

**INCLUSIVITY AND EXCELLENCE: GUIDELINES AND BEST
PRACTICES FOR JUDGES APPOINTING LAWYERS TO LEADERSHIP
POSITIONS IN MDL AND CLASS-ACTION LITIGATION
TEXT OF GUIDELINES AND BEST PRACTICES**

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THE JUDICIAL APPOINTMENTS INCLUSIVITY STANDARD: An MDL transferee judge or presiding class-action judge must uphold the integrity of the federal judiciary and demonstrate to parties, counsel, other participants and stakeholders in the judicial process, and to the public, that invidious discrimination, bias, and exclusion have no place in the federal judiciary.

GUIDELINE 1: An MDL transferee judge or a presiding class-action judge must exercise the power of appointment fairly, transparently, and on the basis of merit. The judge should recognize that diversity enhances the quality of the decision-making process and results, and should make appointments consistent with the diversity of our society and justice system.

A judge should avoid an appearance of favoritism when appointing a leadership team for an MDL or class action made up of a single sex, race, ethnicity, sexual orientation, age range, or similarly prohibited basis. The judge must make a conscious effort to avoid implicit bias and not overlook qualified applicants based on race, color, gender, sexual orientation, disability, or similar prohibited factors.

BEST PRACTICE 1A: An MDL transferee judge or judge presiding over a class action should be fair and transparent in the appointment process, including in considering the financial resources of applicants for leadership positions. When a judge identifies a diverse candidate well suited for a leadership position, but who lacks the necessary financial resources, the judge should nonetheless consider appointment if the attorney will be part of a larger group that is able to provide financial assistance or who can be assigned a limited-leadership role.

BEST PRACTICE 1B: In deciding whether to choose either the individual-application or consensus-selection method, the MDL judge or judge presiding over a class action should consider among other considerations which method will likely result in a more diverse pool of candidates.

BEST PRACTICE 1C: In considering appointing lead counsel, a steering committee, liaison counsel, or a subcommittee, the MDL transferee judge or the judge presiding over the class action should take into account whether the prospective leadership team adequately reflects the diversity of legal talent available and whether those appointed are best able to serve the needs of the case, particularly when the candidates have little, or no, diversity.

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BEST PRACTICE 1D: The MDL transferee judge or judge presiding over a class action should consider issuing orders or guidelines that direct leadership counsel to take into account diversity among the factors considered when assigning duties.

BEST PRACTICE 1E: If there is little or no evidence of diversity in the pool of applicants presented to the court for an MDL or class-action leadership position, a judge should probe whether and how diversity was taken into account in the application or selection process.

BEST PRACTICE 1F: As a matter of district-wide policy, judges should look for and encourage efforts to create a more diverse pool of applicants for leadership positions.

GUIDELINE 2: An MDL transferee judge or judge presiding over a class action should consult with counsel about the type of administrative structure that will best serve the needs of the case, while ensuring that counsel who are interested in and qualified for leadership are not denied opportunities to perform substantial, meaningful work on account of race, color, gender, sexual orientation, age, disability, or similar prohibited factors.

BEST PRACTICE 2A: If the proposed number of leadership positions in an MDL or class action is limited, the judge should consider increasing that number if doing so would enhance diversity.

BEST PRACTICE 2B: A transferee or presiding judge should ask about the litigation team supporting lead counsel and how substantive work will be assigned to enhance the benefits of diversity in that team.

GUIDELINE 3: An MDL transferee judge or judge presiding over a class action has an ongoing duty to monitor the litigation to ensure that counsel, especially those serving in court-appointed roles, are performing their assigned duties in a manner that is free of invidious discrimination and bias and that maintains public confidence in the integrity of the judiciary.

BEST PRACTICE 3A: The transferee or presiding judge should remain vigilant that appointments and work assignments made throughout the litigation take diversity into account.

BEST PRACTICE 3B: The MDL transferee judge or judge presiding over a class action should consider revisiting leadership appointments periodically or reminding the lawyers of the opportunity to do so if circumstances change.

BEST PRACTICE 3C: On request and at the conclusion of the litigation, the MDL transferee judge or judge presiding over the class action should consider offering lawyers appointed to leadership positions, including lead counsel, an opportunity to receive feedback on their performance.

BEST PRACTICE 3D: A transferee or presiding judge should insist that counsel treat other lawyers with dignity and respect and make clear that discriminatory or abusive behavior will be subject to appropriate discipline.

ADDITIONAL SUGGESTIONS TO PROMOTE INCLUSIVITY IN THE APPOINTMENT OF LEAD COUNSEL IN MDLs AND CLASS ACTIONS

SUGGESTION 1: The Judicial Conference should consider issuing a model local rule or other guidance promoting inclusivity in appointments by judges.

SUGGESTION 2: The Judicial Panel on Multidistrict Litigation has appointed diverse MDL transferee judges and should continue to do so.

SUGGESTION 3: At its annual transferee-judge program, the JPML should include programs promoting diversity in appointments to leadership positions.

SUGGESTION 4: The JPML should share its database of leadership-appointment orders publicly either on its website or as part of the annual reports disseminated by the Administrative Office of United States Courts.

SUGGESTION 5: The Federal Judicial Center should continue to provide educational opportunities for judges to recognize the value of diversity in appointing lawyers to leadership positions, maintaining vigilance to avoid implicit bias.

SUGGESTION 6: The Judicial Panel on Multidistrict Litigation should consider transmitting a copy of this report to every newly appointed MDL transferee judge.

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IN MDL AND CLASS-ACTION LITIGATION
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