

Western Alliance Bank Webinars – P&N / WAB Series

Title: Leadership, Judicial Guidance, and the Economics of Diversity.

Overview	This panel will focus on the specific challenges faced by men of color in leadership positions in complex mass tort and class action litigations nationwide. The panel will highlight the importance of attorney diversity and the impact it has on clients, the efforts by the JMPL panel and other courts to increase diversity, and other unique issues that arise in the pursuit of leadership positions. We have assembled an all-star panel of litigators who have led and served in positions of leadership in multidistrict litigations and who will share their extensive experience and knowledge with the attendees.			
Release Date	2/23/22			
Length	60 min			
Webinar Outline	<ul style="list-style-type: none"> A. Brooke Hodge (P&N/co-moderator) Introduction of panelists and overview of webinar (5 mins) B. Majed Nachawati (Fears Nachawati/co-moderator) importance of topic and a quick discussion of law 360 article- see attached (10 mins) C. Khaldoun Baghdadi (Walkup Melodia)- Were diverse leadership opportunities such as <i>Paraquat</i> and <i>JUUL</i> MDLs available 5 years ago? How have these opportunities increased? (10 mins) D. Marlon Kimpson (Motley Rice) – discuss <i>In re Blackbaud</i> MDL leadership “Most Diverse Leadership Team Ever” and how that came about- see attached (10 mins) E. Navan Ward (Beasley Allen)- discussion of efforts that AAJ is making to increase diversity “Pledge To Act” (https://justicedotorg.wufoo.com/forms/r11zt44u1e0rem5/) (10 mins) <p>Roundtable topics: (15 mins)</p> <ul style="list-style-type: none"> 1. Does geography play a role in increased/decreased opportunities for men of color? 2. There have been increased efforts for women to be put forward for leadership positions- what about men of color? Are these competing interests? 3. Economics- minority owned law firms and financing. How does money change the ability to become a leader in mass and class cases nationwide? 4. Are there ethical requirements to have diverse attorney representation? If not, should there be? 			
BIOs (need for CLE)	Attached in Document			
Content/Slide Deck (need for CLE)	Attached in Document			
Confirmed Panelists	<u>Names</u>	<u>Organization</u>	<u>Mobile Numbers</u>	<u>Emails</u>
	Majed Nachawati Khaldoun A. Baghdadi Marlon Kimpson Navan Ward Jr. Brooke Hodge	Fears Nachawati Law Firm Walkup, Melodia, Kelly & Schonberger Motley Rice LLC Beasley Allen Postlethwaite & Netterville	214-890-0711 415-317-8055 843-834-6651	mn@fnlawfirm.com kbaghdadi@walkuplawoffice.com mkipson@motleyrice.com navan.ward@beasleyallen.com bhodge@pn CPA.com
Moderator	Brooke Hodge; Majed Nachawati			
WAB/PN staff backstage				
CC on emails (not on stage)				
Schedule	1/28/22	Work with PN / WAB on content for CLE and outline/flow for webinar. Make sure we have everything to request CLE approval.		
	1/31/22 12:30p ET	Tech Check and Rehearse		
	2/9/22 3p ET	Record		
	2/16/22	1 week for Navis to edit final webinar, verify CLE approval, create links for handouts, webinar and CLE, work with IT department to get posted.		
	2/23/22	Release Date		
States auto request CLE	1. FL 2. IL 3. SC 4. TX	5. CA		

