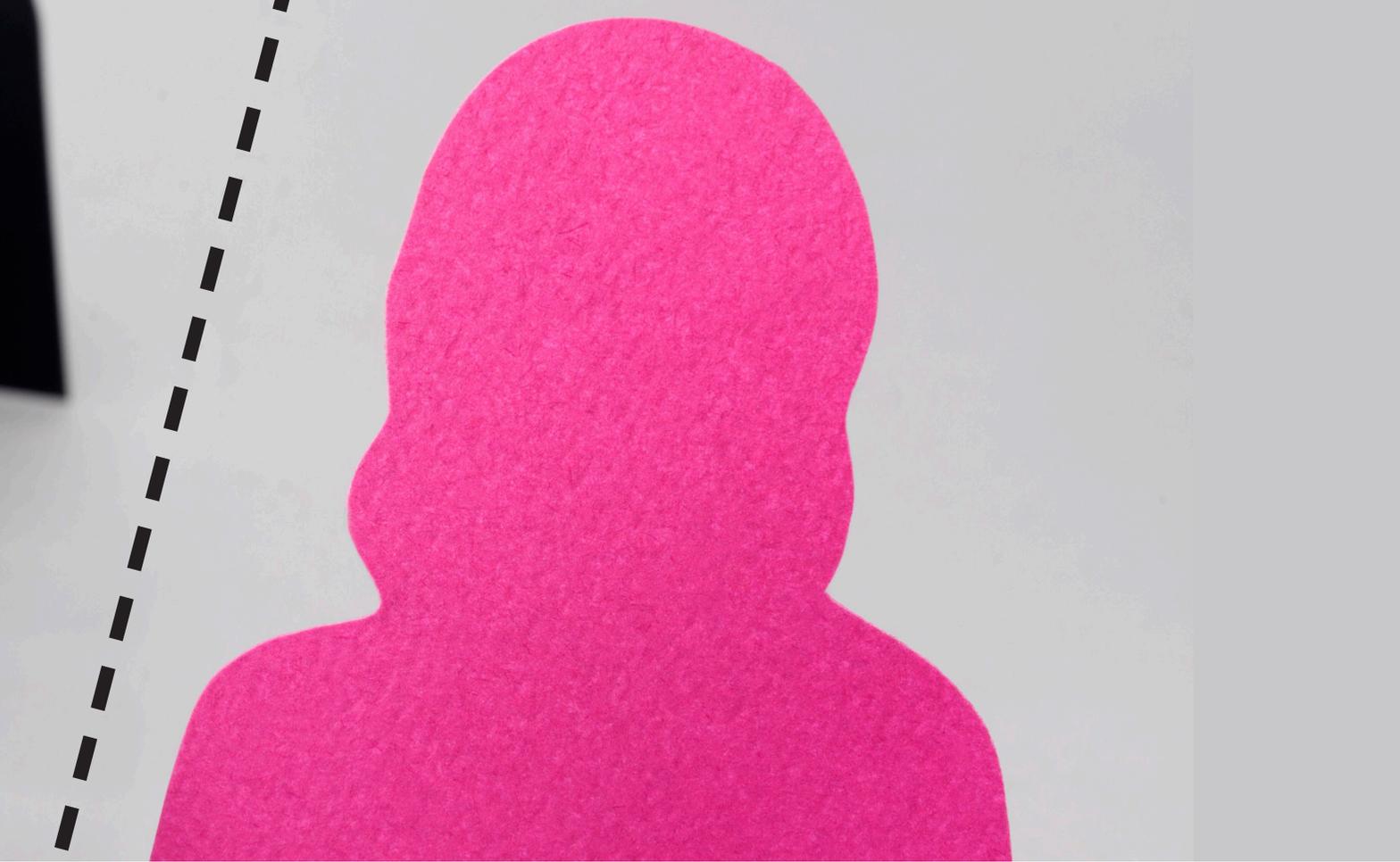


# AN OPPORTUNITY OR LANDMINE

## PROMOTING GENDER DIVERSITY FROM THE BENCH

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**O**n Nov. 18, Hon. Kathryn Vratil appointed 11 female lawyers to a 20-lawyer executive committee overseeing approximately 300 cases consolidated in *In re: Ethicon Inc. Power Morcellator Products Liability Litigation*.<sup>1</sup> The appointments marked the first time women composed the majority of a leadership committee in a consolidated multidistrict litigation (MDL) proceeding.<sup>2</sup> While the press covering the mass tort and the class action bar lauded the milestone, the applause made me slightly uneasy.