MAJED NACHAWATI

Majed Nachawati is a co-founding partner of Fears | Nachawati Law Firm. Majed began his legal career as a two year judicial law clerk with The Thirteenth Court of Appeals. His firm represents individuals and public entities throughout the nation in bad medical device and pharmaceutical cases, whistleblower cases, legal malpractice and barratry cases, antitrust matters and product defect cases. His firm is heavily involved in pharmaceutical and medical device litigation—holding current leadership positions on the Plaintiff’s Steering Committee in the Bard and Cook IVC Filter Litigation. His firm also represents multiple public and private entity clients in litigation arising from product defects. He is admitted to argue before the U.S. Supreme Court. He served as the Panel Chairman for The Grievance Committee for the State Bar of Texas, District 6, and was an appointed member for the past five years with his term ending in June 2019. He serves as a Committee Member for The Dallas Bar Association’s (DBA) Legal Ethics Committee and Lawyer Referral Service Committee. Mr. Nachawati also serves as member of The Board of Directors of Public Justice, The Board of Directors for the Texas Trial Lawyers Association and is a member of the Dallas Trial Lawyers Association. He is an appointed member of The William ‘Mac’ Taylor American Inn of Court and is licensed to practice law in Texas, Arkansas and the U.S. District Courts for the Southern, Eastern and Northern Districts of Texas as well as the U.S. District Court of Colorado. Majed is an AAJ Leader’s Forum Member and remains a dedicated supporter of AAJ PAC. Majed lives in North Dallas with his wife, daughter and son. In their free time, they enjoy traveling and dedicating time to worthy causes.

KHALDOUN A. BAGHDADI

Khaldoun is a shareholder at Walkup, Melodia, Kelly & Schoenberger. Since 2009, Khaldoun has been named a Northern California Super Lawyer®. In addition, Khaldoun is AV – Pre-Eminent rated by Martindale Hubbell, signifying the highest peer review mark for ethics and standards of practice. He is a member of the American Board of Trial Advocates, the American College of Trial Lawyers, and the International Society of Barristers. Khaldoun served an adjunct instructor teaching trial advocacy at the University of California, Berkeley School of Law. He also served as an adjunct professor at the University of California, Hastings College of the Law. He has also served as an instructor on trial technique, deposition practice and lawyering skills for the National Institute of Trial Advocacy. Active in the courtroom and the community, Khaldoun served the City of San Francisco by way of Mayoral appointment to the San Francisco Human Rights Commission. In 2006, he was elected chair of that body.

MARLON KIMPSON

Marlon Kimpson has dedicated much of his life to fighting for those who have been wronged by corporations and organizations that put profits over people. As a partner with Motley Rice LLC, Kimpson represents victims of corporate malfeasance, from investors in securities fraud cases to consumers harmed by large data and privacy breaches, as well as people injured or killed in catastrophic incidents.

Marlon also currently serves as South Carolina State Senator of District 42, representing citizens of Charleston and Dorchester Counties. A frequent speaker, Marlon has presented at seminars and conferences across the country, including the Public Funds Summit, the National Association of State Treasurers, the South Carolina Black Lawyers’ Association, the National Conference on Public Employee Retirement Systems (NCPERS) and the National Association of Securities Professionals (NASP).

Kimpson graduated from Morehouse College and received his J.D. from the University of South Carolina School of Law. Kimpson has two young children, Marleigh and Marlon Davis.

NAVAN WARD JR.

Navan Ward, Jr., is a Principal at Beasley, Allen, Crow, Methvin, Portis and Miles, P.C. Currently, Navan heads up the firm's new Atlanta office location. He is the firm's lead attorney on the Proton Pump Inhibitor (PPI) litigation, which involves thousands of victims who ingested defective prescription and over the counter medicine for acid reflux, which resulted in users suffered kidney damage. Navan is also the firm's lead attorney on the Metal-on-Metal hip implant litigation, which involves thousands of victims who have defective hip implants causing severe pain, metal poisoning, revision surgery, and in some cases permanent injury. Additionally, Navan serves as the President for the American Association for Justice (AAJ).

Navan has been selected to a team of lead lawyers, called either the Plaintiffs Executive Committee (PEC) or Plaintiffs Steering Committee (PSC) for several Multi-District federal court litigations (MDL). Most recently, he was appointed as a PEC member of the PPI Products Liability MDL, located in Newark, New Jersey. Navan was appointed as Co-Lead Counsel in the Biomet M2a Magnum Hip Implant Products Liability MDL. He's also served as a member of the PSC in the DePuy "ASR" Hip Implant Recall Multi-District Litigation (MDL), as well as a PSC member for the DePuy "Pinnacle" hip replacement MDL. He has been instrumental in assisting with the global settlements against these major hip implant manufacturers, including Johnson & Johnson / DePuy, Howmedica Osteonics Corporation / Stryker, and Biomet Corporation, as well as additional confidential settlements involving other metal-on-metal and/or modular-neck hip components.

Navan was also heavily involved in with the hormone replacement therapy (HRT) litigation, representing hundreds of women who were diagnosed with breast cancer because of ingesting these combination hormone medications. Navan has been responsible for overseeing multiple other pharmaceutical drug and/or device litigations, such as Meridia; Celebrex; Bextra; Permax; and Dostinex pharmaceutical drug litigations.

Navan has also litigated nursing home neglect and abuse, as well as wrongful death trucking cases in Mississippi, Tennessee, Alabama and Georgia. Navan has litigated cases where the nursing home resident suffered from injuries such as multiple falls, bedsores, malnutrition, dehydration, aspiration pneumonia, and sepsis/infections.

Judges Should Foster Diversity In MDL Leader Appointments

By **Majed Nachawati** and **Michael Gorwitz** (June 14, 2021, 1:15 PM EDT)

Often, when we speak of barriers to equality in professional settings, we speak of the so-called glass ceiling. Traditionally, this metaphor has been used to express the challenges women face in ascending to managerial positions — a high point of professional advancement you could see, but never reach.

Fortunately, that impediment has finally begun to show a few cracks. Still, many other barriers to professional equality remain firmly in place.

In the legal profession, judges can take an influential first step toward reform by making more diverse appointments to leadership positions in multidistrict litigations.

In addition to the glass ceiling, in law we often speak of gatekeepers. The metaphor is meant to be benign, a necessary aspect of the judicial system's gradual sifting and winnowing of meritorious claims from the frivolous. The image of the gatekeeper is most often bestowed on judges in the context of admission of potential expert testimony.

However, when it comes to consolidated multidistrict litigation, the trial judge performs a crucial gatekeeping function for the legal community itself with the appointment of lawyers to leadership positions in MDLs.

U.S. District Judge Brian Martinotti of the U.S. District Court for the District of New Jersey demonstrates a key example of the beneficial power these judicial gatekeepers have the potential to wield. In a December 2020 pretrial order in *In re: Elmiron (Pentosan Polysulfate Sodium) Products Liability Litigation*, Judge Martinotti informed the parties of his expectation that leadership would be "diverse in gender, ethnicity, geography, and experience."

This directive resulted in a leadership committee that was three-fourths women.

While no official rule of procedure governs the selection and appointment of MDL leadership positions, the Manual for Complex Litigation enshrines a set of best practices for the judiciary. As the manual notes, "Few decisions by the court in complex litigation are as difficult and sensitive as the appointment of designated counsel."



Majed Nachawati



Michael Gorwitz

It is for this reason that the manual advises judges "to take an active part in the decision on the appointment of counsel," going so far as to recommend holding an evidentiary hearing to assess the relative merits of the attorneys desirous of appointment to leadership positions within the MDL.

Thus, just as a trial judge in a normal suit serves as the gatekeeper to the admission of potential expert testimony, the judge serves the same function for the attorneys themselves in an MDL. Rather than weighing the relative merits of scientific methodologies, the judge is tasked with weighing CVs.

As with society at large, these important appointments have traditionally been the exclusive purview of white men and the firms that they own.

As demonstrated by findings published in March by the George Washington University's James F. Humphreys Complex Litigation Center, men are five times more likely to be appointed to MDL leadership positions than women.[1] And, in a 2020 study conducted by Law.com, at best only 9% of MDL leadership appointments between 2016-19 went to attorneys of color.[2]

As we are becoming more aware, it isn't necessarily that judges have consciously barred minority applicants from MDL leadership positions. A number of factors — historical, institutional, implicit and, yes, sometimes explicit — have conspired to frustrate this country's attempts at creating a more equal society.

The point of this article is not to point a finger at the root causes of disparity in society, but rather to highlight how judges can begin to take an active role in fixing one narrow aspect of it.

This is why the judicial gatekeeper metaphor is an important one. The MDL leadership gate can potentially swing both ways.