The appointments were made to oversee lawsuits alleging that Ethicon's power morcellators—medical devices used in laparoscopic uterine surgeries—have caused women to develop an aggressive form of cancer.<sup>3</sup> Did these appointments portend that women should only hold a majority leadership stake over cases involving so-called women's issues?

Paul Pennock, co-lead counsel with Aimee Wagstaff on the official committee in *Power Morcellator*, said he and Wagstaff were inspired to create a leadership team of mostly women after hearing Judge Vratil, a former member of the U.S. Judicial Panel on Multidistrict Litigation, talk at a conference on best practices in MDLs held by Duke Law School's Center for Judicial Studies in September 2014. "The timing of the developing litigation [on power morcellators] is what drove this as being the case" where a female-majority leadership team was appointed, explained Pennock. "It would not have mattered at all what [the case] was; we were going to try and put [a leadership team of women] together."

Unlike typical civil litigation where clients have absolute control over which lawyer will prosecute or defend their claims, courts have absolute control over which lawyers will lead class actions or coordinated mass tort litigation. One court explained: "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."<sup>4</sup> Thus, courts have the power to address gender—or not—when appointing lead counsel in class actions or mass torts.

#### **Rule 23(g) of the Federal Rules of Civil Procedure**

Rule 23(g) of the Federal Rules of Civil Procedure, which regulates the courts' appointment of class counsel and leadership committees, provides in pertinent part:

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.

Noticeably absent from Rule 23(g)(1)(A) is any consideration of gender. But 23(g)(1)(B) provides courts with the discretion to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."

Running with this discretion, Hon. Harold Baer Jr. (deceased) regularly required diversity when appointing class leadership. For example, in a 2007 ERISA and age discrimination case, *In re J.P. Morgan Chase Cash Balance Litigation*, Baer noted that the proposed class included thousands of plan participants, both male and female, diverse racially and ethnically.<sup>5</sup> Granting plaintiffs' motion for class certification, in part, and a request for appointment of class counsel, Baer held:

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.<sup>6</sup>

Subsequently, in *In re Gildan Activewear Inc. Securities Litigation*, Baer appointed two law firms as class counsel, while also imposing a diversity requirement on the plaintiffs' firms. Baer ordered that class counsel "shall make every effort to assign to this matter at least one minority lawyer and one woman lawyer with requisite experience."<sup>7</sup> Five days later, the firms submitted letters to the court setting forth their staffing of the case as well as their diversity commitments.<sup>8</sup> Baer then entered an order stating that co-lead counsel may have "misconstrued . . . that the Court was expressing a specific factual view" of the law firms. Explaining that "the Class Action Order was not intended to be critical in any way of Co-Lead Counsel's prosecution of the case, its staffing of the case, or its diversity efforts," Baer stated that the order was merely "expressing [his] view that the diversity considerations set out in the *J.P. Morgan* Order, 242 F.R.D. 265, 277 (S.D.N.Y. 2007), were goals I would urge be met in similar cases that come before me."<sup>9</sup> These examples echoed this practice and are reflected in multiple other cases.<sup>10</sup>

Baer's view is shared by other judges outside the class context, too. Hon. Barbara Lynn of the Northern District of Texas believes that "[i]f you have a diverse jury, you should have a diverse trial team when you can. And if you have a judge who has expressed an interest in diversity, you want to have a diverse team for oral argument. If the judge is interested in having young lawyers, you should have young lawyers. When given opportunities, they do fantastic."

### The Numbers Don't Lie

Is the level of judicial intervention exercised by Baer required to ensure women have leadership positions in complex nationwide litigation?