On one hand, the gate has historically been a barrier to minority communities — and the firms they own — from positions of influence and power within important multistate litigations. This is due in part to the inherent way that power structures tend to preserve themselves.

As noted by the George Washington University Complex Litigation Center report, "The decades-long record of appointing lawyers largely from a small group of repeat players, who gained the experience used to justify their role at a time when the most visible members of the profession's leaders consisted of white males," resulted in an entrenched favoritism.[3]

However, the gate can also be swung open to help enshrine diversity in this symbolically — and literally — important position for the legal community as a whole.

MDL leadership positions are important because they have the ability to shape crucial litigation across the entire country. Unlike a class action, which involves the resolution of a large number of distinct claims in a single action, an MDL ties together potentially thousands of separate cases filed in courts throughout the country for coordinated pretrial proceedings, before being remanded to individual trials on the merits.

This is why diversity in MDL leadership is so important. Nothing says "business as usual" like seeing a large number of cases removed from their initial jurisdiction, transferred to a single court and then handed off to a familiar set of firms — largely owned by white men — for resolution of crucial pretrial

discovery and motion practice issues.

What is most important to bear in mind when considering these issues is that while there are many barriers to minority practitioners within the legal community, there is no barrier between diversity and ability.

The manual lists a number of factors judges should consider when weighing MDL leadership appointments. Crucially, one of these factors is "whether designated counsel fairly represents the various interests in the litigation — where diverse interests exist among the parties, the court may designate a committee of counsel representing different interests."

Note that "diverse interests" is not defined in terms of identity politics. Diversity as a concept touches on every aspect of complex nationwide litigation: geographical diversity of plaintiffs, legalistic diversity of claims, temporal diversity of inciting events.

The same is true of the firms who seek to lead these important nationwide suits. Courts should be aware of the diversity in ownership of the firms seeking leadership positions, in addition to the attorneys themselves, if they hope to begin to reverse the structural disparities that have dominated this field of practice.

In order to best resolve the wide range of claims from a wide range of claimants in an MDL, it is important that courts appoint a diverse group of attorneys and firms, in every sense of the word, to leadership positions. Judges should embrace their role as gatekeepers of these important positions in order to continue to foster a more open, inclusive and, most importantly, just legal system, for everyone involved.

Majed Nachawati is a founding partner and Michael Gorwitz is an attorney at the Fears Nachawati Law Firm.

Disclosure: Fears Nachawati represents consumers in lawsuits consolidated in the Elmiron MDL, but the firm is not involved in the Elmiron MDL leadership discussed here.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Roger Trangsrud et al., Inklusivity and Excellence: Guidelines and Best Practices for Judges Appointing Lawyers to Leadership Positions in MDL and Class-Action Litigation (March 15, 2021), <https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Inklusivity%20and%20Excellence%20Master%20Draft%204.8.21.pdf>.

[2] Amanda Bronstad, Despite Diversity Efforts, Fewer than 10% of MDL Leadership Posts are Going to Attorneys who are Not White, (Aug. 17, 2020), <https://www.law.com/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white/>.

[3] Trangsrud et al. at 3-4.

INSTANT INSIGHTS

A National Conversation on Racism: the Legal Profession's Role in Driving Equality

NEWS



MDL Judge Taps 'Most Diverse Leadership Team Ever' in Data Breach Class Action



U.S. District Judge J. Michelle Childs of the District of South Carolina. Courtesy photo

U.S. District Judge Michelle Childs instructed lawyers to consider a diverse team to lead about 20 lawsuits against Blackbaud. Five weeks later, she followed through.

March 03, 2021 at 02:46 PM

[Amanda Bronstad](#) 

staff reporter

 1 minute read

What has been hailed as one of the most diverse leadership teams to lead a multidistrict litigation docket, a group of eight women and four men, including lawyers of color, will pilot class actions brought over a data breach involving cloud management software firm Blackbaud.

The [appointment order](#) did not come from just any judge. U.S. District Judge J. Michelle Childs is a 2010 appointee of President Barack Obama to the South Carolina bench. U.S. Rep. James Clyburn, D-South Carolina, recently [floated Childs' name](#) as one to be considered as a top pick for the U.S. Supreme Court. If a vacancy is created and she is selected, Childs would be the first Black woman to serve on the high court. That would fulfill a campaign pledge of President Joe Biden.

In a Jan. 8 order, Childs instructed lawyers to consider a diverse team to lead about 20 lawsuits against Blackbaud, which is headquartered in Charleston, South Carolina.

“The court also seeks to develop the future generation of diverse MDL leadership by providing competent candidates with opportunities for substantive participation now,” she wrote.

Event

GlobeSt. **Women of** **Influence 2021**

GlobeSt. Women of Influence Conference celebrates the women who drive the commercial real estate industry forward.

[Get More Information](#)



Five weeks later, on Feb. 16, she followed through.

The team includes four co-lead counsel. [Amy Keller](#), of Chicago's DiCello Levitt Gutzler, is a veteran MDL lawyer, having served as co-lead counsel in multidistrict litigation over three other data breaches, involving Equifax, Marriott and American Medical Collection Agency. She and Melissa Emert, of Kantrowitz, Goldhamer & Graifman in Chestnut Ridge, New York, who was appointed to the Blackbaud plaintiffs' steering committee, had the most appointments in MDLs of any woman attorney from 2016 to 2019. It is the first appointment for [Krysta Pachman](#), of Susman Godfrey in Los Angeles, and [Marlon Kimpson](#), of Motley Rice, a Democratic state senator in South Carolina, who has worked on other mass torts with name partner [Joe Rice](#). It's the first co-lead counsel role for [Harper Segui](#), a partner in Raleigh, North Carolina, at Whitfield Bryson, now known as Milberg Coleman Bryson Phillips Grossman.

Pachman, speaking for the leadership team, said in an email: "Not only did Judge Childs note her conscious effort to avoid implicit bias and not overlook candidates based on race, color, gender, sexual orientation, age or geography, but she also indicated in her case management order that she expected counsel to perform their duties in a way that is free of discrimination and bias, including choosing a diverse slate of vendors.

"She selected what is arguably the most diverse leadership team ever in an MDL to the benefit of the class."

In the lawsuits, Blackbaud is accused of failing to adequately respond to hackers whose activities exposed its clients and their customers to exposure of personal data. Blackbaud has said, according to media reports, that it combatted and curtailed the threat from the hack.

On Dec. 15, the U.S. Judicial Panel on Multidistrict Litigation sent the Blackbaud lawsuits to Childs, who has handled one prior MDL.

In assembling the leadership team, Childs appointed lawyers from two competing proposed slates, then added three attorneys who applied individually. She appointed Frank Ulmer, of McCulley McCluer in Charleston, as liaison counsel. In addition to Emert, the plaintiffs' steering

committee is: Gretchen Cappio, of Seattle's Keller Rohrback; Desiree Cummings of Robbins Geller Rudman & Dowd in New York; Kelly Iverson of Carlson Lynch in Pittsburgh; Howard Longman of Stull, Stull & Brody in New York; Douglas McNamara, of Washington, D.C.'s Cohen Milstein Sellers & Toll; and Melissa Weiner, of Pearson, Simon & Warshaw in Minneapolis.

READ MORE:

[Despite Diversity Efforts, Fewer Than 10% of MDL Leadership Posts Are Going to Attorneys Who Are Not White](#)

['Boys' Network Slowly Making Room for Gender Diversity in MDL Leadership](#)

['Good Ol' Boys Club' In MDL](#)

You Might Like

February 21, 2020

[Major Law Firms, In-House Departments Strive to Modernize Metrics in New Collaboration](#)

By [Rhys Dipshan](#)

Law.com

[Bench Report](#)

Jacqueline Thomsen is your guide to what's happening with judges across the country, from the opinions they're writing to the rules they're facing, and the scrutiny they may (or may not) be under. Tune in for the latest on judicial trends, including who might be next to sit on the bench and what's in store for the future of the judiciary.