According to a 2015 study of 558 randomly selected civil cases (class and nonclass) filed in 2013 in the Northern District of Illinois, men appeared as lead counsel 76 percent of the time, and women appeared as lead counsel 24 percent of the time.<sup>11</sup> The study, titled "First Chairs at Trial: More Women Need Seats at the Table," found that two-thirds of the appearances filed in federal court are male lawyers.<sup>12</sup>

With respect to class actions, the study found that male lead counsel dominated 87 percent of the time, whereas women filed their appearances as lead counsel just 18 percent of the time.<sup>13</sup> Of the 48 class actions included in the sample, 47 cases (98%) had at least one male lead counsel, and 34 cases (71%) did not have any women lead counsel.<sup>14</sup> Moreover, of all the lawyers filing appearances in class actions, 68 percent were men and 32 percent were women.<sup>15</sup>

Consistent with these findings, another study was undertaken of product liability MDLs pending as of April 15, 2014.<sup>16</sup> The available

data reflected that men were appointed lead counsel 11.8 times more often than women from 2000–04, 6.73 times more often from 2005–09, and 3.02 times more often from 2010–14.<sup>17</sup> However, when the author focused on appointments to plaintiffs' executive committees (PEC) (akin to lead counsel), compared to plaintiffs' steering committees (PSC) (working under the direction of the PECs), he found that from 2005–09 men were appointed 7 times as often as women to PEC positions. From 2010–14, this number decreased to 5.47, but it was still higher than the PSC appointment rate of 3.02 during the same period.<sup>18</sup>

While judges have very little power in the majority of civil cases to address the gap, courts do have the discretion to address any disparity in class or mass tort actions pursuant to Rule 23(g). But not all judges or justices (or lawyers) agree that it is the right thing to do.

After Baer appointed three law firms as class counsel in an antitrust class action challenging the merger of satellite digital audio radio services,<sup>19</sup> he ordered the firms to "ensure that lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics."<sup>20</sup> Following class certification, the parties reached a settlement that drew objections both to the terms of the settlement and to Baer's reliance on race and gender in assessing the adequacy of class counsel.<sup>21</sup> The Second Circuit rejected the objections, and the class member appealed to the Supreme Court. While the Supreme Court denied certiorari, Justice Samuel Alito took an unusual step.

"Respecting the denial of the petition for writ of certiorari," Alito nonetheless published a statement:<sup>22</sup> "I am hard-pressed to see any ground on which Judge Baer's practice [requiring racial and gender diversity among class counsel] can be defended." Speculating that Rule 23(g) does not offer the discretion Baer exercised, Alito characterized the appointment of class counsel where race or gender is used as a factor as potential discrimination and "objectionable."<sup>23</sup>

Alito queried whether the consideration of gender or race in appointing lead counsel could be reconciled with Rule 23(g). He suggested that "any deviation from the criteria set out in the Rule may give rise to suspicions about favoritism. There are more than 600 district judges, and it would be intolerable if each judge adopted a personalized version of the criteria set out in Rule 23(g)."<sup>24</sup> While Alito was forced to acknowledge that Rule 23(g)(B) allows a court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," he nonetheless cast "doubt that this provision can be stretched to justify the practice at issue here." Suggesting that further review may be required in future cases,<sup>25</sup> he explained, for purposes of his statement:

It seems quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race and gender of counsel mirror the demographics of the class. Indeed, if the District Court's rule were taken seriously, it would seriously complicate the appointment process and lead to truly bizarre results.

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Where the demographics of the class can be ascertained or approximated, faithful application of the District Court's rule would lead to strange results. The racial and ethnic makeup of the plaintiff class in many cases deviates significantly from

the racial and ethnic makeup of the general population or the bar. Suppose, for example, that the class consisted of persons who had undergone a particular type of treatment for prostate cancer. Would it be proper for a district judge to favor law firms with a high percentage of male attorneys? Or if the class consisted of persons who had undergone treatment for breast cancer, would it be permissible for a court to favor firms with a high percentage of female lawyers?<sup>26</sup>

In a subsequent interview with Reuters, Baer stated that Alito lacked “either understanding or interest” in race- or gender-based discrimination and characterized Alito’s criticism that the judiciary should not consider race or gender as factors under Rule 23(g) as “unfortunate.”<sup>27</sup>

Alito’s statement has not—and, from this female lawyer’s perspective, should not—deterred the judiciary. In fact, Vratil’s recent appointment of a majority-female leadership committee in the *Power Morcellator* litigation is eerily reminiscent of Alito’s query whether it would be appropriate to appoint one gender to lead litigation concerning a cancer treatment for that same gender.<sup>28</sup> According to one recent commentator Melissa Mortazavi, “It is absolutely valid in cases when the product at issue impacts a specific demographic of people to favor law firms that employ at least some members of the affected demographic over another law firm that does not.”<sup>29</sup>