Jacqueline Thomsen

🕒 1 minute read

May 27, 2021

[Federal Judges Are Asking More—and Earlier—Questions About Class Action Settlements](#)

By [Amanda Bronstad](#)

🕒 1 minute read

March 30, 2021

[State Bar Accuses Plaintiffs Lawyer Tom Girardi of Misconduct Involving Client Funds](#)

By [Cheryl Miller](#)

🕒 1 minute read

May 14, 2021

[It's 'Google v. Oracle' All Over Again at the 2nd Circuit](#)

By [Scott Graham](#)

INSTANT INSIGHTS

A National Conversation on Racism: the Legal Profession's Role in Driving Equality

NEWS



MDL Judge Taps 'Most Diverse Leadership Team Ever' in Data Breach Class Action



U.S. District Judge J. Michelle Childs of the District of South Carolina. Courtesy photo

U.S. District Judge Michelle Childs instructed lawyers to consider a diverse team to lead about 20 lawsuits against Blackbaud. Five weeks later, she followed through.

March 03, 2021 at 02:46 PM

[Amanda Bronstad](#) 

staff reporter

 1 minute read

What has been hailed as one of the most diverse leadership teams to lead a multidistrict litigation docket, a group of eight women and four men, including lawyers of color, will pilot class actions brought over a data breach involving cloud management software firm Blackbaud.

The [appointment order](#) did not come from just any judge. U.S. District Judge J. Michelle Childs is a 2010 appointee of President Barack Obama to the South Carolina bench. U.S. Rep. James Clyburn, D-South Carolina, recently [floated Childs' name](#) as one to be considered as a top pick for the U.S. Supreme Court. If a vacancy is created and she is selected, Childs would be the first Black woman to serve on the high court. That would fulfill a campaign pledge of President Joe Biden.

In a Jan. 8 order, Childs instructed lawyers to consider a diverse team to lead about 20 lawsuits against Blackbaud, which is headquartered in Charleston, South Carolina.

“The court also seeks to develop the future generation of diverse MDL leadership by providing competent candidates with opportunities for substantive participation now,” she wrote.

Event

GlobeSt. **Women of** **Influence 2021**

GlobeSt. Women of Influence Conference celebrates the women who drive the commercial real estate industry forward.

[Get More Information](#)



Five weeks later, on Feb. 16, she followed through.

The team includes four co-lead counsel. [Amy Keller](#), of Chicago's DiCello Levitt Gutzler, is a veteran MDL lawyer, having served as co-lead counsel in multidistrict litigation over three other data breaches, involving Equifax, Marriott and American Medical Collection Agency. She and Melissa Emert, of Kantrowitz, Goldhamer & Graifman in Chestnut Ridge, New York, who was appointed to the Blackbaud plaintiffs' steering committee, had the most appointments in MDLs of any woman attorney from 2016 to 2019. It is the first appointment for [Krysta Pachman](#), of Susman Godfrey in Los Angeles, and [Marlon Kimpson](#), of Motley Rice, a Democratic state senator in South Carolina, who has worked on other mass torts with name partner [Joe Rice](#). It's the first co-lead counsel role for [Harper Segui](#), a partner in Raleigh, North Carolina, at Whitfield Bryson, now known as Milberg Coleman Bryson Phillips Grossman.

Pachman, speaking for the leadership team, said in an email: "Not only did Judge Childs note her conscious effort to avoid implicit bias and not overlook candidates based on race, color, gender, sexual orientation, age or geography, but she also indicated in her case management order that she expected counsel to perform their duties in a way that is free of discrimination and bias, including choosing a diverse slate of vendors.

"She selected what is arguably the most diverse leadership team ever in an MDL to the benefit of the class."

In the lawsuits, Blackbaud is accused of failing to adequately respond to hackers whose activities exposed its clients and their customers to exposure of personal data. Blackbaud has said, according to media reports, that it combatted and curtailed the threat from the hack.

On Dec. 15, the U.S. Judicial Panel on Multidistrict Litigation sent the Blackbaud lawsuits to Childs, who has handled one prior MDL.