On the other hand, Aimee Wagstaff, lead counsel in *Power Morcellator*, suggests that the gender-makeup of the executive committee on a case concerning the treatment of cancer in women is coincidental. “[I]t seems, more and more, that the medical device industry uses women’s bodies as un-consenting clinical trials. Think *TVM*, *Morcellator*, *Mirena*, *Essure* . . . those four just immediately come to my mind,”<sup>30</sup> she explained. According to Wagstaff, she and Pennock “didn’t organize this leadership ‘because’ it was a woman’s-issue MDL; but, the chances that it would end up being an MDL about women’s issues, when devices are involved, was fairly high.”

Even if not squarely addressed by Rule 23(g), composed Vratil’s appointment of a leadership committee of 11 women and nine men is nonetheless consistent with advice given in *A Pocket Guide for Transferee Judges: “Managing Multidistrict Litigation in Products Liability Cases.”*<sup>31</sup> Encouraging the early organization of counsel and appointment of lead and liaison counsel for plaintiffs, the guide explains:

Committees of counsel, often called steering committees, coordinating committees, management committees, or executive committees, are most commonly needed when group members’ interests and positions are sufficiently dissimilar to justify giving them representation in decision-making.

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[Thus,] [i]t is important to assess: . . . whether designated counsel fairly represent the various interests in the litigation—where diverse interests exist among the parties, consider designating a committee of counsel.<sup>32</sup>

The guide notes that, “[w]hile prior MDL experience is valuable, each case requires different talent.”<sup>33</sup> In fact, the guide encourages courts to include “attorneys who may bring new perspectives.”<sup>34</sup>

Some practitioners agree that the place for inclusion of diversity, if the judge thinks it is relevant, is on a committee. Steve W. Berman, managing partner of Hagens Berman Sobol Shapiro LLP, explained: “In my view, judges should pick the best lawyers [as lead counsel for the class] without regard to diversity, but there is a place for diversity on a committee. If the idea is that the class wants the best lawyer, the class does not pick based on diversity—and neither should a judge.”

The opposite viewpoint, however, counsels that a lawyer’s duties extend beyond competence and diligence, such that a lawyer’s race and gender may be relevant to the lawyers’ understanding, empathy and loyalty to class members with similar demographics. Concluding that “[t]he adherence to the neutral partisan norm must yield to concerns that a lawyer’s identity may be relevant to a just outcome,” Mortazavi wrote:

If adequacy and fairness is validated by technical competence in legal research, filings and support services, then Rule 23(g) is easily met. Yet, as the Rules contemplate, a lawyer’s duties extend beyond standard competence and diligence. Perhaps the most important of the traditional lawyerly duties, the bedrock drawn from agency and fiduciary common law, is a duty of loyalty. Loyalty is not purely technocratic; it requires trust, a relationship and candor. Loyalty allows the lawyer to fulfill his or her role as an advisor. A plausible reading of the adequacy requirement could (and perhaps should) include an emotional intelligence component to fulfill this role—a degree of empathy—in order to adequately represent a client as a counselor and as an advocate.<sup>35</sup>

Moreover, Dodge reported that, in interviews with experienced class action litigators, “[m]any noted that the MDL bench is ‘very deep’ and, thus, that diversity could be obtained without compromising any standards and would yield a more successful MDL.” And many judges, like Baer, Vratil, and others discussed herein, would likely agree.<sup>36</sup>

### **Should This Be a Debate About Race and Gender or About Providing Opportunities To Succeed?**

In his standing order, Judge William Alsup of the Northern District of California instructs: “The Court strongly encourages lead counsel to permit young lawyers to examine witnesses at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district’s reputation for excellence in trial practice.”<sup>37</sup>

In an adaptation of Alsup’s standing order, Hon. Barbara Lynn of the Northern District of Texas added the following guidelines for practice in her courtroom to her standard scheduling order:

The Court is aware of a trend today in which fewer cases go to trial, and in which there are generally fewer speaking or “stand-up” opportunities in court, particularly for young lawyers (i.e., lawyers practicing for less than seven years). 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. 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 understands that there may be circumstances where having a young lawyer handle a hearing might not be appropriate—such as where no young lawyers were involved in drafting the motion, or where the motion might be dispositive in a “bet-the-company” type case. Even so, the Court believes it is crucial to provide substantive speaking opportunities to young lawyers, and that the benefits of doing so will accrue to young lawyers, to clients, and to the profession generally. Thus, the Court encourages all lawyers practicing before it to keep this goal in mind.<sup>38</sup>

Judge Michael J. McShane of the District of Oregon also includes a nearly identical version of Lynn’s guidelines in his practices and procedures, entitled “Opportunities for Young Lawyers,” and further notes: “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.”<sup>39</sup>

Lynn explained that she was “motivated principally by the fact that young lawyers were not getting opportunities in court.” She also noted that “[a] higher percentage of young lawyers today are female and other minorities—much more so than when I first started. I thought [the order] would have that impact of promoting diversity as well, but principally I was motivated to provide young lawyers with more opportunities.”

Lynn said that the result of her order is nearly always that female lawyers are given the opportunity to handle oral arguments, but it also has resulted in other minorities appearing more often before her.

One of the top class-action lawyers in the country, Berman has seen many examples in class cases he has tried where trial judges welcome witness examinations by young lawyers. Berman will typically tell the court that he is letting a young lawyer handle an examination and that the court will “give them a bit of a break within reason.” He explains that the “key is to pick a witness or motion at trial that is not too daunting so that the lawyer has a great experience.”

Giving young lawyers opportunities in the courtroom is a way for senior lawyers to nurture experience because “we have to pass the torch,” said Berman. Passing the torch—by ensuring that young lawyers get much-needed courtroom experience—could be a more subtle way of ensuring diversity.

Lynn recounted an example of a big patent trial in her courtroom, where a female party had a female lawyer sitting on its side for the entire trial who never said a word. While speaking with the jury after the trial, the jury asked Lynn why the female lawyer was not allowed to speak. Lynn passed the comments on to the lawyers, explaining: “Juries don’t like it when they think they are being manipulated—when you have a minority client and have a minority lawyer for window dressing, the jury can see through it.” She said that the court can, too—and she has on several occasions interrupted senior lawyers during oral argument as more junior lawyers are whispering in their ears or passing them notes to ask: “Why don’t they just talk?”

Stacey White, now an administrative patent judge in Dallas with the U.S. Patent and Trademark Office’s Patent Trial and Appeal Board, was an early recipient of an oral argument opportunity as a young lawyer before Alsup. During a trial with Dell and Nokia as part of a larger joint defense group, White explained that “junior attorneys rarely received opportunities to present arguments in court.”

However, because of the encouraging nature of Alsup’s order, White was asked to argue a motion that her clients had been misjoined. The motion was granted—and the clients were happy, the joint defense group was happy, and Alsup was apparently happy. In fact, Alsup subsequently told Lynn about this young, black, female lawyer who had done an excellent job. Unbeknownst to him, White had been Lynn’s former law clerk.

An early beneficiary of a mentor that encouraged junior lawyers to try new things, White credits Robert Turner, then head of the intellectual property (IP) practice at Jones Day. “Robert Turner was a great font of wisdom in IP law, and he really enjoyed encouraging younger lawyers to try new things. He had me getting up in federal court arguing motions my first year,” White said. “He was willing to give me that shot. There are a number of us in the Dallas area that credit him as giving us the first opportunity to develop those courtroom skills. He was one of those people that was looking for a chance to encourage talent he saw in people coming up.”

Just as judges’ orders encouraging opportunities for young lawyers have had positive effects outside the class-action context, so too can similar orders encouraging leadership opportunities for a diverse set of lawyers under Rule 23(g). Without the opportunity for new lawyers to gain experience, some commentators criticize that courts overseeing class actions will continue to appoint “repeat players,” which they posit “can infect leadership committees with well-documented group decision-making biases, like conformity,” “create groups of homogeneous thinkers who are less innovative,” and “cut against the notion that ‘diversity trumps ability’ in disjunctive tasks like identifying and cultivating successful legal arguments.”<sup>40</sup>

While such conclusions cannot be generalized to every class-action or mass tort proceeding, the benefits arising from judges ensuring that young lawyers have a chance to succeed in the courtroom are readily apparent. Such encouragement from the bench—and leadership appointments that weigh gender or race as one factor among many<sup>41</sup>—will help ensure that women and minorities have the opportunity to prove themselves on their merits. ☉

## Endnotes

<sup>1</sup>Order dated Nov. 19, 2015, No. 15-md-2652 (D. Kan.) (Dkt No. 10).

<sup>2</sup>See [www.andruswagstaff.com/professionals/aimee-h-wagstaff-esq](http://www.andruswagstaff.com/professionals/aimee-h-wagstaff-esq) (last accessed Feb. 23, 2016).

<sup>3</sup>Transfer Order, *In re: Power Morcellator Prods Liab. Litig.*, MDL No. 2652 (J.P.M.L. Oct.15, 2015), at 2.

<sup>4</sup>*In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007); see also *id.* (“Judge Jack Weinstein of the Eastern District [of New York] has aptly compared the role of class counsel to that of “a judicially appointed fiduciary, not that of a privately retained counsel.”) (quoting *Schwab v. Philip Morris USA Inc.*, 449 F. Supp. 2d 992, 1106-07 (E.D.N.Y. 2006)).

<sup>5</sup>242 F.R.D. 265, 277 (S.D.N.Y. 2007).

*continued on page 87*



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

<sup>7</sup>*In re Gildan Activewear Sec. Litig.*, No. \_\_\_, 2010 U.S. Dist. LEXIS 140619, \*3 (S.D.N.Y. Sept. 20, 2010). Ten days later, on Oct. 1, 2010, a female lawyer from one of the firms filed an appearance in the case.

<sup>8</sup>Order dated Oct. 22, 2010, *In re Gildan Activewear Sec. Litig.*, No. 08 Civ. 5048 (HB) (Dkt # 63), at 1.

<sup>9</sup>*Id.*

<sup>10</sup>*See, e.g., Spagnola v. Chubb Corp.*, 264 F.R.D. 76 (S.D.N.Y.) (denying motion for class certification where class counsel provided no information concerning the race or gender of the lawyers assigned to the case); *see also Public Employees' Ret. Sys. of Miss. v. Goldman Sachs Group, Inc.*, 280 F.R.D. 130, 142, n. 6 (S.D.N.Y. 2012); *New Jersey Carpenters Health Fund v. Residential Capital, LLC*, No. \_\_\_, 2012 WL 4865174, \*5, n. 5 (S.D.N.Y. Oct. 15, 2012).

<sup>11</sup>"First Chairs at Trial: More Women Need Seats at the Table," at 8,10 (ABA 2015).

<sup>12</sup>*Id.* at 9.

<sup>13</sup>*Id.* at 12.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>Jamie Dodge, "Facilitative Judging: Organizational Design In Mass-Multidistrict Litigation," 64 EMORY L.J. 329, 363-364 (2014); *see also* Elizabeth Chamblee Burch, "Judging Multidistrict Litigation," 90 N.Y.U.L. REV. 71, n. 102 (April 2015) (within the 72 product-liability and sales-practices multidistrict litigations that were pending as of May 14, 2013, 50 attorneys were identified as being appointed five or more times as lead counsel; of those 50 attorneys, 11 were female).

<sup>17</sup>Dodge, 64 EMORY L.J. at 363-364.

<sup>18</sup>*Id.* at 365.

<sup>19</sup>*Martin v. Blessing*, 134 S. Ct. 402 (2013).

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 403.

<sup>22</sup>*Id.* at 402.

<sup>23</sup>*Id.* at 403 (citing and quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) ("Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.")).

<sup>24</sup>It is well established that "a denial of certiorari does not constitute an expression of any opinion on the merits." *Martin*, 134 S. Ct. at 405 (Alito, J., statement respecting the denial of the petition for writ of certiorari) (quoting *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007)) (Stevens and Kennedy,

JJ., statement respecting denial of certiorari) (internal quotation marks omitted).

<sup>25</sup>*Martin*, 134 S. Ct. at 405.

<sup>26</sup>*Id.* at 403-04.