In assembling the leadership team, Childs appointed lawyers from two competing proposed slates, then added three attorneys who applied individually. She appointed Frank Ulmer, of McCulley McCluer in Charleston, as liaison counsel. In addition to Emert, the plaintiffs' steering

committee is: Gretchen Cappio, of Seattle's Keller Rohrbach; Desiree Cummings of Robbins Geller Rudman & Dowd in New York; Kelly Iverson of Carlson Lynch in Pittsburgh; Howard Longman of Stull, Stull & Brody in New York; Douglas McNamara, of Washington, D.C.'s Cohen Milstein Sellers & Toll; and Melissa Weiner, of Pearson, Simon & Warshaw in Minneapolis.

READ MORE:

[Despite Diversity Efforts, Fewer Than 10% of MDL Leadership Posts Are Going to Attorneys Who Are Not White](#)

['Boys' Network Slowly Making Room for Gender Diversity in MDL Leadership](#)

['Good Ol' Boys Club' In MDL](#)

You Might Like

February 21, 2020

[Major Law Firms, In-House Departments Strive to Modernize Metrics in New Collaboration](#)

By [Rhys Dipshan](#)

Law.com

[Bench Report](#)

Jacqueline Thomsen is your guide to what's happening with judges across the country, from the opinions they're writing to the rules they're facing, and the scrutiny they may (or may not) be under. Tune in for the latest on judicial trends, including who might be next to sit on the bench and what's in store for the future of the judiciary.



Jacqueline Thomsen

🕒 1 minute read

May 27, 2021

[Federal Judges Are Asking More—and Earlier—Questions About Class Action Settlements](#)

By [Amanda Bronstad](#)

🕒 1 minute read

March 30, 2021

[State Bar Accuses Plaintiffs Lawyer Tom Girardi of Misconduct Involving Client Funds](#)

By [Cheryl Miller](#)

🕒 1 minute read

May 14, 2021

[It's 'Google v. Oracle' All Over Again at the 2nd Circuit](#)

By [Scott Graham](#)

Judges Should Foster Diversity In MDL Leader Appointments

By **Majed Nachawati** and **Michael Gorwitz** (June 14, 2021, 1:15 PM EDT)

Often, when we speak of barriers to equality in professional settings, we speak of the so-called glass ceiling. Traditionally, this metaphor has been used to express the challenges women face in ascending to managerial positions — a high point of professional advancement you could see, but never reach.

Fortunately, that impediment has finally begun to show a few cracks. Still, many other barriers to professional equality remain firmly in place.

In the legal profession, judges can take an influential first step toward reform by making more diverse appointments to leadership positions in multidistrict litigations.

In addition to the glass ceiling, in law we often speak of gatekeepers. The metaphor is meant to be benign, a necessary aspect of the judicial system's gradual sifting and winnowing of meritorious claims from the frivolous. The image of the gatekeeper is most often bestowed on judges in the context of admission of potential expert testimony.

However, when it comes to consolidated multidistrict litigation, the trial judge performs a crucial gatekeeping function for the legal community itself with the appointment of lawyers to leadership positions in MDLs.

U.S. District Judge Brian Martinotti of the U.S. District Court for the District of New Jersey demonstrates a key example of the beneficial power these judicial gatekeepers have the potential to wield. In a December 2020 pretrial order in *In re: Elmiron (Pentosan Polysulfate Sodium) Products Liability Litigation*, Judge Martinotti informed the parties of his expectation that leadership would be "diverse in gender, ethnicity, geography, and experience."

This directive resulted in a leadership committee that was three-fourths women.

While no official rule of procedure governs the selection and appointment of MDL leadership positions, the Manual for Complex Litigation enshrines a set of best practices for the judiciary. As the manual notes, "Few decisions by the court in complex litigation are as difficult and sensitive as the appointment of designated counsel."



Majed Nachawati



Michael Gorwitz

It is for this reason that the manual advises judges "to take an active part in the decision on the appointment of counsel," going so far as to recommend holding an evidentiary hearing to assess the relative merits of the attorneys desirous of appointment to leadership positions within the MDL.

Thus, just as a trial judge in a normal suit serves as the gatekeeper to the admission of potential expert testimony, the judge serves the same function for the attorneys themselves in an MDL. Rather than weighing the relative merits of scientific methodologies, the judge is tasked with weighing CVs.