<sup>27</sup>"Federal Judge Criticized by Supreme Court Justice Fires Back" (Dec. 6, 2013), available at [www.reuters.com/article/idUSL2N0JL1YK20131206](http://www.reuters.com/article/idUSL2N0JL1YK20131206).

<sup>28</sup>*Cf.* "Women should be among lead lawyers in IUD case, federal judge says," A.B.A. J. (May 20, 2013), available at [www.abajournal.com/news/article/iud\\_litigation\\_needs\\_some\\_women\\_as\\_lead\\_lawyers\\_says\\_federal\\_judge](http://www.abajournal.com/news/article/iud_litigation_needs_some_women_as_lead_lawyers_says_federal_judge) ("There are no women lawyers on the proposed plaintiffs [four-person] executive committee overseeing the Mirena IUD litigation, and that's a problem, considering the nature of the case, a federal judge told counsel Friday at an initial status conference.")

<sup>29</sup>Melissa Mortazavi, *Blind Spot: The Inadequacy of Neutral Partisanship*, 63 UCLA L. REV. DISC. 16, 22 (2015).

<sup>30</sup>TVM refers collectively to (1) *In re C.R. Bard Inc. Pelvic Repair System Products Liability Litigation*, MDL No. 2187(S.D. W.Va.); (2) *In re American Medical Systems Inc. Pelvic Repair System Products Liability Litigation Repair*, MDL No. 2325(S.D. W.Va.); (3) *In re Boston Scientific Corporation, Pelvic Repair System Products Liability Litigation*, MDL No. 2326(S.D. W.Va.); (4) *In re Ethicon Inc, Pelvic Repair System Products Liability Litigation*, MDL No. 2327 (S.D. W.Va.); (5) *In re Coloplast Corp. Pelvic Support Systems Product Liability Litigation*, MDL No. 2387(S.D. W.Va.); (6) *In re Cook Medical Inc. Pelvic Repair System Product Liability Litigation*, MDL No. 2440 (S.D. W.Va.); and (7) *In re Neomedic Pelvic Repair System Product Liability Litigation*, MDL No. 2511(S.D. W.Va.). *Mirena* refers to *In re: Mirena IUD Products Liability Litigation*, No. 13-MD-2434 (S.D.N.Y.). Essure refers to cases filed nationwide concerning allegedly defective IUD implants.

<sup>31</sup>Barbara Rothstein & Catherine R. Borden, *A Pocket Guide for Transferee Judges: "Managing Multidistrict Litigation in Products Liability Cases"* (Federal Judicial Center 2011).

<sup>32</sup>*Id.* at 11, 13.

<sup>33</sup>*Id.* at 13.

<sup>34</sup>*Id.*

<sup>35</sup>Mortazavi, *supra* note 29, at 23.

<sup>36</sup>64 EMORY L.J. at 382, note 188 ("Another federal jurist said [at the Duke Law Conference on MDL (Sept. 11-12, 2014)] that 'it's inexcusable that the panel structure is so nondiverse. I'd count from 300 attorneys, get 10 women, 1-to-2 people of color. This meeting today reflects that same reality. ... Some judges are seeking it [diversity] out, and if they are rejecting your private ordering [slates] that may be why.'" (citations omitted)).

<sup>37</sup>"Guidelines for Trial and Final Pretrial Conference in Civil Jury Cases Before the Honorable William Alsup," ¶ 39 (April 19, 2013), available at [www.cand.uscourts.gov/whaorders](http://www.cand.uscourts.gov/whaorders).

<sup>38</sup>Order setting hearing (Nov. 12, 2015), *Velasco v. Blue Cross Blue Shield of Texas*, No. 3:15-CV-615-M (Dkt No. 31).

<sup>39</sup>[www.ord.uscourts.gov/index.php/court-info/judges/judge-mcshane](http://www.ord.uscourts.gov/index.php/court-info/judges/judge-mcshane) (last accessed February 23, 2016).

<sup>40</sup>Burch, *supra* note 16, at 86 (citations omitted).

<sup>41</sup>63 UCLA L. REV. DISC. at 25 ("Accordingly, in determining whether counsel may adequately represent a class, the race of lawyers may matter; the gender of lawyers may matter; and both should be considered in determining the adequacy of a legal representative on a case-by-case basis. Perhaps what is most surprising about *Martin* is how long it has taken for a federal judge to openly come out and say so.")