As with society at large, these important appointments have traditionally been the exclusive purview of white men and the firms that they own.

As demonstrated by findings published in March by the George Washington University's James F. Humphreys Complex Litigation Center, men are five times more likely to be appointed to MDL leadership positions than women.[1] And, in a 2020 study conducted by Law.com, at best only 9% of MDL leadership appointments between 2016-19 went to attorneys of color.[2]

As we are becoming more aware, it isn't necessarily that judges have consciously barred minority applicants from MDL leadership positions. A number of factors — historical, institutional, implicit and, yes, sometimes explicit — have conspired to frustrate this country's attempts at creating a more equal society.

The point of this article is not to point a finger at the root causes of disparity in society, but rather to highlight how judges can begin to take an active role in fixing one narrow aspect of it.

This is why the judicial gatekeeper metaphor is an important one. The MDL leadership gate can potentially swing both ways.

On one hand, the gate has historically been a barrier to minority communities — and the firms they own — from positions of influence and power within important multistate litigations. This is due in part to the inherent way that power structures tend to preserve themselves.

As noted by the George Washington University Complex Litigation Center report, "The decades-long record of appointing lawyers largely from a small group of repeat players, who gained the experience used to justify their role at a time when the most visible members of the profession's leaders consisted of white males," resulted in an entrenched favoritism.[3]

However, the gate can also be swung open to help enshrine diversity in this symbolically — and literally — important position for the legal community as a whole.

MDL leadership positions are important because they have the ability to shape crucial litigation across the entire country. Unlike a class action, which involves the resolution of a large number of distinct claims in a single action, an MDL ties together potentially thousands of separate cases filed in courts throughout the country for coordinated pretrial proceedings, before being remanded to individual trials on the merits.

This is why diversity in MDL leadership is so important. Nothing says "business as usual" like seeing a large number of cases removed from their initial jurisdiction, transferred to a single court and then handed off to a familiar set of firms — largely owned by white men — for resolution of crucial pretrial

discovery and motion practice issues.

What is most important to bear in mind when considering these issues is that while there are many barriers to minority practitioners within the legal community, there is no barrier between diversity and ability.

The manual lists a number of factors judges should consider when weighing MDL leadership appointments. Crucially, one of these factors is "whether designated counsel fairly represents the various interests in the litigation — where diverse interests exist among the parties, the court may designate a committee of counsel representing different interests."

Note that "diverse interests" is not defined in terms of identity politics. Diversity as a concept touches on every aspect of complex nationwide litigation: geographical diversity of plaintiffs, legalistic diversity of claims, temporal diversity of inciting events.

The same is true of the firms who seek to lead these important nationwide suits. Courts should be aware of the diversity in ownership of the firms seeking leadership positions, in addition to the attorneys themselves, if they hope to begin to reverse the structural disparities that have dominated this field of practice.

In order to best resolve the wide range of claims from a wide range of claimants in an MDL, it is important that courts appoint a diverse group of attorneys and firms, in every sense of the word, to leadership positions. Judges should embrace their role as gatekeepers of these important positions in order to continue to foster a more open, inclusive and, most importantly, just legal system, for everyone involved.

Majed Nachawati is a founding partner and Michael Gorwitz is an attorney at the Fears Nachawati Law Firm.

Disclosure: Fears Nachawati represents consumers in lawsuits consolidated in the Elmiron MDL, but the firm is not involved in the Elmiron MDL leadership discussed here.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Roger Trangsrud et al., Inklusivity and Excellence: Guidelines and Best Practices for Judges Appointing Lawyers to Leadership Positions in MDL and Class-Action Litigation (March 15, 2021), <https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Inklusivity%20and%20Excellence%20Master%20Draft%204.8.21.pdf>.

[2] Amanda Bronstad, Despite Diversity Efforts, Fewer than 10% of MDL Leadership Posts are Going to Attorneys who are Not White, (Aug. 17, 2020), <https://www.law.com/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white/>.

[3] Trangsrud et al. at 3-4.